SUPREME COURT

OF THE

State of Connecticut

JUDICIAL DISTRICT OF HARTFORD

S.C. 19285

STATE OF CONNECTICUT

V.

EDDIE PEREZ

BRIEF OF THE STATE OF CONNECTICUT-APPELLANT ON CERTIFICATION
WITH SEPARATE APPENDIX

To Be Argued By:

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NATURE OF THE PROCEEDINGS

After an investigation by a one-person grand jury into corruption in the City of Hartford, the defendant, Eddie Perez, then Hartford's mayor, was arrested on two separate files. *State v. Perez*, 147 Conn. App. 53, 59 n. 5 (2013); *Id.* at 60 n. 6; S/App. at A-51, A-52.[1] The two files were consolidated for trial before a jury of six. S/App. at A-48.

In Docket number 0628569, the defendant was convicted of receiving a bribe, in violation of General Statutes § 53a-148 (a). *Id.* at A-49. On the charges related to the bribery, the defendant also was convicted of being an accessory to fabricating evidence, in violation of General Statutes §§ 53a-155 (a)(2) and 53a-8, and conspiracy to fabricate evidence, in violation of General Statutes § 53a-155 (a)(2) and 53a-48. *Id.* He was acquitted, however, of one count of fabricating evidence as a principal. T. 6/18/10 at 3. (Hereinafter the bribery case).

In Docket Number 0635038, the defendant was convicted of conspiring with longtime Hartford politician Abraham Giles to extort money from developer Joseph Citino, in violation of General Statutes §§ 53a-48, 53a-122 (a)(1) and 53a-119 (5)(H), and one count of attempted larceny by extortion, in violation of General Statutes §§ 53a-49 (a)(2); 53a-122 (a)(1) and 53a-119 (5)(H). *State v. Perez*, S/App. at A-49. (Hereinafter the extortion case).

The trial court, *Dewey, J.*, sentenced the defendant to a total effective term of ten years of incarceration suspended after three years and three years of probation. T. 9/14 at 94.

On appeal, the defendant raised numerous claims, including a challenge to the

[1] The state's appendix will be cited as S/App. at [page].

sufficiency of the evidence on all counts in both files, and a claim that the two files were improperly joined. *State v. Perez*, S/App. at A-50. After determining that there was sufficient evidence to convict the defendant on all counts; *Id.* at A-55 – A-84; the Appellate Court held that the cases were joined improperly and reversed the defendant's convictions. *Id.* at A-105.[2] Specifically, the majority (*DiPentima, C.J.,* and *Bishop, J.*) found that the trial court's initial decision to join the cases was error. *Id.* at A-85. The third panelist, *Lavine, J.*, disagreed with this ground for reversing the defendant's convictions. *Id.* at A-117 – A-134. The Appellate Court held unanimously, however, that failing to sever the cases violated the defendant's right to testify. *Id.* at A-85, *Id.* at A-127 – A-128.

This Court granted the state's petition for certification on the following issues:

> 1. Did the Appellate Court properly determine that the trial court abused its discretion in joining two political corruption cases for trial and that such joinder was not harmless?
>
> 2. Did the Appellate Court properly determine that the trial court's refusal to sever the cases violated the defendant's right to testily in one case while remaining silent in the other?

State v. Perez, 311 Conn. 920 (2014); S/App. at A-129.

COUNTERSTATEMENT OF THE FACTS

The jury reasonably found the following facts.

A. The Bribery Case

In February of 2005, the defendant and his wife decided to remodel their kitchen. *State v. Perez*, 147 Conn. App. at 66; S/App. at A-66. They went to Home Depot and ordered items such as a new granite countertop and backsplash, along with a new sink and

[2] The Appellate Court did not address any issues beyond sufficiency and joinder. *State v. Perez*, 147 Conn. App. at 53; S/App. at A-50 n. 4.

other items attending such a project. *Id.* After placing this order, the defendant informed Carlos Costa, who owned USA Contractors, that he and his wife wanted to remodel their kitchen. *Id.* At the time, USA Contractors had a major city contract upgrading the aesthetics and making repairs to a stretch of Park Street in Hartford. (Hereinafter the Park Street Project). *Id.* at A-60. Costa arranged for the defendant and his wife to view granite countertop samples both in his showroom and at a wholesaler's warehouse. They selected a slab to their liking. *Id.* at A-58 – A-59. Thereafter, the defendant and his wife cancelled their contract with Home Depot and their deposit was refunded. *Id.* at 66.

Costa's employees measured for the granite countertop, had it fabricated and installed it, a backsplash and a sink along with making other repairs to defendant's kitchen. *Id.* Costa, however, never provided the defendant with a quote for this work and never collected a deposit even though he usually insisted upon a 90% deposit on granite. *Id.* at 66-67. The defendant did not offer to pay for the work or the material. *Id.* Indeed, Costa neither provided a quote nor sought a deposit or payment because he never expected to be paid. *Id.* at 67-68. He considered it the cost of doing business in Hartford. T. 5/14 at 52.

The defendant and his wife then asked Costa to perform additional work in their home. *State v. Perez*, 147 Conn. at 67; S/App. at A-59. This included installing ceramic tile in the kitchen and a granite threshold between the kitchen and dining room, and combining two small bathrooms into a single large one. *Id.* This enlarged bathroom was outfitted with a steam shower, whirlpool, a new vanity and other accessories. *Id.* As before, the defendant did not pay for the work or materials and never asked Costa about the cost. *Id.* Indeed, Costa did not provide the defendant with a bill for all of the work until rumors arose that the defendant was accepting free work on his home in exchange for doing Costa

favors regarding USA's Park Street contract. *Id.* at A-66 – A-67. Although Costa estimated that he had performed over $40,000.00 worth of work on the defendant's home, the total bill he eventually created was for $20,217.00. *Id.* at A-67, n. 20.[3]

Meanwhile, USA Contractor's work on the Park Street Project was unsatisfactory. In fact, USA was having trouble with the project as early as 2004, before the defendant sought to remodel his home. *Id.* at A-61. There were multiple delays, the work was often defective, and USA continually tried to bill the city for extras which would drive up the cost beyond what USA quoted when it won the competitive bidding process for the project. *Id.* When Costa, on behalf of USA, could not extract payment from the city, the defendant persuaded city employees to make some periodic payments before they were due, and tried to persuade others to authorize payment for extras well above those approved by city employees and a consultant monitoring the project. *Id.* at A-62. In addition, the defendant interposed an employee, Charles Crocini, who answered directly to him, and ordered that all requests for extra payments be funneled through Crocini, thus bypassing a consulting firm hired to control costs on the project. *Id.*

Ultimately, both the city employees and consultants overseeing the project reached a consensus that USA was in default on its contract and explored the city's options. *Id.* at A-63 – A-64.[4] They decided to contact USA's bonding company.[5] They did so via a letter to

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[3] After the defendant asked Costa for a bill, Costa informed him that the work cost "between the mid to high" $20,000 range. The defendant was shocked by the cost, so Costa reduced it even further to the $20, 217 figure. *State v. Perez*, 147 Conn. App. at 74-75; S/App. at A-66 – A-67.

[4] The options were terminating the contract and calling USA's bond, reducing the scope of USA's work and rebidding that portion of the Project that would remain uncompleted or rehabilitating the project keeping USA on the job. *State v. Perez*, 147

that company dated May 8, 2006, which ostensibly notified it that USA was in default. *Id.* at A-64. Costa received a copy of this letter and was "extremely disappointed." *Id.* Shortly thereafter, the mayor summoned to his office some of those responsible for deciding to send the May 8 letter. *Id.* at A-65. He had Costa's copy of the letter in hand and demanded to know "What the fuck is going on?" *Id.* On May 16, 2006, as a result of the defendant's intervention, the city sent another letter to the bonding company rescinding the May 8 letter. *Id.*[6] USA was allowed to complete the project but did so well beyond the deadline called for in the contract. T. 5/12 at 96.

When the state began investigating this transaction, the defendant was interviewed by Michael Sullivan, an inspector from the Public Integrity Bureau of the Chief State's Attorney's Office. *State v. Perez*, 147 Conn. App. at 75-76; S/App. at A-67 – A-68. When the defendant was asked about the work on his house, he became "noticeably nervous" was "shaking, considerably sweating, he couldn't sit in his chair, he was up and down fidgeting, scratching, touching every part of his body [and] his voice dropped." *Id.* at A-68. When asked specifically if he had paid for the work, he lied and said he had paid Costa. *Id.* The following day, the defendant and his wife applied for a mortgage from their credit union

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Conn. App. at 71; S/App. at A-63.

[5] Contractors working for the city must post a bond which is an insurance policy guaranteeing that if the contractor defaults, the work will nevertheless be completed. *State v. Perez*, 147 Conn. App. 72 n. 17; S/App. at A-64. A bonding company can then prod the contractor to perform, but if the contractor fails, the bonding company is responsible for seeing to the project's completion. *Id.* A contractor who defaults on a bond may lose the ability to obtain bonds in the future and thus be unable to bid on projects that require a bond. T. 5/17 at 19.

[6] For some unexplained reason, the bonding company never received the May 8, letter. It was returned to the city unopened. *State v. Perez*, 147 Conn. App. at 72 n. 18; S/App. at A-64.

in the amount of $25,000 to pay for their home improvements. *Id.* The defendant's wife correctly dated the application as June 27, 2007, whereas the defendant backdated it by one day, to June 26, 2007, suggesting that this process had begun before Inspector Sullivan's June 26 interview. *Id.* On July 6, 2007, the defendant provided a copy of the fraudulent bill along with other items to the Chief State's Attorney's Office. *Id.* at A-68 – A-69. The bill was paid on July 11, 2007. *Id.* at A-68.

B. The Extortion Case

Abe Giles was a Democratic strongman in Hartford's north end. *State v. Perez*, 147 Conn. App. at 84; S/App. at A-76. Originally, he and the defendant did not get along, and Giles supported others candidates running for mayor in democratic primaries *Id.* at A-77.[7] The defendant wanted to win Giles' support in future primaries. One way the defendant sought to gain Giles' support was to protect Giles' business interests. Among those interests were parking lots Giles operated in exchange for a monthly fee on empty lots owned the City. *Id.* at A-76. One such lot was a small parcel of city land at 1143 Main Street which adjoined 1161 Main Street, home to what was known as the "'butt ugly building'" *Id.* at A-75. Joseph Citino wanted to buy the building, tear it down and develop the property for mixed commercial and residential use. *Id.* To make the 1161 Main Street development economically viable, Citino needed to acquire 1143 Main Street as well. *Id.* Citino entered into a contract with Edwards Development Company, owner of the butt-ugly building, to purchase it, but the contract was contingent on Citino also acquiring 1143 Main

[7] Practically speaking, because Hartford is overwhelmingly Democratic, the Democratic primary is the vote that elects the mayor. *State v. Perez*, 147 Conn. App. at 84-85; S/App. at A-76 – A-77.

Street from the city. *Id.*

Citino approached the defendant with his plan to develop the two lots including his need to acquire 1143 Street Main Street. *Id.* Once the defendant approved the basic plans for the project Citino asked him what the next step was. *Id.* at A-76. The defendant told Citino that "we got to take care of [Abe Giles] or there is no next step." *Id.* at A-86. Citino understood this to mean that without making some accommodation with Giles, he could not purchase 1143 Main Street. *Id.*

Upon meeting with Giles, Citino's understanding was confirmed. Giles informed Citino that he was "very close" to the defendant and that he could make or break the deal to develop the properties. *Id.* at A-77. Giles proceeded to make extortionate demands of Citino in exchange for vacating the property.[8] Eventually, Citino agreed to pay Giles $100,000 to vacate the property. *Id.*

In a follow-up meeting with the defendant, Citino informed him that he had satisfied all of the defendant's conditions for acquiring 1143 Main Street, including taking care of Giles to the tune of $100,000. *Id.* Indeed, an addendum was attached to the purchase agreement for the butt ugly property memorializing that obligation. *Id.* at A-77 – A-78. The payment was never made, however, because Citino discovered that Giles did not have a lease with the city for the parking lot and thus had no legal right to be there; *id.* at A-79; hence the attempted larceny by extortion rather than a completed larceny charge. Moreover, the deal to purchase and develop the two properties ultimately fell through when

[8] For example, Giles wanted to continue operating the parking facilities for residents of the condominiums replacing the butt ugly building. *State v. Perez*, 147 Conn. App. at 85; S/App. at A-77. During construction he wanted Citino to pay him $3,000 to $4,000 per month. *Id.* Citino offered a one-time payment of $25,000 to vacate the parking lot, and Giles made a counteroffer of $250,000. *Id.*

news about the arrangement with Giles became public. *Id.* at A-79 – A-80. Ironically, the defendant asked the Chief State's Attorney to investigate Citino's efforts to develop the butt ugly property. *Id.* at A-79, n. 33. The grand jury investigation that ensued led to the defendant's arrest.

The state also established that while the defendant was "taking care of" Giles, Giles became an active supporter of the defendant's bid to be reelected mayor. *State v. Perez*, 147 Conn. App. at 84-85; S/App. at A-76 – A-77.

I. THE APPELLATE COURT IMPROPERLY DETERMINED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN JOINING TWO POLITICAL CORRUPTION CASES FOR TRIAL AND THAT SUCH JOINDER WAS NOT HARMLESS

The panel's majority made two rulings regarding the trial court's decision to join these two political corruption cases. First, it ruled that the trial court abused its discretion when it initially joined the cases for trial. *State v. Perez*, 147 Conn. App. at 108-109; S/App. at A-100 – A-101. The majority also concluded that even if the initial joinder was proper, the court abused its discretion during trial, after it became "more informed about the nature of the two cases", and nevertheless denied the defendant's subsequent motions to sever. *Id.* at A-101 n. 51.[9] Specifically, after analyzing the case pursuant to the factors set forth in *State v. Boscarino*, 204 Conn. 714 (1987) (hereinafter *Boscarino* factors),[10] the majority

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[9] The majority does not identify when that moment arose, or what occurred in the trial that should have prompted the trial court to change its initial decision. Judge Lavine, by contrast, identifies the defendant's offer to testify at the end of the bribery case as the point at which the court should have severed the cases. *State v. Perez*, 147 Conn. App. at 135; S/App. at A-127. That claim is addressed in Issue II.

[10] "[W]hether the "factual similarities ... [although] insufficient to make the evidence in each case substantively admissible at the trial of the others, were significant enough to impair the defendant's right to the jury's fair and independent consideration of the evidence in each case"; (2) whether "[t]he prejudicial impact of joinder in these cases was

determined that the bribery and extortion cases were too complex for the jury to consider each charge separately and distinctly; *State v. Perez*, 147 Conn. App. at 105; S/App. at A-97; and that the facts of each case were not sufficiently distinguishable, thus preventing the jury from giving "a fair and independent consideration of the evidence in each case." *Id.* at A-98 Finally, on the issue of harm, the majority determined that, despite the trial court's "near herculean" steps to keep the cases separate via repeated jury instructions, and the extremely orderly way the cases were presented--first the bribery and then the extortion--it lacked a "fair assurance" that the jury did not use the evidence in one case to convict the defendant of the other. *Id.* As for the fact that the jury acquitted the defendant of one count of fabricating evidence, the majority relied on the questionable bromide from *Boscarino* that it would not speculate on why the defendant was acquitted. *Id.* at A-105.

There are four primary problems with the majority's joinder analysis. First, although the cases were not joined because the evidence was cross-admissible, the majority failed to give enough weight to the import of judicial economy in this matter. Second, the majority evaluated the *Boscarino* factors retrospectively rather than as Judge Lavine did, based on what the trial court knew at the time it exercised its discretion to join the cases. This area of the law needs clarification, especially here, because the different perspectives produced conflicting results. See *State v. Perez*, 147 Conn. App. at 129 (*Lavine J.*, concurring); S/App. at A-121.

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exacerbated by the violent nature of the crimes with which the defendant was charged ... [giving] the state the opportunity to present the jury with the intimate details of each of these offenses, an opportunity that would have been unavailable if the cases had been tried separately"; and (3) whether "[t]he duration and complexity of the trial also enhanced the likelihood that the jury would weigh the evidence against the defendant cumulatively, rather than independently in each case." *State v. Boscarino,* 204 Conn. at 723.

The third problem exists because this Court has not provided adequate guidance on what it means for cases to be too complex to join. *State v. Perez*, S/App. at A-96 n. 49; *id.* at A-123 (*Lavine J.*, concurring). Here, the majority and concurring opinions followed different paths and reached different results. Compare *Id.* at A-93 – A-94 and *Id.* at A-124 (*Lavine J.*, concurring).

The fourth problem requires reversal because the deliberations and verdicts reveal that none of the concerns addressed by the *Boscarino* factors were realized in this case. This jury was not the least bit confused.

A. The Standards For Determining Whether To Affirm A Decision To Join Cases

In *State v. Payne*, this Court set forth the following:

> The principles that govern our review of a trial court's ruling on a motion for joinder or a motion for severance are well established. Practice Book § 41-19 provides that, [t]he judicial authority may, upon its own motion or the motion of any party, order that two or more informations, whether against the same defendant or different defendants, be tried together.... In deciding whether to [join informations] for trial, the trial court enjoys broad discretion, which, in the absence of manifest abuse, an appellate court may not disturb.... The defendant bears a heavy burden of showing that [joinder] resulted in substantial injustice, and that any resulting prejudice was beyond the curative power of the court's instructions. . .
>
> 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....

(Internal quotations and citations omitted.) 303 Conn. 538, 543-545 (2012).

Prior to *Payne*, trial courts operated under a presumption in favor of joinder regardless of whether evidence in one case was cross admissible in another. *Id.* at 548. In *Payne*, however, which was released after the trial court ruled on joinder but before the Appellate Court heard argument, this Court ruled that, at trial, there is a presumption against joinder. *Id.* That presumption is overcome by the state proving either that the evidence is cross-admissible, or the defendant will not be prejudiced under the *Boscarino* factors. *Id.* at 550. Under *Payne*, if one *Boscarino* factor is present, joinder was error, and a reviewing court must then decide whether the trial court's jury instructions cured any prejudice that might have occurred. *State v. Payne*, 303 Conn. at 553.

Three things are notable about *Payne*. First, the decision to join cases remains within the discretion of the trial court. Second, the defendant retains the burden of proving on appeal that he was prejudiced under the *Boscarino* factors. *State v. LaFleur*, 307 Conn. 115, 159 (2012). Third, *Payne* gives no explicit guidance as to whether a trial court's decision to join cases in the first instance is reviewed based on what the court knew at the time, or is it reviewed retrospectively based on how the trial unfolded.

B. The Majority Erred When It Ruled That Joining These Cases Was An Abuse Of Discretion

1. The trial court's joinder ruling must be reviewed at the time it was made

When this Court transformed the presumption in favor of joinder to a presumption against it in *Payne*, it relied on Justice Katz's concurrence in *State v. Davis*, 286 Conn. 17 (2008). *State v. Payne*, 303 Conn. at 548. Justice Katz's analysis in *Davis*, however, did not

end with addressing where the presumption lay. Specifically, Justice Katz revisited earlier precedent and noted that a proper appellate review in joinder cases requires a two-step analysis: First, employing the *Boscarino* factors in a predictive manner, determining whether the trial court abused its discretion at the time the cases were joined, and, second, only if the reviewing court finds an abuse of discretion should it determine whether, applying *Boscarino* retrospectively, the defendant was harmed by joinder. *State v. Davis*, 286 Conn. at 53-54. It was Justice Katz's view that this Court had conflated the joinder analysis much as the majority did below: evaluating both the decision to join cases and whether any prejudice ensued by applying the *Boscarino* factors retrospectively based on what had occurred at trial. *State v. Davis*, 286 Conn. at 46 (*Katz, J.*, concurring).

Indeed, after *Davis*, this Court has vacillated about how it reviews a trial court's initial decision to join cases. For example, in *Payne*, this Court recognized that there was a two-step process for reviewing joinder claims--determining error and then harm. 303 Conn. at 551-552. Nevertheless it reviewed two of the *Boscarino* factors retrospectively to find that the initial joinder was error. In *State v. Lefleur*, by contrast, this Court ruled that joinder was not an abuse of discretion reasoning that the "alleged conduct" in one case was not "so shocking or brutal that the jury's ability to consider fairly and objectively the remainder of the charges is compromised." 307 Conn. 115, 160-161 (2012). This appears to be a prospective analysis based on the allegations in the information. More recently, in *State v. Crenshaw*, 313 Conn. 69, 89 (2014), the defendant argued that finding the evidence cross admissible was error because at trial "the evidence was not actually admitted for such purposes, and the trial court did not issue any limiting instructions regarding the proper use of such evidence." *Id.* This Court rejected that retrospective approach.

> Because the decision to join two cases occurs prior to the introduction of evidence, the trial court must make its decision on the basis of potential admissibility rather than what actually transpires at trial. It would not make sense for a reviewing court to overturn the trial court's discretionary, pretrial decision to consolidate solely on the ground that the parties did not ultimately introduce the evidence at trial.

State v. Crenshaw, 313 Conn. at 88-89.

As in *Crenshaw*, when reviewing whether defendants were properly joined, "the discretion of the court is necessarily exercised before the trial begins and with reference to the situation as it then appears to the court." (Internal citations and quotation marks omitted.) *State v. Booth*, 250 Conn. 611, 620 (1999). Thus, this Court "must review the trial court's decisions to grant the state's motion for joinder and to deny the defendants' motions for severance based upon the evidence before the court at the time of the motions." (Internal citation and quotation marks omitted.). *State v. Turner*, 252 Conn. 714, 739 (2000). See also *State v. Johnson*, 214 Conn. 161, 170-171 (1990) (where trial court issues preliminary ruling court will review only merits of that ruling if issue not reasserted when record more fully developed).

Here, the majority used the results of the trial itself to determine that the initial decision to join the cases was an abuse of discretion under the *Boscarino* factors. By contrast Judge Lavine analyzed the decision on joinder based on what the court knew at the time it was made. This Court should return to the analysis referred to by Justice Katz in *Davis* and applied by Judge Lavine and overturn the Appellate Court's holding on that the decision to join the cases was an abuse of discretion, because, to do otherwise, does not really review the trial court's discretionary ruling. Rather it evaluates whether the potential harm attending joinder has been realized.

2. The procedural history before the trial court when the cases were joined

After a grand jury investigation, the state charged the defendant in the bribery case on January 21, 2009. S/App. at A-50; A-4. That investigation continued and, as a result, the state charged the defendant in the extortion case on August 28, 2009. S/App. at A-52; A-1. On September 10, 2009, the state moved to consolidate the two cases for trial. *Id.* at A-9. The state argued that consolidation would foster judicial economy, that the charges involved discrete, easily distinguishable factual scenarios, were not brutal or violent, and would be presented in an orderly manner, one case and then the other. T. 11/4/09 at 4; S/App. at A-136. The state was confident that the trial court's instructions would ensure that the jury would consider the cases separately. S/App. at A-135 – A-136. The state pointed out that the crimes had occurred in different years, in that the defendant accepted the bribe in 2005, but tried to extort money from Citino in 2006-2007. *Id.* at A-134. As for judicial economy, the state first pointed out that the defendant repeatedly had stated that he wanted the criminal matters resolved quickly so he could resume governing the City of Hartford. *Id.* at A-137. Consolidating jury selection would also advance that interest because it would take three weeks to pick one jury for both cases, rather than the three weeks allotted for the bribery case and maybe another three or four weeks whenever the extortion case might be tried. S/App. at A-135. The state also indicated that the extortion charges would add only two to three weeks to the trial. *Id.*

The defendant opposed consolidation for several reasons, only some of which are relevant to the appeal. The defendant argued that joinder would transform two already complex trials into one enormous, complex trial. S/App. at A-15. He pointed out that if the grand jury investigation involved 100 witnesses, calling that many would make a joint trial

much longer than the six weeks estimated. S/App. at A-143. The trial court responded that a trial with 200 witnesses had just been completed in Hartford and it lasted only four weeks. *Id.* Next, the defendant, noting that the state did not claim cross-admissibility, did not believe that curative instructions would be effective in such a long trial. *Id.* at A-148. As he argued in his memorandum of law, a jury hearing both sets of evidence would blend the facts together making the joint trial functionally similar to a case in which one crime is more brutal and/or shocking than the other. The defendant projected that there would be overlapping witnesses "because they are City [employees.]" *Id.* Next, he complained that the elements of the two primary offenses were complex and hard for lay jurors to understand. *Id.* at A-149 – A-150. Finally, for the purpose of appellate review, the defendant asked that the presumption in favor of joinder, which had been recently reaffirmed in *State v. Davis*, 286 Conn. 17 (2008), be eliminated.

The trial court granted the state's motion to consolidate. T. 11/4 at 25; S/App. at A-157. The court found that larceny by extortion was "basically a common law crime." *Id.* at A-155. The court also noted that the projected eight week trial was not as long as "some of the other trials that are done [in Hartford]." *Id.* The court "view[ed] the crimes as distinct" and indicated that it was bound by this Court's decision in *Davis* regarding which party had the burden of proving prejudice when a motion for joinder is considered. *Id.* at A-157. Nevertheless, the court ruled that, 1) it was not concerned about cross-contamination of the evidence; 2) the crimes were not brutal or shocking in nature and; 3) other jurisdictions consolidated white collar crimes regularly so there was no reason not to do so in Connecticut. *Id.* Although judicial economy was not the sole reason for joining the cases, it was a factor supporting the trial court's decision. *Id.* at A-158. The court continued the case

to provide the defendant with time to prepare his defense to the extortion case. *Id.*

3. When made, the decision to join was not an abuse of discretion

This Court has set forth two ways of rebutting *Payne's* presumption against joinder. First, if the evidence in the joined cases is cross admissible, the presumption is automatically overcome because judicial economy, the main reason for joinder, is maximized. *Id.* The *Boscarino* factors play no role in this analysis. *Id.* By contrast, when evidence is not cross admissible, judicial economy has less weight because the state must still prove two or more cases independently. Thus, the trial court must evaluate the *Boscarino* factors to overcome *Payne's* presumption against joinder.

a. Judicial economy was a weighty concern in this case

This case presented the trial court with a unique example of how the judicial economy realized through joinder serves an important public interest: the need to promptly resolve litigation that has a direct impact on government operations. See *Office of Governor v. Select Comm. of Inquiry*, 271 Conn. 540, 623 n. 1 (2004) (appeal expedited); see also *Butts v. Bysiewicz*, 298 Conn. 665, 667 (2010) (same). When the charges were lodged and throughout the joint trials, the defendant was a sitting mayor of the City of Hartford. He did not resign until after he was convicted.[11] The impact this had on the defendant's ability to govern was not lost on him or the state. As the state informed the trial court when arguing the joinder issue, the defendant had tried to address these concerns in two ways. Very early in the investigation, the defendant tried to delay his arrest until 2010 and delay the trials themselves until 2012, when his mayoral term would be over. S/App. at A-137 – A-

[11] The defendant was convicted on June 18, 2010; T. 6/18 at 2-5; but did not resign until the following week.

138. At other times the defendant expressed a desire to resolve the issues quickly so he could resume governing Hartford. *Id.* at A-136 – A-137. The defendant never contested these points. Thus, it was reasonable for the trial court to infer that as long as these charges were pending, Hartford, a city that recently had changed its charter to place executive authority in its mayor; *State v. Perez*, 147 Conn. App. at 57 n. 1; S/App. at A-49; had an extremely compromised mayor.

In addition, by joining the cases, the court had to pick only a single jury without concern that the jury pool for a potential second trial would be tainted by publicity resulting from the verdict in the first trial regardless of the outcome. This would avoid having to delay the second trial until publicity waned. See *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) ("But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates..."). Delaying the second trial would also keep at least one case on the docket longer and, if the defendant were acquitted in the first trial, possibly leave Hartford with a compromised mayor for a more extended period of time. Thus, although judicial economy was not the primary reason for joining the cases; S/App. at A-158; this was not simply a joinder of convenience.

b. Looking prospectively, the trial court did not abuse its discretion when it joined the cases

When evidence is not cross admissible, a trial court presented with a motion for joinder must exercise its discretion to determine whether the risk of prejudice of a joint trial is "substantially reduced" by the circumstances of the case. *State v. Davis*, 286 Conn. at 45 (*Katz, J.*, concurring). Or, as explained in *Drew v. United States*, 331 F.2d 85, 91-92 (D.C. Cir. 1964), the case cited by Justice Katz in *Davis*,

even where the evidence would not have been admissible in separate trials,

> if, from the nature of the crimes charged, it appears that the prosecutor might be able to present the evidence in such a manner that the accused is not confounded in his defense and the jury will be able to treat the evidence relevant to each charge separately and distinctly, the trial judge need not order severance or election at the commencement of the trial.

Trial courts reach this conclusion by applying the *Boscarino* factors "from a predictive perspective." *State v. Davis*, 286 Conn. at 48. Nevertheless, on appeal, the defendant has the burden of proving that the trial court abused its discretion. *State v. Payne*, 303 Conn. at

In applying the *Boscarino* factors to this case, the majority was correct to the extent that these were similar cases because the defendant abused his position as mayor in both. *State v. Perez*, 147 Conn. App. at 105-106; S/App. at A-97 – A-98. However, just because the cases shared this attribute, does not mean that the crimes were so similar that a jury cannot distinguish between them. If that were true, then this Court could not have affirmed the convictions in *State v. Herring*, 210 Conn. 78, 96-98 (1989). In *Herring,* this Court held that even though the joined crimes were both murders, that was the end of any similarity, because each crime was committed distinctly enough that the jury was able to keep them separate. *Id.* at 96. Likewise, here, as Judge Lavine and the trial court concluded, the two cases contained very distinct criminal conduct.

For example, in *Herring*, there were different motives for each murder. One victim was killed attempting to flee a robbery, whereas the other was killed after helping the defendant rob a bank. *Id.* Similarly, here, the defendant's motives were different. He committed the bribery for personal financial gain: to spruce up his house. He committed the extortion, however, to strengthen his political base. Indeed, the parallels with *Herring* are quite remarkable. The robbery in *Herring* is the bribery here, an act done for financial gain, whereas eliminating an accomplice is similar to protecting one's political future.

In *Herring*, both victims were shot. Nevertheless, this Court ruled the cases were distinguishable because "[t]he two victims were shot in different parts of their bodies, and died of wounds to different organs." *Id.* Here, the trial court reviewed the warrants, fulfilling its "independent obligation to inquire about the evidence supporting the charges to ascertain whether joinder was proper;" *State v. Davis*, 286 Conn. at 46 n. 6 (Katz, J. Concurring); and could conclude that these two cases inflicted "wounds to different organs" of city government. The bribery dealt with a construction contract let by the city, whereas the extortion dealt with an independent developer trying to purchase city land.

Moreover, in *Herring*, this Court was not concerned that the jury would be confused deliberating on the exact same elements. There was no such concern here. Each case charged crimes with vastly different elements. Indeed, one can commit larceny by extortion without even being a public official, whereas only a public official can accept a bribe. In exercising its discretion, the trial court also had the state's representation that the cases would be tried in an orderly manner, that only one witness would testify in both cases during the same stint on the stand, and that there were no overlapping exhibits. The warrants bore that out. Thus, the trial court was well within its discretion to find that there was "a substantially reduced risk" of cross-contamination or confusion. S/App. at A-157. See also, *State v. Hilton*, 45 Conn. App. 207, 215 (1997) (clear line separating evidence in the murder case and the narcotics case).[12]

The court also determined that the extortion charge was basically a common law larceny, a crime that the jury would have no difficulty understanding. T. 11/4/09 at 23. All

[12] The defendant never seriously claimed that one case was more brutal or shocking than the other. Neither case included a violent crime. *Id.* at 25. See e.g. *Farnum v. Comm'r of Correction*, 118 Conn. App. 670, 676 (2009).

the jury had to determine was whether the defendant tried to coerce Citino to give Giles a payoff in order to complete his plan to redevelop the butt ugly property. As for the complexity of the bribery charge, the defendant acknowledged "[t]he issues are relatively straight forward. Work was done at the house and benefits were conferred to . . . . Mr. Carlos Costa later on and that was that--was that a bribery?" T. 11/8/09 at 18. "[A]s white collar crimes go, there was nothing unduly complex or confusing about the evidence in these two cases." *State v. Perez*, 147 Conn. App. at 131; S/App. at A-23 (*Lavine, J.*, concurring). By holding otherwise, the majority erred because it "significantly underestimate[d] the ability of juries to understand judicial proceedings and properly evaluate evidence," and separately decide the two cases. *Id.* at A-126.

As for the length of trial, Judge Dewey noted that "[t]he Hartford Judicial District selects jurors for long trials multiple times every year. . . .And even if it were an eight-week trial, that would be a short period of time compared to some of the trials that are done here." S/App. at A-155. The defendant never contested this observation. That the majority disagreed with the practical knowledge of an experienced criminal trial judge should be of no moment when reviewing that judge's exercise of discretion. In sum, at the time the decision was made, joining the cases was not an abuse of discretion, even if two judges of the Appellate Court think otherwise. *See State v. Reynolds*, 264 Conn. 1, 224 n. 192 (2003).

C. Looking Retrospectively The Defendant Was Not Prejudiced By Joinder

The Appellate Court majority, looking retrospectively at the trial, found that joinder was an abuse of discretion because two *Boscarino* factors augured against joinder: the cases were too similar and also too long and complex for the jury to keep them separate.

The majority determined further that the prejudice was not cured by the concededly orderly trial and the trial court's "near herculean" efforts to instruct the jury to keep the cases separate. The majority's ruling, however, was incorrect. This jury was not the least bit confused; they kept cases crimes and even elements of related counts separate. Thus, the defendant failed to carry his "heavy burden" on appeal that a substantial injustice occurred.

1. Facts concerning joinder available after the trial

The jury was empaneled and sworn on May 12, 2010. T. 5/12 at 4. In its introductory charge, the court read each information separately. T. 5/12 at 5-11, 11-13. When the court completed its remarks, the defendant moved for a mistrial. *Id.* at 27-28. He claimed that he already had been prejudiced because the introductory instructions made the jury aware of both cases. *Id.* He also asked the court to provide a cautionary instruction that the evidence of the bribery could not be considered in the extortion case and vice-versa. *Id.* In response, the state pointed out that the jurors already knew that there were two separate informations from voir dire. The jury also had been instructed that charges are not evidence. *Id.* at 28. The state agreed, moreover, that the court should provide an instruction at the end of each case reminding the jury that the evidence presented went solely to that case. *Id.* at 28-29. The state also represented to the court that there would be a clear delineation between the two cases and that only one witness dealing with phone records might testify at the same time about both cases. *Id.* at 29. The court denied the motion for a mistrial but stated it would give the cautionary instruction requested. *Id.*

After the first witness was sworn, the court instructed the jury that "this witness and the witnesses that follow, until I tell you otherwise," will be testifying about the bribery case. *Id.* at 31. The court told jurors that the trial would be presented in two parts and they would

be informed at the appropriate time when the second part was to begin. *Id.* Almost every day after that, the court told the jury which case the witnesses were testifying about. T. 5/13 at 2-3; 5/14 at 5; 5/17 at 1; 5/18 at 1; 5/19 at 1; 5/20 at 2 (Bribery case); T. 5/27 at 1, 6/2 at 2; 6/4 at 2.

Moreover, it is uncontested that the state presented the case in an orderly fashion with a clear demarcation between the cases. There was only one common substantive witness, Inspector Sullivan, who had interviewed the defendant about both cases on June 26, 2007. Exh. 73.[13] Inspector Sullivan testified twice, and each time limited his testimony and the evidence presented through him (mostly the recorded interview with the defendant) to the specific case on trial on that particular day. T. 5/20 at 47-137; T. 6/7 at 120; T. 6/8 at 54; T 5/20 at 60-64; T. 6/7 at 122.

Near the end of the bribery case, the defendant wanted the extortion case severed and was willing to accept an instruction to the effect that jurors should ignore the fact that they originally were selected to hear two sets of charges. T. 5/20 at 145, 147. On May 26, the state called one witness and then rested in the bribery case. T. 5/26 at 23-24. Thereafter, the court instructed the jury that the bribery case was complete, and it would begin hearing evidence in the extortion case. *Id.* Jurors were told that the cases were joined for convenience but were separate cases. *Id.* They also were told that the defense

[13] As the Appellate Court noted, there was a second common witness, Thomas Ladegard, Hartford's Information Technology administrator. Like Sullivan, he testified twice. *State v. Perez*, 147 Conn. App. at 101 n. 47. See, T. 5/18 at 139. He testified briefly in the bribery case to provide foundational evidence, that emails are made and stored in the ordinary course of business, and that he provided emails to Inspector Sullivan. *Id.* at 139-143. He was not substantively cross-examined. In the extortion case, Ladegard's testimony consumes all of two pages, was offered only to establish a chain of custody for phone records, and the defendant did not cross-examine him at all. T. 6/7 at 118-119. He was hardly a confusing witness.

would not present its case until after the state completed the extortion case and they were to keep an open mind until then. *Id.* Jurors were also reminded that the cases must be considered separately and that they could not consider evidence of the bribery to prove the larceny by extortion and vice-versa; each case had to stand on its own proof. *Id.* The state then presented evidence in the extortion case.

Near the end of all the evidence in both cases, the defendant moved to sever. He was willing to agree to let the jury deliberate on only one case, and he did not care which one. See T. 6/11 at 2 ("we would prefer larceny, but are most certainly prepared to go on either one in order to try to salvage a verdict on one of these charges."). At the end of all the evidence, the defendant moved to have the jury deliberate on one case and was willing to have the jury instructed to ignore evidence from whichever case was eliminated and reach a verdict solely on the remaining case. 6/15 at 3 ("we would have no objection if the Court were to sever[] the bribery charge from the larceny and have one of the charges go to the jury--at this point we don't care which one, and have the Court give a cautionary instruction with regard to the fact that it had to ignore the evidence it heard on the charge that was not going to the jury. And we would acquiesce in that because we feel that the joinder of these two charges has created severe prejudice.").[14]

During final argument, the state argued the facts of each case separately. T. 6/16 at 3-21, 21-32.[15] So did the defendant. *Id.* at 59-64, 64-75. The court instructed the jury, as it

[14] The defendant has never explained why an instruction to consider the evidence in only one case and disregard the evidence in the other would be effective and acceptable after a jury heard all of the evidence in both cases but deliberated on only one, whereas a jury reaching a verdict on both cases was incapable of effecting such a separation.

[15] The Appellate Court claimed that the state "blurred the distinction" between the

had throughout, that the cases were separate and had been "consolidated for convenience." Jurors were told to decide each information and each count separately. T. 6/16 at 104. At the defendant's request, the court reinstructed the jury that the cases were joined for convenience but must be considered separately. T. 6/17 at 3. They also were reminded that evidence of bribery could be considered only for the bribery and vice-versa and that, as separate cases, each must stand on its own proof. *Id.*

During deliberations, the jury asked the court about Count 2 of the bribery case, which was one of three counts charging the defendant with fabricating evidence. In Count 2 he was charged as a principal. Specifically, the jury wanted to know whether "***presenting***" the bill he received from Costa to the Chief State's Attorney's Office could establish guilt on that charge. T. 6/17 at 8. Over the state's objection, the trial court erroneously answered the question, is "presenting equal to fabricating," ... "No." T. 6/17 at 12.[16] Although the defendant was convicted of fabricating the fake bill, as both an accessory and as a conspirator, the jury, as required by the trial court's erroneous instruction, acquitted him of Count 2 even though the defendant never contested that he presented the fake bill to the state through his attorney. T. 5/20 at 67.

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two cases in its opening argument by briefly stating that both cases were examples of the defendant abusing his position. *State v. Perez*, 147 Conn. at 107; S/App. at A-99. But that relationship was as inescapable and obvious to the jury as was the fact that the defendant in *Herring* was a murderer. Moreover, as set forth in sec 3 infra, the defendant was not prejudiced by this brief linkage.

[16] This instruction was erroneous because General Statutes § 53a-155 (a)(2) expressly prohibits "presenting...any record, document or thing knowing it to be false with the purpose to mislead a public servant who is or may be engaged in such official proceeding." And the state's theory of Count 2 was the defendant was guilty when he presented the fraudulent bill to the Chief State's Attorneys' Office during its investigation. *State v. Perez*, 147 Conn. App. at 59 n. 5.

2. The cases were not too complex to be joined

The majority and Judge Lavine agree that Connecticut precedent provides little guidance as to what makes cases too "complex" to be joined. *State v. Perez*, S/App. at A-96 n. 49; *Id.* at A-123 (*Lavine, J.*, concurring). They parted ways, however, on how to answer that question. The majority, looking at this Court's precedent, considered the number of witnesses, the number and volume of the exhibits, the overlapping time periods and the length of the trial as important indicators that the cases were too complex for the jury to keep separate. *Id.* at A-93 – A97. By contrast, Judge Lavine looked at the legal issues the jury had to decide and determined that these were not complex cases and thus joinder was not an abuse of discretion. S/App. at A-124. Both Judge Lavine's method and his conclusion are correct.

For example, *Boscarino* was complex because the jury had to sort out many crimes, charging the same elements, based on very similar factual patterns, that were committed against different victims within a short period of time. Moreover, some of the 55 witnesses in this Court's tally testified more than once but provided very similar testimony, albeit regarding different victims. *Id.* at 723-724. Practically speaking, this Court was not confident that the *Boscarino* jury, having heard repeated similar evidence of sexual assaults, especially from the same witnesses for different victims, was capable of keeping the testimony separate. *Id.* That is what made *Boscarino* complex, not simply the number of witnesses and the length of the trial. There was no comparable tangled evidence here.

Likewise, here, the majority's concern over the "details" of each of these cases confuses detail with complexity. Indeed, federal courts do not evaluate complexity as a function of a trial's length, or number of exhibits or witnesses, but rather, employ an

analysis similar to Judge Lavine's. For example, in *United States v. Casamento*, the United States Court of Appeals for the Second Circuit confronted the following:

> By any standard, the magnitude of this trial was extraordinary. Based on a multi-count indictment which charged thirty-five defendants, the joint trial of twenty-one defendants spanned more than seventeen months, produced more than forty-thousand pages of trial transcript, and, according to defense counsel, involved the introduction of thousands of exhibits and the testimony of more than 275 witnesses.

887 F.2d 1141, 1149 (2d Cir. 1989). As here, the

> [a]ppellants argue that the length and complexity of the trial prevented the jury from adequately remembering and evaluating the evidence. They argue that because the jury could not remember the evidence sufficiently, it had to rely uncritically on the government's summary charts. Appellants contend that, because the jury was unable to evaluate the evidence independently, severance was required, and that the district court's refusal to sever the trial, as requested, deprived them of due process.

Id. In response the Court held:

> We do not agree that the length and complexity of this trial caused the appellants substantial prejudice. First of all, we have no reason to believe that the jury lacked the intellectual capacity to meet the task before it. Although the jury had to evaluate a tremendous amount of evidence, the nature of the evidence and the legal concepts involved in the case were not extraordinarily difficult to comprehend, as they might be, for example, in a complex anti-trust case involving abstruse economic theories or an employment discrimination case involving technical statistical evidence and formulae. Here, the jury was required to grasp the legal significance of shipments of narcotics, sales of narcotics, and transfers of money required.

Id. at 1150; See also *United States v. Moten*, 564 F.2d 620, 627 (2d Cir. 1977) ("Although this was a comparatively long trial and involved numerous defendants, the issues were not so complicated as to be beyond the comprehension of the jury."); *United States v. Garner*, 837 F.2d 1404, 1414 (7th Cir. 1987) ("The evidence was indeed massive, but it was not complex").

Put simply, cases are too complex when the legal theories are themselves complex

and/or, as in *Boscarino*, when the evidence is difficult to untangle or hard to follow. Cases are not too complex simply because the trial is long and the evidence provides a lot of details, especially if those details inform simple concepts. Thus, although the majority thought the jury would be undone by hearing the details attending each crime; *State v. Perez*, S/App. at A-95 – A-97; this jury had to understand the simple crimes of bribery and extortion that were not "unduly complex or confusing." *Id.* at A-123 – A-125 (*Lavine J.*, concurring.) Moreover, the crimes were different, as were the exhibits, witnesses and city departments and employees involved. *Id.* at A-124 – A-125.

Contrary to the majority's suggestion, the defendant's jury did not have to comprehend all of the intricacies of Costa's contact with the city. See *State v. Perez*, S/App. at A-95. Rather, it had to understand, as various witnesses testified, that Costa had a job to do and was entitled to certain payments if his work was satisfactory. It was not, and when he ran into trouble the defendant helped him in exchange for improvements to the defendant's house. As for the "painstaking" details of the home improvements; *State v. Perez*, S/App. at A-97 n. 50; the jury had to understand that the work Costa performed had an actual cost and that the defendant either never intended to pay for it or paid nothing close to that cost.

As for the extortion, the jury did not have to understand any details about the contracts involved beyond Citino's need to purchase 1143 Main Street and the fact that the defendant agreed to help Giles extract an extortionate payment for access to land Giles had no right to occupy. The cases were not too complex to join.

Moreover, sound policy requires that this Court avoid calling a case "complex" by merely referring to the number of witnesses or the volume of exhibits and length of the trial.

That is equivalent to declaring that a Connecticut citizen, who the Second Circuit has recognized is fully capable of resolving an even longer joint trial with many more exhibits, issues, defendants and counts when seated on a federal jury; *United States v. Casamento*, supra; is wholly incompetent when asked to do the same thing in state court. Likewise, there is no reason to conclude that a Connecticut trial judge is incapable of acting with "extreme diligence" and fully protecting a defendant's rights while trying two white collar cases. See, *United States v. Casamento*, 887 F. 2d at 1152. Indeed, that would be an especially poor policy choice here, where, as set forth below, the trial court and jury were more than up to the task of keeping the two cases separate.

3. The acquittal proves that none of the *Boscarino* factors exist in this case

In this case, a retrospective analysis of the deliberations and verdicts eliminates the concerns that animate the *Boscarino* factors. Indeed, rather than try to speculate, as did the majority, what the jury could and could not do, Judge Lavine correctly resolved any claim of prejudice on the joinder issue by simply looking at what happened. "[T]he jury here demonstrated that it could not only keep the cases separate, but also counts within the informations. The jury found the defendant not guilty on count two in the bribery case." *State v. Perez*, 147 Conn. App. at 134 (*Lavine, J.*, concurring).

a. The Appellate Court majority applied the wrong method for evaluating the effectiveness of the jury instructions and the acquittal

Having conceded that the case was tried in an orderly fashion and the trial court undertook "near herculean" steps to guide the jury, the majority nevertheless refused to consider the acquittal on Count 2 of the bribery case as proof that the jury was not confused or biased against the defendant due to joinder. Instead, it relied on the bromide

from *Boscarino* that it would not speculate as to why the jury acquitted the defendant on that count. *State v. Perez*, S/App. at A-105. There are two rules of review, however, that control why the bromide does not apply to this case.

First, the majority overlooked the appellate presumption that juries follow the court's instructions to keep the cases separate. *State v. Davis*, 286 Conn. at 37. This freed the majority to ignore what actually happened and replace it with "nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict..." *Opper v. United States*, 348 U.S. 84, 95 (1954). That was error.

Second, the majority ignored this Court's practice of relying on the record of deliberations and the resulting verdicts in cases when both validate the presumption. See, e.g., *State v. Davis*, 286 Conn. at 17. In *Davis,* for example, this Court held that, "by acquitting the defendant of all of the offenses charged [in one case], the jury evidently was able to keep the three cases separate and did not blindly condemn the defendant on the basis of the evidence adduced in the [other two joined] case[s]." *State v. Davis*, 298 Conn. at 37. The *Davis* Court looked at the order of deliberations and the different verdicts-- convictions in two cases and an acquittal in the third case-- as proof that joinder was not prejudicial. *Id.* at 36-37. As this Court concluded in *Davis*, when instructions are thorough, and the presumption that jurors follow instructions is borne out by the deliberative process, including the jury's questions and the verdicts, it will not find prejudice from joinder.[17]

[17] Federal courts reviewing joinder of offenses or offenders consider acquittals proof that the jury was not confused and reached independent verdicts. E.g. *United States v. Casamento*, 887 F. 2d at 1150; *United States v. Smith*, 919 F. 2d 67, 68 (8th Cir. 1990); *United States v. Sicree*, 605 F. 2d 1381, 1389 (5th Cir. 1979); *United States v. Harris*, 635 F. 2d 526, 527 (6th Cir. 1980); *United States v. Papia*, 560 F. 2d 827, 837 (7th Cir. 1977); *United States v. Kopitul*, 690 F. 2d 1289, 1320 (11th Cir. 1982). As the United States

Indeed, what happened below completely eliminates the *Boscarino* concerns that the cases were too similar or the trial too long and complex to be tried jointly.

b. How the deliberative process proves that this case was not too long or complex for the jury

In summarizing its conclusion that the cases were too complex to be joined, the majority held that, "[d]espite the orderly manner in which the state presented the evidence, first of the bribery case and then of the extortion case, ***we conclude that the jury was not able to consider each charge separately and distinctly."*** (Emphasis added.) *State v. Perez*, S/App. at A-85, *Id.* at A-97. The record shows, however, that the jury not only kept the crimes separate, but was able to separate counts with overlapping facts and elements.

The most direct evidence of the jury's deliberative precision is revealed by its inquiry during deliberations. See, e.g., *State v. Miguel C.*, 305 Conn. 562, 581 (2012); *State v. Wallace*, 290 Conn. 261, 276 (2009); *State v. Pappas,* 256 Conn. 854, 889 (2001); *State v. Edwards*, 247 Conn. 318, 329 (1998); *State v. Bradley*, 134 Conn. 102, 113 (1947); *United States v. Casamento,* 887 F. 2d at 1150. Here, the jury asked for guidance about one specific element of Count 2 in the bribery case, fabricating evidence as a principal. S/App. at A-216. In that count, the state sought to prove via a very discreet uncontested fact, that the defendant fabricated the fake bill when, through counsel, he "presented" it to Inspector Sullivan during the investigation. The jury's question focused on the only element and facts that distinguished Count 2 from Count 3 (accessory) and one of the two options alleging an overt act in Count 4 (conspiracy). See S/App. at A-4 – A-6. And all three counts alleged that

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Supreme Court held when evaluating how an acquittal informed its ruling that prejudice should not be presumed due to pretrial publicity, "It would be odd for an appellate court to presume prejudice in a case in which jurors' actions run counter to that presumption." *Skilling v. United States*, __ U.S. __, 130 S. Ct. 2896, 2916 (2010).

the defendant fabricated the very same piece of evidence: the bill. As in *Davis*, the jury revealed that it was evaluating the evidence count-by-count, indeed element-by-element. Likewise, the jury's question proved that it had no problem sifting through all the "painstaking details" of both cases to focus on the unique factual predicate that distinguished Count 2 from Counts 3 and 4. To speculate the jury could not do this when it obviously did, is error that must be reversed.

c. This jury reached discreet independent verdicts

On the *Boscarino* factor concerned with whether the cases presented distinct factual scenarios, the majority determined that "the intricate and overlapping fact patterns" regarding the bribery and extortion cases, and the opening lines of the state's closing argument pointing out that both crimes arose from an abuse of his position as mayor, made "it more difficult to determine the defendant's guilt in each case independently." *State v. Perez*, S/App. at A-99. The majority concluded that the cases' similarity--both were political corruption cases-- significantly impaired the defendant's right to "a fair and independent consideration of the evidence in each case." *Id.* at A-98. This *Boscarino* factor reflects a concern that a jury may cumulate evidence of guilt because it is unable to differentiate between evidence offered for one case but not the other. It also addresses the concern that jurors will conclude that if the defendant is guilty of one crime, he is guilty of the other, regardless of the evidence. *State v. Boscarino*, 204 Conn. at 723. Neither concern exists here.

After the jury's inquiry about a specific element in Count 2, the trial court instructed that presenting the fake bill did not constitute fabricating evidence. S/App. at A-220. Of course that was incorrect. But the jury did not know that. What it did, however, was acquit

the defendant of Count 2. The jury also convicted the defendant of Counts 3 and 4, both charging fabricating evidence. In light of what proceeded these verdicts, it is obvious that the jury deliberated individually on each count, indeed on each element, and there was no cross-contamination.

First, the verdicts in Counts 3 and 4 establish that the jury was convinced beyond a reasonable doubt of every other element of fabricating evidence. Nevertheless, after the court answered the jury's question, it acquitted him of "presenting" the bill, despite evidence that proved this element beyond a reasonable doubt. This jury not only followed the court's instructions precisely, but also had a precise grasp of the facts and elements distinguishing each count and evaluated them independently even after a long trial and all the evidence it heard. *United States v. Casamento*, 887 F. 2d at 1150 ("The jury's ability to discover that no evidence supported this particular racketeering act, when such acts were charged in the indictment, is telling support for the conclusion that the jury scrutinized the evidence with great care.").

One other *Boscarino* concern has to be addressed here. In holding that the defendant's right to testify was violated when the cases were not severed, the majority raised an issue that is normally relevant to the first *Boscarino* prong: "Had the trials been severed, a jury hearing the extortion charges would not have known of the defendant's lies to Sullivan. . . ." *State v. Perez*, S/App. at A-115. Notably, the "lie" at issue was in the bribery case, when, in the June 26 interview, the defendant falsely told Inspector Sullivan that he had paid Costa the amount indicated on the fake bill. That is the same bill underlying the three counts charging fabricating evidence. That lie, however, did not prevent the jury from acquitting the defendant of Count 2. In other words, the jury did not

conclude "once a liar, always a liar," even when considering a count that charges the defendant with physically lying about evidence. To conclude, as the majority did, that the "lie" poisoned both cases when it did not even poison the case to which it applied, was both illogical and reversible error.

D. Summary Of Joinder Issue

If the *Boscarino* factors are evaluated prospectively, the trial court did not abuse its discretion when it joined the cases. Looking retrospectively, the Appellate Court erred when it ruled that the defendant had carried his heavy appellate burden of proving prejudice. The evidence in each case was not too complex; it was just detailed. Finally, the record establishes that this jury was not the least bit confused, and was not biased against the defendant. The majority's ruling to the contrary must be reversed.

II. THE APPELLATE COURT ERRED WHEN IT RULED THAT BY REFUSING TO SEVER THE CASES THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO TESTIFY

One reason a court will sever cases or deny joinder is to honor the defendant's right to testify in one, while remaining silent in the other. *State v. Schroff*, 198 Conn. 405, 409 (1986), adopting *Baker v. United States*, 401 F. 2d 958 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970). Here, the defendant wanted to testify in the bribery case and remain silent in the extortion case. To perfect this claim, a defendant must make a convincing showing via a detailed offer of proof that he has ***both*** an important reason to testify in one case and a strong need to refrain from testifying in the other. *State v. Schroff*, 198 Conn. at 409. Here, the entire panel found that the defendant made both showings and, once he did, the trial court should have severed the cases. *State v. Perez*, S/App. at A-122 – A-123; *Id.* at A-127 – A-128 (*Lavine, J., concurring*). The Appellate Court erred, however, because it 1)

misidentified when the defendant provided a convincing reason why he needed to testify in the bribery case;[18] 2) never weighed the competing interests at stake when that occurred, and thus 3) never even discussed, let alone ruled upon the trial court's response once the claim was perfected.

A. The Defendant's Incremental Claim Regarding His Right To Testify

Prior to trial, the defendant briefly mentioned that joinder would affect his right to testify as one in a litany of rights compromised by joinder. He made no substantive argument or offer in that regard. *State v. Perez*, 147 Conn. App. at 113.

During the bribery case, the defendant indicated that he would be filing a motion to sever the cases so he could testify in that case. T. 5/18 at 158; S/App. at A-163 – A-166. In the motion that followed, the defendant asserted that he wanted to testify: a) to explain why he misled Inspector Sullivan during their initial interview on June 27, 2007; b) to explain how Costa became involved in renovating the defendant's home; c) the "context" of his involvement in the letter of May 16, 2006 to the bonding company, and; d) the context of his involvement in issuing emergency manual checks to Costa's company, USA. S/App. at A-32 – A-33. At this point in the trial, however, the defendant did not offer any details about his proposed testimony, but rather limited his offer to the general topics set forth above. The defendant also stated that he had no need to testify in the extortion case because his defense was contained in his interview with Inspector Sullivan, and he did not want his testimony in the bribery case to be impeached by questions about his other dealings with Giles. T. 5/20 at 146; S/App. at A-173. He also indicated that he did not want to wait until

[18] The state is not contesting the fact that the defendant provided an adequate explanation as to why he did not want to testify in the extortion case.

the end of both cases to put on his defense because he then would have to refresh the jury as to which facts he was addressing. *Id.* at A-174 – A-175. The state will refer to the defendant's general list of topics as the May 20 offer of proof.

The state responded that the defendant should not have waited until the end of the bribery case to move for severance based on his right to testify. T. 5/20 at A-177. The state pointed out that the defendant knew, via pretrial discovery, what evidence the state was going to elicit on the four topics the defendant allegedly wanted to address in his testimony, and thus could have made an offer of proof at the time the trial court was deciding the pretrial motion for joinder. *Id.*[19] The state noted further that the trial court had to review a mid-trial effort to sever based on a defendant's desire to testify pursuant to *State v. Chance*, 236 Conn. 31 (1996). The state also pointed out that, on cross-examination, the defendant had been able to elicit information that was helpful to him on all of the topics he mentioned. S/App. at A-178. Thus, the defendant failed to show why he was compelled to testify in the bribery case. Based on this offer of proof, the trial court denied the defendant's motion to sever. *Id.* at A-182.

Just before the state rested on the extortion case--that is, after all of the state's evidence in both cases was before the jury--the defendant filed a written motion for a mistrial or severance or, ***in the alternative***, for permission to testify only about the bribery

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[19] The defendant argued that he waited until May 20 to make his limited offer of proof on the topics his testimony would address because, in a normal case, a defendant's decision to testify is delayed as long as possible. T. 5/20 at 151-153. The defendant, however, confused two issues. He could have asserted his desire to testify when he opposed the state's motion for joinder and informed the court then of the details of his testimony. That does not mean, however, that if the cases were not joined, he would have to testify. It would simply mean that his decision later in the case would be unencumbered by joinder.

case. S/App. at A-38; T. 6/11 at 1; S/App. at A-186. It was at this point the defendant acknowledged that he had the burden to show a "particularized need as to why he wants to testify on one count and not the other." *Id.* at A-188. For the first time in the case, he put "on the record why it is important for the mayor to testify on the bribery and fabrication counts." *Id.* at A-189 – A194. For example, on the topic of his lie to Inspector Sullivan, he provided the actual explanation he would give: Corporation Counsel John Rose was in the room during the interview and the defendant was embarrassed to reveal that he had not paid Costa. *Id.* at A-190. On the topic of how Costa came to work on the defendant's house, he wanted to explain that Costa approached him when the Perez's were ordering the countertop at Home Depot, and not the other way around. *Id.* On the topic of why Costa's bill was created when it was, the defendant wanted to testify that he repeatedly requested a bill, but when Mrs. Perez came home from the hospital, payment of the bill went on the "back burner." *Id.* at A-191. The defendant provided many other particulars in this regard. *Id.* at A-192 – A-1-94. As for the extortion case, he again stated that he had no need to testify because Citino was not credible, the taped interview laid out his defense as to why he wanted Giles to remain on the property, and there was strong evidence that Giles had a right to park cars at 1143 Main Street. *Id.* at A-195 – A-196. He also asserted that he wanted to avoid being impeached on the bribery case by misconduct evidence admitted solely in the extortion case *Id.* at A-197. See, *State v. Perez*, S/App. at A-108 n. 58. The state will refer to this as the June 11 offer.

After hearing the June 11 offer, the trial court did three things. First, it denied the defendant's motion for a mistrial. Second, it concluded that, "At this point I am not going to sever" the cases. *Id.* at A-204. Third, the court granted the defendant's alternative proposal,

to limit his testimony to the bribery case and insulate him from cross-examination regarding anything pertinent only to the extortion case. *Id.* at A-204 – A-205. The court ruled that this solution was practical because the jury had been told every day that these were separate cases and the evidence was presented in that manner. *Id.* The court left it to the defendant to decide whether or not he would testify. *Id.* at A-205 – A-206. In other words, the defendant prevailed on his alternative request.

After the court ruled in the defendant's favor and allowed him to limit his testimony and the states' cross-examination, the defendant expressed, ***for the first time***, his concern about offering an explanation in the bribery case and remaining silent in the extortion case. Id. at 22; T. 6/15 at 2. He later argued that no jury instruction could cure the prejudice that would ensue. T. 6/15 at 2. He then renewed his motion for severance and expressed his willingness to proceed to a verdict on one case or the other. *Id.* The court denied this motion.

B. How Courts Evaluate A Defendant's Claim That Joinder Denied Him The Right To Testify

A defendant is not automatically entitled to have his cases severed by a desire to testify in one case and not the other. Otherwise, defendants, rather than the trial courts, would control the issue of joinder or severance. *United States v. Alexander*, 135 F.3d 470, 477 (7th Cir. 1998). Nevertheless, when a defendant wants to testify in only one case that has been consolidated for trial, several concerns arise.

> [A defendant's] decision whether to testify will reflect a balancing of several factors with respect to each count: the evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross examination. But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's

> consideration of the other count. Thus he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his express denial of the other. Thus he may be coerced into testifying on the count upon which he wished to remain silent.

Baker v. United States, 401 F.2d at 976. Of these concerns, the defendant here claimed that he wanted to testify in the bribery and not the extortion and did not want facts from the extortion to be fodder for cross-examination. This Court reviews the specific claim pursued in the trial court. See, *State v. Chance*, 236 Conn. 49.

In order to evaluate the defendant's claim that his right to testify is compromised by joinder, he must:

> make 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."

(Emphasis added.) *State v. Schroff*, 198 Conn. at 409 quoting *Baker v. United States*, 401 F. 2d at 977.

However, the claim is evaluated differently depending on ***when in the process*** the defendant makes a convincing showing on both prongs. See, *State v. Chance*, 236 Conn. 31, 46, 48-49 (1996). When the offer comes early in the case, it is evaluated under *Baker* as adopted in *Schroff* to determine whether the defendant's right testify was compromised. By contrast, if an adequate offer is not made until the end of the case, the claim is analyzed pursuant to *State v. Chance*, to determine whether the defendant's was prejudiced by the fact that the jury had before it misconduct evidence in the form of the other cases joined for

trial. 236 Conn. at 49 n. 17. Under this test, the defendant retains the burden on appeal of making a substantial showing that he was prejudiced. *Id.* at 52-53.

1. The May 20 offer was not a "convincing showing" because it was bereft of details

Under the federal precedent this Court has adopted in *Schroff*, an offer that does not reveal the substance of the defendant's proposed testimony is inadequate to convey the gravity of his need to testify. *United States v. Alexander*, 135 F.3d at 477-478. Indeed, the *Alexander* court ruled against the defendant because, although he indicated that the topic his testimony would address was his fraudulent conduct, he did not inform the trial court "how he would explain" that conduct. 135 F.2d at 477. By failing to provide the substance of his testimony he "[i]n effect, deprived the court of the ability to make a decision that any claim of prejudice is genuine." *State v. Schroff*, 198 Conn. at 410; United *States v. Alexander*, 135 F. 3d 470 (7th Cir. 1998); *State v. Marsala*, 43 Conn. App. 527, 536-537 (1996).

Likewise here, the May 20 offer was deficient because the defendant provided general topics his testimony would address bereft of the details necessary for the trial court to rule in his favor. For example, he told the trial court that he wanted to testify "in order to explain certain things in connection with the interview by Inspector Sullivan..." S/App. at A-172. This is the very same type of offer rejected as inadequate to inform the trial court's discretion in *Alexander*. The other topics he wanted to testify about were equally vague. Further, because *Chance* holds that this claim is reviewed on the state of the record at the time the defendant perfects it, the Appellate Court could not, as the majority appears to have done, conflate the two offers and thus rely on the June 11 offer to hold that the trial erred on May 20. Thus, on May 20, there was no need to sever the cases to protect the

defendant's right to testify. *State v. Marsala*, 43 Conn. App. at 527-528.

2. Evaluating the trial court's ruling after the defendant perfected his claim on June 11

As the trial court found, the defendant did not make a substantial showing until June 11, when he first offered the details of his testimony. S/App. at A-204, A-206. Indeed, defense counsel tacitly acknowledged as much when he stated on June 11 that: "'what I'm prepared to do, with the court's permission, is to ***lay on the record why it is important for the [defendant] to testify on the bribery [case], and I will list them [seriatum]***. . .'" (Emphasis added.) S/App. at A-189 n. 58. For its part, the majority below noted that June 11 was the date that the defendant provided "greater detail of what [his] testimony would be." *State v. Perez*, S/App. at A-138. That detail, however, is required before the trial court has to sever the cases. Because the Appellate Court focused on the offer of May 20, it never reviewed the trial court's ruling on the defendant's motion either to sever the cases ***or*** allow him to testify in the bribery case free from cross-examination on facts arising from the extortion case. On June 11 the defendant persuaded the trial of his need to testify in the bribery, and ruled in his favor on his alternative proposal: he could testify solely on the bribery with no concern that he could be cross-examined about anything arising from the extortion case. S/App. at A-205. This eliminated the precise concerns the defendant raised on May 20. In other words, once the defendant made a genuine claim of prejudice, he prevailed. The trial court's exercise of discretion at this juncture--in the form of balancing judicial economy and the defendant's rights--should be affirmed.

By the time the defendant made his detailed offer of June 11, things had changed radically from May 20. By June 11, all of the evidence in both cases was before the jury. Considerations of judicial economy augured against throwing away all the time that had

been expended presenting that evidence. Moreover, by June 11, severance was no longer an option for keeping the jury from hearing other misconduct evidence derived from the fact that the jury had heard both cases. Thus, had the trial court severed the cases at that juncture, a remedy the defendant was willing to accept, he would have to rely on both the court's instruction to disregard all of the misconduct evidence in whichever case was severed, and the jury's ability to do so when deliberating on whichever case it received. If the jury could to this, it is hardly an abuse of discretion to conclude it also could keep the cases separate when deliberating on both. The trial court exercise of discretion was further informed by the fact that the cases had been tried in an orderly manner, that it had carefully instructed the jury on a regular basis to keep the cases separate, and it had observed the jury's conduct throughout. Thus, it was for the trial court to conclude that nothing would be gained by severance and that much would be moot.

Moreover, when the defendant's genuine offer is made at this late date, the issue is analyzed pursuant to *State v. Chance*, 236 Conn. at 31. In *Chance,* the defendant did not renew his objection to consolidation until after the trial and after he had testified on one count but not the other. *Id.* at 48-49. The Court ruled that *Schroff* did not apply under these circumstances because, "[h]ad severance been granted, the defendant's expressed choice [to testify in one case and not the other] would not have been altered." *Id.* Likewise here, the defendant only wanted to testify in the bribery case and wanted to do so free from being impeached by facts from the extortion case. The trial court's June 11 ruling freed him to do this. Thereafter, the "mere fact" that impeachment evidence became available because the cases were joined, did not transform his delayed motion into a right to testify claim under *Schroff. Id.* at 49 n. 17. Rather, "[w]e simply treat the defendant's post-trial objection to

consolidation as any other claim where the defendant alleges that unduly prejudicial evidence has come before the jury as a result of consolidation and has rendered the jury unable fairly to deliberate." *Id.* Under this analysis, courts "routinely allow juries to hear impeachment evidence regarding prior felony convictions and still trust that those juries will be able fairly to judge the defendant's guilt or innocence when properly instructed by the trial court." *Id.* at 52.

In issue I, the state established that the jury's exposure to both the bribery and extortion cases did not compromise its ability "fairly to deliberate," so the state will not repeat its argument here. It suffices that the jury's exposure to the extortion case did not impede its ability to rule distinctly and independently on each count and each element within the bribery case.

3. The defendant failed to prove how he was harmed

The Appellate Court chided the state for not arguing that any violation of the defendant's right to testify was not harmless, so it refused to evaluate harm. *State v. Perez*, S/App. at A-116. That was error. Under *Chance*, the defendant must meet his burden of showing he was harmed by joinder, not the other way around. 236 Conn. at 31; see also *State v. Schroff*, 198 Conn. at 405. The defendant cannot carry that burden.

To the extent the defendant concluded that his testifying was risky because joinder exposed other misconduct evidence that would have compromised his credibility, he cannot prove harm because he failed to testify after the court insulated him from being directly impeached by the extortion case. *State v. Harrell*, 199 Conn. 255, 266 (1986) following *Luce v. United States*, 469 U.S. 38 (1986). Indeed, in *Chance*, *Baker* and the case the majority below cited, *Cross v. United States,* 335 F.2d 987 (D.C.Cir. 1964), the defendants'

claims could be reviewed fully because they testified. When the defendant has that opportunity to testify and does not, this Court does not speculate about the possible prejudice from the jury's exposure to other crimes evidence. *State v. Harrell*, 199 Conn. at 266. Likewise, the Court cannot evaluate the effectiveness of any limiting instruction a trial court might have given concerning how the jury should assess the defendant's testimony in one case and silence in the other. See General Statutes § 54-84. *State v. Harrell*, 199 Conn. at 266. Thus, by not testifying, the defendant cannot carry his burden of proving the only possible harm arising after the trial court adopted his alternative remedy.

The Appellate Court rejected the state's reliance on *Harrell* because it concluded that "[]the defendant in the present case did not present a claim of improper impeachment with a prior conviction." *State v. Perez*, S/App. at A-111 – A-112. This attempted distinction is invalid. In *Chance* this Court denied relief in part because it "routinely allow[s] juries to hear impeachment evidence regarding prior felony convictions and still trust[s] that those juries will be able fairly to judge the defendant's guilt or innocence when properly instructed by the trial court." *State v. Chance,* 236 Conn. at 52. *Chance* describes a *Harrell* claim. In other words, when the defendant waits to perfect his claim that he wants to testify in one case, this Court, will not grant relief unless the defendant testified at trial because it cannot assess harm. The state had no obligation to prove anything in this regard.

In addition, when evaluating harm, this Court will consider what information was before the jury, and whether the defendant has established that a different process would have changed the verdict. *Id.* at 53. As the state pointed out to the Appellate Court in its brief below; State's Appellate Court Brief at 45 n. 19; almost all of the topics the defendant allegedly wanted to address in his testimony; *State v. Perez*, 147 Conn. App. at 116-118 n.

5; were presented to the jury during cross-examination of the state's witnesses. Thus, his personal testimony was of "debatable significance." *United States v. Freeland*, 141 F.3d 1223, 1228 (7th Cir. 1998). For example, from another source, the jury knew about Mrs. Perez's illness and how it affected the defendant. T. 6/10 at 123-127. It learned about the difficulty the defendant had paying her hospital bills. T. 6/11 at 33-40. The jury knew the defendant was very busy with other major city construction projects. Id. at 27-28. As for the context behind the city's letter rescinding the default letter sent to the bonding company, Charles Crocini, the city employee the defendant appointed to oversee the Park Street project, testified that he was behind the letter. T. 6/10 at 84. Crocini also testified that the defendant often tried to accelerate payments for minority businesses to ameliorate their cash flow problems. T. 6/10 at 61. Finally, rather than having to testify that he tried to elicit a bill from Costa well before the rumors about their relationship began, he got Costa to admit that, at a much earlier date, Julio Mendoza had asked him, on the defendant's behalf, to prepare a bill. T. 5/17 at 131.

As to the other topics the defendant sought to address in his testimony, they hardly provided a convincing reason for him to testify and were fraught with problems that would arise during cross-examination. For example, the defendant wanted to explain that Costa approached him regarding the home improvements and not the other way around. That explanation, however, would not transform a bribe into a lawful transaction. On the topic of how the defendant's religious beliefs prevented him from doing anything dishonest, the defendant elicited testimony from a state's witness that he was an "honest" guy. T. 6/10 at 84. By contrast, in the unlikely probability that the defendant testified about his religion, he would have had to admit that he lied to Inspector Sullivan in the bribery case and that he

backdated the mortgage application. As for his offer to explain that he never really read Costa's bill but was happy with the bottom line, he would be confronted by Costa's testimony that when told the bill would be much higher, he was upset. He certainly was not prejudiced by being unable to explain that he had no intent to mislead when he presented the fake bill to the state, because he was acquitted of that charge. The only remaining topic, explaining why the defendant lied to Inspector Sullivan, was equally fraught with problems. The defendant wanted to explain that he lied because he was embarrassed to admit in front of Corporation Counsel John Rose that he had yet to pay Costa. On cross, however, he would have been confronted with the fact that he backdated the mortgage application when Rose was nowhere to be seen.

In sum, the first time the defendant perfected the claim that he wanted to testify was on June 11. S/App. at A-206. By that date it was not an abuse of discretion to deny severance but adopt the defendant's alternative remedy that allowed him to testify only on the bribery free case from being confronted with evidence from the extortion case. Finally, he chose not to testify, therefore, he cannot establish harm, nor could he.

CONCLUSION

For all of the foregoing reasons, the State of Connecticut-Appellee asks this Court to affirm the trial court's judgment of conviction.

Respectfully submitted,

STATE OF CONNECTICUT

BY: _____

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October, 2014

CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that

(1) the electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

(2) the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(3) a copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7; and

(4) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(5) the brief complies with all provisions of this rule.

HARRY WELLER
Senior Assistant State's Attorney

SUPREME COURT

OF THE

STATE OF CONNECTICUT

JUDICIAL DISTRICT OF HARTFORD

S.C. 19285

STATE OF CONNECTICUT

V.

EDDIE PEREZ

SEPARATE APPENDIX
PART 1 AND PART 2

APPENDIX
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PART ONE

PART TWO

DOCKET NO. CR09-0635038	**:**	**SUPERIOR COURT**
STATE OF CONNECTICUT	**:**	**JUDICIAL DISTRICT OF HARTFORD**
VS.	**:**	**AT HARTFORD**
EDDIE A. PEREZ	**:**	**MAY 7, 2010**

SUBSTITUTE INFORMATION

COUNT ONE

The undersigned Executive Assistant State's Attorney hereby accuses Eddie A. Perez of the crime of Conspiracy to Commit Larceny in the First Degree by Extortion in violation of sections 53a-48, 53a-122(a)(1), and 53a-119(5)(H) of the Connecticut General Statutes and charges that between December, 2005 and May, 2007, in the city of Hartford, said Eddie A. Perez, with intent that conduct constituting the crime of Larceny in the First Degree by Extortion be performed agreed with Abraham Giles to engage in or cause the performance of such conduct, and one of them committed an overt act, including but not limited to the following, in furtherance of the conspiracy:

1. In the early portion of 2006, in the city of Hartford, Eddie A. Perez, the mayor of Hartford, told Joseph Citino, who had made a proposal to purchase and develop the property at 1143 Main Street which was owned by the city of Hartford, that, in order for the purchase to be approved, he would have to "take care" of Abraham Giles;
2. That in March, 2006, the city of Hartford, under the direction of Eddie A. Perez, set as one condition of Joseph Citino's purchase and development of the property at 1143 Main Street that Abraham Giles be

allowed to remain in place on the property until Citino initiated his development program for the site;

3. During negotiations for the purchase of the property at 1143 Main Street in Hartford, Abraham Giles told Joseph Citino he would vacate the premises if he received two hundred fifty thousand dollars ($250,000) from Joseph Citino;

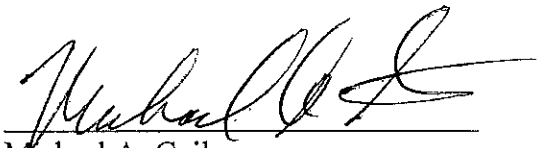
4. During negotiations for the purchase of the property at 1143 Main Street in Hartford, Abraham Giles told Joseph Citino that "he was a good friend of Eddie's (Perez) and he could either help this project go forward or not";

5. Abraham Giles agreed to vacate the premises at 1143 Main Street if he was paid one hundred thousand dollars ($100,000) by Citino.

COUNT TWO

The undersigned Executive Assistant State's Attorney further accuses Eddie A. Perez of Criminal Attempt to Commit Larceny in the First Degree by Extortion in violation of sections 53a-49(a)(2), 53a-122(a)(1), and 53a-119(5)(H) of the Connecticut General Statutes and charges that between December, 2005, and May, 2007, in the city of Hartford, said Eddie A. Perez, while acting with the intent to deprive Joseph Citino of property or to appropriate the same to a third person, to wit: Abraham Giles, intentionally did an act which was a substantial step in a course of conduct planned to culminate in the commission of the crime of Larceny in the First Degree by Extortion.

RESPECTFULLY SUBMITTED,
THE STATE OF CONNECTICUT

By: 

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DOCKET NO. CR09-0628569	**:**	**SUPERIOR COURT**
STATE OF CONNECTICUT	**:**	**JUDICIAL DISTRICT OF HARTFORD**
VS.	**:**	**AT HARTFORD**
EDDIE A. PEREZ	**:**	**MAY 7, 2010**

SUBSTITUTE INFORMATION

COUNT ONE

The undersigned Executive Assistant State's Attorney accuses Eddie A. Perez of the crime of Bribe Receiving in violation of section 53a-148(a) of the Connecticut General Statutes and charges that between January, 2005, and July, 2007, said Eddie A. Perez, a public servant, solicited and accepted from Carlos Costa a benefit, to wit: remodeling work to his residence at 59 Bloomfield Avenue, Hartford, Connecticut, for, because of, and as consideration Eddie Perez's decision, opinion, recommendation and vote

COUNT TWO

The undersigned Executive Assistant State's Attorney further accuses Eddie A. Perez of the crime of Fabricating Physical Evidence in violation of section 53a-155(a)(2) of the Connecticut General Statutes and charges that on or about July 10, 2007, in the town of Rocky Hill, the said Eddie A. Perez, believing that an official proceeding was about to be instituted, presented a document, to wit: a bill from USA Contractors that purported to be for all remodeling work completed at Eddie A. Perez's residence at 59 Bloomfield Avenue, Hartford, Connecticut, knowing that the invoice was false and with the purpose of misleading a public servant who may be engaged in such official proceeding.

COUNT THREE

The undersigned Executive Assistant State's Attorney further accuses Eddie A. Perez of the crime of Fabricating Physical Evidence in violation of sections 53a-8 and 53a-155(a)(2) of the Connecticut General Statutes and charges that between January, 2006 and July, 2007, in or near the city of Hartford, the said Eddie A. Perez, believing that an official proceeding was about to be instituted, and acting with the kind of mental state required for the crime of Fabricating Physical Evidence, solicited, requested, commanded, and intentionally aided Carlos Costa in making a document, to wit: a bill from USA Contractors that purported to be for all remodeling work completed at Eddie A. Perez's residence at 59 Bloomfield Avenue, Hartford, Connecticut, knowing that the invoice was false and with the purpose of misleading a public servant who may be engaged in such official proceeding.

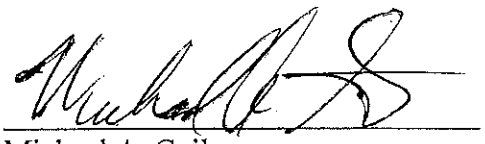
COUNT FOUR

The undersigned Executive Assistant State's Attorney further accuses Eddie A. Perez of Conspiracy to Commit Fabricating Physical Evidence in violation of sections 53a-48 and 53a-155(a)(2) of the Connecticut General Statutes and charges that between January, 2007 and July, 2007, in the city of Hartford and the town of Rocky Hill, said Eddie Perez, with intent that conduct constituting the crime of Fabricating Physical Evidence be performed, agreed with Carlos Costa, to engage in and cause the performance of such conduct, and one of them committed an overt act, including but not limited to the following, in support of the conspiracy:

1) The drafting of a bill from USA Contractors for what was purported to be the total work done at 59 Bloomfield Avenue;

2) Presenting the bill from USA Contractors for the work done at 59 Bloomfield Avenue to the office of the Chief State's Attorney as a complete bill for all of the work done on the property.

RESPECTFULLY SUBMITTED,
THE STATE OF CONNECTICUT

By: 

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INFORMATION 5/07/10
JD-CR-71 Rev. 8-08

STATE OF CONNECTICUT
SUPERIOR COURT

DISPOSITION DATE 09-14-2010

TITLE, ALLEGATION AND COUNTS

STATE OF CONNECTICUT VS. *(Name of accused)*: PEREZ, Eddie | G.A. NO.: JD | DOCKET NO.: CR09-628569-T

ADDRESS | DATE OF BIRTH

TO BE HELD AT *(Town)*: Hartford | COURT DATE

The undersigned Prosecuting Authority of the Superior Court of the State of Connecticut charges that:

	AT (Town)	ON OR ABOUT (Date)	IN VIOLATION OF GENERAL STATUTE NO.
FIRST COUNT - DID COMMIT THE OFFENSE OF: Bribe Receiving	Hartford	Jan. 2005-July 2007	53a-148(a)
SECOND COUNT - DID COMMIT THE OFFENSE OF: Fabricating Physical Evidence	Rocky Hill	July 10, 2007	53a-155(a)(2)
THIRD COUNT - DID COMMIT THE OFFENSE OF: Fabricating Physical Evidence	In or Near Hartford	Jan. 2006-July 2007	53a-8; 53a-155(a)(2)

☐ SEE OTHER SHEET(S) FOR ADDITIONAL COUNTS

DATE | SIGNED *(Prosecuting Authority)*

CONTINUED TO	PURPOSE	REASON
5/12/10	J	6/03/10 J
5/13/10	J	6/04/10 J
5/14/10	J	6/07/10 J
5/17/10	J	6/08/10 J
5/18/10	J	6/10/10 J
5/19/10	J	6/11/10 J
5/20/10	J	6/14/10 J
5/25/10	J	6/15/10 J
5/26/10	J	6/16/10 J
5/27/10	J	6/17/10 J
6/02/10	J	

COURT ACTION

DEFENDANT ADVISED OF RIGHTS BEFORE PLEA (JUDGE) Dewey, J. (DATE) 5/12/10 ☑ ATTORNEY ☑ PUB. DEFENDER | GUARDIAN: Santos

BOND: PTA $100,000 c.s. or 10% bail w/ attachment | SURETY ☐ 10% ☐ CASH | BOND CHANGE: bond 10% cash posted 9/14/10

ELECTION (Date): ☐ CT ☑ JY 5/12/10

SEIZED PROP. INVENTORY NO.

COUNT	PLEA DATE	PLEA	PLEA WITHDRAWN DATE	PLEA WITHDRAWN NEW PLEA	VERDICT FINDING	FINE	REMIT	ADDITIONAL DISPOSITION
1	5/12/10	PF NG			G 6/18/10	$	$	3 yrs, e/s/a 1 yr, 3 yrs probation.
2	5/12/10	PF NG			NG 6/18/10	$	$	
3	5/12/10	PF NG			G 6/18/10	$	$	2 yrs, e/s/a 6 months, 3 yrs probation. Concurrent to counts 1.

DATE	OTHER COURT ACTION	JUDGE
4/12/10	Jury selection begins; Each party given an additional peremptory.	S/Dewey
4/22/10	Jury selection completed.	S/Dewey
5/12/10	Jury sworn-in; Evidence begins; Witnesses ordered sequestered.	S/Dewey
5/19/10	Juror #3 excused - Alt. #2 replaces Juror #3.	S/Dewey
5/26/10	Alt. #3 excused.	S/Dewey
6/08/10	State rests.	S/Dewey

RECEIPT NO. | COST ☐ IMP ☒ NCI | BOND INFORMATION ☐ BOND FORFEITED ☐ FORFEITURE VACATED ☐ FORFEITURE VACATED AND BOND REINSTATED

APPLICATION FEE - RECEIPT NO. IF PAID | CIRCLE ONE W I Q | PROGRAM FEE - RECEIPT NO. IF PAID | CIRCLE ONE W I Q | PROBATION FEE - RECEIPT NO. IF PAID | CIRCLE ONE W I Q

PROSECUTOR ON ORIGINAL DISPOSITION: M. Gailor; C. Alexy | REPORTER/MONITOR ON ORIG. DISP.: K. Kobylenski | SIGNED *(Clerk)* | SIGNED *(Judge)*

☐ SEE BACK OF PAGE 1

INFORMATION
JD-CR-71 Rev. 8-08

STATE OF CONNECTICUT
SUPERIOR COURT

DISPOSITION DATE

TITLE, ALLEGATION AND COUNTS

STATE OF CONNECTICUT VS. *(Name of accused)*	G.A. NO.	DOCKET NO.
PEREZ, Eddie	JD	CR09-628569-T

ADDRESS | DATE OF BIRTH

TO BE HELD AT *(Town)*: Hartford | COURT DATE

The undersigned Prosecuting Authority of the Superior Court of the State of Connecticut charges that:

	AT *(Town)*	ON OR ABOUT *(Date)*	IN VIOLATION OF GENERAL STATUTE NO.	CONTINUED TO	PURPOSE	REASON
1th FIRST COUNT - DID COMMIT THE OFFENSE OF: Conspiracy to Commit Fabricating Physical Evidence.	Hartford & Rocky Hill	Jan. 2007-July 2007	53a-48; 53a-155(a)(2)	6/18/10 9/10/10 9-14-10	J D-PSI D-PSI	
SECOND COUNT - DID COMMIT THE OFFENSE OF						
THIRD COUNT - DID COMMIT THE OFFENSE OF						

☐ SEE OTHER SHEET(S) FOR ADDITIONAL COUNTS | DATE | SIGNED *(Prosecuting Authority)*

COURT ACTION

DEFENDANT ADVISED OF RIGHTS BEFORE PLEA (JUDGE) (DATE) | BOND | SURETY | ☐ 10% ☐ CASH | ELECTION *(Date)* ☐ CT ☐ JY

☐ ATTORNEY ☐ PUB. DEFENDER | GUARDIAN | BOND CHANGE | SEIZED PROP. INVENTORY NO.

COUNT	PLEA DATE	PLEA	PLEA WITHDRAWN DATE	PLEA WITHDRAWN NEW PLEA	VERDICT FINDING	FINE	REMIT	ADDITIONAL DISPOSITION
4 X	5/12/10	PF W6			GY 6/18/10	$	$	2 yrs, e/s/a 6 months, 3 yrs probation. Concurrent to counts 1 and 3.
2						$	$	
3						$	$	

DATE	OTHER COURT ACTION	JUDGE

RECEIPT NO.	COST ☐ IMP ☐ NCI	BOND INFORMATION ☐ BOND FORFEITED ☐ FORFEITURE VACATED ☐ FORFEITURE VACATED AND BOND REINSTATED
APPLICATION FEE - RECEIPT NO. IF PAID	CIRCLE ONE W I Q	PROGRAM FEE - RECEIPT NO. IF PAID / CIRCLE ONE W I Q	PROBATION FEE - RECEIPT NO. IF PAID / CIRCLE ONE W I Q
PROSECUTOR ON ORIGINAL DISPOSITION	REPORTER/MONITOR ON ORIG. DISP.	SIGNED *(Clerk)*	SIGNED *(Judge)*

☐ SEE BACK OF PAGE 1

(12)

CR09-0635038-S

STATE OF CONNECTICUT	:	**SUPERIOR COURT**
V.	:	**JUDICIAL DISTRICT AT HARTFORD**
EDDIE A. PEREZ	:	**SEPTEMBER 10, 2009**

STATE'S MOTION TO CONSOLIDATE

Pursuant to Connecticut Practice Book § 41-19, State v. Davis, 286 Conn. 17, 26-38 (2008); and State v. Rodriquez, 91 Conn. App. 112, 117-120 (2005), cert. denied 276 Conn. 909 (2005), the State moves the court to join this case for trial with docket number CR09-0628569. In support thereof, the State submits that: (1) joinder would foster judicial economy and administration; (2) the charges involve discreet, easily distinguishable factual scenarios; (3) the crimes alleged are not of brutal or violent nature; (4) presentation of evidence in an orderly sequence would contribute to the distinguishability of the facts alleged in the joined information; (5) the court's instructions would also result in the jury's ability to consider the cases separately.

Therefore, as a result of the above, the defendant would not suffer undue prejudice were the cases to be joined for trial.

Respectfully Submitted,
STATE OF CONNECTICUT

By: _____

Christopher A. Alexy
Supervisory Assistant State's Attorney
Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, CT 06067
(860) 258-5800

OFFICE OF
THE CHIEF STATE'S ATTORNEY
300 CORPORATE PLACE
ROCKY HILL, CONNECTICUT 06067

ORDER

Heard this 4th day of ~~September, 2009,~~ November, 2009 the court hereby Orders: the motion

GRANTED/DENIED.

Dewey, J.

OFFICE OF
THE CHIEF STATE'S ATTORNEY
300 CORPORATE PLACE
ROCKY HILL, CONNECTICUT 06067

Docket No. H14H-CR09-0635038-S
Docket No. H14H-CR09-0628569-S

State of Connecticut	:	**Superior Court**
	:	
V.	:	**Judicial District of Hartford**
	:	
Eddie Perez	:	**November 2, 2009**

Defendant's Memorandum In Opposition To
State's Motion To Consolidate

The Defendant, **Eddie Perez**, hereby submits this Memorandum of Law in Opposition to the State's Motion to Consolidate dated September 10, 2009.

I. Introduction

After successfully derailing Mr. Perez's opportunity for a fair and speedy trial by arresting him on new charges one week before jury selection in his first case, the State is now attempting to prejudice him even further by lumping all of its allegations into one trial that no single jury could possibly be expected to fairly assess. In its one-page motion to this Court, the State has asserted without any analysis that joinder of these completely unrelated matters would serve the interests of judicial economy without substantially prejudicing the Defendant. The State's conclusory justifications are both wrong and noteworthy insofar as none address the key factor in this case; namely, that if there were separate trials the evidence from either case would be completely inadmissible.

Consolidation of these cases implicates a host of Mr. Perez's constitutional rights under the fifth, sixth and fourteenth amendments to the federal constitution and article 1, sections 8, 9 and 20 of the state constitution, including his rights to due process, a

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fair trial, confrontation, equal protection, the effective assistance of counsel, and the ability to exercise his right to testify. For these reasons and the others that follow in this memorandum, the Defendant will suffer substantial prejudice if the charges are joined for trial, and this Court should deny the State's motion.

II. Background

As this Court is aware, jury selection was scheduled to begin in docket number CR09-0628569 on September 9, 2009, with trial scheduled to commence on or about November of 2009. However, after being arrested just seven days before jury selection on entirely new charges, the Defendant moved to dismiss both cases on September 2, 2009, on the basis that the State had engaged in intentional misconduct by attempting to prejudice the jury pool just prior to the commencement of trial. After that motion was denied by the Court, the Defendant moved for and was granted a continuance based on the prejudice that would result from the pretrial publicity regarding allegations that were not part of the existing charges scheduled for trial.

On September 10, 2009, despite the fact that a continuance was granted in part because the jury would be prejudiced by news reports of the unrelated charges, the State filed a motion to consolidate. The Defendant was granted an extension of time to November 4, 2009, so that he would be able to review the discovery on the new charges before responding to the State's motion, and a hearing date was scheduled for the same day.

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III. Argument

While Connecticut represents the minority of jurisdictions with a presumption in favor of joinder, our Courts have clearly and consistently reaffirmed that when prejudice would result and jury instructions are an insufficient cure, a trial court must sever unrelated charges. Because such substantial prejudice would occur in the present case, the State's motion should be denied.

A. Standard

General Statutes § 54-57 provides that "[w]henever two or more cases are pending at the same time against the same party in the same court for offenses of the same character, counts for such offenses may be joined in one information unless the court orders otherwise." Practice Book § 41-19 similarly provides that "[t]he judicial authority may, upon its own motion or the motion of any party, order that two or more informations, whether against the same defendant or different defendants, be tried together." While Connecticut has upheld a presumption in favor of joinder, it is well settled that "[t]he court's discretion ... is not unlimited; rather, that discretion must be exercised in a manner consistent with the defendant's right to a fair trial." State v. Davis, 286 Conn. 17, 29 (2008) (citations omitted).

In reviewing cases where defendants have challenged a trial court's discretion to join cases for trial, our Supreme Court has typically assessed the potential for prejudice under the factors articulated in State v. Boscarino, 204 Conn. 714, 722 (1987). "These factors include: (1) whether the charges involve discrete, easily distinguishable factual

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scenarios; (2) whether the crimes were of a violent nature or concerned brutal or shocking conduct on the defendant's part; and (3) the duration and complexity of the trial...." Id. at 722-24. "If any or all of these factors are present, a reviewing court must decide whether the trial court's jury instructions cured any prejudice that might have occurred." Id. As recognized by Justice Katz in her concurring opinion in Davis, though, "Boscarino did not purport to identify an exhaustive list of factors relevant to determining whether joinder is proper in any given case; rather, it simply applied those considerations that previously had been identified in our case law." State v. Davis, 286 Conn. at 50 n. 8 (Katz, concurring) (citing State v. Boscarino, 204 Conn. at 722-23).

B. Judicial Economy Will Not Be Served By Joinder Of The Present Charges

The State has first submitted in conclusory fashion that "joinder would foster judicial economy and administration" in this case. Even without assessing the prejudice that the Defendant would suffer from a consolidated trial, reasoned analysis of this preliminary consideration reveals that there is little, if any, economic benefit to consolidating the Defendant's trials under the circumstances of this case. Thus, when considered with the substantial prejudice that the Defendant would suffer as a result of these so-called efficiencies, severance is supported even further.

1. The pending charges against Mr. Giles negates any efficiencies created by joinder

First, it is noteworthy that the State has *not* moved to consolidate the Defendant's cases with that of Abraham Giles, who has been charged as a co-

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conspirator in connection with the State's second set of charges against the Defendant. See State v. Abraham Giles, Docket No. HHD-CR09-0635036-T.[1] Thus, even if the Defendant's larceny case was consolidated with the unrelated bribery charges, this Court would potentially be holding a separate trial where the State would be calling the same witnesses into court and introducing the same evidence at a trial which would take even more time and judicial resources than if Mr. Perez's charges had not been consolidated at all. If the State were truly interested in judicial economy, it would move to consolidate the Defendant's case with that of Mr. Giles, not with unrelated charges that are not going be rehashed at another trial in the future. Consolidation in this alternate manner would not only foster greater judicial economy, but would also better protect the Defendant's constitutional rights to confrontation, since Mr. Giles would be present at the same trial.

2. The inefficiencies created from holding one large trial outweigh any perceived efficiencies

Furthermore, because these unrelated crimes involve different times, locations, witnesses and evidence, there are few, if any efficiency advantages to the consolidation of two complex trials into one enormously complex trial. Indeed, the inefficiencies created by trying both cases together is apparent in all three stages of these proceedings:

[1] Even if the State had moved to consolidate Mr. Giles' matter with both of the Defendant's pending cases, it is unlikely that this Court could grant such a motion since he would be prejudiced from the unrelated bribery case in which he has not been implicated in any way.

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- *Pretrial Preparation*

As this Court is aware, the Defendant moved for an extension of time to respond to this motion precisely so that he could review the discovery and include more detailed information about the relative complexity of preparing the second set of charges in its submission to this Court. See Motion For Extension Of Time In Which To Respond To State's Motion To Consolidate dated October 1, 2009.[2] Ironically, the Defendant was nearly unsuccessful in presenting this factor precisely *because* the discovery from the second case was too voluminous for the State to provide in the time provided. See Letter from Supervisory Assistant State's Attorney Alexy to Attorney Santos dated October 23, 2009, attached here as Exhibit A.

As indicated in the letter sent by Attorney Alexy to undersigned counsel, as of one week ago the State was unable to even provide the discovery to undersigned counsel, despite its diligent efforts. Attorney Alexy indicates that "[t]he relevant material has to be culled from over 800 reports (plus attached documents) and the transcripts of over 100 witnesses questioned not only during the 18 months of the grand jury, but before and after as well." See Exhibit A. Indeed, the State has just begun the process of providing those aspects of the discovery that are available electronically; just last

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[2] While the State previously indicated in its Notice of Compliance With Discovery Request dated October 20, 2009 that evidence copied by the State remained at the Office of the Chief State's Attorney, undersigned counsel have confirmed that there were in fact no additional boxes to pick up from the Office of the Chief State's Attorney, but rather a number of discs containing audio recordings, many of which were already provided to the Defendant. In any case, the fact that the Defendant requires additional time to adequately prepare for the second case should not suggest that he is not ready to go forward on the first set of charges.

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Thursday defense counsel received the first disc of discovery that is available electronically. See Letter from Supervisory Assistant State's Attorney Alexy to Attorney Santos dated October 29, 2009, attached here as Exhibit B. Undersigned counsel have now begun their review over 1 gigabyte of electronic discovery, including 36 grand jury transcripts, numerous arrest and search warrants, hundreds of pages of phone records and nearly 19 hours of audio recordings. Separate and apart from that information that was provided last Thursday, much of the State's material is not even available for electronic production and is currently only being offered for inspection and copying at the Office of the Chief State's Attorney in Rocky Hill. See Exhibit B.

Considering the amount of discovery that must be reviewed in connection with the new case, a consolidated trial would likely have to be delayed yet again in order for counsel to be given the fair opportunity to effectively represent the Defendant. Where trial has already been scheduled *twice* in connection with the first case, it fosters neither judicial economy nor the Defendant's rights to a fair and speedy trial on his first charges to delay it yet again as a result of discretionary consolidation.

This point is more important when considered with the prejudice that the Defendant will suffer if he is forced to try the second case without delay. The new charges are more complex, involve more witnesses and present complicated questions of law. See infra, at 15-16. As indicated in his motion to amend the scheduling order that was denied by the Court, defense counsel had previously cleared his trial calendar to prepare and try the charges in the first information last month. Now that the first trial

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has instead been delayed he has been ordered to commence jury trials in November and December of 2009, and January 2010. Two of those cases involve charges of manslaughter, and the third case involves a charge of sexual assault and risk of injury. To now require defense counsel to proceed on the new charges in March when all his time prior to trial has already been scheduled on other trials, will deny the Defendant effective assistance of counsel.

- *Jury Selection*

Judicial economy is also not served when it will prolong the processes of both jury selection and service under the circumstances of this case. In the present case, where the Defendant is a highly visible figure being tried in a judicial district where there has been intense media attention, it will be difficult enough to pick a jury for one case that will be unusually lengthy. Adding another set of more complex charges to the same case will dramatically extend the length of the trial, which will in turn decrease the number of venirepersons able to serve on the such a long jury.

Consolidation will transform a relatively straightforward bribery prosecution into a nine-week marathon. Indeed, in undersigned counsel's experience, the only citizens typically able to serve on a trial of such length are either retirees, state workers or employees of large corporations. The Defendant has not sought a change of venue so that he could be judged in part by the minority community that he serves. Thus, joinder in and of itself will substantially prejudice the Defendant because it will be directly attributable to his receiving a fair cross section of the community to sit on the jury.

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- *Length of the Trial*

Finally, it cannot be said that the interests of judicial economy will be served when consolidation of these informations would create one trial that could potentially take months to try together. Each of the two informations that the State is attempting to consolidate involve multiple sets of allegations with overlapping timeframes, which will result in numerous breaks in trial activity to determine what part of the State's evidence is applying to which case, and numerous sets of jury instructions throughout the trial to properly alert the jury. See infra, at 15-16. This result will not only negate any of the efficiencies derived from holding one trial, but will also substantially prejudice the Defendant.

C. The Defendant Will Suffer Substantial Prejudice Because The Evidence From One Case Is Not Cross-Admissible In The Other

As indicated above, it is extremely significant that in support of its motion to consolidate, the State has not argued that any of the evidence in these cases is "cross-admissible." That is, if Mr. Perez's two informations were to be tried separately, no jury hearing one would hear evidence as to the others. This is true because Connecticut follows the universal rule that evidence of other "bad acts" is inadmissible so as to avoid the prohibited conclusion that because the defendant committed some bad acts, he has the propensity to commit others. See Connecticut Code of Evidence § 4-5(a).[3]

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[3] Conn. Code of Evid. § 4-5 provides: "(a) Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character or criminal tendencies of that person. (b) Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the

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It is well settled that a jury may hear "other act" evidence only if a two part test is satisfied. First, the evidence must be relevant and material to at least one of the circumstances encompassed by the exceptions enumerated under subsection (b) of § 4-5. See footnote 3. In the present case, the State has not even suggested that any of the evidence from one of the Defendant's unrelated cases would be admissible in the other, let alone identified a recognized exception that would justify such admission.[4] Even if the State attempted to identify such an exception, though, such evidence would still need to be excluded from the separate trials under C.C.E. § 4-3 since the probative value of the evidence must outweigh its prejudicial effect." State v. Aaron L., 272 Conn. 798, 820 (2005).[5]

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crime, or to corroborate crucial prosecution testimony." Our Supreme Court has held that "[a]s a general rule, evidence of guilt of other crimes is inadmissible... The rationale of this rule is to guard against its use merely to show an evil disposition of an accused, and especially the predisposition to commit the crime with which he is now charged." State v. Stenner, 281 Conn. 742, 752 (2007).

[4] For the purposes of the present memorandum, the Defendant will not play the legal version of "Go Fish" by arguing against all of the possible exceptions to the rule prohibiting evidence of other crimes, wrongs or bad acts pursuant to Connecticut Code of Evidence § 4-5. It is the State's burden to demonstrate that the evidence would be admissible under any of the recognized exceptions enumerated under C.C.E. § 4-5(b). Should the State belatedly argue that the evidence would be admissible under one of the exceptions in support of its motion, due process demands that the Court defer judgment on the Motion to Consolidate, order the State to specify the evidence that it submits is cross admissible and to provide the Defendant a reasonable opportunity to respond to the State's proffer.

[5] Our Supreme Court "has previously enumerated situations in which the potential prejudicial effect of relevant evidence would counsel its exclusion. Evidence should be excluded as unduly prejudicial: (1) where it may unnecessarily arouse the jury's emotions, hostility or sympathy; (2) where it may create distracting side issues; (3) where the evidence and counterproof will consume an inordinate amount of time; and (4) where one party is unfairly surprised and unprepared to meet it." State v. Horrocks, 57 Conn. App. 32, 40, cert. denied, 253 Conn. 908 (2000) (internal quotation marks omitted).

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When "unrelated" charges are consolidated, that is, charges where evidence from the first case would not otherwise be admissible in the second, the jury is put in the unusual position of evaluating evidence that it would never be permitted to assess if the crimes were severed. For this reason, joinder of unrelated cases is wholly inconsistent with the longstanding prohibition on the admissibility of other "bad act" evidence, and liberal application of joinder poses all of the same risks to a defendant's fair trial that the other "bad act" exclusion is intended to avoid. While our Supreme Court has declined to follow other jurisdictions that have employed a presumption of prejudice from joinder under these circumstances, it has recognized that improper joinder may expose a 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.... State v. Atkinson, 235 Conn. 748, 763, (1996); see State v. Horne, 215 Conn. 538, 546-47 (1990).

State v. Davis, 286 Conn. 17, 28 (2008).

While Connecticut courts have consistently evaluated the Boscarino factors in deciding whether to join two cases, both our trial and appellate courts have attached even more significance to the distinction between prejudice that results from "related" joined cases, and cases in which the evidence is not cross-admissible. See, e.g., State

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v. Sanseverino, 287 Conn. 608, 628-31 (2008), rev'd on other grounds, 291 Conn. 574 (2009) (cases were properly joined because the evidence was cross-admissible); State v. McKenzie-Adams, 281 Conn. 486, 527 (2007) (joinder was justified because the evidence would be cross-admissible under the common plan or scheme exception); State v. Marsala, 43 Conn. App. 527, 533 (1996), cert. denied, 239 Conn. 957 (1997) (evidence cross-admissible to prove the identity, intent and a common plan or scheme); State v. Greene, 209 Conn. 458, 464, (1988) (evidence in two cases was cross-admissible); State v. Pollitt, 205 Conn. 61, 68 (1987) ("[w]here evidence of one incident can be admitted at the trial of the other, separate trials would provide the defendant no significant benefit").

In State v. Ellis, 270 Conn. 337 (2004), our Supreme Court concluded that evidence of alleged sexual misconduct by the defendant against two victims was not admissible as acts of prior misconduct to show a common plan or scheme regarding charges involving a third victim. Id. at 367-69. In ruling on the defendant's claim that that the cases were improperly joined by the trial court, the Court principally relied on the fact that the evidence was not cross-admissible, and that because those other cases involved more prejudicial conduct than the third case, the trial court had abused its discretion in joining them for one trial. Id. at 379-81. Similarly in State v. Randolph, 284 Conn. 328, 360-61 (2008), the Court concluded that the trial court erroneously allowed the jury to consider evidence of the other joined crimes under the common plan

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or scheme exception, and in light of its ruling specifically instructed the trial court to reevaluate whether the cases should be joined on retrial. Id. at 368.

In State v. Davis, 286 Conn. at 26 n. 6, the Court declined to adopt the defendant's claim that the court should presume prejudice from joinder where the evidence would not be cross-admissible in separate trials. In her concurring opinion, Justice Katz (joined by Justice Palmer) recognized that Connecticut is in the minority of jurisdictions that do not recognize either (a) the minimal judicial economy that is derived from joining two unrelated cases, or (b) the inherent prejudice that inures to the defendant when inadmissible "other acts" evidence is presented to the jury. After reviewing the significant number of cases from other jurisdictions that do recognize these risks,[6] Justice Katz remarked:

> As the Fourth Circuit Court of Appeals noted: "[A]lthough it is true that the ... [r]ules of [c]riminal [p]rocedure [were] designed to promote economy and efficiency and to avoid a multiplicity of trials ... we are of the strong opinion that the consideration of one's constitutional right to a fair trial cannot be reduced to a cost/benefit analysis. Thus, while we are concerned with judicial economy and efficiency, our overriding concern in an instance such as this is that [the] jury consider only relevant and competent evidence bearing on the issue of guilt or innocence for each individually charged crime separately and distinctly from the other." (Citation omitted; internal quotation marks omitted.) United States v. Isom, 138 Fed. Appx. 574, 581 (4th Cir.2005), cert. denied, 546 U.S. 1124 (2006) ... . Accordingly, I would instruct the trial courts that the presumption in favor of joinder is limited to cases wherein there is cross admissibility of substantive evidence. When the evidence would not be cross admissible, trial courts should presume prejudice and grant joinder only when the risk of prejudice appears to be "substantially reduced."

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[6] See e.g., Drew v. United States, 331 F.2d 85, 89-90 (D.C.Cir.1964); United States v. Halper, 590 F.2d 422, 431(2d Cir.1978); United States v. Foutz, 540 F.2d 733, 738 n. 4 (4th Cir.1976); United States v. Isom, 138 Fed. Appx. 574, 581 (4th Cir.2005), cert. denied, 546 U.S. 1124 (2006). See also McKnight v. Maryland, 375 A.2d 551, 554 (Md. 1977) (in joining unrelated offenses "the saving of time and money allegedly effected by a joint trial is questionable").

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Id. at 44 (Katz, concurring) (citations omitted).

For the purposes of appellate review, the Defendant maintains that the majority's decision in Davis should be overruled and the Court should adopt Justice Katz's concurring opinion presuming prejudice under these circumstances. Even if that portion of Davis is not overruled, though, it remains clear from our own caselaw that the issue of cross-admissibility remains one of the most key considerations in assessing the potential for substantial prejudice to the defendant. See supra, at 12. In the present case, where the State has not even argued that the evidence is cross-admissible, the substantial prejudice that the Defendant would suffer, including the prejudice from the jury's consideration of inadmissible "other act" evidence, substantially outweighs the efficiencies, if any, from a joined trial.

D. The Complexity Of The Second Set Of Charges, If Joined With The Defendant's First Case, Will Prejudice Him In The Same Manner As A Joined Case With Brutal Or Shocking Characteristics

As indicated above, the factors enumerated under State v. Boscarino are not exhaustive, and have developed largely from the factual circumstances of the cases before it. See supra, at 4; State v. Davis, 286 Conn. at 50 n. 8 (Katz, concurring). Thus, under the circumstances of prior cases where the elements of the offense were inherently violent by nature, the comparatively "brutal or shocking nature" of those allegations would predictably be a relevant factor for the Court's consideration. See, e.g., State v. Davis 286 Conn. at 50; State v. Ellis, 270 Conn. at 378.

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In the present case, the nature of the charges against the defendant are never inherently violent. Therefore, this Court should not be led to believe that just because the cases do not include brutal or shocking aspects, that such circumstances somehow support joinder. In the present case, the crux of the substantial prejudice that the Defendant will suffer arises from the combination of a jury assessing numerous complex scenarios that it would not otherwise assess in separate trials.

Careful examination of the complexity contained in both arrest warrant affidavits confirms that in the same way "brutal or shocking" allegations can prevent jurors from fully and fairly assessing all of the evidence, so too can the complexity of many unrelated scenarios with overlapping timeframes irreversibly prejudice them.

In the first case, the Defendant has been charged in a 25-page affidavit with bribe receiving and fabricating physical evidence. The State's allegations, while relatively straightforward in the first case, still contain multiple allegations surrounding the timing and values of multiple payments from different sources, see Arrest Warrant Affidavit at 2-5; 7-15, as well as three separate allegations related to the inner workings of city government as they allegedly relate to Mr. Perez's interactions with Mr. Costa during the time periods between 2005 and 2007. See Arrest Warrant Affidavit at 6; 16-25.

In the second case, the Defendant is charged with criminal attempt and conspiracy to commit larceny in the first degree. In contrast to the first case, the State's 24-page affidavit in support of the second contains a far greater variety of factual

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allegations which span over different time periods and alleging a number of different scenarios that are completely unrelated from the first case, yet overlap in time and location in ways that would needlessly confuse a jury that would otherwise be able to clearly follow the first case. Indeed, preliminary review of the arrest warrant without the benefit of reviewing the underlying discovery reveals that the most recent charges allege no less than *seven* different scenarios over a variety of dates and times overlapping the same time periods addressed in the first case. See Arrest Warrant Affidavit dated 8/28/09 at 4-9 (allegations regarding 1214 Main Street spanning overlapping time periods over various months in 2006); Arrest Warrant Affidavit dated 8/28/09 at 9-16 (allegations regarding 1143 Main Street from dates in 2006, 2007 and 2008); Arrest Warrant Affidavit dated 8/28/09 at 16 (allegations regarding the so-called "Triangle Lot" on the corner of Main Street and Trumbull Street during various dates in 2007); Arrest Warrant Affidavit dated 8/28/09 at 17 (allegations regarding Giles' warehouse in 2006 and 2007); Arrest Warrant Affidavit dated 8/28/09 at 17-18 (allegations regarding an eviction fee increase in 2005); Arrest Warrant Affidavit dated 8/28/09 at 18-19 (allegations relating to a dumpster at 726 Windsor Street from 2007); Arrest Warrant Affidavit dated 8/28/09 at19-20 (allegations relating to a new moving services contract from 2005, spanning into 2007).

Under these circumstances, jury instructions would simply not cure the substantial prejudice that will result from so many unrelated scenarios spanning the same general time periods being thrown at the same jury. In the same way that brutal

or shocking conduct in violent cases can blur the lines between joined cases, the complexity of the dual white-collar prosecutions can blur the lines for an already confused jury.

III. Conclusion

In September, when jury selection was scheduled in the bribery case, the trial testimony was estimated to be three to four weeks. If the Court grants the State's motion to consolidate, undersigned counsel predicts that the length of the trial will far exceed this original estimate, substantially prejudicing the Defendant and depriving him of both his state and federal constitutional rights outlined above. As such, this Court should deny the State's motion to consolidate the cases.

RESPECTFULLY SUBMITTED,
EDDIE PEREZ

BY _____

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CERTIFICATION

THIS IS TO CERTIFY that a copy of the foregoing has been sent by fax and regular mail, first class and postage prepaid, this 2nd day of November, 2009 to the following counsel of record:

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Docket No. H14H-CR09-0635038-S
Docket No. H14H-CR09-0628569-S

State of Connecticut	:	**Superior Court**
V.	:	**Judicial District of Hartford**
Eddie Perez	:	**May 20, 2010**

MOTION FOR SEVERANCE OF OFFENSES

Pursuant to the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, Article 1, §§ 8 and 9 of the Constitution of the State of Connecticut and Practice Book § 41-18, the Defendant, **Eddie Perez**, moves to sever the offenses charged in Docket No. CR09-0635038 ("the bribery charges") from the offenses charged in Docket No. CR09-0628569 ("the larceny charges") on the grounds that failure to sever will result in a substantial injustice to the Defendant and deny him a fair trial and due process of law. In support of this Motion, the Defendant makes the following representations:

1. On September 10, 2009, the State moved to consolidate the above-referenced cases pursuant to General Statutes § 54-57 and Practice Book § 41-19. The Defendant filed a Memorandum in Opposition to the State's Motion to Consolidate, arguing, *inter alia*, that judicial economy would not be served by joinder of the charges and that he would suffer substantial prejudice because the evidence presented in both cases is not cross-admissible. The Defendant further argued that consolidation under the circumstances of this case would inevitably implicate a host of constitutional rights, including his rights to due process, a fair trial, confrontation, equal protection, the

effective assistance of counsel, and the ability to exercise his rights to testify.[1] Following a hearing, this Court overruled the Defendant's objections and granted the State's motion to consolidate.

2. Following the presentation of evidence by the State regarding the bribery case, the Defendant now moves to sever the charges pursuant to Practice Book § 41-18.[2] In so doing, the Defendant incorporates by reference those same arguments made in the course of opposing joinder, particularly those arguments regarding the substantial prejudice that he will suffer as a result of the jury being improperly exposed to evidence that would not otherwise be cross-admissible if there were two separate trials. See Memorandum in Opposition to State's Motion to Consolidate dated November 2, 2009.

3. In addition to those grounds previously articulated in his original objection to joinder, it is now clear that the Defendant will be even more substantially prejudiced because he wishes to testify regarding the State's bribery charges, but will continue to exercise his fifth amendment right not to testify regarding the larceny charges. Even if the Court's original decision on joinder was arguably correct, this additional ground

---

[1] It is defense counsel's recollection that at the time of oral argument on the motion, he also raised the issue of the Defendant's wish to testify on one charge but not the other as a reason to deny the State's motion for consolidation.

[2] Practice Book § 41-18 provides that "[i]f it appears that a defendant is prejudiced by a joinder of offenses, the judicial authority may, upon its own motion or the motion of the defendant, order separate trials of the counts or provide whatever other relief justice may require."

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(which is based on an analysis of the evidence that has been submitted thus far at trial) is substantial and warrants severance.

4. The unique prejudice that occurs when a Defendant wishes to testify in only one of two consolidated cases has been significantly developed in federal caselaw, which has in turn been recognized by our Connecticut Supreme Court. See State v. King, 187 Conn. 292, 305-309 (1982). As recognized in King, both the Second Circuit Court of Appeals as well as its lower district courts have relied largely on caselaw from the Court of Appeals for the District of Columbia beginning with Cross v. United States, 335 F.2d 987 (D.C. Cir. 1964).[3] In Cross, the Court ruled that "prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence." Id. at 989. The Court of Appeals succinctly explained the host of concerns that are in play when the Defendant is put into such an untenable position:

> His decision whether to testify will reflect a balancing of several factors with respect to each count: the evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross-examination. But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging

[3] Caselaw from the federal courts analyzes Federal Rule of Criminal Procedure Rule 14 ("Relief from Prejudicial Joinder"), which provides in relevant part that "[i]f the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendant's trials, or provide any other relief that justice requires." This provision closely parallels the provisions of Practice Book § 41-18.

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> in the face of his express denial of the other. Thus he may be coerced into testifying on the count upon which he wished to remain silent.

Id.

5. The Court of Appeals for the District of Columbia later expanded this analysis in Baker v. United States, 401 F.2d 958, 977 (D.C.Cir. 1968), cert denied, 400 U.S. 965 (1970), where it ruled that the trial court should assess whether the Defendant has made a "convincing showing" justifying his decision to testify in one case but not the other:

> [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 reason 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.

Baker v. United States, 401 F.2d at 977. See also State v. King, 187 Conn. at 307. This approach has been adopted by our Second Circuit, and has impliedly been adopted in Connecticut by virtue of its extensive discussion in King. See, e.g., United States v. Sampson, 385 F.3d 183, 190-193 (2d Cir. 2004); United States v. Amato, 15 F.3d 230, 237 (2d Cir. 1994); United States v. Werner, 620 F.2d 922, 930 (2d Cir. 1980); United States v. Owens, 824 F. Supp. 24 (D. Conn. 1993); United States v. Rollack, 64 F. Supp. 2d 255, 258-59 (S.D.N.Y. 1999); United States v. Florio, 315 F.

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Supp. 795, 798 (E.D.N.Y. 1970); United States v. Douglas, 2007 WL 2027837, *6-*10 (N.D.N.Y. 2007); United States v. Watts, 2005 WL 2738948, *3-*4 (S.D.N.Y. 2005);[4]

6. Following the State's presentation of evidence in the bribery case, the Defendant has reached the conclusion that he has important testimony to give concerning the bribery case, which stands in direct contrast to his decision to follow his counsel's advice to exercise his right not to testify in the larceny case. This genuine conflict presents a substantial ground to grant severance.

7. Regarding the nature of the testimony that the Defendant wishes to give in response to the State's Bribery and Fabrication of Physical Evidence charges, the Defendant believes that he is the sole source of information regarding the following points raised by the State:

a. The Defendant's reasons for misleading Inspector Sullivan during their initial interview on June 27, 2007;

b. How Carlos Costa became involved in the Defendant's home renovation project, details regarding when he first approached Carlos Costa and requested a bill, the number of times that he personally followed up with Costa regarding his request, and the reasons for his delay in payment;

c. The context of his involvement in the letter of May 16, 2006 directed to U.S. Fidelity regarding the Park Street project; and

[4] Copies of all cases cited in the present motion have been attached in alphabetical order at Exhibit A.

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d. The context of his involvement in the issuing of emergency and manual checks from the Treasurer for the City of Hartford to USA Contractors.

The Defendant's testimony on these points, at a minimum, will be absolutely critical for the jury's complete assessment of both his intent, as well as interactions that he alone may have had with Carlos Costa. Thus, his ability to exercise his right to testify is critical because he is the sole source of information on these points.

8. Regarding his reasons for not wishing to testify regarding the conspiracy and attempt to commit larceny by extortion charges, the Defendant is currently balancing (a) the fact that his version of events surrounding those charges will already be revealed to the jury through the admission of his interview with Inspector Sullivan on June 27, 2007, and (b) the risk that he will subject himself to prejudicial cross examination regarding uncharged misconduct that was not discussed during the June 27 interview.

9. The key issue in the larceny case - the reason that Abe Giles demanded $100,000.00 from Joseph Citino – is explained by a written lease that Giles had with LAZ Parking. The Defendant had no role in that lease arrangement between Giles and LAZ; thus, it is unnecessary for him to testify in order to establish that defense.

10. However, based on the State's representations during oral argument on the Defendant's Motion for Notice of Uncharged Misconduct, the State has provided notice that it intends to introduce evidence of uncharged misconduct, the details of

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which are set forth in the arrest warrant affidavit at pages 16 to 24. If the Defendant testified, these and other arrangements that Giles had with the City would be fodder for cross-examination.

Wherefore, for the foregoing reasons, the Defendant submits that he has presented a genuine claim of prejudice warranting severance of the bribery and larceny charges in this case.

RESPECTFULLY SUBMITTED,
EDDIE PEREZ

BY _____

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ORDER

The foregoing motion having been heard, it is hereby:

GRANTED/DENIED.

BY THE COURT

_____

Judge

SANTOS & SEELEY, P.C. • *ATTORNEYS AT LAW* • 51 RUSS STREET • HARTFORD, CT 06106-1566 • (860) 249-6548 • FAX (860) 724-5533 • JURIS NO. 07230

CERTIFICATION

THIS IS TO CERTIFY that a copy of the foregoing has been hand delivered, this 20th day of May, 2010 to the following counsel of record:

Christopher Alexy, Esq.
Michael Gailor, Esq.
Office of the Chief State's Attorney
300 Corporate Place
Rocky Hill, CT 06067

HUBERT J. SANTOS

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Docket Nos. HHD-CR09-0628569-T
HHD-CR09-0635038-T

State of Connecticut	:	**Superior Court**
	:	
V.	:	**Judicial District of Hartford**
	:	
Eddie Perez	:	**June 9, 2010**

Motion For Mistrial And In The Alternative For A Severance And In The Alternative For Permission To Testify On The Larceny And Fabricating Evidence Charges Only

Pursuant to the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, Article 1, §§ 7, 8, and 20 of the Connecticut Constitution, and Section 42-43 of the Practice Book, the Defendant, **Eddie Perez**, moves for a mistrial on the following grounds:

1. The trial of two unrelated crimes (bribery and fabricating evidence and attempt to and conspiracy to commit larceny in the first degree), together with evidence regarding 1214 Main Street has so prejudiced the Defendant so as to deny him due process of law and a fair trial.

2. The evidence regarding the two sets of charges (bribery and fabricating evidence and larceny) would not be cross admissible against the other if separate trials were conducted. Furthermore, evidence regarding 1214 Main Street would not have been admissible if the bribery and fabricating evidence trials were conducted separately.

3. Evidence concerning the Defendant allegedly lying to inspectors in connection with the bribery and fabricating evidence charges would not have been admissible in the larceny case if the charges were not consolidated.

4. Evidence of the Defendant allegedly lying to the inspectors in the larceny case would not have been admissible in the bribery case if the charges were not consolidated.

5. Much of the other allegedly incriminating evidence in each of the cases would not be admissible if the other case in the matters were not consolidated.

6. No cautionary instruction can cure the prejudice caused by the consolidation of the two cases. If, for example, the jury concludes that the Defendant lied to Inspector Sullivan regarding Costa the spill over effect on the larceny case will be incurable. The same is true regarding the spill over effect on the bribery case if the jury finds that Defendant lied to Inspector Sullivan regarding the larceny case.

7. In addition, if the jury finds that the Defendant committed, or might have committed one of the crimes charged, that conclusion will effect the jury's verdict on the other crime and will prejudice the Defendant, deny to him due process of law and a fair trial.

8. The Defendant wishes to testify in the bribery and fabricating case. He does not elect to testify in the larceny case. The Defendant's position regarding the larceny case has been captured in a secretly taped interview that has been made an exhibit and played to the jury. The Defendant sees no need to testify regarding the larceny charge, in light of the recording, but does see a need to testify in the bribery and fabricating evidence charges. The Defendant needs to explain his alleged lies regarding Costa, his delay in paying Costa, his intention of paying Costa earlier in time, and the fact that whatever he did to help Costa was justified on the merits and unrelated to any benefits he may have received.

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9. Testimony by the Defendant on only the bribery and fabricating counts, and not on the larceny counts will result in substantial prejudice. A cautionary instruction that the jury should not consider, in any way, the Defendant's failure to testify on the larceny count cannot cure the prejudice created by the Defendant testifying only as to the bribery and fabricating evidence counts. The jury will wonder why the Defendant is testifying on one set of charges and not the other.

10. In the alternative, if the Court denies the motion for mistrial, the Defendant seeks permission to testify on the bribery and fabricating evidence charges only. Although such a tactic will result in substantial prejudice, he needs to testify in the bribery and fabricating evidence charges in order to have a chance of acquittal on those charges. In making this request, the Defendant does not waive his request for a mistrial.

11. In addition to the foregoing, the Defendant moves for a severance of the bribery and fabricating evidence charges from the larceny charges. Although the Defendant has been prejudiced by the jury's consideration of any of the charges against him, a severance of the charges now with an appropriate cautionary instruction may mitigate some of the prejudice caused by the consolidation of the charges. The Defendant, however, is left with no option.

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12. The Defendant incorporates his prior written and oral objections to the State's motion for consolidation and his prior motion for severance.

THE DEFENDANT,
EDDIE PEREZ

BY: _____

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ORDER

The foregoing motion having been heard, it is hereby:

GRANTED/DENIED.

BY THE COURT

_____
Judge

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing has been telefaxed and hand-delivered this 10th day of June, 2010 to:

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Christopher Alexy, Esq.
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CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing has been telefaxed and hand-delivered this 9th day of June, 2010 to:

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STATE OF CONNECTICUT
SUPERIOR COURT - JUDICIAL DISTRICT OF HARTFORD
HONORABLE JULIA D. DEWEY

HHD-CR09-628569-T

OCT 13 2010

STATE OF CONNECTICUT

v.

EDDIE A. PEREZ September 14, 2010

JUDGMENT

Upon the information of the state, charging the defendant with the crimes of: in count one, Bribe Receiving, in violation of Connecticut General Statutes §53a-148(a); in count two, Fabricating Physical Evidence, in violation of Connecticut General Statutes §53a-155(a)(2); in count three, Fabricating Physical Evidence, in violation of Connecticut General Statutes §53a-8 & §53a-155(a)(2); and, in count four, Conspiracy to Commit Fabricating Physical Evidence, in violation of Connecticut General Statutes §53a-48 & §53a-155(a)(2), as on file.

The accused appeared on May 12, 2010 and made the following plea: pro forma not guilty, and elected to be tried by a jury. After a full hearing, the case was committed to the jury which returned a verdict of guilty of counts one, three and four; not guilty of count two.

WHEREUPON, on September 14, 2010, per order of the Honorable Julia D. Dewey, the defendant was committed to the custody of the Commissioner of Correction for a period of: on count one, three (3) years, execution suspended after one (1) year, three (3) years probation; on count three, two (2) years, execution suspended after six (6) months, three (3) years probation, concurrent with count one; and, on count four, two (2) years, execution suspended after six (6) months, three (3) years probation, concurrent with counts one and three.

By the Court,

Cheryl L. Lewis
Court Officer
October 8, 2010

STATE OF CONNECTICUT *v.* EDDIE A. PEREZ
(AC 32747)

DiPentima, C. J., and Lavine and Bishop, Js.

Syllabus

Convicted, under two informations, of the crimes of bribe receiving, fabricating evidence as an accessory, conspiracy to fabricate evidence, conspiracy to commit larceny by extortion, and attempt to commit larceny by extortion, the defendant, the former mayor of the city of Hartford, appealed to this court. The defendant's conviction stemmed from certain home remodeling work performed at his personal residence in 2005 by a contractor, C, who never received payment for his work at the time

it was performed. At the time C was remodeling the defendant's residence, his company, U Co., had been selected by the city for a revitalization project. Issues arose over the timeliness and quality of the work on the project performed by U Co., which finished the project approximately two and one-half years late. Over the course of the project, C received assistance from the defendant related to the project and, contrary to normal procedures, submitted certain claims for extra payments to the defendant's office and received expedited payments to U Co. from the city. After the defendant became aware of rumors in the community that work had been done at his residence by C, he requested C to develop a bill for the work, and C prepared a bill, dated February 27, 2007, totaling $20,217. Thereafter, S, an investigator with the state Division of Criminal Justice, commenced an investigation of the matter and interviewed the defendant, who falsely indicated that the remodeling work had been paid for. The following day the defendant applied for and received a home equity loan to pay for the home improvements, and U Co. was paid $20,217. With respect to the bribery charges, the state alleged that the defendant had accepted or solicited the renovation work at his home in consideration for aiding C in his dealings and disputes with the city as to his work on the revitalization project. The extortion charges concerned negotiations between the city and J, a general contractor and property developer, who sought to develop certain property owned by the city. The state alleged that the defendant told J that, in order for his purchase to be approved, J had to take care of G, the operator of a parking lot owned by the city located on the subject property who had agreed to vacate the premises if he was paid $100,000, and that the defendant had agreed with G to engage in or cause the performance of such conduct. *Held*:

1. Contrary to the defendant's claim, the evidence was sufficient to support his conviction of the bribery charges:

   a. With respect to the charges of fabricating evidence as an accessory and conspiracy to fabricate evidence, the jury reasonably could have found that the defendant had requested the creation of the bill because he believed that an official proceeding would be instituted on the basis of the rumors that work was being done at his home by C, who had pending business with the city, that the defendant aided in the fabrication of the bill, and that he had conspired to enter into an agreement with C to fabricate the bill.

   b. With respect to the charge of receiving a bribe, the jury could have found that, after starting work at the defendant's residence, C received assistance related to the project more quickly from the defendant than he had in the past, that C, contrary to normal procedures, submitted his claims for extra payments to the defendant's office, that the defendant had assigned the director of capital projects to assist C in a project that was controlled by the city's Department of Public Works, that the defendant was involved in a letter being sent to U Co.'s bonding company

that effectively rescinded a letter previously sent by that department to terminate U Co.'s contract, and that the defendant helped expedite payments from the city to U Co.

2. Contrary to the defendant's claim, the evidence was sufficient to support his conviction of the extortion charges: the jury reasonably could have found that the defendant sought to compel J to pay G $100,000 to vacate the parking lot, and the jury was not required to find that J feared that the defendant would use his position as an elected official to adversely affect him in order to convict him of the inchoate crimes of conspiracy to commit larceny by extortion or attempt to commit larceny by extortion; furthermore, the jury could have found that there was an agreement between the defendant and G to engage in criminal conduct in light of the evidence that there was a change in their political relationship with G supporting the defendant's bid for re-election, that the defendant told J that there was a lease between G and the city and that J had to take care of G or there would be no next step for the development project, that G stated that he was very close to the defendant and could make or break the development deal, and that the defendant's expressed concern that J had memorialized the need for the payment to G in an e-mail was based on the agreement to engage in criminal conduct.

3. The trial court abused its discretion in joining the bribery and extortion cases against the defendant for trial, and because that court's instructions to the jury to keep the evidence separate for each case did not cure the improper joinder, this court was not assured that the jury's verdict was not substantially affected given the prejudice to the defendant from the joinder of the two cases, and, therefore, the defendant was entitled to new, separate trials on the bribery and extortion charges; this court concluded that the jury was not able to consider each charge separately and distinctly, given that the jury heard evidence for seventeen trial days over a five week period, heard testimony from forty-two witnesses, and considered 150 exhibits, that the two cases presented a high degree of complexity, that the underlying events took place over an extended period of time, and that the two cases were similar, yet separate, which increased the risk of prejudice that the jury might have confused the evidence in the separate cases; furthermore, the cases for which the defendant was tried did not involve discrete, easily distinguishable factual scenarios, as evidence concerning the bribery charges involved conduct spanning a time period of approximately two and one-half years, while the evidence regarding the extortion charges covered a time period of one and one-half years and included uncharged misconduct, the cases involved complex factual scenarios, the factual similarities between the two cases significantly impaired the defendant's right to a fair trial and independent consideration of the evidence in each case, and certain comments by the prosecutor obscured the lines between the bribery and extortion cases, which made it more difficult for the jury to determine the defendant's guilt in each case independently.

4. The trial court abused its discretion in failing to sever the bribery case from the extortion case, the defendant having suffered substantial prejudice from the failure to sever the two cases, which improperly compromised his decision to testify in the bribery case and not to testify in the extortion case: the defendant's motion to sever made it clear to the court why he wanted to testify in the bribery case and not in the extortion case, as he explained the important need to testify in the bribery case concerning his reason for lying to S during his interview and investigation of the defendant, and the strong need for him to refrain from testifying in the extortion case to avoid cross-examination on areas of uncharged misconduct, and had the trials been severed, a jury hearing the extortion charges would not have known of the defendant's lies to S, and a jury hearing the bribery case would have had to determine whether to accept the defendant's explanation regarding his interview with S, and whether to believe his version of interactions with C, both as to his home and the city project, which demonstrated that the defendant's interest in testifying in one case outweighed the considerations of judicial economy; moreover, the state having failed to meet its burden of proving that the impropriety was harmless beyond a reasonable doubt, the defendant's convictions were reversed and he was entitled to new trials on the bribery and extortion charges.

(*One judge concurring separately*)

Argued February 19—officially released December 17, 2013

Procedural History

Two substitute informations charging the defendant, in the first case, with two counts of the crime of fabricating physical evidence, and with the crimes of bribe receiving and conspiracy to commit fabricating physical evidence, and, in the second case, with the crimes of conspiracy to commit larceny in the first degree and attempt to commit larceny in the first degree, brought to the Superior Court in the judicial district of Hartford, where the court, *Dewey, J.*, granted the state's motion to consolidate; thereafter, the matters were tried to the jury; subsequently, the court denied the defendant's motions for a mistrial, a judgment of acquittal and to sever; verdicts of guilty of one count of fabricating physical evidence, and bribe receiving, conspiracy to commit fabricating physical evidence, conspiracy to commit larceny in the first degree and attempt to commit larceny in the first degree; thereafter, the court

denied the defendant's motions for a judgment of acquittal and for a new trial, and rendered judgments in accordance with the verdicts, from which the defendant appealed to this court. *Reversed; new trials.*

Hubert J. Santos, with whom were *Hope C. Seeley* and, on the brief, *Jessica M. Santos*, for the appellant (defendant).

Harry Weller, senior assistant state's attorney, with whom were *Christopher A. Alexy*, senior assistant state's attorney, and, on the brief, *Gail P. Hardy*, state's attorney, and *Michael A. Gailor*, executive assistant state's attorney, for the appellee (state).

Opinion

DiPENTIMA, C. J. The defendant, Eddie Alberto Perez, once mayor of the city of Hartford (city),[1] appeals from the judgments of conviction, rendered after a jury trial, of bribe receiving in violation of General Statutes § 53a-148 (a), fabricating evidence as an accessory in violation of General Statutes §§ 53a-155 (a) (2) and 53a-8, conspiracy to fabricate evidence in violation of General Statutes §§ 53a-155 (a) (2) and 53a-48, conspiracy to commit larceny in the first degree by extortion in violation of General Statutes §§ 53a-48, 53a-122 (a) (1) and 53a-119 (5) (H), and attempt to commit larceny in the first degree by extortion in violation of General

[1] Following his election, the defendant began his two year term as mayor of Hartford in December, 2001. The city's charter was changed in 2003, resulting in a strong-mayor form of municipal government and a four year term for the position of mayor. At the defendant's trial, Kenneth H. Kennedy, Jr., a former member of the Hartford Democratic Town Committee and, since 2003, an elected member of the Hartford City Council, testified that a "[s]trong-mayor form of government is where the mayor is not just the head of the council, more of in a ceremonial position, but actually has real power, to appoint all department heads, they all work for the mayor as opposed to working for the city manager, who used to be the chief executive officer; now, the mayor is the chief executive officer."

Statutes §§ 53a-49 (a) (2), 53a-122 (a) (1), and 53a-119 (5) (H).

On appeal, the defendant claims that (1) the evidence was insufficient to support his convictions, (2) the court improperly consolidated the two informations for trial, (3) the court improperly instructed the jury[2] and (4) the court improperly admitted into evidence testimony regarding uncharged misconduct.[3] We conclude that there was sufficient evidence to sustain the defendant's convictions. We further conclude that the court improperly joined the defendant's two criminal cases for a single trial, and, therefore, reverse the judgments of conviction and remand each case for a new trial. As a result of this determination, we do not reach the defendant's instructional or evidentiary claims.[4]

We begin by setting forth the relevant procedural history. On January 21, 2009, the state charged the defendant by information with bribe receiving, fabricating physical evidence and conspiracy to fabricate physical evidence. On May 7, 2010, by way of a substitute information, the state charged the defendant with bribe receiving, fabricating physical evidence, fabricating physical evidence as an accessory and conspiracy to

[2] Specifically, the defendant claims that the court improperly instructed the jury with respect to the bribe receiving and extortion charges, and improperly failed to give the jury an admitted perjurer instruction.

[3] Specifically, the defendant claims that the court improperly permitted the state to present evidence of other misconduct, namely, that he awarded Abraham Giles a license for parking rights at 1214 Main Street, Hartford, and that this was done for the purpose of benefiting Giles.

[4] As a general matter, when our appellate courts reverse the judgment and remand the case for a new trial, only claims likely to arise on retrial are addressed by the reviewing court. See, e.g., *State* v. *T.R.D.*, 286 Conn. 191, 195, 942 A.2d 1000 (2008); *State* v. *Braswell*, 145 Conn. App. 617, 619 n.2, A.3d , cert. granted on other grounds, 310 Conn. 939, A.3d (2013). In the present case, our remand order is for two separate trials. Therefore, we cannot say that the claims relating to the jury instructions and other misconduct evidence are likely to arise, and thus we do not address them in this opinion.

fabricate physical evidence (hereinafter the bribery charges or bribery case). The defendant entered pleas of not guilty to all of the bribery charges on May 12, 2010.[5]

[5] The May 7, 2010 substitute information for the bribery charges alleged the following:

"Count One

"The undersigned Executive Assistant State's Attorney accuses [the defendant] of the crime of Bribe Receiving in violation of section 53a-148 (a) of the Connecticut General Statutes and charges that between January, 2005, and July, 2007, said [defendant], a public servant, solicited and accepted from Carlos Costa a benefit, to wit: remodeling work to his residence at 59 Bloomfield Avenue, Hartford, Connecticut, for, because of, and as consideration [for the defendant's] decision, opinion, recommendation and vote.

"Count Two

"The undersigned Executive Assistant State's Attorney further accuses [the defendant] of the crime of Fabricating Physical Evidence in violation of section 53a-155 (a) (2) of the Connecticut General Statutes and charges that on or about July 10, 2007, in the town of Rocky Hill, the [defendant], believing that an official proceeding was about to be instituted, presented a document, to wit: a bill from USA Contractors that purported to be for all remodeling work completed at [the defendant's] residence at 59 Bloomfield Avenue, Hartford, Connecticut, knowing that the invoice was false and with the purpose of misleading a public servant who may be engaged in such official proceeding.

"Count Three

"The undersigned Executive Assistant State's Attorney further accuses [the defendant] of the crime of Fabricating Physical Evidence in violation of sections 53a-8 and 53a-155 (a) (2) of the Connecticut General Statutes and charges that between January, 2006 and July, 2007, in or near the city of Hartford, the said [defendant], believing that an official proceeding was about to be instituted, and acting with the kind of mental state required for the crime of Fabricating Physical Evidence, solicited, requested, commanded, and intentionally aided Carlos Costa in making a document, to wit: a bill from USA Contractors that purported to be for all remodeling work completed at [the defendant's] residence at 59 Bloomfield Avenue, Hartford, Connecticut, knowing that the invoice was false and with the purpose of misleading a public servant who may be engaged in such official proceeding.

"Count Four

"The undersigned Executive Assistant State's Attorney further accuses [the defendant] of Conspiracy to Commit Fabricating Physical Evidence in violation of sections 53a-48 and 53-155 (a) (2) of the Connecticut General Statutes and charges that between January, 2007 and July, 2007, in the city of Hartford and the town of Rocky Hill, said [defendant] with intent that conduct constituting the crime of Fabricating Physical Evidence be performed, agreed with Carlos Costa, to engage in and cause the performance of such conduct, and one of them committed an overt act, including but not limited to the following, in support of the conspiracy: [1] The drafting of a bill from USA Contractors for what purported to be the total work done at 59 Bloomfield Avenue; [2] Presenting the bill from USA Contractors for the work done at 59 Bloomfield Avenue to the office of the Chief State's Attorney as a complete bill for all of the work done on the property."

Meanwhile, on August 28, 2009, in a separate information the state charged the defendant with attempt to commit larceny in the first degree by extortion, conspiracy to commit larceny in the first degree by extortion and conspiracy to commit coercion. On May 7, 2010, the state filed a substitute information charging the defendant with conspiracy to commit larceny in the first degree by extortion and attempt to commit larceny in the first degree by extortion (hereinafter the extortion charges or extortion case).[6] The defendant entered

[6] The May 7, 2010 substitute information for the extortion charges set forth the following allegations:

"Count One

"The undersigned Executive Assistant State's Attorney hereby accuses [the defendant] of the crime of Conspiracy to Commit Larceny in the First Degree by Extortion in violation of sections 53a-48, 53a-122 (a) (1), and 53a-119 (5) (H) of the Connecticut General Statutes and charges that between December, 2005 and May, 2007, in the city of Hartford, said [defendant], with intent that conduct constituting the crime of Larceny in the First Degree by Extortion be performed agreed with Abraham Giles to engage in or cause the performance of such conduct, and one of them committed an overt act, including but not limited to the following, in furtherance of the conspiracy: 1. In the early portion of 2006, in the city of Hartford, [the defendant], the mayor of Hartford, told Joseph Citino, who had made a proposal to purchase and develop the property at 1143 Main Street which was owned by the city of Hartford, that, in order for the purchase to be approved, he would have to 'take care' of Abraham Giles; 2. That in March, 2006, the city of Hartford, under the direction of [the defendant], set as one condition of Joseph Citino's purchase and development of the property at 1143 Main Street that Abraham Giles be allowed to remain in place on the property until Citino initiated his development program for the site; 3. During negotiations for the purchase of the property at 1143 Main Street in Hartford, Abraham Giles told Joseph Citino he would vacate the premises if he received two hundred fifty thousand dollars ($250,000) from Joseph Citino; 4. During negotiations for the purchase of the property at 1143 Main Street in Hartford, Abraham Giles told Joseph Citino that 'he was a good friend of [the defendant] and he could either help this project go forward or not'; 5. Abraham Giles agreed to vacate the premises at 1143 Main Street if he was paid one hundred thousand dollars ($100,000) by Citino.

"Count Two

"The undersigned Executive Assistant State's Attorney further accuses [the defendant] of Criminal Attempt to Commit Larceny in the First Degree by Extortion in violation of sections 53a-49 (a) (2), 53a-122 (a) (1), and 53a-119 (5) (H) of the Connecticut General Statutes and charges that between

not guilty pleas to all the extortion charges on May 12, 2010.

On or about September 10, 2009, the state filed a motion to consolidate the informations, to join the bribery charges with the extortion charges for a single trial. On November 4, 2009, the court held a hearing on the state's motion to consolidate. At the conclusion of that hearing, the court granted the state's motion. Jury selection commenced on April 12, 2010, and was completed ten days later. On May 12, 2010, after the court's initial remarks to the jury, including reading both of the operative informations, the defendant moved for a mistrial. Defense counsel argued that the defendant had been prejudiced because the jury knew of the bribery charges and the extortion charges. In the alternative, defense counsel requested that the court instruct the jury that the evidence presented during the bribery case could not be considered as part of the extortion case. The court agreed to the latter[7] and denied the motion for a mistrial.

The state then presented its case on the bribery charges. The jury heard testimony on these charges on May 12, May 13, May 14, May 17, May 18, May 19, May 20, and May 26, 2010. On May 20, 2010, the defendant filed a motion for severance of offenses pursuant to Practice Book § 41-18.[8] He claimed that the failure to

December, 2005, and May, 2007, in the city of Hartford, said [defendant], while acting with the intent to deprive Joseph Citino of property or to appropriate the same to a third person, to wit: Abraham Giles, intentionally did an act which was a substantial step in a course of conduct planned to culminate in the commission of the crime of Larceny in the First Degree by Extortion."

[7] On nearly every day of testimony, the court informed the jury to which case the evidence applied.

[8] Practice Book § 41-18 provides: "If it appears that a defendant is prejudiced by a joinder of offenses, the judicial authority may, upon its own motion or the motion of the defendant, order separate trials of the counts or provide whatever other relief justice may require."

sever would result in substantial injustice, and would deny him a fair trial and due process of law. He incorporated the arguments previously made in his objection to the state's motion to consolidate and claimed substantial prejudice from the fact that he wanted to testify as to the bribery charges but to exercise his fifth amendment right not to testify as to the extortion charges. The court heard argument on this motion and denied it. The state concluded its case on the bribery charges on May 26, 2010. The court then instructed the jury: "Furthermore, I remind you that these two cases must be considered separately; in other words, the evidence that has been presented by the state relating to the charges of bribe receiving and fabricating physical evidence may not be considered by you in regard to the second case. Likewise, the evidence the state introduces relating to the charge of attempted larceny by extortion and conspiracy to commit larceny by extortion cannot be considered by you in regard to the first case; they are two separate cases, each case must stand on its own proof and the charges must be proven by the state beyond a reasonable doubt."

The jury heard evidence on the extortion changes on May 26, May 27, June 2, June 3, June 4, June 7, and June 8, 2010. The state rested with respect to both sets of charges on June 8, 2010. On June 10, 2010, the defendant moved for a judgment of acquittal, a mistrial, and, in the alternative, to sever the two cases. The defendant also requested permission to testify only as to the bribery charges. The court denied the motion for a judgment of acquittal and deferred ruling on the other motions until the next day. After hearing argument, the court denied the defendant's remaining motions on June 11, 2010.

The defense presented evidence on June 10, June 11 and June 14, 2010. The state presented rebuttal evidence, and the evidentiary portion of the trial concluded

on June 14, 2010. The next day, defense counsel renewed the motions for a judgment of acquittal, mistrial and severance. The court denied the defendant's motions.

With respect to the bribery charges, the jury found the defendant guilty of bribe receiving, fabricating physical evidence as an accessory and conspiracy to fabricate physical evidence. The jury found the defendant not guilty of fabricating physical evidence. With respect to the extortion charges, the jury found the defendant guilty of conspiracy to commit larceny in the first degree by extortion and attempt to commit larceny in the first degree by extortion.

On July 6, 2010, the defendant filed a motion for a new trial, arguing, inter alia, that the court improperly joined the two cases for trial and denied his motion to sever. That same day, the defendant also filed a motion for a judgment of acquittal on the ground that there was insufficient evidence to support the jury's verdicts. The court denied the defendant's motions and rendered judgments in accordance with the verdicts. The court sentenced the defendant to a total effective term of ten years incarceration, suspended after three years, and three years of probation. This appeal followed.

I

The defendant first claims that the evidence was insufficient to support his convictions on both the bribery charges and the extortion charges.[9] With respect to the bribery charges, the defendant argues that there

[9] "We review the defendant's sufficiency of the evidence claim first because that claim, if successful, would necessitate the entry of a judgment of acquittal . . . . *State* v. *Murray*, 254 Conn. 472, 478, 757 A.2d 578 (2000)." (Internal quotation marks omitted.) *State* v. *Mourning*, 104 Conn. App. 262, 266 n.1, 934 A.2d 263, cert. denied, 285 Conn. 903, 938 A.2d 594 (2007); see also *State* v. *Monahan*, 125 Conn. App. 113, 118 n.7, 7 A.3d 404 (2010), cert. denied, 299 Conn. 926, 11 A.3d 152 (2011); *State* v. *Bereis*, 117 Conn. App. 360, 364, 978 A.2d 1122 (2009).

was insufficient evidence that (1) an official proceeding was about to be instituted, (2) the defendant intended to mislead a public servant, (3) the defendant aided Carlos Costa[10] in fabricating the invoice from USA Contractors, Inc. (USA Contractors), for renovations done at the defendant's residence, (4) the defendant and Costa agreed to fabricate the invoice from USA Contractors, and (5) the defendant accepted or solicited the renovation work on his home in consideration for aiding Costa in his dealings and disputes with the city as to his work on the Park Street revitalization project in Hartford (project). The defendant also argues that the evidence was insufficient to support his conviction of the extortion charges. Specifically, he contends that the state failed to establish that (1) he sought to compel Joseph Citino to pay $100,000 to Abraham Giles, (2) the defendant instilled a fear in Citino that if he failed to pay Giles, the defendant would impede Citino's renovation and development plans at the Davis Building lot, and (3) the defendant and Giles had an agreement to extort money from Citino. We are not persuaded by these claims of evidentiary insufficiency.

As an initial matter, we set forth the relevant legal principles and standard of review relating to a claim of insufficient evidence. "In reviewing the sufficiency of the evidence to support a criminal conviction we apply a two-part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a

[10] At the time of his testimony at the defendant's trial, Costa had been charged with two counts of bribery and one count of tampering with physical evidence. Costa pleaded no contest to the charge of being an accessory to coercion in violation of General Statutes § 53a-192, and, on March 10, 2011, he was sentenced to one year, execution suspended, and one year conditional discharge.

reasonable doubt. . . . [I]n viewing evidence which could yield contrary inferences, the jury is not barred from drawing those inferences consistent with guilt and is not required to draw only those inferences consistent with innocence. The rule is that the jury's function is to draw whatever inferences from the evidence or facts established by the evidence it deems to be reasonable and logical." (Internal quotation marks omitted.) *State* v. *Ovechka*, 292 Conn. 533, 540–41, 975 A.2d 1 (2009), aff'd after remand, 118 Conn. App. 733, 984 A.2d 796, cert. denied, 295 Conn. 905, 989 A.2d 120 (2010); see also *State* v. *Bennett*, 307 Conn. 758, 763, 59 A.3d 221 (2013).

"It is axiomatic that the jury must find every element proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense, [but] each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . If it is reasonable and logical for the jury to conclude that a basic fact or an inferred fact is true, the jury is permitted to consider the fact proven and may consider it in combination with other proven facts in determining whether the cumulative effect of all the evidence proves the defendant guilty of all the elements of the crime charged beyond a reasonable doubt." (Internal quotation marks omitted.) *State* v. *Lindsay*, 143 Conn. App. 160, 166, 66 A.3d 944, cert. denied, 310 Conn. 910, A.3d (2013); *State* v. *Abreu*, 141 Conn. App. 1, 7, 60 A.3d 312, cert. denied, 308 Conn. 935, 66 A.3d 498 (2013); see also *State* v. *Calabrese*, 279 Conn. 393, 402, 902 A.2d 1044 (2006).

"[A reviewing court] cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict. . . . [P]roof beyond a reasonable doubt does not mean proof beyond all possible doubt . . . nor does proof beyond a reasonable doubt require acceptance of every hypothesis of innocence posed by the defendant that, had it been found credible

by the [jury], would have resulted in an acquittal. . . . On appeal, we do not ask whether there is a reasonable view of the evidence that would support a reasonable hypothesis of innocence. We ask, instead, whether there is a reasonable view of the evidence that supports the jury's verdict of guilty." (Internal quotation marks omitted.) *State* v. *Moore*, 141 Conn. App. 814, 818, 64 A.3d 787, cert. denied, 309 Conn. 908, 68 A.3d 663 (2013); see also *State* v. *Hedge*, 297 Conn. 621, 657, 1 A.3d 1051 (2010). Guided by these principles, we address the defendant's claims in turn.

A

We first address the defendant's claims of insufficient evidence with respect to the bribery charges. We begin by setting forth the facts, as reasonably found by the jury. In February, 2005, the defendant ordered from The Home Depot, among other items, a countertop and backsplash to remodel the kitchen at his residence. The order subsequently was canceled and, in March, 2005, the store refunded the money that had been paid.

At that same time, the defendant and his wife, Maria Perez, went to the showroom of Costa's business, USA Contractors. The defendant had known Costa for several years. The defendant and his wife informed Costa that they were looking for a new kitchen countertop. He showed the defendant and Maria Perez various samples of granite and informed them that they could view additional options at a wholesaler, International Granite and Marble. There was no discussion of the cost of purchasing and installing the new countertop. As a general matter, USA Contractors charged $45 per square foot, $55 per square foot or $65 per square foot depending on the quality of the granite selected by a customer. Other charges included between $100 and $150 per hole for a sink cutout and $10 per linear foot for a backsplash. In accordance with the industry standard,

Costa normally required customers to pay a 90 percent deposit prior to templating the countertop, with the balance due at installation.

After a style of granite was selected, one of Costa's employees went to the defendant's residence to take the necessary measurements to manufacture the countertop. The size of the countertop was 116 square feet, and the granite selected was $65 per square foot. The defendant never offered to pay Costa a deposit, and Costa never collected one for the defendant's order. The countertop then was installed in the defendant's kitchen in April, 2005. The defendant did not pay for the countertop following the installation.

While reviewing the installation of the countertop, Costa spoke with Maria Perez, and this conversation led to additional work at the defendant's residence. This included the installation of ceramic tile in the kitchen and a granite threshold between the kitchen and dining room. At the time this work was performed, Costa received no payment. More renovations followed, namely, combining two smaller bathrooms into one large one. This undertaking consisted of the following: removing a wall; installing new floor; repairing a wall; merging two doors; installing a steam shower, a whirlpool tub, toilets, a vanity, a vanity cabinet and Sheetrock; painting; and performing electrical work. The defendant did not pay for any of these items or labor at the time of the upstairs bathroom work. Finally, additional work in the defendant's residence included minor repairs and painting in a first floor bathroom. At the time of this work, the defendant did not pay for either the supplies or the labor. Throughout the work on his residence, which was completed by September, 2005, the defendant never asked about the cost. Furthermore, Costa never expected to be paid for his work; he just did it and "absorbed the cost." Costa specifically testified that doing the renovation at the defendant's

residence was part of the cost of doing business with the city.

At the time that Costa was remodeling the defendant's residence, he had been selected by the city to revitalize Park Street. The project involved street reconstruction, pavement reconstruction, repairs to the drainage system and aesthetic improvements, including decorative lighting, sidewalk treatment involving brick pavers, new curbing and other amenities. The project was funded primarily by the federal government and was valued at $7.3 million. USA Contractors, along with other qualified contractors, had bid on the project in 2003.[11] USA Contractors successfully bid approximately $5.3 million.[12] In October, 2004, John H. McGrane, employed by the city as the assistant director of public works and a city engineer, was assigned to oversee the project. As part of his duties, McGrane was responsible for ensuring that the project was progressing in a timely fashion, that the quality controls as set forth in the contract were implemented and that payments made on the project were correct and accurate. The work on the project had begun in the spring of 2004 and the contract allotted 300 calendar days, exclusive of the winter shutdown, for substantial completion and 330 calendar days, exclusive of the winter shutdown, for final completion.[13]

[11] The next closest bid was $1.3 million higher than USA Contractors.

[12] The federal government provided funding in the amount of $4.3 million. The city and the state Department of Transportation each contributed $500,000 to the project.

[13] McGrane testified as follows regarding the difference between substantial compliance and final completion: "Substantial completion generally means that the project, as implied, is substantially completed to the point where it's usable by the owner; however, there may be punch lists and other minor uncompleted items that have yet to be done. And final completion means that everything is done as specified on the plans and as detailed in any punch lists, exclusive of warranty items that may come up later."

McGrane also testified that the time period from December 1 through April 1 was excluded from the time to complete the project because this type of work generally was not permitted in the winter for quality reasons.

As McGrane started work in October, 2004, he immediately became aware of issues regarding the project; primarily, the fact that 30 to 40 percent of the time for final completion had run and the project was not 30 to 40 percent complete. Additionally, logistical and coordination problems with merchants and others on Park Street existed. Finally, McGrane noted that the city was not satisfied with the quality of certain aspects of the work, including the line and grade of the pavers.[14] To remedy these matters, the city sent several letters to Costa, addressing both the failure to adhere to the schedule and the poor quality of the work.[15] McGrane participated in meetings with Costa to resolve these issues. Costa submitted an updated schedule for the project, but McGrane rejected it because it called for a completion date of at least one year past that specified in the contract.

In the beginning of 2005, Costa submitted claims for extra payments due from the city. McGrane explained that if a contractor encountered conditions that were outside those contemplated by a contract, he or she is entitled to submit a written request for extra payment. Costa requested payments exceeding the $5.3 million contractually owed by the city. For example, in a summary report dated April 19, 2005, USA Contractors claimed that $273,246.72 was owed for work performed per the contract with the city but not appropriated for payment by the city's Department of Public Works, $27,487 was owed for work performed per the contract but underpaid by the Department of Public Works and

[14] There also were concerns that Costa had failed to comply with the requirement that 15 percent of the total contract value had to be subcontracted to minority or disadvantaged business enterprises.

[15] For example, in a letter dated January 27, 2005, McGrane informed Costa that the project was less than 30 percent complete, yet over 65 percent of the scheduled time had elapsed. McGrane also noted that if the project was not completed on schedule, Costa faced liquidated damages in the amount of $350 per calendar day.

$81,834.81 was owed for extra work as a result of unforeseen site conditions. The city agreed to pay approximately $41,000 for the first category of extra payments, approximately $3300 for the second and approximately $9000 for the third category.

Both prior to and after he began working on the defendant's residence, Costa had sought assistance from the defendant regarding jobs involving city work being performed by USA Contractors. After he performed the work at the defendant's residence, however, the defendant's responses to Costa were quicker, and the defendant provided Costa with access to Charles J. Crocini, the city's director of capital projects, "to help [him] diffuse some of the problems that [Costa] was having on [the project], due to the unforeseen conditions of construction . . . ."

Bhupen Patel, the city's director of public works, reported directly to the defendant. He was aware of the many extra claims submitted by Costa and did not question his staff's assessment that most of them did not require payment from the city. Contrary to normal procedure, Costa submitted the claims directly to the defendant's office instead of to the city's Department of Public Works. The defendant told Patel that he should review the claims again and suggested that there should be some merit to them. Patel also stated that the defendant "suggested that if [Costa's] making [claims] for $1.5 million, at least to—that there may be a legitimate claim for 50 percent or so."

Patel and his staff conducted a review of the claims and determined that most of them were unfounded. Patel informed the defendant of this. The defendant then suggested Crocini should review the claims submitted by Costa. Patel and Crocini decided to use a third party to review the continual extra claims submitted by Costa. The city previously had entered into a contract

with Urban Engineers, Inc. (Urban Engineers), and in early 2005, one of its tasks was to assist in responding to the voluminous paperwork from Costa and USA Contractors. Urban Engineers also provided construction management services for the project and acted as a liaison and coordinator between the city and Costa. The staff of Urban Engineers expressed concern over the slow progress and quality of USA Contractors' work.[16] In reviewing more claims for extra payment submitted by Costa, this time totaling approximately $350,000, Urban Engineers determined that only $50,000 to $60,000 appeared to have merit.

As part of its duties for the city, Urban Engineers came up with three alternative courses of action for the problems with the project. The first alternative proposed was to terminate the contract with USA Contractors, the second was to reduce the scope of USA Contractors' work on the project and rebid the remainder of the project, and the third was to rehabilitate the project. Urban Engineers provided the advantages and disadvantages of each alternative to the city, as well as a list of conditions USA Contractors had to meet if it were to remain on the project.

In January, 2006, Najib Habesch, Vincent Carita, and Jay Bertoli of Urban Engineers, and McGrane, Patel, John Rose, the city's corporation counsel, Mark Turcotte, the city's purchasing director, and Crocini held a meeting regarding the project and its issues. At this point, it was the consensus of all in attendance that the contract with USA Contractors would be terminated.

[16] Najib Habesch, a former employee of Urban Engineers, testified as follows with respect to the poor quality of work: "There were grates that weren't installed according to the proper elevation; there were crosswalks that were not being installed according to the design; there were issues with maintaining what was already put out there such as the trash cans that were either being lost, vandalized, hit; light poles that were being broken, quite a few issues."

They agreed further that USA Contractors' bonding company, U.S. Fidelity and Guarantee Corporation (U.S. Fidelity),[17] would be notified of the issues with the project and that Crocini would inform the defendant of the decision to terminate the contract. Crocini, who reported directly to the defendant, was responsible for construction projects outside the auspices of the city's Department of Public Works. Crocini's involvement in the project was unusual, and his role was to evaluate whether the Department of Public Works was treating Costa fairly.

In a letter dated May 8, 2006, McGrane wrote to U.S. Fidelity with copies sent to Patel, Rose, Crocini, Carita and Costa.[18] This letter served "to formally notify [U.S. Fidelity] of the continued failure of [USA Contractors] to perform under the terms of the above contract. It is clear that USA Contractors is in default of their contract, and the [city] needs to take action to remedy the situation in order to limit the damages we are incurring as a result of late completion of the project." The letter requested that U.S. Fidelity evaluate the options under the bond to remedy the situation, to meet with officials from the city to discuss the option and set forth a course of action.

Upon receiving his copy of this letter, Costa was "extremely disappointed" that it had been sent to U.S. Fidelity. He contacted his attorneys, the defendant and Crocini. He spoke with the defendant about the issues with the project. The defendant indicated that Crocini

[17] McGrane testified that "the bonding company is basically providing an assurance, financially, that the project gets complete and all the terms get met; it's like an insurance policy. So by putting the bonding company on notice, they very often can put pressure on a contractor to shape up and comply, because there are severe consequences to him from the bonding company if he does not do that."

[18] U.S. Fidelity never received McGrane's letter. The letter was returned to the city unopened in the original envelope as undeliverable.

was reviewing the matter with the Department of Public Works. Costa understood that McGrane's letter would be rescinded. Furthermore, on May 12, 2006, Crocini told Costa that all communications regarding the project should go through him. When Urban Engineers attempted to clarify the communication protocol in a May 17, 2006 telefax to Costa, he rejected this arrangement and indicated that he had spoken with Crocini and that all communication from USA Contractors would go through Crocini's office.

A few days later, Patel received a telephone call informing him that the defendant wanted to see him. He walked into the defendant's office with Crocini. The defendant, holding Costa's copy of McGrane's letter to U.S. Fidelity, appeared angry, and asked: "What the fuck is going on?" Crocini said that he would "take care of it" by letting U.S. Fidelity know that McGrane's letter was merely a "warning" and not a request to call the bond. Crocini wrote a letter, dated May 16, 2006, which provided in relevant part: "The intent of [McGrane's May 8, 2006 letter] was to serve a notice, only, to the bonding company, and there is no wish, at this time, to execute any action against the contractor, [USA Contractors]. It is the intent of the [city] to work with [USA Contractors] to ensure a successful and complete project for the [city]. . . . If in the future, if there are any additional problems or concerns regarding this project and the performance of [USA Contractors], a formal request for bond action will be presented to [U.S. Fidelity]."

Crocini's letter effectively rescinded McGrane's letter to U.S. Fidelity and came as a surprise to McGrane.[19]

[19] Prior to writing this letter, Crocini met with McGrane and informed him that the defendant was "displeased that the [May 8, 2006] letter had been sent and that [the defendant] wanted it retrieved . . . ." Crocini also asked for contact information for U.S. Fidelity and told McGrane that the defendant did not want U.S. Fidelity to take over the project; rather, the defendant's preference was to have the issues with USA Contractors settled and to have

The Crocini letter also was contrary to the decision of the Department of Public Works and the opinion of Urban Engineers. U.S. Fidelity never took any action with respect to USA Contractors' performance. The city deemed the project to be complete in February, 2008, approximately two and one-half years late. In total, USA Contractors requested approximately $2 million in extra payments, of which the city approved approximately $300,000.

The normal procedures for paying vendors of the city consisted of mailing payment within thirty days of receipt of the invoice. Upon a written request, however, this process could be expedited. Kathleen Palm-Devine, the treasurer of the city since January, 1999, and whose responsibilities of this elected position included issuing all checks to vendors of the city and managing the city's temporary idle cash, testified that this expedited procedure caused a disruption in the work flow of the employees in her office. Additionally, when an emergency check was picked up rather than mailed, the city lost interest income. On several occasions, members of the defendant's staff requested expedited checks for payment to USA Contractors.

In February, 2006, Joaquim "Jack" Espirito Santo, the owner of a furniture store in Hartford, learned that work was being performed on the bathroom and kitchen of the defendant's residence, and that it did not appear that the defendant was paying for this. Santo started to discuss this matter with friends a few weeks later. The defendant was cognizant of rumors in the community that work had been done on his residence by Costa. In the late summer or early fall of 2006, the defendant requested Costa to develop a bill for the work done at his residence. Costa informed the defendant that his

that company continue on. Last, the defendant wanted to transfer a "bucket of money" into the project to settle the claims submitted by Costa's company.

bill would be "between mid to high [$20,000s]." The defendant appeared shocked that the bill would be so high. Costa estimated, however, that he had performed $40,000 worth of work. Because he had not thought he would ever be preparing a bill for the defendant, Costa had not kept records of the work.

In early 2007, Santo informed Frank Barrows and Minnie Gonzalez about Costa's work at the defendant's residence. Both Barrows and Gonzalez, political opponents of the defendant, were running against him in the 2007 mayoral election. Costa prepared a bill, dated February 28, 2007, totaling $20,217.[20] He attached various receipts from vendors. He acknowledged, however, that the bill did not accurately charge the defendant for all of the work done.

Michael Sullivan, an inspector with the state Division of Criminal Justice in its public integrity unit, commenced an investigation following a newspaper article in the Hartford Courant.[21] Additionally, the defendant had written a letter to the chief state's attorney requesting his office to investigate possible criminal activities unrelated to the project or Costa.[22] Sullivan

[20] The first page of the bill created by Costa provided: "Please review this bill for all work completed at [the defendant's residence].

"Kitchen Countertop	$2,385.00
"1 Bathroom cabinet	$371.00
"1 Shower Door	$1,774.63
"1 Tile installation	$750.00
"1 Tile materials	$1,234.80
"1 Grout & miscellaneous	$88.21
"1 Home Depot	$1,681.68
"1 Metcaf Glass	$408.02
"1 Plimpton & Hills	$5,762.47
"1 Donald Sullivan	$2,862.00
"1 Lump sum labor	$2,900.00
"Overall Total	$20,217.00"

[21] Sullivan testified that he was a sworn law enforcement officer and that his duties included investigating allegations of criminal activity.

[22] See footnote 33 of this opinion for the text of the letter sent by the defendant to the chief state's attorney.

made an appointment and interviewed the defendant in his office on June, 27, 2007.[23] After discussing other matters with the defendant, Sullivan, on the basis of general information he had received the day before, asked the defendant if he had had any renovation work done at his residence by USA Contractors. The defendant replied that it had performed work on his bathroom, vanities and countertops. The defendant also indicated that he had paid for this work.

After Sullivan turned his questions to the issue of work done by USA Contractors at the defendant's residence, the defendant's demeanor changed. Sullivan explained: "Then [the defendant] was noticeably nervous, shaking, considerably sweating, he couldn't sit in his chair, he was up and down fidgeting, scratching, touching every part of his body, his voice dropped." The defendant told Sullivan that he had paid USA Contractors by a check approximately one and one-half years earlier and that he had paid market price. The defendant told Sullivan that he did not have a written contract with USA Contractors and that he would provide Sullivan with a copy of his check.

The next day, the defendant went to the Hartford Federal Credit Union (credit union) for the purpose of applying for a home equity loan. Specifically, he requested a loan in the amount of $25,000 to pay for home improvements and consolidation of personal debts. The defendant dated the application for June 26, 2007, but his wife, as co-borrower, correctly indicated the date as June 27, 2007. The credit union approved the defendant's loan application and issued a check, dated July 11, 2007, to USA Contractors in the amount of $20,217. Following a meeting on July 6, 2007, the defendant provided Sullivan with a copy of a bill from

[23] Sullivan recorded this interview and the relevant portions were played for the jury.

USA Contractors, a copy of his loan application to the credit union and paperwork and receipts from The Home Depot.

1

The defendant argues that there was insufficient evidence to support his conviction of fabricating evidence as an accessory and conspiracy to fabricate evidence.[24] Before addressing the defendant's arguments, we first set forth the relevant statutory language of § 53a-155 (a): "A person is guilty of tampering with or fabricating physical evidence if, believing that an official proceeding is pending, or about to be instituted, he: (1) Alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding; or (2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such official proceeding." Accordingly, the state must establish, beyond a reasonable doubt, that "the defendant (1) believed that an official proceeding was pending, (2) presented or used the [evidence] knowing it to be false and (3) did so with the purpose of misleading a public servant." *State* v. *Widlak*, 85 Conn. App. 84, 89–90, 856 A.2d 446 (2004). Furthermore, this court has stated that "[t]he statute making criminal the fabricating of evidence is found in part XI of our Penal Code, which addresses offenses against the administration of justice. Statutes found in that section address crimes that effect a fraud or harm to the court. The purpose of those statutes is to punish those who

[24] We have stated that "there is no practical significance in being labeled an accessory or a principal for the purpose of determining criminal responsibility and that [t]here is no such crime as being an accessory . . . . The accessory statute merely provides alternate means by which a substantive crime may be committed." (Internal quotation marks omitted.) *State* v. *Gamble*, 119 Conn. App. 287, 297, 987 A.2d 1049, cert. denied, 295 Conn. 915, 990 A.2d 867 (2010).

interfere with the courts and our system of justice." *State* v. *Servello*, 80 Conn. App. 313, 323, 835 A.2d 102 (2003), cert. denied, 267 Conn. 914, 841 A.2d 220 (2004).

The defendant first contends that there was insufficient evidence that an official proceeding was about to be instituted when the bill was created. Specifically, he points to Costa's testimony that he requested a bill in the fall of 2006 for the work done at his residence. Costa did not provide the defendant with the bill until February, 2007. Sullivan's investigation into the work at the defendant's residence did not commence until later that year.

Our analysis is guided by our Supreme Court's decision in *State* v. *Foreshaw*, 214 Conn. 540, 572 A.2d 1006 (1990). In that case, the defendant shot and killed the victim, and then fled in her automobile. A short time later, the police located and arrested the defendant. Id., 543. Between the shooting and the arrest, the defendant had thrown the gun out the window of her automobile, and it never was recovered. Id. The state charged the defendant with, inter alia, tampering with physical evidence in violation of § 53a-155 (a) (1). Id., 549. The defendant argued on appeal that the evidence was insufficient to sustain her conviction on that charge because, at the time she discarded the gun, she had had no contact with the police or the judicial system, and thus "she could not have believed an official proceeding was about to be instituted." (Internal quotation marks omitted.) Id., 550. Our Supreme Court rejected this argument. "The statute, however, speaks to that which is readily apt to come into existence or be contemplated and thus plainly applies to the official proceeding arising out of such an incident." Id., 551.[25] In other words,

[25] We are cognizant of the following question certified by our Supreme Court in *State* v. *Jordan*, 305 Conn. 918, 47 A.3d 388 (2012): "Should this court overrule its construction of General Statutes § 53a-155 in *State* v. *Foreshaw*, 214 Conn. 540, 572 A.2d 1006 (1990)?" At this time, however, we are bound to follow *Foreshaw*, the controlling precedent from our Supreme Court.

§ 53a-155 does not require a temporal proximity between the alleged act and the subsequent official proceeding. See, e.g., *State* v. *Pommer*, 110 Conn. App. 608, 617–18, 955 A.2d 637, cert. denied, 289 Conn. 951, 961 A.2d 418 (2008); see also *State* v. *Foreshaw*, supra, 551.

Applying the law to the facts of this case, we conclude that there was sufficient evidence to support the jury's finding of this element of fabricating physical evidence. In *Pommer*, we noted that our "Supreme Court concluded that the official proceeding is pending, or about to be instituted element of § 53a-155 (a) could be satisfied when the facts support the inference that the defendant reasonably could have contemplated that an official proceeding was likely to arise." (Internal quotation marks omitted.) *State* v. *Pommer*, supra, 110 Conn. App. 618; see also *State* v. *Foreshaw*, supra, 214 Conn. 551. In the present case, the evidence was sufficient to support the jury's finding that the defendant reasonably could have contemplated that an official proceeding was likely to arise. Costa testified that in the summer or fall of 2006, the defendant instructed him to create a bill for the work done at his residence. At that time, the defendant had learned of rumors in the community regarding Costa's work on his residence. It was within the province of the jury to find that the defendant, the mayor of Hartford since December, 2001, had requested the creation of the bill because he believed that an official proceeding would be instituted on the basis of the rumors, i.e., work being done on the home of an elected city official by a contractor who had pending business with the city.

The defendant next contends that there was insufficient evidence that he aided Costa in creating the bill. Specifically, the defendant claims that the evidence showed only that Costa took it upon himself to lower the bill and that the defendant never knew the true

value of the work being done on his residence. We are not persuaded.

The jury could view the evidence to find that neither Costa nor the defendant ever intended for the bill to exist. The defendant never received a price quote for the work, nor inquired about paying for all of the work done on his residence, even as the project expanded to the upstairs bathroom. Only upon learning of the rumors in the community did the defendant ask Costa to develop a bill. The bill, on its face, did not include all of the work done at the defendant's residence. Further, when Costa indicated that the bill would be in "the mid to high twenty" thousand dollars, the defendant expressed surprise and subsequently received a bill of $20,217. On the basis of this evidence, there was sufficient evidence to support the jury's finding that the defendant aided in the fabrication of the bill.

Last, the defendant contends that there was no evidence that he and Costa agreed to fabricate the bill. This contention pertains to the conspiracy to fabricate evidence charge. "To establish the crime of conspiracy under § 53a-48 of the General Statutes, the state must show that there was an agreement between two or more persons to engage in conduct constituting a crime and that the agreement was followed by an overt act in furtherance of the conspiracy by any one of the conspirators. The state must also show intent on the part of the accused that conduct constituting a crime be performed. The existence of a formal agreement between the parties need not be proved; it is sufficient to show that they are knowingly engaged in a mutual plan to do a forbidden act." (Internal quotation marks omitted.) *State* v. *Padua*, 273 Conn. 138, 181–82, 869 A.2d 192 (2005). "[I]t is not necessary to establish that the defendant and his coconspirators signed papers, shook hands, or uttered the words we have an agreement. . . . [A] conspiracy can be inferred from the conduct

of the accused . . . and his coconspirator, as well as from the circumstances presented as evidence in the case." (Citation omitted; internal quotation marks omitted.) *State* v. *Berger*, 249 Conn. 218, 227, 733 A.2d 156 (1999). The evidence that supported the finding that Costa aided in fabricating the bill also supported the jury's finding that the defendant had conspired to enter into such an agreement.

2

The defendant next argues that there was insufficient evidence to support his conviction of receiving a bribe.[26] Stated broadly, the defendant contends that there was no evidence that he solicited or accepted discounted work on his home from Costa in exchange for providing Costa with assistance on the project. We are not persuaded.

We begin by setting forth the statutory language. Section 53a-148 (a) provides: "A public servant or a person selected to be a public servant is guilty of bribe receiving if he solicits, accepts or agrees to accept from another person any benefit for, because of, or as consideration for his decision, opinion, recommendation or vote." Simply put, "[a] public servant is guilty of bribe receiving . . . if he [accepts, agrees to accept or] solicits a benefit as consideration for his decision, opinion, recommendation or vote." *State* v. *Fox*, 22 Conn. App. 449, 456, 577 A.2d 1111 (1990); see also *State* v. *Bergin*, 214 Conn. 657, 668, 574 A.2d 164 (1990).

The defendant's argument is focused on the issue of whether he assisted Costa by way of a decision, opinion, recommendation or vote. His appellate brief presents his view and interpretation of the evidence. Our scope

[26] We note that our Supreme Court has described bribery as "a crime that involves a violation of the public's trust in our elected officials . . . ." *State* v. *Bergin*, 214 Conn. 657, 662, 574 A.2d 164 (1990). It also stated that the crime of bribery "may occur subtly over a period of time." Id., 675.

of review, however, is not whether a reasonable view supports his claim of innocence; rather, it is whether there is a reasonable view that supports the jury's finding of guilt. *State* v. *Moore*, supra, 141 Conn. App. 818.

After starting work on the defendant's residence, Costa noted that he received assistance related to the project more quickly from the defendant than he had in the past. Contrary to normal procedures, Costa submitted his claims for extra payments to the defendant's office. The defendant then requested Patel to review the claims and suggested that 50 percent may have had a legitimate basis. The defendant also assigned Crocini to help Costa in a project controlled by the city's Department of Public Works. After Costa received a copy of McGrane's letter to U.S. Fidelity, he met with the defendant, who said he was reviewing the matter. Shortly thereafter, Patel had a meeting with the defendant and Crocini. Holding a copy of that letter that he had received from Costa, the defendant appeared angry. This led to Crocini's writing a letter to U.S. Fidelity, which effectively rescinded McGrane's letter and was contrary to the decision of the Department of Public Works to terminate USA Contractors and to involve U.S. Fidelity in the project. Both of these events would have had serious repercussions for Costa and USA Contractors. The jury also heard evidence that the defendant helped expedite payments from the city to USA Contractors. Costa thereby received the benefit of receiving payment sooner than he would have through the city's normal course of operations. In short, we conclude that the evidence supported the jury's finding with respect to the charge of receiving a bribe in violation of § 53a-148 (a).

B

We now address the defendant's sufficiency claim with respect to the extortion charges. The jury reasonably could have found the following facts. Joseph Citino, a general contractor and property developer,

owned a construction company known as Providian Builders of Connecticut. Part of his business included looking for properties to develop in the city. He found an old, vacant, and blighted property located at 1161 Main Street that was for sale. The building located on this property was known alternatively as the "Davis building" and "the butt ugly building." Citino performed some preliminary research on this property, including the sale price and its permitted uses. Citino intended to tear down the existing building and construct residential condominiums with retail space on the lower level. Citino also needed to purchase property located at 1143 Main Street so that 1161 Main Street was not landlocked.[27]

The property at 1161 Main Street was owned by the Edwards Development Company. After negotiations, Citino signed a purchase and sale agreement to buy 1161 Main Street.[28] The initial sale price was $1.3 million, but subsequent negotiations lowered the price to approximately $1,150,000. The purchase was contingent on Citino's ability to purchase 1143 Main Street from the city.

Citino, through his construction firm, contacted John Palmieri, the city's director of development, about the plans to develop 1161 Main Street and his interest in purchasing 1143 Main Street in late January, 2006. At that time, 1143 Main Street was being used as a parking lot. Citino attended a meeting with Palmieri and Matthew Hennessy, the defendant's chief of staff, to present concept drawings for the two properties on Main Street. Palmieri asked Citino to send a letter directly to the

[27] During the trial, the parcel of property also was described as 1155 Main Street. For convenience and consistency, we refer to this parcel as 1143 Main Street.

[28] Jon Concilio testified that he had been employed as a sales representative by Chozick Realty in Hartford and that it had listed the property "[o]n and off for probably a year and a half to two years . . . ."

defendant setting forth his intentions and the need to purchase 1143 Main Street. Citino did so in late February, 2006.[29]

In May, 2006, Citino attended a meeting with the defendant, and others, where they discussed various options for the redevelopment of 1161 Main Street. At the meeting, the following were topics of discussion: (1) why Citino wanted to purchase the properties; (2) what Citino was going build on 1161 Main Street; (3) the defendant's assurance that Citino had an agreement in place to purchase 1161 Main Street before the city sold 1143 Main Street to Citino; and (4) the needs of Abraham Giles, the parking lot operator at 1143 Main Street.[30] The defendant also implied that Giles had a lease with the city with respect to 1143 Main Street.[31] At the end of the meeting, Citino inquired what the next step for the redevelopment was and the defendant replied: "[F]irst, we got to take care of [Giles] or there is no next step." Citino understood this to mean that if an arrangement with Giles did not occur, then he would not be able to redevelop 1161 and 1143 Main Street.

Giles had been active in city politics since the 1940s. His occupation was operating a parking lot business. In 2006, as the 2007 mayoral election approached, the members of the Hartford Democratic Town Committee,

[29] See footnote 1 of this opinion, describing the power of the defendant in the strong-mayor form of municipal government.

[30] This parking lot was not paved or lighted and lacked curbs and drainage. In this condition, it did not meet the city's standards, and Citino's request for permission to have it "grandfathered" was denied; therefore, improvements were necessary.

[31] During redirect examination, Citino testified as follows: "The conversation that took place during the meeting, whereby it was conveyed to me that this person [Giles] had either an existing long-term lease—I think the term, for twenty years, was thrown out there, and I didn't know if that was twenty years prior or twenty years into the future, but there was mention of there being a lease."

which is divided into districts, began the process of endorsing a candidate. Securing the committee's nomination is often crucial to a candidate's being elected in the city, due to the high percentage of Democratic voters. Although Giles previously had backed other candidates opposing the defendant, at some point in late 2005, or early 2006, he supported the defendant.

Citino, who did not know Giles, arranged a meeting with him.[32] This meeting occurred between May 23, 2006, and July 18, 2006. Giles informed Citino that he was "very close" to the defendant and that he "could help make or break" the deal to redevelop 1161 and 1143 Main Street. Giles made several requests, including that he be awarded the right to operate a parking lot after Citino had purchased the properties and the new building had been completed. Giles also sought monthly payments from Citino of $3000 to $4000 per month during the construction, a time period of approximately twenty-four months. These terms were unacceptable to Citino, who eventually asked Giles how much money it would take for him to vacate 1143 Main Street. Citino offered a one time payment of $25,000, and Giles responded with a counteroffer of $250,000. After negotiations lasting for approximately one week, Citino and Giles agreed on a payment of $100,000.

Citino attended a meeting with the defendant in July, 2006. He informed the defendant that the four conditions discussed at their earlier meeting had been met, including "tak[ing] care" of Giles. He specifically told the defendant about the agreement that he had reached with Giles, namely, the payment of $100,000 to Giles for vacating the parking lot at 1143 Main Street. In fact, the payment, described as a lease termination fee, was

[32] Jon Concilio, the sales representative for Chozick Realty in Hartford, testified that he performed an Internet search to find a way to reach Giles, and that he set up the meeting with Giles on Citino's behalf.

included as an addendum to the purchase of the building at 1161 Main Street.

At some point, Citino learned that Giles did not have a lease with the city for 1143 Main Street and decided that he would not pay the $100,000 to Giles. He informed the city's corporation counsel that he would not make the payment, and that it would be the city's responsibility to remove Giles from 1143 Main Street. He was told that the city would not get involved in the agreement between Citino and Giles.

As the costs for this redevelopment escalated, Citino began to have concerns regarding its viability, and contacted the defendant in February or March, 2007. In a March 5, 2007 e-mail to the defendant, Citino detailed the various issues with the redevelopment project, such as asbestos abatement and other expenses. Citino then stated: "I made an agreement with the parking operator who presently leases the city owned parcel [Giles] and for a sum of $100,000, he has agreed to vacate the property on the day we are having our real estate closing." A few hours later, the defendant attempted to reach Citino by telephone five or six times.

On March 16, 2007, the defendant and Citino spoke on the telephone. At some point, the defendant, referring to Citino's March 5, 2007 e-mail, stated that he wished Citino had not put the reference of the payment to Giles in writing. Citino offered to delete the e-mail, and the defendant responded that "it couldn't be deleted because it was part of the computer's hard drive or permanent record." The defendant also expressed a concern that if the e-mail got into the "wrong hands" it would not "look good." The defendant agreed to find some funds to help with the rising asbestos abatement costs and to reduce the sale price of 1143 Main Street from approximately $56,000, as set by the Hartford City Council in November, 2006, to $1. A few days later,

Citino received an e-mail from the city's assistant corporation counsel, Ben Bare, indicating that the city would contribute $80,000 toward the asbestos removal costs and sell 1143 Main Street to Citino for $1. The defendant indicated that Citino was no longer required to make the payment to Giles.

In April, 2007, Citino received a telephone call from a newspaper reporter asking him to respond to the fact that the Main Street redevelopment deal had collapsed. The reporter told Citino that the defendant previously had denied knowledge of the condition requiring Citino to make a $100,000 payment to Giles for him to vacate 1143 Main Street. Thereafter, the plans for the redevelopment project at 1161 and 1143 Main Street ended. In a letter dated April 23, 2007, the defendant requested that the chief state's attorney determine whether any party had violated the law with respect to "two parcels of land on Main Street," including one owned by the city.[33]

[33] The defendant's letter to the chief state's attorney stated: "I am writing to request the assistance of your . . . office to determine if any person violated the law in connection with a failed redevelopment effort of two parcels of land on Main Street in Hartford, one of which is city owned. It has come to my attention that a provision for a $100,000 'termination fee' payable to the operator of a parking lot on city owned property was included in a purchase and sale agreement between Joseph Citino of Providian Builders of Hartford and Edwards Development LLC of Miami Beach, Florida for the purchase of 1161 Main Street, a privately owned parcel.

"Though private parties are free to include any provisions they desire in private sales of land, the city owned parcel was to be transferred to Providian Builders pursuant [to] terms set by the city council, which did not include provisions for the purchaser to pay a 'termination fee' as a condition of purchasing the parcel. The city has decided to not proceed with the sale of its parcel, as Providian Builders has been unable to meet the city's condition for sale which include the demolition of a blighted building located at 1161 Main Street and the timely execution of a purchase and sale agreement with the city. However, I am concerned even though no city money or land was transferred, that one or more individuals may have intended to use city funds from the project to unjustly enrich one or more parties.

"I would appreciate your assistance to determine if any party may have violated the Connecticut General Statutes in connection with this failed transaction. The resources of the city will be at your disposal and I look forward to your response."

When he learned about this letter from a reporter, Citino questioned the defendant's motives.[34]

The defendant argues that there was insufficient evidence to support his conviction of conspiracy to commit larceny by extortion or attempt to commit larceny by extortion. We begin by setting forth the relevant statutory language for the underlying substantive offense of larceny by extortion. Section 53a-119 provides in relevant part: "A person commits larceny when, with intent to deprive another of property or to appropriate the same to himself or a third person, he wrongfully takes, obtains or withholds such property from an owner. Larceny includes, but is not limited to . . . (5) Extortion. A person obtains property by extortion when he compels or induces another person to deliver such property to himself or a third person by means of instilling in him a fear that, if the property is not so delivered, the actor or another will . . . (H) use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely . . . ."

Next, we restate the elements of conspiracy. "[Section] 53a-48 (a) provides in relevant part that [a] person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy. Therefore, a conspiracy also consists of two essential elements: (1) a

[34] Specifically, Citino testified: "I actually thought that that was a very, very underhanded, spineless move, because why would anyone try to have me investigated for something that was a perfectly legitimate deal, unless he knew that it wasn't legitimate and he got his hand caught in the cookie jar. Because there was no reason to send that out and have me investigated. He wasn't concerned about my reputation, the way I was being portrayed in the newspaper. He wasn't concerned with my family's well-being. He was concerned about his you know what."

specific agreement to engage in or cause the performance of conduct constituting a crime and (2) an overt act in pursuance of that agreement." (Internal quotation marks omitted.) *State* v. *Lokting*, 128 Conn. App. 234, 239, 16 A.3d 793, cert. denied, 301 Conn. 926, 22 A.3d 1277 (2011); see also *State* v. *Padua*, supra, 273 Conn. 167–68. Additionally, we note that "[w]hile the state must prove an agreement, the existence of a formal agreement between the conspirators need not be proved because [i]t is only in rare instances that conspiracy may be established by proof of an express agreement to unite to accomplish an unlawful purpose. . . . [T]he requisite agreement or confederation may be inferred from proof of the separate acts of the individuals accused as coconspirators and from the circumstances surrounding the commission of these acts." (Internal quotation marks omitted.) *State* v. *Leggett*, 94 Conn. App. 392, 399, 892 A.2d 1000, cert. denied, 278 Conn. 911, 899 A.2d 39 (2006).

Last, we identify the elements of criminal attempt. Section 53a-49 (a) provides that "[a] person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." We have stated: "Both § 53a-49 (a) (1) and (2) require that the state prove both intent and conduct to sustain a conviction. . . . There are two essential elements of an attempt under this statute. They are, first, that the defendant had a specific intent to commit the crime as charged, and, second, that he did some overt act adapted and intended to effectuate that intent. . . .

[T]he attempt is complete and punishable, when an act is done with intent to commit the crime, which is adapted to the perpetration of it, whether the purpose fails by reason of interruption . . . or for other extrinsic cause." (Citations omitted; internal quotation marks omitted.) *State* v. *Torres*, 47 Conn. App. 205, 220, 703 A.2d 1164 (1997). Thus, the state was required to prove that the defendant, acting with the required mental state for larceny, intentionally performed an act constituting a substantial step in a course of conduct planned to culminate in his commission of the crime. See *State* v. *Brown*, 33 Conn. App. 339, 350, 635 A.2d 861 (1993), rev'd in part on other grounds, 232 Conn. 431, 656 A.2d 997, superseded on other grounds, 235 Conn. 502, 668 A.2d 1288 (1995) (en banc).

1

The defendant first contends that the state failed to establish that he sought to compel Citino to pay Giles $100,000 to vacate the parking lot at 1143 Main Street. We are not persuaded. Citino testified that, at the May, 2006 meeting where he first presented his redevelopment plans to the defendant, after he inquired about his "next step," the defendant responded: "[W]ell, first we got to take care of . . . Giles or there is no next step." The defendant's appellate brief challenges Citino's credibility by comparing this testimony to Citino's grand jury testimony[35] and noting that Citino admitted to testifying untruthfully in his prior trial for counterfeiting. Neither of these arguments, however, precluded the jury from finding that the defendant compelled Citino to make the payment to Giles. As this court has noted, "[q]uestions of whether to believe or to disbelieve a competent witness are beyond our review. As

[35] Citino stated to the grand jury that the defendant had told him "something to [the] effect" that Giles had to be taken care of "before we could move forward." He also testified that his statements "mean[t] the same thing."

a reviewing court, we may not retry the case or pass on the credibility of witnesses. . . . We must defer to the trier of fact's assessment of the credibility of the witnesses that is made on the basis of its firsthand observation of their conduct, demeanor and attitude." (Internal quotation marks omitted.) *State* v. *McCarthy*, 105 Conn. App. 596, 605, 939 A.2d 1195, cert. denied, 286 Conn. 913, 944 A.2d 983 (2008). Because the jury was free to credit Citino's testimony, we cannot say that the evidence was insufficient with respect to this element of larceny by extortion.

2

The defendant next contends that there was insufficient evidence that Citino was in fear that the defendant would not assist him with the deal to redevelop 1161 Main Street if Citino did not pay Giles. The state counters that because the defendant was charged only with the inchoate offenses of attempt to commit larceny by extortion and conspiracy to commit larceny by extortion, the defendant's contention is irrelevant. We agree with the state. As this court noted in *State* v. *Lynch*, 21 Conn. App. 386, 403, 574 A.2d 230, cert. denied, 216 Conn. 806, 580 A.2d 63 (1990): "This argument cannot succeed because it fails to recognize the distinction between the actual commission of a crime and an attempt or a conspiracy to commit that crime." Simply put, the jury was not required to find that Citino feared that the defendant would use his position as an elected official to adversely affect him in order to find the defendant guilty of the inchoate crimes of conspiracy to commit larceny by extortion or attempt to commit larceny by extortion.

3

Finally, the defendant argues that there was no agreement between the defendant and Giles to engage in criminal conduct. Specifically, he claims that there

was nothing "nefarious" about the defendant's request for Citino to arrange a plan for Giles to vacate the property at 1143 Main Street. The state counters that this was a question for the jury and that there was sufficient evidence to support a finding of an agreement to engage in criminal conduct. We agree with the state.

The jury heard evidence regarding the political relationship between Giles and the defendant and how Giles supported the defendant's bid for re-election after previously supporting other candidates. The defendant implied to Citino that there was a lease between Giles and the city and that Citino had to take care of Giles or there would be no next step for the development. Additionally, Giles stated that he was "very close to the [defendant] and that he could help make or break this deal." The defendant expressed concern that Citino had memorialized the need for the payment to Giles in an e-mail and expressed a concern that it "wouldn't look good" if someone else obtained a copy of it. In interpreting the evidence, the jury could conclude that the reason for the defendant's concern regarding Citino's e-mail was based on the agreement to engage in criminal conduct. After reviewing the record and applying our deferential standard of review, we conclude that the jury's finding of guilt with respect to extortion charges was based on sufficient evidence.

II

The defendant next claims that the court improperly consolidated the bribery and extortion cases for trial, and then improperly failed to sever them, depriving him of his federal and state constitutional rights to a fair trial.[36] The defendant presents two related arguments

[36] Specifically, the defendant argues that the joinder of and failure to sever the two cases violated the fifth, sixth and fourteenth amendments to the United States constitution and article first, §§ 8 and 9, of the Connecticut constitution. The defendant's brief expressly states: "It should be noted that defense counsel is not raising a separate state constitutional claim."

with respect to this claim. The defendant first argues that he suffered substantial prejudice as a result of the court's erroneous application of the multifaceted test set forth in *State* v. *Boscarino*, 204 Conn. 714, 529 A.2d 1260 (1987), and that this error was not harmless pursuant to *State* v. *Payne*, 303 Conn. 538, 34 A.3d 370 (2012). Additionally, the defendant contends that the court's denial of his motion to sever improperly compromised his choice to testify in the bribery case and not the extortion case. See *State* v. *Schroff*, 198 Conn. 405, 503 A.2d 167 (1986). We agree with both of the defendant's arguments, and, accordingly, conclude that he is entitled to new, separate trials.

The following additional facts and procedural history are relevant to our discussion. On September 10, 2009, the state filed a motion to consolidate the two cases pursuant to Practice Book § 41-19.[37] The state argued that (1) joinder would foster judicial economy and administration, (2) the charges involved discrete and easily distinguishable fact patterns, (3) the crimes charged were not brutal or violent in nature, (4) the presentation of the evidence in an orderly manner would contribute to the distinguishable nature of the crimes charged in each docket, and (5) the court's instructions would result in the jury's ability to consider the bribery charges separately from the extortion charges. On November 2, 2009, the defendant filed an objection to the state's motion to consolidate.[38] He argued that judicial economy would not be served by joinder, he would suffer substantial prejudice because the evidence from one docket would not be admissible

[37] Practice Book § 41-19 provides: "The judicial authority may, upon its own motion or the motion of any party, order that two or more informations, whether against the same defendant or different defendants, be tried together."

[38] By filing his objection to the state's motion to consolidate, the defendant preserved the issue for appellate review. See *State* v. *LaFleur*, 307 Conn. 115, 154 n.31, 51 A.3d 1048 (2012).

in the other, and the complexity of the extortion charges, if joined with the bribery charges, would prejudice him in the eyes of the jury in the same manner as brutal or violent crimes "can blur the lines between joined cases . . . ." On November 4, 2009, the court held a hearing and granted the state's motion. During the remainder of the proceedings, the court denied the defendant's repeated requests to sever the two cases that had been joined.[39]

We begin our discussion by setting forth certain legal principles that inform our analysis. We have recognized the benefits of joining two criminal cases involving the same defendant. "A joint trial expedites the administration of justice, reduces congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries, and avoids the necessity of recalling witnesses who otherwise would be called to testify only once." (Internal quotation marks omitted.) *State* v. *Wilson*, 142 Conn. App. 793, 799–800, 64 A.3d 846, cert. denied, 309 Conn. 917, 70 A.3d 40 (2013). Courts and commentators, however, have long recognized the tension between these advantages[40] and the defendant's right to a fair

[39] On May 12, 2010, after the court had made its initial remarks and read the informations to the jury, the defendant moved for a mistrial, arguing that the jury had been prejudiced by hearing details about both the bribery and extortion cases. The court denied this motion. On May 18, 2010, the defendant alerted the court and the prosecutor that he would be moving to sever the cases after the state had completed its evidence in the bribery case. On May 20, 2010, the defendant filed a motion to sever the two cases. The court heard argument that day and denied the defendant's motion. On June 9, 2010, the defendant filed another motion for a severance, which was argued on June 11, 2010, and denied as well. The defendant orally renewed his request for severance on June 15, 2010; the court denied the motion.

[40] Our Supreme Court expressly has questioned the extent of the benefits of joinder in cases such as the present appeal. "[T]here is legitimate debate about whether the interests favoring joinder should be weighed differently when both the offenses are not legally related and the evidence is not cross admissible. As one treatise has observed: The argument for joinder is most persuasive when the offenses are based upon the same act or criminal

trial. See *State* v. *Davis*, 286 Conn. 17, 42–43, 942 A.2d 373 (2008) (*Katz, J.*, concurring) (commentators generally critical of joinder in absence of cross admissibility of evidence); *State* v. *Herring*, 210 Conn. 78, 95, 554 A.2d 686 (noting undeniable tension between need to conserve judicial resources by consolidation and defendant's right to fair trial), cert. denied, 494 U.S. 912, 109 S. Ct. 3230, 106 L. Ed. 2d 579 (1989); 5 W. LaFave et al., Criminal Procedure (5th Ed. 2007) § 17.1 (b), p. 9; C. Whitebread & C. Slobogin, Criminal Procedure An Analysis of Cases and Concepts (5th Ed. 2008) § 21.04, pp. 610–14; J. Farrin, "Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice," 52 Law & Contemp. Probs. 325, 332–33 (1989). Mindful of this background, we turn to the specifics of the defendant's appeal.

A

The defendant first argues that the court improperly applied the multipart test of *State* v. *Boscarino*, supra, 204 Conn. 714. Specifically, he contends that the first

transaction, since it seems unduly inefficient to require the state to resolve the same issues at numerous trials. Commentators have been generally critical, however, of the joinder of offenses which are unrelated, since the need to prove each offense with separate evidence and witnesses eliminates any real savings in time or efficiency which might otherwise be provided by a single trial. A. Spinella, Connecticut Criminal Procedure (1985) p. 416. As the Fourth Circuit Court of Appeals has noted as a general matter: [A]lthough it is true that the [f]ederal [r]ules of [c]riminal [p]rocedure [were] designed to promote economy and efficiency and to avoid a multiplicity of trials . . . we are of the strong opinion that the consideration of one's constitutional right to a fair trial cannot be reduced to a cost/benefit analysis. Thus, while we are concerned with judicial economy and efficiency, our overriding concern in an instance such as this is that [the] jury consider only relevant and competent evidence bearing on the issue of guilt or innocence for each individually charged crime separately and distinctly from the other. . . . *United States* v. *Isom*, 138 Fed. Appx. 574, 581 (4th Cir. 2005), cert. denied, 546 U.S. 1124, 126 S. Ct. 1103, 163 L. Ed. 2d 915 (2006)." (Internal quotation marks omitted.) *State* v. *Gupta*, 297 Conn. 211, 231–32 n.13, 998 A.2d 1085 (2010).

and third *Boscarino* factors support his claim of substantial prejudice as a result of the consolidation of the bribery and the extortion charges. He further claims that this improper joinder resulted in harmful error, warranting new trials. We agree.

We analyze the joinder and failure to sever issue under the principles set forth in *State* v. *Payne*, supra, 303 Conn. 538, which was decided after the defendant's conviction and the filing of his brief in this court. In *Payne*, our Supreme Court overruled its prior cases[41] and concluded "that the blanket presumption in favor of joinder . . . is inappropriate and should no longer be employed. . . . In cases where the evidence cannot be used for cross admissible purposes . . . the blanket presumption in favor of joinder is inconsistent with the well established evidentiary principle restricting the admission of character evidence." (Citations omitted; internal quotation marks omitted.) Id., 548.

In reaching this conclusion, the court in *Payne* adopted the reasoning of Justice Katz's concurring opinion in *State* v. *Davis*, supra, 286 Conn. 38–45. In particular, *Payne* referred to Justice Katz's concerns regarding the lack of any benefit for judicial economy purposes when cases were not of similar character. *State* v. *Payne*, supra, 303 Conn. 549. "The argument for joinder is most persuasive when the offenses are based upon the same act or criminal transaction, since it seems unduly inefficient to require the state to resolve the same issues at numerous trials. . . . In contrast, when the cases are not of the same character, the argument

[41] See, e.g., *State* v. *Johnson*, 289 Conn. 437, 451, 958 A.2d 713 (2008); *State* v. *Sanseverino*, 287 Conn. 608, 628, 949 A.2d 1156 (2008), overruled in part on other grounds by *State* v. *DeJesus*, 288 Conn. 418, 437, 953 A.2d 45 (2008), superseded in part after reconsideration by *State* v. *Sanseverino*, 291 Conn. 574, 969 A.2d 710 (2009); *State* v. *McKenzie-Adams*, 281 Conn. 486, 521, 915 A.2d 822, cert. denied, 552 U.S. 888, 128 S. Ct. 248, 169 L. Ed. 2d 148 (2007).

for joinder is far less compelling because the state must prove each offense with separate evidence and witnesses [thus] eliminat[ing] any real savings in time or efficiency which might otherwise be provided by a single trial." (Citation omitted; internal quotation marks omitted.) Id., 580, quoting *State* v. *Davis*, supra, 43–44 (*Katz, J.*, concurring). Thus, our Supreme Court concluded: "[W]hen charges are set forth in separate informations, presumably because they are not of the same character, and the state has moved in the trial court to join the multiple informations for trial, the state bears the burden of proving that the defendant will not be substantially prejudiced by joinder pursuant to Practice Book § 41-19. The state may satisfy this burden by proving, by a preponderance of the evidence, either that the evidence in the cases is cross admissible or that the defendant will not be unfairly prejudiced pursuant to the *Boscarino* factors." (Footnote omitted.) Id., 549–50.

Notwithstanding this shift in the law with respect to the proceedings in the trial court, our Supreme Court did not alter the analysis employed by appellate courts in reviewing claims of improper joinder. "Despite our reallocation of the burden when the trial court is faced with the question of joinder of cases for trial, the defendant's burden of proving error on appeal when we review the trial court's order of joinder remains the same. See *State* v. *Ellis*, 270 Conn. 337, 376, 852 A.2d 676 (2004) ([i]t is the defendant's burden *on appeal* to show that joinder was improper by proving substantial prejudice that could not be cured by the trial court's instructions to the jury . . .)." (Emphasis in original; internal quotation marks omitted.) *State* v. *Payne*, supra, 303 Conn. 550 n.11; see also *State* v. *LaFleur*, 307 Conn. 115, 157–58, 51 A.3d 1048 (2012); *State* v. *Wilson*, supra, 142 Conn. App. 801; *State* v. *Bree*, 136 Conn. App. 1, 9, 43 A.3d 793, cert. denied, 305 Conn. 926, 47 A.3d 885 (2012). Furthermore, we continue to

review the court's decision to join the two criminal cases under the abuse of discretion standard. *State* v. *LaFleur*, supra, 158; *State* v. *Wilson*, supra, 800; see also *State* v. *Ellis*, supra, 375.

Our task, therefore, is to determine whether the defendant has established substantial prejudice[42] as a result of the court's decisions to join the bribery and extortion cases and to refuse to sever them. "A long line of cases establishes that the paramount concern is whether the defendant's right to a fair trial will be impaired. Therefore, in considering whether joinder is proper, this court has recognized that, where evidence of one incident would be admissible at the trial of the other incident, separate trials would provide the defendant no significant benefit. . . . Under such circumstances, the defendant would not ordinarily be substantially prejudiced by joinder of the offenses for a single trial. . . . Accordingly, we have found joinder to be proper where the evidence of other crimes or uncharged misconduct [was] cross admissible at separate trials. . . . Where evidence is cross admissible, therefore, our inquiry ends.

"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

[42] In *State* v. *David P.*, 70 Conn. App. 462, 467, 800 A.2d 541, cert. denied, 262 Conn. 907, 810 A.2d 275 (2002), we noted that "[w]hether a joint trial will be substantially prejudicial to the defendant's rights means something more than that it will be less advantageous to [him]." (Internal quotation marks omitted.)

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. . . .

"[Accordingly, the] court's discretion regarding joinder . . . is not unlimited; rather, that discretion must be exercised in a manner consistent with the defendant's right to a fair trial. Consequently, [in *State* v. *Boscarino*, supra, 204 Conn. 722–24] we have identified several factors that a trial court should consider in deciding whether a severance [or denial of joinder] may be necessary to avoid undue prejudice resulting from consolidation of multiple charges for trial. These factors include: (1) whether the charges involve discrete, easily distinguishable factual scenarios; (2) whether the crimes were of a violent nature or concerned brutal or shocking conduct on the defendant's part; and (3) the duration and complexity of the trial. . . . If any or all of these factors are present, a reviewing court must decide whether the trial court's jury instructions cured any prejudice that might have occurred." (Internal quotation marks omitted.) *State* v. *LaFleur*, supra, 307 Conn. 155–56.

In its brief to this court, the state provided the following statement with respect to the matter of cross admissibility of the evidence: "Although never conceding the issue below, the state did not seek joinder based on cross admissibility, and does not argue it on appeal."[43]

[43] This court succinctly has summarized the topic of cross admissibility of evidence in joint trials. "Our Supreme Court has determined that [w]here evidence of one incident *can* be admitted at the trial of the other, separate

Accordingly, our analysis is focused on the applicable *Boscarino* factors.[44] Applying those factors here, we consider whether the bribery and extortion charges involved discrete and easily distinguishable factual scenarios and the duration and complexity of the trial on both sets of charges. See *State* v. *LaFleur*, supra, 307 Conn. 155–56; *State* v. *Boscarino*, supra, 204 Conn. 722–24. We conclude that these factors support the defendant's claim that joining the two cases constituted an abuse of the trial court's discretion.[45]

1

We begin with the *Boscarino* factor pertaining to the length and complexity of the trial. The factor, at its core, is a question of whether the jury will confuse the evidence as a result of a long, complicated trial. See *State* v. *Boscarino*, supra, 204 Conn. 723–24. The jury heard eight days of testimony presented by the state over a two week period in the bribery case. It heard seven days of testimony over a thirteen day period for the state's evidence presented in the extortion case.[46] The defense presented a total of three days of evidence over a five day period. On the last day of the defense

trials would provide the defendant no significant benefit. It is clear that, under such circumstances, the defendant would not ordinarily be substantially prejudiced by joinder of the offenses for a single trial." (Emphasis in original; internal quotation marks omitted.) *State* v. *Webb*, 128 Conn. 846, 858, 19 A.3d 678, cert. denied, 303 Conn. 907, 32 A.3d 961 (2011); see also *State* v. *Morgan*, 140 Conn. App. 182, 201–202, 57 A.3d 857 (2013).

[44] The second *Boscarino* factor, which is whether the crimes were of a violent nature or concerned brutal or shocking conduct on the part of the defendant, is not applicable given the nature of the bribery and extortion charges against the defendant. See *State* v. *Davis*, supra, 286 Conn. 29; *State* v. *Boscarino*, supra, 204 Conn. 723.

[45] The concurrence correctly notes that at the time the trial court granted the state's motion to consolidate, the controlling law on joinder was *State* v. *Davis*, supra, 286 Conn. 17. We point out, however, that the majority in *Davis* applied the principles of *State* v. *Boscarino*, supra, 204 Conn. 714.

[46] On May 26, 2010, the jury heard evidence on both the bribery and extortion cases.

case, the state produced rebuttal evidence. In total, the jury heard evidence for seventeen trial days over a five week period.

Twenty witnesses testified for the state during the bribery case and sixteen during the extortion case.[47] Defense counsel called seven witnesses. The court admitted into evidence 114 state's exhibits and thirty-six defendant's exhibits. The state's exhibits included a copy of the voluminous documents of the bid made by USA Contractors to the city for the contract to improve the Park Street area, numerous correspondence regarding the issues with that project, including detailed reports regarding the extra charges by USA Contractors and the responses made by the city's Department of Public Works, thorough memoranda drafted by city employees outlining the various benefits and risks regarding the options to completing the project, the contradictory letters sent to U.S. Fidelity from McGrane and Crocini, a copy of the contract between the city and Urban Engineers, evaluations completed by Urban Engineers of the claims for extra charges made by USA Contractors, a copy of the bill provided to the defendant by USA Contractors for the work done on his house, photographs of the interior and exterior of the defendant's house, sample invoices for other customers made by USA Contractors, invoices from various subcontractors and supplies to USA Contractors for the items used in the renovation to the defendant's residence, e-mails and calendar entries from the defendant's computer, checks and e-mails from the treasurer's office, price quotes from The Home Depot, USA Contractors' file on the project at the defendant's residence, the defendant's cellular telephone records, the application filed by the defendant for a home equity

[47] Sullivan, the inspector with the Division of Criminal Justice in its public integrity unit, and Thomas Ladegard, an employee of the information technology department of the city, testified for the state in both cases.

loan, photographs of 1161 Main Street, the documents of the various real estate transactions and proposals, numerous e-mails to city officials regarding the 1161 Main Street proposal, Citino's cellular telephone records, and an insurance policy and other materials regarding parking lots in the city. The exhibits of the defendant were similar in nature to those of the state. In total, the jury heard testimony from forty-two witnesses and considered 150 exhibits during the five week trial.

In *State* v. *Boscarino*, supra, 204 Conn. 723–24, our Supreme Court concluded that where the trial lasted approximately ten weeks, the jury heard testimony from approximately fifty-five witnesses, some of whom testified in more than one case, and examined sixty-six exhibits, "it was highly likely that the jury might confuse the evidence in separate cases." The court also cautioned that "[w]hile jury confusion is a hazard of any long, complicated trial, *its impact is especially prejudicial in a joint trial of similar, but separate cases.*" (Emphasis added.) Id., 724.

A review of the relevant case law demonstrates that the trial in the present case was longer than those where our appellate courts have concluded that this factor did not favor the defendant. See, e.g., *State* v. *Payne*, supra, 303 Conn. 552 (trial lasted two weeks and consisted of eight days of testimony and twenty-one witnesses); *State* v. *Atkinson*, 235 Conn. 748, 766, 670 A.2d 276 (1996) (entire trial lasted five days and consisted of fifteen witnesses); *State* v. *Jennings*, 216 Conn. 647, 659–60, 583 A.2d 915 (1990) (jury heard testimony from fourteen witnesses over five days and considered twenty-eight exhibits); *State* v. *Herring*, supra, 210 Conn. 97 (jury heard eight days of testimony from twenty-three witnesses); *State* v. *Bree*, supra, 136 Conn. App. 10 (trial lasted approximately four days).

Additionally, we conclude that the two cases joined by the trial court presented a high degree of complexity.[48] The genesis of the bribery case occurred in February or March, 2005, when the defendant and his wife ordered, and then canceled, items for remodeling their kitchen from The Home Depot. They then spoke with Costa, who assumed their home improvement project shortly thereafter. The jury heard evidence of Costa's business practices and all of the details of the improvements made to the defendant's home. There was detailed testimony of the actual costs of the supplies and labor, contrasted with what eventually was charged to the defendant. The jury also heard evidence regarding Costa's work, and his numerous issues with the city's Department of Public Works, and later Urban Engineers, the third party hired by the city to review the extra claims submitted by Costa and USA Contractors, while working on the project for the city. It heard particularized information regarding the city's bidding procedures and review of the work done by Costa on the project. The state introduced evidence of the various city officials who considered the pros and cons of removing Costa from the project. The state also produced evidence of how the defendant assisted Costa in his dealings with the city, including obtaining early

[48] Cf. *State* v. *Chance*, 236 Conn. 31, 43, 671 A.2d 323 (1996) (issues presented in two cases were simple and straightforward); *State* v. *Bree*, supra, 136 Conn. App. 9 ("Although all three cases involved cigarettes taken from convenience stores, the three cases were not so similar so as to substantially prejudice the defendant. See *State* v. *Fauci*, 87 Conn. App. 150, 159, 865 A.2d 1191 [2005] [no abuse of discretion in joinder of three informations arising out of three robberies of three different fast food restaurants where, in each incident, rocks were thrown through glass doors of restaurants, but where each robbery took place on different date, at different location, with different victims], aff'd, 282 Conn. 23, 917 A.2d 978 [2007]; *State* v. *Bell*, 93 Conn. App. 650, 656, 891 A.2d 9 [not abuse of discretion to join two cases that both involved crimes at Friendly's restaurants where sole employee was put into walk-in refrigerator, but which took place on different days in different towns with different victims], cert. denied, 277 Conn. 933, 896 A.2d 101 [2006].").

payments. Furthermore, the jury heard how political opponents of the defendant learned of the work being done on his house. These events did not constitute an isolated moment in time, such as a murder or a robbery, but rather encompassed a two and one-half year time period.

Although the time of the events that make up the extortion case was shorter than the bribery case, the underlying facts were no less complicated. The jury heard testimony of another project within the city, the redevelopment of 1161 Main Street. It was presented with the origins of this undertaking, and the complex transactions involving various parcels of land, including one that was owned by the city. There was evidence of different parking lots, and the respective lot owners and operators. The jury also heard many details regarding the nature of city politics. For example, as the press uncovered the details of this redevelopment, the defendant requested the chief state's attorney to conduct an investigation. This led to the defendant's interview with Sullivan, during which the defendant was questioned about the underlying facts in both the bribery and the extortion cases. As with the bribery case, the facts in the extortion case developed over a period of time.

We agree with the defendant that both cases were complicated and that the underlying events took place over an extended period of time.[49] Further, we conclude

[49] The concurrence asserts that our appellate case law does not contain "an explanation or discussion of what constitutes a 'complex' case." While we do not necessarily disagree with this statement, we note that in *State* v. *Boscarino*, supra, 204 Conn. 714, our Supreme Court concluded, under the facts and circumstances of that case, that the complexity factor weighed in favor of the defendant. Id., 723–24. "The duration and complexity of the trial also enhanced the likelihood that the jury would weigh the evidence against the defendant cumulatively, rather than independently in each case." Id., 723. In that case, the defendant was charged with three separate violent sexual assaults stemming from incidents in South Windsor, Bloomfield and Windsor. Id., 715–16.

that the cases were similar, yet separate, thereby increasing the risk of prejudice. *State* v. *Boscarino*, supra, 204 Conn. 724. We are mindful of the careful approach taken by the state to present the case in seriatim. Despite the orderly manner in which the state presented the evidence, first of the bribery case and then of the extortion case, we conclude that the jury was not able to consider each charge separately and distinctly. See, e.g., *State* v. *Pollitt*, 205 Conn. 61, 68, 530 A.2d 155 (1987). Therefore, the defendant was prejudiced by the presence of this *Boscarino* factor.

2

We turn to the remaining applicable *Boscarino* factor, that is, whether the cases for which the defendant was tried jointly involved discrete, easily distinguishable factual scenarios. *State* v. *Boscarino*, supra, 204 Conn. 722–23. The defendant argues that evidence concerning the bribery charges did not involve a discrete event but rather involved conduct spanning a time period of approximately two and one-half years. He also contends that evidence regarding the extortion charges covered a time period of one and one-half years and included uncharged misconduct. We agree with the defendant that this factor supports his claim that the court abused its discretion in joining and not severing the bribery and extortion cases.

As we previously noted, these cases presented complex factual scenarios.[50] Both involved the defendant's

[50] The concurrence posits that the two informations in the case present two distinct scenarios, a bribery related to a kitchen renovation and an extortion stemming from a parking lot transaction. Distilled to its bare essence, this statement is true. Nevertheless, such a viewpoint does not account for the complex and complicated details surrounding each charged crime. Specifically, in regard to the Park Street project, the jury heard in painstaking detail about the work performed on the defendant's home, the manner in which the defendant's bill was fabricated, specifics as to the interworkings of municipal government and local politics, particulars about Hartford parking lots, and the features of the proposal to remodel 1161 Main Street. Our recitation of the facts in this case, as set forth in part I of

misuse of his power as mayor. Additionally, the cases contained evidence of similar, yet separate, ventures that were proposed as substantial improvements to the city and required testimony of how municipal government operates. The defendant's interview with Sullivan encompassed both cases, and the time periods during which each case occurred overlapped. These factual similarities between the two cases significantly impaired the defendant's right to a fair and independent consideration of the evidence in each case. Id., 723; *State* v. *David P.*, supra, 70 Conn. App. 469 ("[w]e are mindful that when incidents are factually similar, there is an inherent danger that a jury might use evidence of one crime to find a defendant guilty of the others"). We also note that the two cases were not legally related. Cf. *State* v. *Atkinson*, supra, 235 Conn. 765 (charge of escape in first degree related to felony murder charge because former indicated consciousness of guilt).

The state points us to *State* v. *Hilton*, 45 Conn. App. 207, 214–15, 694 A.2d 830, cert. denied, 243 Conn. 925, 701 A.2d 659 (1997), cert. denied, 522 U.S. 1134, 118 S. Ct. 1091, 140 L. Ed. 2d 147 (1998), where we concluded that a sixteen day trial with twenty-five witnesses and ninety-nine exhibits did not support the defendant's claim for improper joinder. We note that while the number of trial days in *Hilton* exceeded that of the present case, there were fewer witnesses and exhibits. Furthermore, the defendant in *Hilton* was charged with disparate crimes, namely, narcotics and murder. Id., 215. The state used eyewitness testimony of bystanders during the murder case and photographs of the murder site to convict the defendant on that charge. Id. In the narcotics cases, the state presented testimony from police officers and photographs of sites relating to the drug

this opinion, is illustrative of the complex nature of the proceedings before the jury. Put another way, the jury was presented with evidence of the actions of numerous parties, complicated in nature, over an extended time period.

charges, as well as the contents of two car trunks. Id. "We cannot conclude that the jury might easily have been confused by these photographs because the exhibits and evidence clearly fell into two easily identifiable and separate groups according to the charge and the distinctive factual scenario. We are also not persuaded that, under the circumstances of this case, a sixteen day trial was of such a duration as to itself enhance the likelihood of a cumulative weighing of the evidence." Id.

The underlying facts of the present case, namely, the intricate and overlapping fact patterns regarding the bribery and extortion cases, make *Hilton* inapposite. As noted, the facts of the bribery and extortion cases do not fall into easily identifiable scenarios. Thus, the underlying reasoning for our conclusion in *Hilton* cannot be used in the matter before us and, accordingly, we conclude that it is distinguishable.

We also note that the state's closing argument blurred the two cases, resulting in prejudice to the defendant. See, e.g., *State* v. *Ellis*, supra, 270 Conn. 379. At the outset of his closing remarks to the jury, the prosecutor stated: "Being the mayor of Hartford carries with it a lot of power. This is a case about how the [defendant] abused that power for his own benefit, both financially and politically." Later, the prosecutor again tied the two separate cases together when he remarked: "Now, that's the first half of the case. That's what the [defendant] did for his own personal benefit. Now, what happened with respect to the second half of the case, that's the half of the case where the [defendant] used his position—I should say, abused his position to gain political support . . . ." These statements, taken in context, painted the defendant as a politician who used his elected office as a conduit for both personal and political gain. As a result, the prosecutor's comments obscured the lines between the bribery and extortion cases. This made it more difficult for the jury to determine the defendant's

guilt in each case independently. See *State* v. *Ellis*, supra, 379–80.

For these reasons, we conclude that the defendant has met his burden of establishing that the court abused its discretion in joining the bribery and extortion cases.[51] We are mindful of the broad discretion afforded

[51] The concurrence, relying on Justice Katz's concurrence in *State* v. *Davis*, supra, 286 Conn. 39, expresses a concern that our conclusion, which is based on the entirety of the trial, that granting the state's motion for joinder constituted an abuse of discretion, fails to afford the appropriate deference to the judge who had to decide the motion well before the trial began and solely on the basis of the motions and arguments of the parties. We acknowledge the difficult position of the trial court in deciding the state's motion on November 4, 2009, some six months prior to the trial. Nevertheless, our analysis is consistent with that of *State* v. *Boscarino*, supra, 204 Conn. 714, and its progeny. See, e.g., *State* v. *Ellis*, supra, 270 Conn. 369, 378–80. In both of those cases, our Supreme Court reviewed the entirety of the proceedings and did not limit its evaluation solely to the information presented to the trial court at the time the state requested joinder. We therefore disagree with the concurrence on this issue.

Additionally, the cases cited in Justice Katz's concurring opinion in *State* v. *Davis*, supra, 286 Conn. 46–47, namely, *State* v. *Castelli*, 92 Conn. 58, 63, 101 A. 476 (1917), and *State* v. *Holup*, 167 Conn. 240, 245, 355 A.2d 119 (1974), do not support the concurrence because both predate our Supreme Court's opinion in *State* v. *Boscarino*, supra, 204 Conn. 714. Furthermore, the issue in *State* v. *Castelli*, supra, 62–65, and *State* v. *Holup*, supra, 241–48, was whether the court properly denied the defendant's motion for a trial separate from that of his codefendant and not whether the court improperly joined or failed to sever two informations against a single defendant. *Holup* also recognized that this rule is not absolute. "[E]xceptional cases may arise where a motion for separate trials has been denied, but during or after the joint trial it appears that the joint trial is resulting or has resulted in substantial injustice to one or more of the accused. In such circumstances, justice to the prejudiced accused requires that he be afforded a new trial." *State* v. *Holup*, supra, 245; see also *State* v. *Booth*, 250 Conn. 611, 623, 737 A.2d 404 (1999) ("[w]e have held that, even after concluding that there was no abuse of discretion in granting pretrial motions to join trials, an appellate court must also consider whether, as the trial developed, the joinder of the trials resulted in substantial injustice to the defendants"), cert. denied sub nom. *Brown* v. *Connecticut*, 529 U.S. 1060, 120 S. Ct. 1568, 146 L. Ed. 2d 471 (2000); *State* v. *Diaz*, 69 Conn. App. 187, 199, 793 A.2d 1204 (2002) (same).

Moreover, we note that given our Supreme Court's decision in *State* v. *Payne*, supra, 303 Conn. 549–50, rejecting the blanket presumption in favor of joinder and shifting the burden to the state to prove, by a preponderance of the evidence, that the defendant will not be unfairly prejudiced by joinder pursuant to the *Boscarino* factors, we do not anticipate that future trial judges will be placed in such a problematic situation. In order to obtain a joinder where evidence is not cross admissible, the state will need to present

to the trial court in such matters. That discretion, however, is to be exercised in a manner consistent with a defendant's right to a fair trial. *State* v. *LaFleur*, supra, 307 Conn. 155–56; *State* v. *Davis*, supra, 286 Conn. 29. This right was compromised in the present case.[52]

B

Having concluded that the cases were joined improperly, we turn to the question of whether this amounted to harmless error. *State* v. *Payne*, supra, 303 Conn. 552–53; see also *State* v. *LaFleur*, supra, 307 Conn. 163 n.35. The defendant bears the burden of establishing harm. *State* v. *Payne*, supra, 553. "The proper standard for review of a defendant's claim of harm is whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) Id. We conclude that the defendant met his burden of proving harm.

The following additional facts are necessary for our discussion. Prior to the start of evidence, during its preliminary instructions to the jury, the court informed the jury that it was required to consider each count in

the court with sufficient evidence to establish that a defendant will not be unfairly prejudiced by such a course of action.

Even if we were to assume, arguendo, that the court's decision to grant the state's motion to consolidate and join the bribery and extortion cases was proper, given what was known to the trial judge in November, 2009, we would conclude that the failure to grant the defendant's motion to sever made during the trial proceedings was an abuse of discretion when the trial court was more informed of the nature of the two cases.

[52] The concurrence expresses a concern that our opinion fails to provide concrete guidance for courts facing this issue in the future. First, we note that, as stated in the concurrence, "every case must be evaluated in light of its own facts and circumstances; no mechanical test can be applied." Second, our decision follows the controlling precedent from our Supreme Court, which is found in the analysis contained in part II A of this opinion. See, e.g., *State* v. *Boscarino*, supra, 204 Conn. 719–25.

the two informations separately when deciding each case. After moving for a mistrial, defense counsel requested that the court provide a "cautionary instruction that the evidence regarding the bribery case, which the state is now going to put on, is not admissible; it cannot be considered in connection with the extortion case. And when we get to the extortion case, I'm going to ask for a similar cautionary instruction . . . ." The prosecutor had no objection to the request for a cautionary instruction, and noted that there would be a clear delineation between the two cases. The court agreed to give the cautionary instruction requested by the defense.[53] The court provided a similar instruction on most days that the state presented testimony regarding the bribery case.

At the conclusion of the state's presentation of evidence regarding the bribery case, the court instructed the jury as follows: "The state has just completed presenting its evidence relating to the first set of charges against [the defendant]; that is, the charges of bribe receiving and fabricating physical evidence. At this point, the state will begin presenting its evidence relating to the second set of charges . . . . These cases were joined for the convenience of trial, but they are separate cases. . . .

"The defense will not be presenting any evidence relating to the bribery and fabricating physical evidence charges, if they do so, until after the state has presented its evidence in both cases. I instruct you to please keep an open mind and not reach a verdict until after all the

[53] Before the state's first witness testified, the court stated: "Now ladies and gentlemen of the jury, this witness and the witnesses that follow, until I tell you otherwise, are being presented by the state for the purposes of the first set of charges, the bribe receiving and the charges relating—the allegations of bribe receiving and the allegations regarding fabricating physical evidence. And the state has indicated there are going to be two portions, the second set of charges. Again, I'll caution you when that comes about."

evidence has been provided to you; you've heard the argument of both counsel, and I've instructed you as to the law.

"Furthermore, I remind you that these two cases must be considered separately, in other words, the evidence that has been presented by the state relating to the [bribery case] may not be considered by you in regard to the second case. Likewise, the evidence the state introduces relating to the [extortion case] cannot be considered by you in regard to the first case; they are two separate cases, each case must stand on its own proof, and the charges must be proven by the state beyond a reasonable doubt. With that, the state is going to begin at this point presenting evidence on the second set of charges."

On the first day that the state presented evidence exclusively as to the extortion case, the court instructed the jury that "the evidence that is being offered for this case, now, at this point, by the state, is being offered for the second set of charges, the charges involving the [extortion case]." The court gave similar cautionary instructions on one other day of this phase of the trial. Finally, during its charge to the jury, the court provided instructions regarding the consolidation of the two informations for trial.[54]

The court clearly made near herculean efforts to instruct the jury to keep the evidence separate for each case. We acknowledge that "[i]t is a fundamental principle that jurors are presumed to follow the instructions given by the judge." (Internal quotation marks omitted.) *State* v. *Ramos*, 261 Conn. 156, 167, 801 A.2d 788 (2002).

[54] Specifically, the court charged the jury: "You will note that there are two separate informations. Again, the state had commenced two separate cases against the defendant; they have been consolidated for the convenience of trial. The defendant is entitled to and must be given by you a separate and independent determination of whether he is guilty or not guilty as to each of the informations and each of the counts."

Our Supreme Court also has stated, however, that "a curative instruction is not inevitably sufficient to overcome the prejudicial impact of [inadmissible other crimes] evidence. . . . [W]e conclude that even the trial court's apt and thorough admonitions could not mitigate the potential for prejudice wrought by the joinder of the cases against the defendant." (Citation omitted; internal quotation marks omitted.) *State* v. *Boscarino*, supra, 204 Conn. 724–25; see also *State* v. *Jennings*, supra, 216 Conn. 660; cf. *State* v. *Atkinson*, supra, 235 Conn. 766–67 (in cases where prejudice not overwhelming curative instructions may tip balance in favor of determining whether right to fair trial was preserved).

Under the facts and circumstances of this case, we conclude that the court's instructions did not cure the improper joinder. Cf. *State* v. *Payne*, supra, 303 Conn. 553–54. In *Payne*, our Supreme Court concluded that the court's instructions to the jury "helped to cure the error" of improper joinder and, thus, that error was harmless. Id., 554. We employ the same analytical technique, but reach a contrary conclusion in this matter. Although the court's efforts to instruct the jury were laudable, they do not provide us with fair assurance that the verdicts were not affected substantially by the error. Similarly, we are not assured that the jury's verdicts were not substantially affected given the prejudice to the defendant from the joinder of these two cases. In a single trial, the jury was presented with a portrait of the defendant as a corrupt politician for two unrelated series of charges. It may well have accepted this characterization of the defendant and accumulated the evidence against him, used the evidence in one case to find him guilty in another, or used the sum of all of the evidence to find the defendant guilty of most of the individual counts contained in the two informations. The duration, nature, and complexity of the two cases

created a situation where the prejudice from joinder could not be remedied by the court's instructions.

The state also argues that because the jury inquired about a specific element of a single count in the bribery case, and then acquitted the defendant of that charge, this demonstrated that it followed the court's instruction and considered the evidence in each case separately. See, e.g., *State* v. *Davis*, supra, 286 Conn. 36–37. We are not persuaded. In *State* v. *Boscarino*, supra, 204 Conn. 724, our Supreme Court noted that an appellate court "can only speculate as to why the jury rendered varying conclusions as to the defendant's guilt . . . . It is beyond our power to probe the minds of the jurors in order to determine what considerations influenced their divergent verdicts." Thus, we disagree that the jury's single not guilty verdict supports the state's argument. As a result, we conclude that the defendant is entitled to new, separate trials on the bribery and extortion charges.

C

We next address the defendant's claim that he suffered substantial prejudice as a result of the trial court's failure to sever the two cases because it improperly compromised his decision to testify in the bribery case and not to testify in the extortion case. We agree with the defendant.

The following additional facts are necessary for our discussion. In his November 2, 2009 objection to the state's motion to consolidate, the defendant briefly mentioned that consolidation would implicate "a host" of his constitutional rights, including "the ability to exercise his right to testify." Aside from this passing reference, the defendant did not discuss this argument further, and his memorandum of law contained no substantive analysis of the matter. On May 18, 2010, in the midst of the state's presentation of evidence on the

bribery charges, defense counsel notified the court and the prosecutor that he would be moving to sever the cases on the ground that the defendant wanted to testify in the bribery case but not in the larceny case. Defense counsel stated that this decision was based on his assessment of Costa as a witness for the prosecution. Two days later, defense counsel filed a motion pursuant to Practice Book § 41-18.[55] He incorporated the previous arguments pertaining to the *Boscarino* factors. Additionally, he expressly claimed that the defendant substantially was prejudiced by the consolidation because he wanted to testify in the bribery case and continue to exercise his fifth amendment[56] right not to testify in the extortion case. In his motion, the defendant provided the following testimony that he would give in the bribery case: "The [d]efendant's reasons for misleading . . . Sullivan during their initial interview on June 27, 2007; [h]ow . . . Costa became involved in the [d]efendant's home renovation project, details regarding when he first approached . . . Costa and requested a bill, the number of times that he personally followed up with Costa regarding his request, and the reasons for his delay in payment . . . [t]he context of his involvement in the letter of May 16, 2006, directed to U.S. Fidelity regarding the Park Street Project; and . . . [t]he context of his involvement in the issuing of emergency and manual checks from the [t]reasurer for the [c]ity . . . to USA Contractors." The motion further stated that the defendant's testimony "on these points, at a minimum, will be absolutely critical for the jury's complete assessment of both his intent, as well as interactions that he alone may have had with . . . Costa. Thus, his ability to exercise his right to testify is critical because he is the sole source of information on these points." Defense counsel also explained why the defen-

[55] See footnote 8 of this opinion.

[56] The fifth amendment to the United States constitution provides in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

dant did not want to testify in the extortion case. These reasons included: (1) the defendant's versions of the underlying facts in the larceny case would be presented to the jury when it heard his interview with Sullivan; (2) the risk of prejudicial cross-examination regarding uncharged misconduct; and (3) his lack of involvement as to why Giles demanded a payment of $100,000.

On May 20, 2010, the court heard argument on the defendant's motion. At this hearing, defense counsel further explained why the defendant did not want to testify with respect to the extortion charges. At the outset, defense counsel noted: "And we're at this point, now, where we have a pretty good sense of what the state's bribery case looks like in terms of the evidence and the credibility of the witnesses. And it's our view that the defendant has to testify in order to explain certain things in connection with the bribery charge. One of which is, the evidence was introduced today regarding the interview by . . . Sullivan on [June 27] at City Hall, and there are other matters that are set out in our papers." Counsel also identified the negatives to having the defendant testify with respect to the extortion charges.[57] Counsel pointed out that this argument

[57] At this hearing, defense counsel argued as follows: "The problem with [the extortion charges]—we have a tape-recorded conversation from . . . Sullivan, which is now an exhibit, and in that tape-recorded conversation we feel that the bulk of the defendant's position is laid out in the interview. And the problem with testifying in the larceny case is, we're going to be subject to attack from several different corners, and one of the areas is all of this so-called prior bad acts evidence or other crimes evidence or whatever it is—misconduct evidence involving . . . Giles, and Giles—there's about a—three different episodes involving . . . Giles; picking up his garbage, his eviction contract and another matter. And so the defendant testifying on those sets of charges is going to be at a great, great disadvantage because he's going to be hit with so many subjects, and it would be difficult to handle that.

"And so if we end up in a situation where these matters are consolidated to verdict, we are going to be having to make some very difficult choices. And one of the choices before us will be whether or not to forgo from testifying at all because we're going to get into charge number two, the larceny charge, and, therefore, not being about to testify in the bribery charge because we can't testify halfway."

had not been presented to the court in a such a specific nature because he needed to evaluate the evidence during the course of the proceedings. After argument from the prosecutor, defense counsel again noted that this claim could be raised only after the state's witnesses testified in court, namely, Costa. He then concluded his argument by stating: "And we've had an opportunity to do that, and consequently, we know we have to testify if we have a chance to persuade the jury to acquit in connection with the bribery case. We feel we do not—from what we know, we do not have to testify or wish to testify in the other case because—for the reason I've already stated." The court then denied the defendant's motion.

The matter was raised again on June 9, 2010, following the state's presentation of evidence regarding the extortion case, when the defendant renewed his arguments in a motion to sever. The court held a hearing on June 11, 2010, where defense counsel provided greater detail of what the defendant's testimony would be.[58]

[58] Specifically, defense counsel stated: "And so what I had prepared to do, with the court's permission, is to lay on the record why it is important for the [defendant] to testify on the bribery [case], and I will list them seriatim; one, he needs to explain the lies that were made to . . . Sullivan with . . . Rose in the room, and he'll testify that he was embarrassed to reveal that he had not paid the bill to . . . Costa with . . . Rose present in the room.

"The efforts—he'll testify as to the efforts he had made to do the home improvement project himself, and the fact that he was at The Home Depot picking out a product—a countertop product; the fact that he had been to other stores doing that before he got to Home Depot. The fact that . . . Costa came down to Home Depot to see him and advised him that he could do it a lot cheaper; and thereafter, the defendant will testify he, at . . . Costa's invitation, he went to his showroom.

"He'll testify as to his historical relationship with . . . Costa as a friend and political supporter that went back many years; and that when . . . Costa was doing the work in his home, he did not view it as a contractor for the city . . . doing the work, but as a friend and will admit, if he testifies, that in retrospect that was a mistake.

"He will testify that he repeatedly requested a bill from . . . Costa. . . . Costa testified that there was a bill request, but I think his testimony was only on one occasion; but [the defendant] will testify when . . . [his wife] came back home from the hospital and they had a reception for her, he asked him for a bill, and he asked him for a bill a number of times thereafter.

"He will testify, Your Honor, concerning the effect of his wife's illness regarding—regarding his conduct, and how it affected him in terms of concentrating, reading material that might have been available to him; focusing on the bill that was due . . . Costa . . . [and Costa would] say, in light of Maria's illness, there was no hurry on the bill, and [the defendant] was focused on Maria's illness and put the payment of the bill on the back burner and really did not think there was any immediacy to pay it, although he had every intention to pay it.

"Furthermore, his problem [in] terms of focus and the problems with the bill, was tremendously compounded by BlueCross and BlueShield's refusal to pay the medical bills for the doctor in New York at Columbia Presbyterian Hospital, and he would receive bill after bill from Medicare, BlueCross/BlueShield showing large balances that were due; and this—and this caused him to realize that he might have to get a major loan, not $20,000 loan, but a major loan, not only to pay for the medical bills, but also to pay . . . Costa. And the medical bills just—were not resolved for a long period of time after [Maria's] surgery.

"He will further testify of his lack of involvement in the home improvement project, and that, principally . . . Costa interacted with Maria Perez and that he had little, if anything, to do with it because most of the time he was off and running . . . City Hall, getting home late in the day from his school board duties, and his many, many obligations as the mayor of the city . . . . And he seldom saw . . . Costa at the house or his workmen at the house.

"He'll further testify that he—when he asked . . . Costa for the bill . . . Costa told him that it was going to run between twenty-six and twenty-eight thousand dollars, and he was stunned by that amount. And he'll testify concerning that, in support of his claim, that he had every intention to pay the bill, otherwise he would not have been stunned by the amount that . . . Costa quoted him.

"He'll testify that when he finally got the bill from . . . Costa, he did not read the bill; he did not analyze the bill. He simply saw that the amount was twenty-thousand plus, and he was relieved that it wasn't twenty-six or twenty-eight thousand. And there was no knowledge, on his part, that the bill was incomplete and misleading or whatever. He just saw that number, $20,000, and he was pleased that it was—it was in that ballpark.

"He'll testify that the decision to turn over the bill—the invoice, through counsel, to the office of the chief state's attorney was in no way intended to mislead the state, it simply was in an attempt to show the state what they asked for, which was the bill he received from . . . Costa.

"He'll further testify, Your Honor, that his involvement with Costa regarding the Park Street—regarding the Park Street project, he'll further testify concerning his decision to get . . . Crocini involved in the project. He'll testify as to the project's delay, and that it was an important project to him for many reasons. Once it was—it was a project to benefit the Latino community, of which he was obviously a part and a leader; and also a source of pride to be able to develop something that had not been developed over the years by any predecessor mayors.

"He'll testify concerning his decision to accept and follow . . . Crocini's decision or recommendation to send the May 16, 2006 letter to United States Fidelity/Saint Paul's Insurance Company, and he will deny that accusation made by . . . Patel that there was an episode in his office where he was shaking a letter and saying what the F is this; that never occurred, he will testify in his own defense.

"He will further testify that his decision not to assist . . . Costa in his quest for the payment of claims and extras, and many of which were detailed

Defense counsel then explained why the defendant would not testify with respect to the extortion case.[59]

in the lawsuit and other documents, that he did not, in any way, participate to help . . . Costa get those paid.

"He'll testify about his concern of a delay on the Park Street project—if the project were delayed by terminating . . . Costa, and the tremendous problems it would cause him, not only in his service to the Latino community, but also politically by the reaction among the merchants and other people who were interested in the project.

"He will further testify that there were many more projects and issues that required his time and attention during the 2005-2007 period of time when Park Street was going on, including the school building projects, the library construction controversy, and the issues of violent crime in the city . . . and that when compared—with these problems compared to [the] Park Street streetscape project, the Park Street project was a minor project in terms of his priorities at the city . . . and the enormity of the other projects that he was involved in, including the eleven school projects, which were budgeted at between four hundred and five hundred million dollars.

"He will further testify that the—that [the] practice of supporting businessmen like—minority businessmen or contractors, like USA Contractors, was one of his top priorities as a mayor and as a candidate for mayor and in following through with that commitment, he would make efforts to make sure that they got their approved invoices paid in a timely manner out of the treasurer's office.

"He will testify as to the reasons he took to help [to] get some of . . . Costa's approved invoices paid. He will testify that he devoted his life to public service, and further testify that he is not interested in worldly possessions or the accumulation of wealth or other material things.

"He will also testify that his religious convictions guide his conduct, and those convictions would not, in any way, permit him to accept a bribe or to do anything that not only—or to fabricate evidence, or anything else that would violate his moral code."

[59] "This—he would not offer testimony because of a number of reasons. One of which is the credibility of . . . Citino. The defendant is of the view that . . . Citino is not a believable witness, is a convicted felon, is a bully, and, in fact, is a person who threatened the [defendant] when he didn't get his way with regard to the Davis Building development. So, he will rely to a large extent on the credibility—a lack of credibility of . . . Citino.

"He will further rely upon the audiotape, that is in evidence, that details essentially substantial form, although there are a couple of issues there, too, but substantially lays out his defense with regard to why he wanted . . . Giles to remain until the construction project began; that is in evidence, there's no need to deal with that.

"The other issue of importance is that charge is . . . Giles' rights vis-vis 1143 Main Street. The testimony in there is very strong, that a lot of pretty intelligent people thought that . . . Giles had rights to that property, either in the form of a lease, or in the form of a contract, or in the form of a management agreement. The evidence is clear, for example, that [Jon] Concilio [of Chozick Realty in Hartford] prepared a document that talked about the lease. Mr. Palmieri, early on—this is evidence—these are in evi-

The court, after hearing argument from the parties noted that the defendant had made a showing as to why he wanted to testify in the bribery case and not to testify in the extortion case. Nevertheless, it denied the defendant's motion to sever the two cases.[60]

dence, produced a document that indicated that . . . Giles had certain rights. [John] Kardaras, the lawyer representing . . . Giles, thought he had certain rights, and that the fact that he had a sublease to LAZ, LAZ thought he had certain—he had a lease, and Giles represented in the sublease with LAZ that he had a lease. And remarkable, that five year lease—when the approach was made to Giles by Citino, through Mr. Concilio, to try to work out something, the balance that was due on that lease if it had gone to term, was $106,000. The full value of it was one-thirty-five, but at the time, it was $106,000.

"The testimony is in with—regarding to the Redevelopment Agency minutes, and the fact that, obviously, at some point in time . . . Giles had rights to that property; he had his rent reduced at that property; he then had his rent reduced again.

"So, the essence of the defense is that everyone reasonably believed that . . . Giles had rights, and that those rights had to be considered as part of the transaction, and that the request that he be allowed to park there until the building came down and the project began, it's based upon the testimony of other people and other exhibits, and there's no need for the defendant to get on the [witness] stand and talk about that.

"The downside, Your Honor, of [the defendant] getting on the stand to testify on this charge of larceny by extortion . . . I rely upon the arrest warrant affidavit, in those areas where the state spends a lot of time detailing all of these favors that [the defendant] did for . . . Giles. First, 1214 Main Street, that is going to be revisited on cross-examination if he takes the stand. The reduction of his rent as—over at 1143 Main Street will be attacked; the increase in his eviction fees that were given to Giles, that will be attacked; the removal of large amounts of garbage from Giles' business location, that will be attacked. The fact that Giles was trying to sell, in his warehouse—or make an arrangement of his warehouse for storage, this will be attacked.

"Now, that's bad enough, because now we're getting into conduct that the jury has not heard about except 1214 Main Street, and that is going to paint the picture—a negative picture of the [defendant] that would not be the case if we were just dealing with [the] bribery count.

"And in addition, Your Honor, we would have this problem if he took the stand. We have the e-mails, the most powerful evidence that the state has are these e-mails that Citino sent to the [defendant's] office; March 15—I think March 5, March 16, April 23—and those emails would permit a cross-examination to go on for a long period of time; did you read this, did you read this, did you see this, I mean, we could imagine how devastating that type of cross is going to be. And that is something that we feel is one of the—one of the principal reasons that we elect not to testify on that count."

[60] The state argues that pursuant to *State* v. *Harrell*, 199 Conn. 255, 265, 506 A.2d 1041 (1986), the defendant was required to testify in order to obtain appellate review of his claim. We conclude that *Harrell* is distinguishable,

We begin our analysis with a brief review of the relevant case law. In *State* v. *Schroff*, supra, 198 Conn. 408, the defendant filed a motion to sever on the ground that he wanted to testify as to the sexual assault and kidnapping charges that had been lodged against him, but not to testify as to the firearms charges that had been lodged against him. At the outset of its analysis, the court noted that the matter of severance was within the sound discretion of the trial court and that the defendant bore a heavy burden of showing substantial injustice. Id., 408–409. Our Supreme Court then detailed the test for determining whether the denial of the motion to sever was proper; that is, balancing expedition and economy of judicial resources against the defendant's interest in having a free choice regarding testifying. Id., 409. Before that question could be answered, however, the defendant was required to provide the trial court with his reasons for testifying in one case and not the other. "[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

and thus not applicable to the present case. In *Harrell*, our Supreme Court stated that it would follow the rule of *Luce* v. *United States*, 469 U.S. 38, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984), on a prospective basis. *State* v. *Harrell*, supra, 265. "The *Luce* court . . . held that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." (Internal quotation marks omitted.) Id., 265–66. The defendant in the present case did not present a claim of improper impeachment with a prior conviction; therefore, this case does not come within the scope of *Harrell*.

a free choice with respect to testifying." (Internal quotation marks omitted.) Id.; see also *State* v. *King*, 187 Conn. 292, 306–307, 445 A.2d 901 (1982), overruled in part on other grounds by *State* v. *Payne*, 303 Conn. 538, 547, 34 A.3d 370 (2012). The court concluded that the defendant had failed to substantiate his claim of substantial prejudice, and therefore his claim failed on appeal. *State* v. *Schroff*, supra, 410.

We now turn to the seminal case on this issue, *State* v. *Chance*, 236 Conn. 31, 671 A.2d 323 (1996). In *Chance*, the defendant raised a pretrial objection to the state's motion to consolidate, arguing that he might elect to testify in one case and not the other. Id., 45. Our Supreme Court concluded that the defendant had failed to establish that the trial court abused its discretion in consolidating the cases pursuant to *State* v. *Schroff*, supra, 198 Conn. 405. "The trial court properly overruled the defendant's pretrial objection to the consolidation of the arson charge and the assault charge because the defendant failed to divulge a clear intent to testify as to one count but not the other." *State* v. *Chance*, supra, 46. The court acknowledged that "there are cases in which a defendant will have legitimate reasons for being unable to make a decision as to whether to testify until shortly before trial begins, and that a court should not prod defendants to make that decision prematurely. . . . After the trial commenced, the defendant never again reasserted his claim that his decision concerning whether to testify was being or had been in any way infringed upon by the consolidation of the charges against him. *Once the defendant's intentions as to testifying became clear, he could and should have made them clear to the trial court and renewed his objection to consolidation on the grounds that he had been deprived of a meaningful choice as to whether to testify.*" (Emphasis added.) Id., 47–48.

We now apply *Chance* and *Schroff* to the facts of the present case. In his pretrial opposition to the state's motion to consolidate, the defendant argued that consolidation implicated a "host of [his] constitutional rights . . . including . . . the ability to exercise his right to testify." Standing alone, the mere mention of this right does not meet the requirements of *State* v. *Chance*, supra, 236 Conn. 46; see also *Closs* v. *Leapley*, 18 F.3d 574, 578–79 (8th Cir. 1994) (defendant failed to offer specifics as to why he was not willing to testify as to all counts). Put another way, the defendant's pretrial objection to the state's motion to consolidate, by itself, fails to substantiate his claim of prejudice. See *State* v. *Schroff*, supra, 198 Conn. 410.

Our Supreme Court recognized in *Chance* that when a defendant's intentions regarding testifying become clear during the trial, he or she must make them clear to the court by renewing his objection to consolidation. *State* v. *Chance*, supra, 236 Conn. 47–48. The defendant followed this course when he filed his motion to sever on May 20, 2010, following the conclusion of the state's evidence as to the bribery charges. Specifically, the defendant stated: "In addition to those grounds previously articulated in his original objection to joinder, it is now clear that the [d]efendant will be even more substantially prejudiced because he wishes to testify regarding the [s]tate's bribery charges, but will continue to exercise his fifth amendment right not to testify regarding the larceny charges. Even if the [c]ourt's original decision on joinder was arguably correct, this additional ground (which is based on an analysis of the evidence that has been submitted thus far at trial) is substantial and warrants severance." On May 20, 2010, in both the motion and at the subsequent hearing, the defendant explained the important need to testify in the bribery case, i.e., his reason for lying to Sullivan and the defendant's responses to Costa's testimony,

and the strong need to refrain from testifying in the extortion case, i.e., avoiding cross-examination on areas of uncharged misconduct. Additionally, at the conclusion of the state's cases, the defendant provided a more specific explanation of his bases for wanting to testify only as to the bribery case. See footnotes 57 and 58 of this opinion.

The state presented evidence in the bribery case that revealed that the defendant had lied to Sullivan. Specifically, during the interview with Sullivan, the defendant falsely stated that he had paid Costa approximately $20,000 for the work done on his house. The jury also heard testimony of the defendant's conduct following the interview, including backdating his application for a home equity loan. The need to rehabilitate these untruths is evident, and to do that, the defendant's testimony was required. In contrast, the defendant's defense with respect to the extortion case consisted of his strategy that a jury would find him more credible than Citino, a convicted felon. This course of action sustained significant damage when the jury heard the defendant's falsehoods regarding the bribery case. Had the trials been severed, a jury hearing the extortion charges would not have known of the defendant's lies to Sullivan and a jury hearing the bribery case would have had to determine whether to accept the defendant's explanation regarding his interview with Sullivan, and whether to believe his version of interactions with Costa, both as to his home and the city project. See, e.g., *Cross* v. *United States*, 335 F.2d 990–91 (D.C. Cir. 1964). Under these facts and circumstances, we conclude that the defendant's interest in testifying in one case outweighed the considerations of judicial economy. We conclude, therefore, that the court abused its discretion in failing to sever the bribery case from the extortion case.

We turn briefly to the issue of harm. This claim, unlike the defendant's *Boscarino* argument, is of constitutional magnitude. In *State* v. *King*, supra, 187 Conn.

303–304, our Supreme Court observed: "As to any influence on the defendant's decision to testify which the joinder might have had, we note that this claim was never raised at trial or at the hearing on the pretrial motion for joinder. Since this claim does implicate a fundamental constitutional right, i.e., the right of an accused to testify; see Connecticut Const., art. I. § 8; we will review this claim." (Footnote omitted; internal quotation marks omitted.) Therefore, the state bears the burden of proving that the impropriety was harmless beyond a reasonable doubt. See *State* v. *Melendez*, 291 Conn. 693, 711, 970 A.2d 64 (2009). The state has not briefed the issue of harmlessness and thus has failed to carry its burden. Consequently, we conclude that the defendant's conviction must be reversed and that he is entitled to new trials on the bribery and extortion charges.

The judgments are reversed and the cases are remanded for new, separate trials on the bribery and extortion charges.

In this opinion BISHOP, J., concurred.

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).

[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).

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

[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).

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]

[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

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

the *Davis* concurrence, the cases cited therein, and the present case concerns evidence that may come before the jury if the cases are consolidated.

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

[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).

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

[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).

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]

[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

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).

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.

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]

[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.

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

"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.

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.

PAUL FINE *v.* COMMISSIONER OF CORRECTION (AC 34683)

Sheldon, Keller and West, Js.

Syllabus

The petitioner, who had been convicted on guilty pleas of the crimes of murder and assault in the first degree, sought a writ of habeas corpus claiming that he had received ineffective assistance from his trial counsel and that, as a result, his guilty pleas were not knowing, intelligent or voluntary. The habeas court granted the motion to dismiss filed by the respondent Commissioner of Correction and rendered judgment dismissing the petition, from which the petitioner, on the granting of certification, appealed to this court. He claimed that the habeas court, in dismissing his petition, improperly concluded that he had intentionally and knowingly withdrawn a prior habeas petition with prejudice, thereby waiving his right to bring the present habeas petition, which was virtually identical to the prior petition. *Held* that the habeas court improperly dismissed the habeas petition, the respondent, as the party moving for a dismissal of the present petition, having failed to make a showing that a valid, enforceable waiver of the petitioner's right to petition for a writ of habeas corpus had occurred in connection with the prior petition; although it was not in dispute that the petitioner withdrew his prior petition, the record did not support a finding that the petitioner knowingly, voluntarily and intelligently waived his right to bring any habeas petition related to the ineffective assistance of his trial counsel, as the respondent did not introduce a transcript of the prior proceeding, the court file related to the prior petition was not before the habeas court, a copy of the withdrawal form filed in that proceeding did not indicate that a withdrawal with prejudice had occurred, neither party asserted that the prior habeas court had imposed any sanction on the petitioner that precluded him from bringing any related petitions thereafter, and the respondent did not make an affirmative showing that, at the time of the withdrawal, the petitioner was apprised of and understood the right being waived and the consequences of his waiver.

Argued September 26—officially released December 17, 2013

SUPREME COURT

STATE OF CONNECTICUT

FEB 27 2014

NO. PSC-13-0281

State of Connecticut

v.

Eddie A. Perez

ORDER ON PETITION FOR CERTIFICATION TO APPEAL

On consideration of the petition by the State of Connecticut for certification to appeal from the Appellate Court (147 Conn. App. 53 [AC 32747]), it is hereby ordered that said petition be, and the same is hereby granted, limited to the following issues:

1. Did the Appellate Court properly determine that the trial court abused its discretion in joining two political corruption cases for trial and that such joinder was not harmless?

2. Did the Appellate Court properly determine that the trial court's refusal to sever the cases violated the defendant's right to testify in one case while remaining silent in the other?

Eveleigh, J., did not participate in the discussion or decision of this petition for certification.

BY THE COURT,

Alan M. Gannuscio

ALAN M. GANNUSCIO
ASSISTANT CLERK-APPELLATE

Dated:2/26/2014

S.C. 19285

STATE OF CONNECTICUT	:	SUPREME COURT
V.	:	STATE OF CONNECTICUT
EDDIE A. PEREZ	:	MARCH 19, 2014

STATE OF CONNECTICUT-APPELLANT
REVISED DOCKETING STATEMENT

Pursuant to Connecticut Practice Book §§ 63-4 (a)(4), the State of Connecticut-Appellant hereby states the following:

1. The names and addresses of all parties to the appeal and their counsel:

The State of Connecticut:

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Benjamin B. Adams, Esquire

2. The State knows of no person having a legal interest in this appeal sufficient to raise a substantial question regarding the disqualification of any Supreme Court Justice.

3. There were exhibits in the trial court.

4. The defendant is not incarcerated as a result of these proceedings.

Respectfully submitted,

STATE OF CONNECTICUT- APPELLANT

By: _____

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CERTIFICATION

Pursuant to Practice Book § 62-7 and 66-3, the undersigned hereby certifies that a copy of this document was mailed to Hubert J. Santos, Esquire and Jessica Santos, Esquire, Law Office of Hubert Santos, 51 Russ Street, Hartford, CT 06106, Tel: (860) 249-6548, Fax: (860) 724-5533, on March 19, 2014.

_____

HARRY WELLER
Senior Assistant State's Attorney

HHD-CR09-628569T HHD-CR09-635038T	: SUPERIOR COURT
STATE OF CONNECTICUT	: JUDICIAL DISTRICT
V.	: HARTFORD, CONNECTICUT
EDDIE A. PEREZ	: NOVEMBER 4, 2009

B E F O R E :

THE HONORABLE JULIA D. DEWEY, JUDGE

A P P E A R A N C E S :

REPRESENTING THE STATE

Christopher Alexy, Esq.
Assistant State's Attorney

REPRESENTING THE DEFENDANT

Hubert Santos, Esq.
Benjamin Adams, Esq.

Recorded and Transcribed By:
Karen Kobylenski
Court Recording Monitor
101 Lafayette Street
Hartford, Connecticut 06106

THE COURT: All right. We're here on the State's motion to consolidate in the matter of State versus Perez, if the parties could identify themselves for the record please.

MR. ALEXY: Good morning, Your Honor. Christopher Alexy from the Chief State's Attorney's office.

MR. SANTOS: Hurbert Santos for the defendant and with me is Attorney Benjamin Adams.

THE COURT: All right. Since your client is not here I presume this is just going to be the legal argument then. Correct?

MR. SANTOS: Yes.

THE COURT: It's your motion, Counsel.

MR. ALEXY: Thank you, Your Honor.

I filed a motion dated September 10th moving to consolidate the two cases involving Mr. Perez. This is the type of motion that Courts and judges deal on a regular basis. And as a result, I merely cited two cases, *State versus Davis* and *State versus Rodriquez*, as well as the Practice Book section, which permits, at the Court's discretion, the consolidation of the cases. I'm sure the Court has researched this matter.

THE COURT: I think that *Davis* is also cited by the defendant in the defendant's brief.

MR. ALEXY: That's correct. There are limited

issues involved that the Court must decide, four in particular. First, whether joinder would foster judicial economy; second, whether the crimes alleged are of a brutal or shocking nature; third, do they involve easily distinguishable factual scenarios; and four; with presentation of an orderly sequence of the evidence contribute to the distinguishability of the facts of the case in question. I will address each of those four points very briefly.

Number one, the cases do involve easily distinguishable factual scenarios. In fact, they involve conduct that occurred in different years. The first case involves conduct that occurred in the year 2005, second case involves conduct that occurred in 2006/2007. The parties involved are two separate parties. The charges do not relate to each other in any way.

Second, obviously --

THE COURT: Counsel, if you could just keep your voice up. The monitor is having a little difficulty hearing you.

MR. ALEXY: I apologize, Your Honor. I'm a little under the weather today --

THE COURT: All right.

MR. ALEXY: -- with the flu or a cold.

The charges obviously do not involve brutal and shocking conduct. These are charges of attempted

bribery and things of that nature, essentially financial type of crimes, as opposed to violent crimes such as occurred in *State versus Boscurino*.

Third, the state believes that this would foster judicial economy and that there would only be one jury selection. Some discussion in terms of the scheduling order and I believe the actually scheduling order allowed for three to four weeks to select a jury in the initial case, we would be -- if they're consolidated still selecting just one jury. If the cases were separated we would be, in fact, adding another three to four weeks for a separate jury selection that would be involved.

THE COURT: How much time are you estimating the additional charges would take is the question?

MR. ALEXY: I estimate that the additional charges would take no longer than the initial charges.

THE COURT: Which is?

MR. ALEXY: I believe we had thought in the range of two, perhaps three weeks maximum.

THE COURT: So now you're talking six weeks?

MR. ALEXY: Correct.

THE COURT: All right. Continue.

MR. ALEXY: Thank you. The other consideration that the Court should consider is whether the Court's instructions would be able to assist the jury in being able to consider the cases separately. There is no

doubt in my mind that with orderly presentation of evidence -- presenting evidence in the first case first, the second case second, and with the Court's instructions, not just during voir dire, but throughout the case, would inform the jury that the cases are to be considered separately. And there have been a number of instances, reported decisions where, in fact, the jurors had no trouble doing that; occasionally finding acquittal on one charge in one case, convictions in the other case. So again, I believe that orderly presentation of evidence would pose -- or rather make it very easy for the jurors to separate the two cases.

I would like to respond briefly to a couple points raised in the defendant's memorandum. The first is that the -- suggests that the state would have been better serve -- or judicial economy would have been better served had the state moved to consolidate the first case involving the defendant -- I'm sorry, the second case involving the defendant with the case involving Mr. Giles. The problem with that is that it raises a host of potential *Bruton* issues because they are co-defendants, they are charged as co-conspirators in that case and no doubt that would be a frivolous motion to try to do that.

Second, the defendant has consistently said, in fact, from day one of the arraignment that he wanted these issues resolved quickly and speedily so he could

get about the business of continuing to govern the City of Hartford. In this matter we will be able to accomplish that where the defendant would not have to sit here through another three to four weeks of daily jury selection.

The other point is that again, the defendant is claiming that the state tried to derail the first scheduling order by the timing of the arrest. I think we have been over that before. And the defendant has, for whatever reason, decided to include private correspondence between myself and him along with this motion so I feel no compulsion to restrain from indicating that I've had discussion with defense counsel since the first arrest, informing him that if the -- and it was in January, that if the grand juror found probable cause in the second case, if our office, after reviewing all the evidence, determined that it was a case that we could prosecute and would likely prevail, that we would be seeking an arrest warrant or applying for an arrest warrant, and that if a neutral magistrate signed off on that warrant, that then there would be another arrest.

The defendant did correspond with my office, asking that that case -- that the arrest not occur until 2010. However, most recently the defendant filed, in a public document, in the Supreme Court. There was the motion for contempt that was denied and

the defendant requested that in the alternative that the Supreme Court schedule these cases for 2012. Coincidently, that would be the time -- the year that the mayor's term would have expired and he would be eligible for City benefits. I don't believe that is realistic that the trial court would grant an extension until that time, but it would -- one could conclude that this attempt to -- not to object to the consolidation of the trials, there's an attempt to delay the trial for as long as possible.

And with the Court's permission I'll reserve any other comments until the defendant has concluded his argument.

THE COURT: You'll be allowed a brief rebuttal.

MR. ALEXY: Thank you.

THE COURT: Attorney Santos.

MR. SANTOS: Yes, thank you.

Your Honor, the issue before Your Honor I think is unique in the sense that we really haven't had a consolidation case reported in Connecticut that involves this type of scenario, that is, complicated white-collar cases. Invariably the cases that we see reported are either burglaries where there are six burglaries, sexual assaults where there's four assaults, or other type of street crime. This white-collar -- so-called white-collar offenses have not -- we cannot find one in Connecticut.

The reason this is important, Your Honor, it goes to the issue that Your Honor has to consider in terms of some of the *Boscarino* factors as to the complexity and the duration of the trial if both matters are joined.

I would submit to Your Honor that there's another unique aspect to this. The defendant is charged with a conspiracy involving Mr. Giles. There's no attempt to consolidate the Giles conspiracy count with this case, even though the mayor will be charged with conspiracy to extort money from this fellow, Citino, the developer.

THE COURT: You hadn't requested a consolidation.

MR. SANTOS: I'm sorry?

THE COURT: You haven't requested that either, have you?

(Pause)

THE COURT: You haven't requested that the cases be joined.

MR. SANTOS: Well, no, no. But I think that -- what I'm saying is it's -- we don't want -- we don't want a consolidation of everything. But what I'm saying is this idea of judicial economy, the state would have to try this case if the Court orders it consolidated, that is the new arrest. Then it would have to try Giles on the same facts on the conspiracy

case.

Giles is important to the defendant because he is -- he has significant exculpatory information for this defendant and this is a factor that is not really mentioned in any of the cases. I think that it's clear that no one ever intended the *Bascarino* factors to be exhaustive. But you take -- here's the situation, Your Honor. If there is a trial on this new arrest, separate from the bribery case of Mr. Giles and Mr. Perez, or if it's going to be consolidated with Mr. Giles and Mr. Perez, we would be in a better circumstance where Mr. Giles would testify than we would be if we proceeded on a trial of Mr. Perez on both, the first arrest for bribery and the new arrest for extortion. Because obviously if we proceed first with a consolidated trial concerning the new charges, Mr. Giles is -- is not going to testify because he's going to rely upon his Fifth Amendment privilege and any lawyer would advise him to do so. And so Mr. Giles will be unavailable to us, a critical witness with exculpatory information. As a matter of fact, some of the exculpatory information is laid out in the arrest warrant affidavit at page 23 where they interview Mr. Giles and he states that he never discussed his being taken care of with Mayor Perez. Giles stated that the $100,000 payment from Citino was not related to any promise of political support for Mayor Perez. Giles

stated he did support Perez in the 2007 election, may have supported him in 2003, did not support him in 2001. And there's more to it in our judgment based upon my conversations with Mr. Kelly; Mr. Kelly couldn't go into detail.

But one of the reasons we wanted to get discovery before we argue this motion is -- and the state has tried. I mean there's a letter attached to our submission where the state indicates the complexity of complying with discovery.

THE COURT: Well actually there's not going to be a letter but there is a response, at least in the Court file, that indicates all the matters have been available since March. Is that incorrect, Counsel, that all of this material has been available since last March?

MR. ALEXY: All the material for the first case has been available since last March. All the materials --

THE COURT: How about the second case?

MR. ALEXY: All the material for the second case has been available. We have an open file policy. It's available since the time of arrest.

MR. SANTOS: Well, the state provides us, as I understand what I received --

THE COURT: Have you gone to the Chief State's Attorney's office to look at the information?

MR. SANTOS: No, Your Honor. Because they have provided it to us, in other words, in the first arrest, they, in a very timely manner, provided to us the grand jury testimony of all of the witnesses that they either called before the grand jury or that they intended to call before the grand jury.

In the -- this case, we have not received that compliance, which is their obligation --

THE COURT: Is their obligation to hand it to you or for you to have it available to you?

MR. SANTOS: I think provide us with copies of it, Your Honor, I don't think --

THE COURT: Are you supposed to provide them with copies?

MR. ALEXY: I'm sorry, Your Honor?

THE COURT: Are you supposed to provide them with copies?

MR. ALEXY: Pratice Book says we have to make them available for copying and inspection to the defense.

THE COURT: Exactly.

MR. SANTOS: Your Honor, tab A --

THE COURT: I'm familiar with it, move on, Counsel.

MR. SANTOS: Right. And Tab A is important for another reason. One hundred witnesses, the state has to review in terms of the -- apparently one hundred

witnesses either called before the grand jury, or witnesses that they interviewed outside the grand jury. And that's an indication, I would submit to Your Honor, the complexity of the second case to put them together.

So as far as the case law and the *Bascarino* factors, this is a different type of case than we've had in the street crime areas that -- for example one case that was cited for burglaries, the trial lasted four days. I suspect the other cases lasted shorter periods or not substantially longer.

I beg to differ with the prosecution. I suspect that this case, if we're talking about the possibility of one hundred witnesses, having been interviewed, then I suspect that this is going to be double or triple the original trial.

THE COURT: Well, we just did jury selection in a case where there were approximately two hundred witnesses and it's a four-week trial. So I'm guessing it's going to closer to four weeks, Counsel.

MR. SANTOS: Well, Your Honor, you don't know and I don't know and the state --

THE COURT: I'm guessing it's going to be closer to four weeks.

MR. SANTOS: And the problem is if Your Honor guesses wrong --

THE COURT: I might.

MR. SANTOS: It really is a problem here in

terms of duration.

The other problem in duration is jury selection. Because my observations just in this Lawlor case that we've been presiding over, you don't get that many Hispanics being called in.

THE COURT: Well actually, I looked to the list. There were quite a few Hispanics. Many were challenged and many were excused but there were quite a few called in.

MR. SANTOS: Well I didn't see that many as Your Honor saw. But if you get a situation, and of course we're looking for a cross section of the community.

THE COURT: Yes, we are.

MR. SANTOS: And we're not looking for executives of CIGNA, we're looking for people who live in the community, work in the community, and are a representative of the cross section of the community that the defendant interacts with. That's why we haven't moved for a change in venue.

THE COURT: The defendant interacts act with or in Hartford County. Which is the city?

MR. SANTOS: With Hartford. I mean --

THE COURT: Hartford County or Hartford, it's --

MR. SANTOS: Well, in terms --

THE COURT: The community -- excuse me, the community makes a difference in a venire.

MR. SANTOS: Well --

THE COURT: It's not just Hartford that we select from, it's Hartford County, Counsel.

MR. SANTOS: This is true.

THE COURT: Right.

MR. SANTOS: But this a minority defendant.

THE COURT: I know you want people from Hartford, but the venire is from Hartford County.

MR. SANTOS: I agree. But all I'm trying to say, Your Honor, is this a minority defendant and that a minority defendant stands in a different posture, I would submit, in terms of the jury pool. That maybe the pool is going to be the Judicial District of Hartford, which of course will be, but I'm saying that once you double or triple or quadruple, the length of the trial, the chances of getting Hispanic jurors is going to be substantially diminished. We're going to be left with retirees, corporate employees, or state employees.

THE COURT: Or municipal employees.

MR. SANTOS: Municipal employees, yeah.

THE COURT: Or hospital employees or employees from anyone who allows jury service.

MR. SANTOS: But I think, Your Honor, we're not going to get people, in my -- the bulk of the Hispanic community is in Hartford, and you're not going to get the type of people who have regular jobs and who are the people that -- most certainly we'd like some of

those people that would be on the jury.

Your Honor, let me just go back to Mr. Giles, if I might, for one moment.

THE COURT: Certainly.

MR. SANTOS: The critical part of this -- and this is why I wanted to get the discovery before we got -- before the argument, Mr. Giles had an attorney that negotiated this $100,000 payment to Citino -- either Citino had a lawyer also or with Citino, that lawyer testified before the grand jury. I suspect that either by way of testifying or for other reasons, that that lawyer has within his possession, as does Mr. Giles, substantial exculpatory information. Because the bottom line is that this was a business deal that the state has put a twist on and now claims is extortion. So the ability for us to call Mr. Giles, Your Honor, is a critical factor that is not in *Bascarino*. Of course, this could be cured very easily by the Court, and the Court could order the bribery trial to go first and then the Giles conspiracy trial to go second, either with or without Mayor Perez.

For example, Giles has a -- apparently has a application for Accelerated Rehabilitation; that's before a different judge as I understand it than Your Honor.

THE COURT: Yes, it is.

MR. SANTOS: If a Court grants that and puts him

on AR, for example, he will not be available until that AR period is completed. And Mr. Giles, I believe, is 83 years old. So it seems to me that the availability of that witness's is critical to Mr. Perez's defense and that could be accomplished in one of two ways. The second case, that is the Giles case -- and if Your Honor orders could go first. I don't -- I oppose that because we've been preparing the bribery case for eight or nine months this year, and the state decided to file the -- make the arrest just before jury selection, when, in fact, there was no reason for that. And I wrote to Mr. King and I asked him, don't make the arrest until after the bribery trial is over. There's no prejudice to the state and we could have our trial, and then if there is another warrant for Mr. Perez, we can try that case. But the state decided to proceed otherwise.

Your Honor, and unlike these other cases that are cited and -- we have this critical question of cross-admissibility. And the state is basically conceded, as I heard it, but they don't claim cross-admissibility; they most certainly do not claim it in their papers. And there are a number of cases that have been reversed because with a consolidation there has been evidence that was not cross-admissible.

Now on this most recent *Davis* case, the three to two opinion by Justice Rogers, Chief Justice Rogers,

the Court seems to say, well that may not be critical because we could have different jury charges here. The jury could be instructed to ignore it, but Your Honor that is, I think, judicial pie-in-the-sky thinking with all due respect to the Chief Justice. Because in the reality of a courtroom, when you have a defendant where you do not have cross-admissible evidence that's all being presented to the jury, that's got to have a prejudicial effect.

And this is not the kind of case where, as the case with -- I think Judge LaCarey had it with the burglaries or sexual assault, one of which was violent and brutal, the Court can instruct the jury over four, five six-day period. Here we're going to go four weeks, eight weeks, twelve weeks, and I submit to Your Honor that that's going to be a problem.

Also, this case has a unique aspect in this regard: Many of the witnesses overlap because they're City people, City employees. So in phase one, the bribery case, you're going to have Mr. Morrison, for example from the City, Mr. Patel from the City, and other people from the City that are going to testify about the bribery. And then on case two, the extortion, you're going to have Mr. Morrison testify, Mr. Patel, and other people from the City. And once again, you could have a credibility attack on case two, let's say, on Mr. Morrison or Mr. Patel, or visa versa

that will prejudice the defendant.

There also, in this case, unlike the other cases that are cited, the issues -- the legal issues are complex. They may not be complex as lawyers to judges or judges to lawyers, but when a jury is instructed, for example, in the crime of bribery, that is not a simple statute I respectfully submit because the Court's have disagreed upon it in terms of quid pro quo or the corrupt intent and whether or not there needs to be a nexus with a benefit, and I submit that it took the Second Circuit in the -- in the *Ganim* case some long and tortured reasoning to conclude with they concluded.

On the issue of the attempted extortion of Mr. Citino, which is the criminal attempt to commit extortion and conspiracy to commit extortion, you have that statute and you also have the whole concept of renunciation, which the state understands is pivotal issue in that case because in the arrest warrant affidavit on the last page, they indicated that the actions of Mayor Perez was not a renunciation within the meaning of 53a-50, as it was motivated by rising costs for the developer, which made the accomplishment of the criminal objective, getting the money for Giles, more difficult. Well, need I say more? I mean that is going to take us right down another road, that little -- that little question.

Plus, Your Honor, you have this unique aspect of this case. The new charges are full of sub plots, and they're all in the affidavit. And you have them there at pages 16 to 21 in the affidavit. There's the question of the triangle lot. There's a question of Mr. Giles attempt to lease Giles' warehouse. There's a section on eviction fee increases. There's a section on the dumpster at 726 Windsor Street. There's a question of new moving services contract, all related to Mr. Giles. So this is -- we're going to be going down a lot of roads if the state puts on its case consistent with the affidavit or close to the affidavit.

So I would respectfully submit, Your Honor, that this a unique type of case that really would be, I think, fair to both sides actually, because the issues on the bribery -- although the bribery -- legal issues may be complex. The issues are relatively straight forward. Work was done at the house and benefits were conferred to Mr. -- the developer Mr. Carlos Costa later on and was that -- was that a bribery? And that really is part of it.

And so I would submit, Your Honor, that consistent with what we've been doing all year, which is getting ready for the bribery case, which we're ready to go if everyone were available, and now, you know, what happened here is -- with the new charges and

the state's desire to consolidate them, we have to do catch-up here in terms of preparing for that case and I know it's not a consideration, but I did switch my jury schedule because I thought the bribery case was going in September, and now --

THE COURT: But then you picked up the Lawlor case in the middle. I mean that case was not -- you were --

MR. SANTOS: I -- I was approached by the Lawlor case, Your Honor, much earlier.

THE COURT: I know but that case came right in the middle. You should have been doing the Perez case, instead of the Lawlor case was being done. Because Perez --

MR. SANTOS: I was ready to do the Perez case; that was with Your Honor.

THE COURT: I understand.

MR. SANTOS: But then Your Honor was available and there was a Supreme Court decision that came down and Lawlor was moved up much quicker than anticipated.

So for --

THE COURT: Are you going to be available, Counselor?

MR. SANTOS: I'm sorry?

THE COURT: It begs the question, are you available right now to try Perez?

MR. SANTOS: Well, of course I'm not. I'm with

Your Honor with Lawlor.

THE COURT: And -- in February, on the original date?

MR. SANTOS: Well, no. Here -- what Your Honor had indicated -- I indicated to Your Honor I had to finish Lawlor, then I had to go to New London to do the Ross case, which actually we were going to do earlier, then I have to go to Rockville on that shaken baby case, which I had indicated to Your Honor when you set the schedule. Now Lawlor, we were informed, is going to be longer than everyone anticipated when we met with the -- with the prosecution. And so --

THE COURT: One week longer. It was supposed to end at Thanksgiving, it's one week.

MR. SANTOS: Well, I'm ready to finish Lawlor. I'm ready to go to New London, but that's going to be delayed until mid-Christmas, and inevitably it's going to be hard to get a jury mid-December.

THE COURT: So you wouldn't be available in February anyway to try Perez?

MR. SANTOS: I'm sorry?

THE COURT: You're not available anyway to try Perez in February.

MR. SANTOS: It depends -- it depends on what happens in Rockville on that shaken baby case. I think if the Court -- you know, I may or may not be, but my point is I want to be -- I would be ready but for my

schedule which was set around the cancellation of the Perez case because Perez was supposed to go in November with the evidence.

So what I'm saying, Your Honor, is that this is going to cause all kinds of problems I expect. There's going to be motions for mistrial as we proceed. There's going to be double jeopardy claims depending on the rulings on mistrial when it's a much cleaner case.

THE COURT: You're already anticipating a mistrial before it begins?

MR. SANTOS: I most certainly -- I am Your Honor, because we're going to make the -- of course we're going to continue to make the claim as the case unfolds and as prejudice, in our view, develops, we're going to be moving for mistrials. So I just think that everyone is ready to go on the bribery case, it's all prepared. We were ready to go in September and to throw this into the mix now with such a complex case, I would submit, denies the defendant the various rights that we indicate in our memorandum.

THE COURT: Counsel.

MR. ALEXY: First of all there's no possibility that a hundred witnesses are going to be testifying if the cases are consolidated. The reference Attorney Santos is referring to is that there was over a hundred witnesses that testified before the grand jury. The grand jury investigated a number of matters not related

to these two cases, matters relating to other individuals, some of whom were arrested and have cases pending here. So those -- that number of witnesses is inflated.

Second, characterization of Mr. Giles' attorney and the relationship -- characterizing it as a business relationship, I don't want to get into a trial of the facts here, but I recently, at that attorney's request, provided him with a copy of his testimony before the grand jury and that is not what he said to the grand jury. Whether he's changes his testimony at trial is a different matter.

Lastly, I don't understand why it is that Mr. Giles -- defense counsel seems to guarantee that Mr. Giles would testify if the conspiracy cases were joined, but not if they were tried separately; that does not seem to make sense to me. And at best it is purely speculative. And again, any attempt to join those two cases at this time,(10:02:44) stories is a potential of many brudent issues, that could arise.

THE COURT: Anything further, Attorney Santos?

MR. SANTOS: No, Your Honor.

THE COURT: All right. I spent some time looking at the Perez file. It really is a relatively simple procedural history. You had your first one in January 2009 and since very shortly after that date, that September trial was set. The only thing that was

really questionable was that grand jury report. We waited and waited for the grand juror and the grand jury report. And unfortunately that didn't come until August, and at that point there was the additional arrest. I can't control when the state arrests individuals, that is strictly a state function; it's not up to the Court.

Both have supplied arguments before the Court. There's a lot of speculation, a lot of conjecture. I can't presume or not presume witness availability. But there's only one motion before the Court and that's the motion to consolidate.

I've looked at the warrants. What's involved in the second is a larceny and a conspiracy to commit larceny; a lot of allegations, but it's basically a common law crime, larceny. It's just one of the original crimes.

Talking about the jury process, one jury process is possible in this. The Hartford Judicial District selects jurors for long trials multiple times every year. It does happen within the jury pool we have, not just for white-collar crimes, but for violent crimes for murder and for capital offenses; it is done. And even if it were an eight-week trial, that would be a short period of time compared to some of the trials that are done here.

Now I already got the information, I was

concerned about discovery. Apparently the discovery in the second matter was not available until after the arrest. Is that correct?

MR. ALEXY: That's correct.

THE COURT: I was under the misapprehension that it was all available. So it wasn't available until the second arrest, so Attorney Santos hasn't had an opportunity, except for the period of September and October to look at it. Correct?

MR. ALEXY: That would be correct.

THE COURT: And for -- I will note for a good part of the period in October he's been before me selecting a jury. So he hasn't been available to go to the Chief State's Attorney's office to look at it because he was selecting a jury in another matter. So I will concede he hasn't had the opportunity to look at the discovery in the second matter.

I'm going to go back to the jury selection. I don't think it is going to be a major issue. Counsel, if you have an issue with the venire that comes in the venire pool, you're aware what the procedures are to challenge a venire, but we go by all of Hartford County. We can't presume a pool is just Hartford, that is not where our pool comes from; it is the entire County. What you're also presuming is that non-minority members are not similarly situated as are minority members, and that's a real leap. You're going

to have to have more facts than just, it can't happen that Hispanics and blacks are not situated in the same fashion as whites, don't have the same problems, or aren't available to the same extent. I'm not going to make that presumption because of the pools I've seen. They are available for sitting on long trials. You just saw it in the recent one. We had members of the minority community available to sit in the Lawlor trial, who were available for a four-week trial at that point.

Now, my concerns are two in the consolidation -- well, actually three. First there's the consolidation and then there's the time that would have to take place if there were a consolidation. 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 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 done -- have consolidated white-collar crimes, in fact, I wrote a consolidation of white-collar crimes in cases in this district.

So the consolidation is going to happen. I'm granting the motion to consolidate. But I have a second problem and that is when the trial takes place because I've already heard, through your arguments,

Attorney Santos didn't have the material for the bribery until October and by that time he was heavily involved in the jury selection and the motions in Lawlor. And I will note for the record he was before me virtually everyday, so he did not have time either between motions or jury selection to see that discovery.

And additionally, at this point -- I mean he's got prepare. If he doesn't prepare he's ineffective assistance of counsel if he doesn't look at that second file. So I'm going to give him what he asked for, the same amount of time he would have had to prepare for the bribery as he had to prepare for -- I'm sorry, the same amount of time to prepare for the larceny as he had to prepare for the bribery charges.

You will be done in Rockville in February. Correct?

MR. SANTOS: Hopefully.

THE COURT: Hopefully. I'm reluctant to do it, but I'm going to continue the trial only because of the discovery issue and the fact that there is no discovery. I don't think it's shocking that this has happened, I don't think it's a surprise to the defendant, I think that it -- judicial economy is one factor but it's not the predominant factor in this matter. It should be done and it should be done at one time.

I'm going to set you down for the first week of April. That is the final, Counsel. I don't want to hear I have a federal trial; I have a trial in Rockville, New London, another Hartford trial. You certainly won't be conflicted in Hartford. Don't make yourself available for anything else. So absent your being ill, and I mean really ill --

MR. SANTOS: Don't wish --

THE COURT: I'm not wishing.

MR. SANTOS: You may get what you wish for.

THE COURT: You're going to start jury selection the first week in April. What we will do is we will meet in the middle of March. At that point we'll know exactly how long jury selection will be. You'll have had enough time to look at all the state's documents at that point, but we are starting jury selection in April and the trial will take place in May, which will be a very good time because we don't have school conflicts or vacation conflicts during the month of May. It's a time were jurors are relatively available I found. There's no winter vacations, school doesn't get out until the month after that, no holidays except for Memorial Day itself.

So you're starting trial the first of May, your jury selection is going to be in April. And if we find that we could move jury selection shorter then the trial will start earlier in May. But that is it. I

think we've given enough continuances; I've given enough continuances in this case. Your client wanted a speedy trial, the fact that this happened, this is the speediest we could give that trial, at the same time understanding he has rights that have to be preserved.

MR. SANTOS: Your Honor, just so -- I want to make this clear because we have the media here, I want this to be very clear, we're the ones who asked for the speedy trial.

THE COURT: I understand that.

MR. SANTOS: Your Honor accommodated us.

THE COURT: I did. I gave you a speedy trial.

MR. SANTOS: And then they derailed it, the other side derailed it. And now Your Honor is looking at me --

THE COURT: No, I'm not looking at you.

MR. SANTOS: -- and saying you should be available. I was available on September 9th.

THE COURT: I'm saying you should be available now, again.

MR. SANTOS: I am --

THE COURT: Still understanding your desire to have this, there's not going to be any question, you are going to be available, taking care of all of the issues. I suggest that members of your staff, quickly, go to the Chief State's Attorney's office and if it's not available start copying it now because I've given

you your timeframe and there should be no other excuses.

MR. SANTOS: There are no excuses. All we are asking for is the right that every other defendant has in this courthouse, that when you're arrested in late August and September, you're not on trial in April. But we don't have a problem with that. But we're not looking to delay things. We were the ones who were trying to get the things moving.

THE COURT: No. I'm not saying you're delaying, but I know you're a busy person and I don't want you to commit yourself --

MR. SANTOS: Oh, I --

THE COURT: -- to another trial anywhere. I've given you more than enough time. I've already considered all of your letters and all the correspondence. I think that should adequately protect your client's rights and allow you sufficient time for discovery in this matter.

MR. SANTOS: Thank you, Your Honor.

THE COURT: Thank you. Anything further?

MR. ALEXY: No, Your Honor.

THE COURT: All right. So motion to consolidate granted. Trial is now set for those dates. Thank you.

(Court adjourned)

HHD-CR09-628569T HHD-CR09-635038T	: SUPERIOR COURT
STATE OF CONNECTICUT	: JUDICIAL DISTRICT
V.	: HARTFORD, CONNECTICUT
EDDIE A. PEREZ	: NOVEMBER 4, 2009

C E R T I F I C A T I O N

I hereby certified the foregoing pages are a true and correct transcript of the audio recordings of the above-referenced case, heard in Superior Court, Judicial District of Hartford, Connecticut, before the Honorable Julia D. Dewey, Judge on November 4, 2009.

Karen Kobylenski

Court Recording Monitor

Certification does not apply to photocopies

MUST BE SIGNED IN BLUE INK

HHD-CR09-628569T HHD-CR09-635038T	: SUPERIOR COURT
STATE OF CONNECTICUT	: JUDICIAL DISTRICT
V.	: HARTFORD, CONNECTICUT
EDDIE A. PEREZ	: MAY 18, 2010

B E F O R E :

THE HONORABLE JULIA D. DEWEY, JUDGE

A P P E A R A N C E S :

REPRESENTING THE STATE

Michael Gailor, Esq.
Assistant State's Attorney

Christopher Alexy, Esq.
Assistant State's Attorney

REPRESENTING THE DEFENDANT

Hubert Santos, Esq.
Hope Seeley, Esq.

Recorded and Transcribed By:
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101 Lafayette Street
Hartford, Connecticut 06106

MR. SANTOS: -- when the state completes its evidence in the bribery charge, Your Honor. At that point we move -- we would move to severe the bribery case from the larceny case on the ground that Mayor Perez wishes to testify in connection with the bribery case, but does not wish to testify in connection with the larceny case.

MR. GAILOR: Your Honor, and the state's position on that, obviously, is going to be that severance is not appropriate.

Counsel had the opportunity to raise this issue when we addressed the severance issue twice; once when the cases were first joined, and a second time when it was argued prior to the beginning of jury selection. And he did not raise this issue at that point in time, particularly -- he did request severance, but he did not specifically raise the issue that his client wanted to testify in one half and not the other; that's my recollection.

MR. SANTOS: Well, I think I did raise the issue, but I can't -- I'm not going to sit here and tell you I did. But here's the point --

THE COURT: Isn't that somewhere in writing when you raised it?

MR. SANTOS: I think it is, yeah. But I don't want to --

THE COURT: Again, I'll read the motions. I'm no

sure it is, but it might be in there.

MR. SANTOS: Well I think something to the affect he may want to testify in one charge and not the other.

THE COURT: I'll have to read the motions. It's been awhile since I've read them.

MR. SANTOS: But here's my point, we make these assessments as to whether a defendant is going to testify as we here the evidence. And as we heard the evidence here, particularly Mr. Costa's testimony, that lead us to the position that Mayor Perez wants to testify on the bribery case.

THE COURT: Again, it's something that probably should have been raised and highlighted a lot earlier. To indicate that after there's been five days of testimony -- to indicate there are motions in limine after five days of testimony -- I understand trials are fluid, but this seems to be a bit too fluid.

MR. SANTOS: We can't make the judgment.

THE COURT: I understand.

MR. SANTOS: You know we had to hear how Mr. Costa does and how persuasive he was etc. etc. And that's why I'm alerting the Court now, because it's our view now that we want to testify to refute this bribery charge. But see in the larceny charge, Inspector Sullivan tape-records, secretly, a conversation -- that same conversation I eluded to

with Mayor Perez on the 27th, where he elicited from him his position on the larceny charge; it's all on tape. And so we're disinclined on that charge to have the defendant testify because his position --

THE COURT: Is on tape?

MR. SANTOS: Right.

MR. GAILOR: By the same token, Your Honor, because it's a fluid concept, and Counsel doesn't make these decisions until after he hears the evidence, he could be -- he could make a decision to testify in the other case; that's what we're left with here.

I agree with Your Honor that this is a little too fluid. Counsel has to make these determinations and make these arguments in a timely fashion and I don't think he has. And in any event I don't think it warrants severance at this point in time.

THE COURT: Again, give me case law. I'll look it up as well. Thank you.

MR. SANTOS: Thank you, Your Honor.

THE COURT: Adjourned.

(Court adjourned)

HHD-CR09-628569T HHD-CR09-635038T	: SUPERIOR COURT
STATE OF CONNECTICUT	: JUDICIAL DISTRICT
V.	: HARTFORD, CONNECTICUT
EDDIE A. PEREZ	: MAY 18, 2010

CERTIFICATION

I hereby certified the foregoing pages are a true and correct transcript of the audio recordings of the above-referenced case, heard in Superior Court, Judicial District of Hartford, Connecticut, before the Honorable Julia D. Dewey, Judge on May 18, 2010.

Karen Kobylenski

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HHD-CR09-628569T HHD-CR09-635038T	: SUPERIOR COURT
STATE OF CONNECTICUT	: JUDICIAL DISTRICT
V.	: HARTFORD, CONNECTICUT
EDDIE A. PEREZ	: MAY 20, 2010

B E F O R E :

THE HONORABLE JULIA D. DEWEY, JUDGE

A P P E A R A N C E S :

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Michael Gailor, Esq.
Assistant State's Attorney

Christopher Alexy, Esq.
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101 Lafayette Street
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time, I think it makes more sense. It's really one day we're looking at, maybe two, as opposed to losing another juror.

THE MARSHAL: Your Honor, you want all the jurors including her.

THE COURT: All the jurors including her as a group.

(Jury enters the courtroom)

THE COURT: All right. One of our jurors did receive a note; there has been a family emergency and condolences are in order. To accommodate arrangements that have to be made for the family, we were going to have tomorrow off anyway and the juror has obviously has asked if we be allowed to go home this afternoon, which is very reasonable, and we will not be in session on Monday, again, to accommodate the family.

What I am going to ask to do is to make sure that the clerk, Justin, has your numbers. If there are any other days we will call you -- well --

THE CLERK: I have the numbers, Your Honor.

THE COURT: Either way, on Monday as to whether we're coming in on Tuesday or not. But again, it depends on the family and we'll accommodate in whatever way we can. All right. So with that you are excused at least until Tuesday morning at 9:30, possibly longer. You'll receive a call Monday, verification one way or another. Right?

THE CLERK: Yes.

THE COURT: We'll verify one way or another whether it is Tuesday or not. Thank you. So you all have a nice long weekend.

(Jury leaves the courtroom)

THE COURT: Argument.

MR. GAILOR: Motion to severe, Your Honor.

THE COURT: Motion to severe; we can still argue the motion to severe, that could be done now.

MR. GAILOR: Okay. We -- I had done some research Your Honor. I know Attorney Alexy had done it but we just received the memo today.

THE COURT: All right. When would you like to argue that?

MR. ALEXY: I'm prepared to go forward, Your Honor.

THE COURT: You are?

MR. ALEXY: Yes.

THE COURT: All right, go forward now.

MR. SANTOS: Right now.

THE COURT: Well he says he prepared to go forward now.

MR. SANTOS: Okay.

THE COURT: All right. Attorney Santos.

MR. SANTOS: Your Honor, as you know we objected to the joinder of the matter or the two charges because we anticipated problems along the way. And we did

submit a motion and memorandum in connection with our motion post joinder, and my recollection is, and more importantly I really show say Attorney Adams who I spoke with, he recalls that at the argument on the motion for -- an opposition to joinder -- the motion for joinder, that I did refer to the problem of the defendant wanting to testify in one charge and not on the other.

THE COURT: Which argument are you talking about, are you talking about the supplement that happened just before the trial began?

MR. SANTOS: No.

THE COURT: Because it didn't happen then.

MR. SANTOS: Right, I know that now. But no I'm talking about when we actually argued the motion for joinder.

THE COURT: All right, let me see if it's in the notes, course that doesn't mean my notes are exhaustive. All right, here we go. I don't see a lot of argument on the motion concerning severance.

MR. SANTOS: I know in our --

THE COURT: But be that as it may --

MR. SANTOS: In our motion itself --

THE COURT: Yes, there is a sentence in it.

MR. SANTOS: Quote, the inevitable -- it would inevitable implicate a host of rights, including the right to testify.

THE COURT: Correct.

MR. SANTOS: And we're at this point now where we have a pretty good sense of what the state's bribery case looks like in terms of the evidence and the credibility of the witnesses. And it's our view that the defendant has to testify in order to explain certain things in connection with the bribery charge. One of which is the evidence was introduced today regarding the interview by Inspector Sullivan on the 27th of June at City Hall, and there are other matters that are set out in our papers. But --

THE COURT: You cite *State versus King,* but in *State versus King* didn't they allow the joinder -- I thought.

MR. SANTOS: Well they may have allowed the joinder but of course, you see it's -- it's --

THE COURT: And the defendant -- the argument was the defendant couldn't testify, I thought -- I might be wrong, it's an old case.

MR. SANTOS: There's cases, I think, both ways on this, but --

THE COURT: But the one you cite is for the opposite proposition.

MR. SANTOS: So our point is, Your Honor, that we have a practical problem and it can be cured very easily by now just cutting off the government's case after it rests on the bribery charge. Your Honor could

instruct the jury that has far as any references to another charge, that's not for their consideration. And then we'd be in a position to testify on the bribery charge.

The problem with the larceny charge is that the larceny charge -- we have a tape-recorded conversation from Inspector Sullivan which is now an exhibit, and in that tape-recorded conversation we feel that the bulk of the defendant's position is laid out in the interview. And the problem with testifying in the larceny case is we're going to be subject to attack from several different corners, and one of the areas is all of this so-called prior bad-act evidence or other crimes evidence or whatever it is -- misconduct evidence involving Mr. Giles, and Giles -- there's about a -- three different episodes involving Mr. Giles; picking up his garbage, his eviction contract, and another matter. And so the defendant testifying on those sets of charges is going to be at a great, great disadvantage because he's going to be hit with so many subjects and it would be difficult to handle that.

And so if we end up in a situation where these matters are consolidated to verdict, we are going to be having to make some very difficult choices. And one of the choices before us will be whether or not to forego from testifying at all because we're going to get into charge number two, the larceny charge and therefore,

not being able to testify in the bribery charge because we can't testify halfway.

And this particular issue was really not before the Court because it didn't really crystallize until we could evaluate the evidence as its come in; and to easily remedy now. And of course our position would be whatever remarks the Court made about there being two sets of charges can be cured by a supplemental cautionary instruction to the jury that they are to ignore it.

THE COURT: Well, you've asked me to make those remarks of the beginning of everyday, Counsel.

MR. SANTOS: Right. No, I agree, Your Honor. But what I mean is if you severe it -- if you severe it we would agree that there be no prejudice to the defendant by the fact that there has been reference to these other charges.

THE COURT: All right.

MR. SANTOS: And for that reason, Your Honor, and for the other reasons I indicated in the joinder, our opposition to joinder, we would ask the Court to now stop the prosecution's case after they complete their evidence, severe it, and then let us put on our defense.

The other problem, Your Honor, is this: in this type of case where there -- there's fairly complicated issues here. I mean these aren't did the defendant

hold up three banks. There is going to be tremendous lag time between the start of the second phase, until we get to put on our defense. In other words, in a normal trial, you know, you start it and you go to the end of the episode and then we put on our defense. Here the jury is going to hear the bribery case, now it's going to hear the larceny case, and now the defense is going to be the bribery case and we now have to try to refresh them as to what the critical issues are in the bribery case, which they, at that point, would not have heard for a couple of weeks. And that's the other problem in terms of not severing it at this point. Thank you, Your Honor.

THE COURT: Attorney Alexy.

MR. ALEXY: Thank you. I believe the most recent case in Connecticut that dealt with this issue is *State versus Chance.*

THE COURT: I have *State versus Davis.* How old is *Chance*?

MR. ALEXY: *Chance* is 1996.

THE COURT: *Davis* is 2008.

MR. ALEXY: 2008, that's correct.

THE COURT: Yes.

MR. ALEXY: And --

THE COURT: And I have *Davis* in front of me, that's what I was glancing at.

MR. ALEXY: And the rule here is that the

defendant must demonstrate that he has important testimony to give concerning one case, and a strong need to refrain from testifying in the other. And that in making such a showing, it's essential that the defendant present enough information regarding the nature of the testimony he wishes to give on one case, and his reasons for not wishing to testify in the other. To satisfy the Court that the claim of prejudice is genuine and enable it to intelligently weigh considerations of economy in expedition in judicial administration against the defendant's interest in having the free choice with respect to testimony.

Now in this case the issue was not brought up or discussed at any -- I don't recall at all, and if it was certainly not more than a mere mention when the motion to consolidate was heard.

THE COURT: And when you're referring to *Chance* --

MR. ALEXY: *Chance.*

THE COURT: You're referring to specifically the defendant's desire to testify. Correct?

MR. ALEXY: Correct.

THE COURT: All right.

MR. ALEXY: In fact, in that case and the other Connecticut cases that I found, this was -- the issue was always raised before the trial began. I haven't

found any cases in Connecticut which deal with the issue being raised mid-trial. There was one case that dealt with the issue being raised initially, and then at the end of both cases. When it was raised at the end of both cases it was -- the Court treated it as a motion for mistrial which was denied.

So first of all in this case, the proper time to have raised this motion would have been at the beginning when we had the initial motion to consolidate the cases. And I say that because the defendant sets forth four reasons or four areas in which he wishes to testify in this phase of the case. All four of these issues were known to the defense, in fact, they're contained in the arrest warrant affidavit and the state stated at the arraignment has had an open file policy and that was almost a year to the day before jury selection started. So these issues -- potential issues were well known to the defense and they've waited now, until the last witness is to be presented to file this motion and claim that the defendant now wants to testify.

This is -- appears to me to be an attempt at the defense trying to control the course of the case. You know, the Court has already ruled on this matter and so I don't believe any of the reason set forth are strong reasons as to why the defendant must testify in this case or that the other reason the defendant cannot

testify in the other. I also believe that they are untimely, and I don't believe that it's the case that the defendant must testify. All these witnesses have been cross-examined on the issues that have been raised and the defense had ample opportunity and latitude to do that with regards to A,B,C and D. So I can see no reason that stratifies the requirements of *Chance* or *Davis*.

THE COURT: Attorney Santos, it is your motion.

MR. SANTOS: Yes, Your Honor.

THE COURT: I'm going to presume for the sake of argument that there some mention during the initial discussion. I don't have -- again, I take notes but I could have missed something, so I will presume that Attorney Adams was right and during the initial discussion it was mentioned; I don't think it was highlighted but I --

MR. SANTOS: I just don't remember. I thought it was mentioned somewhere along the lines.

THE COURT: I'll say mentioned. Go on.

MR. SANTOS: Well, what I'm saying, Your Honor, is that you see we have to make assessments based upon what's said in court. And when Mr. Costa testifies in a certain way about certain things, for example the conversation with the mayor at the front steps of the mayor's house after Maria came back from the hospital, he denies that happened. He testifies for the first

time that certain -- a copy of the bill, the invoice, was given to Mr. Julio Mendoza; that was not in the grand jury testimony or any records. And I could give other examples where we heard certain testimony from Carlos Costa that were not in the grand jury testimony or in the reports of his interviews by Inspector Sullivan.

THE COURT: Is that unique to this case?

MR. SANTOS: No. What's unique to this case is the fact that these cases were consolidated.

THE COURT: I don't know if that's unique. Is the fact that a witness doesn't give the testimony that's totally expected unique to this case, that's my question.

MR. SANTOS: No. The answer to your question is this, Your Honor, the decision -- as you know and the prosecution knows, in every criminal case you don't make the decision as to whether a client is going to testify until the last possible moment because the case is in a state a flux and you have to make judgment calls on credibility of witnesses.

Here because of the joinder, where these cases are not cross admissible, we're listening to the testimony at phase one. And if this were the only trial we would do what we do in any case where there's only one event, we would make the judgment as to whether or not to testify at the end. So we didn't say

we're going to testify on the bribery case no matter what, that decision has to be made after you hear all of the witnesses and the testimony and how you perceive the jury is reacting to it all.

And we've had an opportunity to do that, and consequently we know we have to testify if we have a chance to persuade the jury to acquit in connection with the bribery case. We feel we do not -- from what we know we do not have to testify or wish to testify in the other case because -- for the reason I've already stated. So there's no prejudice to anybody. The state gets to try Mr. Perez again if they lose; there's no prejudice to the state.

And in this case I think the defendant's constitutional right to testify outweighs the interest of judicial economy. And don't forget, we're in the minority in the United States as a result of the opinion Chief Justice Rogers on consolidation.

THE COURT: But it is the law in Connecticut.

MR. SANTOS: It is the law in Connecticut.

THE COURT: And I'm not on the Supreme Court.

MR. SANTOS: Well, not yet.

THE COURT: And I can't overturn it, so --

MR. SANTOS: It doesn't seem to me that some rule of efficiency trumps the defendant's constitutional rights.

THE COURT: I don't know if it's just a rule of

efficiency.

MR. SANTOS: Well the rational -- I think the principle rational for joinder is judicial economy and hopefully someday that decision will be reversed; it was three to two. My only point is --

THE COURT: Two were concurrent, the only difference was the standard -- they agreed there should be a joinder, it was just the standard that they disagreed with.

MR. SANTOS: Justice Katz, I think would go a little further than that.

THE COURT: I have that right in front of me. I mean it said concurred -- Justice Katz and Palmer concurred, they didn't decent. Their argument concerned whether or not -- well what the standard actually was, whether it should be -- what the state had to prove, whether the risk of prejudice is substantially reduced. It was the risk of prejudice that they focused on in the concurring opinion, not whether or not should be done.

MR. SANTOS: Now can you imagine a situation, Your Honor, where we go -- we complete the evidence, okay, and the defendant announces to the Court through his counsel that he wants to testify but he can't testify because he's going to get cross-examined on all of these collateral matters -- so-called bad act evidence, misconduct evidence, other act evidence; so

he cannot testify because he leaves himself open to cross-examination on those other matters in connection with the second set of charges involving larceny. And since that it is a real concern and not something that's just being brought up so we can confuse the record, this would be the time to cure it. And if the Court, in weighing that, where it would draw the line -- it just seems to me that the line should be drawn right here and let us exercise our constitutional right to testify.

THE COURT: I understand your argument, Counsel, but where you're asking me to draw the line is even further than the line would have been drawn by Justice Katz. The motion is denied.

So with that, we are going to be adjourned until Tuesday. Counsel, be sure that the clerk has your cell numbers so that he can call you as well when we find out on Monday. And is she going to call you directly?

THE CLERK: She has my number.

THE COURT: We didn't ask her how she's going to contact us, did we.

THE CLERK: I will contact her.

THE COURT: All right. Make sure he has your numbers so that he can contact all of you to find out what is going to be happening on that date, all right.

MR. GAILOR: Thank you, Your Honor.

THE COURT: And email would help as well.

(Court adjourned)

HHD-CR09-628569T HHD-CR09-635038T	: SUPERIOR COURT
STATE OF CONNECTICUT	: JUDICIAL DISTRICT
V.	: HARTFORD, CONNECTICUT
EDDIE A. PEREZ	: MAY 20, 2010

C E R T I F I C A T I O N

I hereby certified the foregoing pages are a true and correct transcript of the audio recordings of the above-referenced case, heard in Superior Court, Judicial District of Hartford, Connecticut, before the Honorable Julia D. Dewey, Judge on May 20, 2010.

Karen Kobylenski

Court Recording Monitor

Certification does not apply to photocopies

MUST BE SIGNED IN BLUE INK

HHD-CR09-628569T HHD-CR09-635038T	: SUPERIOR COURT
STATE OF CONNECTICUT	: JUDICIAL DISTRICT
V.	: HARTFORD, CONNECTICUT
EDDIE A. PEREZ	: JUNE 11, 2010

B E F O R E :

THE HONORABLE JULIA D. DEWEY, JUDGE

A P P E A R A N C E S :

REPRESENTING THE STATE

Michael Gailor, Esq.
Assistant State's Attorney

Christopher Alexy, Esq.
Assistant State's Attorney

REPRESENTING THE DEFENDANT

Hubert Santos, Esq.
Hope Seeley, Esq.

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THE COURT: All right. Counsel, you have a motion for mistrial, a motion for severance, and a motion concerning limiting testimony.

MR. SANTOS: Thank you, Your Honor.

I just want to make one thing clear on our motion for severance, we are also moving -- although it's not cited, pursuant to the Practice Book prevision, which I believe is 41-18.

As Your Honor knows, we had objected to consolidation of the charges, and we had moved for a severance of offenses on May 20, 2010 and I would incorporate those grounds and these remarks.

With regard to the motion for mistrial, Your Honor, it just seems to me we're at a stage of the proceedings where there is no way a defendant can get a fair trial or due process of law. And I laid out, in detail, the reasons for that in my motion for severance, in terms of the evidence that has come in on both of these charges, in addition to 1214 Main Street. And so the defendant is in a posture of having suffered tremendous prejudice that did not have to occur if the charges were tried separately. There's no need for me to recite all of the grounds, because I recite them in the motion, and I know Your Honor has seen them. So let me move on, if I might, to our motion for severance.

Even though we have suffered this tremendous prejudice, the defendant still wants to attempt to get a verdict, having gone through this process now for these many weeks; and so he is prepared -- even to waive many of the claims for prejudice if the Court would severe one count from the other. And what we would ask the Court to do is to severe, obviously, the bribery and fabricating evidence counts from the larceny by extortion count --

THE COURT: And which count do you presume we go under then?

MR. SANTOS: I would -- I would like to proceed under the larceny count. And obviously there's been prejudice as a result of the consolidation, but we are prepared -- because to have the jury now have both counts just compounds the problem, because now we're going to have argument, we're going to hear all kinds of things dealing with Mayor Perez that would have no relevancy as to -- for example, the larceny count alone.

We also are prepared, Your Honor, just so the record is clear, to go on the bribery count alone. We just want to get to the jury on one count, whether it's bribery or it's larceny; we would prefer larceny, but we are most certainly prepared to go on either one in order to try and salvage a verdict on one of these charges.

And with regard to the motion of the permission of the defendant to testify, I've read the cases that Your Honor suggested and I read *Moore*, the standard basically is to ask for this type of relief, the defendant must make a particularized need as to why he wants to testify as to one and not the other, and the reason -- and the specific reasons in support of why he chooses to testify in one count and not the other.

THE COURT: Does he need to make that need just for the motion to severe, is my question, or does he need to make that need when he's asking at the time at trial to limit cross-examination?

MR. SANTOS: Well, you mean to testify?

THE COURT: Yes.

MR. SANTOS: I think he has to --

THE COURT: Well, to limit cross-examination, because you're asking --

MR. SANTOS: Right.

THE COURT: -- that he testify in one count only, but what you're really asking is there not be any cross-examination about the second count.

MR. SANTOS: Right, right. I think that the -- the standard principally applies to the request to testify on one, although it's relevant to the severance issue, I also think that it's -- it's more appropriate for his desire to testify in the bribery and fabricating evidence counts, and not testify on the

larceny count.

And so what I had prepared to do, with the Court's permission, is to lay on the record why it is important for the mayor to testify on the bribery and fabrication counts, and I will list them sciendum; one, he needs to explain the lies that were made to Inspector Sullivan with Mr. John Rose in the room, and he'll testify that he was embarrassed to reveal that he had not paid this bill to Mr. Costa, with Mr. Rose present in the room

The efforts -- he'll testify as to the efforts he had made to do the home improvement project himself, and the fact that he was at the Home Depot picking out a product -- a countertop product; the fact that he had been to other stores doing that before he got to Home Depot. The fact that Mr. Costa came down to Home Depot to see him and advised him that he could do it a lot cheaper; and thereafter, the defendant will testify he, at Mr. Costa's invitation, he went to his showroom.

He'll testify as to his historical relationship with Mr. Costa as a friend and political supporter that went back many years; and that when Mr. Costa was doing the work in his home, he did not view it as a contractor for the City of Hartford doing the work, but as a friend and will admit, if he testifies, that in retrospect that was a mistake.

He will testify that he repeatedly requested a

bill from Mr. Costa. Mr. Costa testified that there was a bill request, but I think his testimony was only on one occasion; but Mayor Perez will testify when Maria --

THE COURT: Limited occasions.

MR. SANTOS: Hum?

THE COURT: Limited occasions.

MR. SANTOS: Right. When Maria came back home from the hospital and they had a reception for her, he asked him for a bill, and he asked him for a bill a number of times thereafter.

He will testify, Your Honor, concerning the affect of his wife's illness regarding -- regarding his conduct, and how it affected him in terms of concentrating reading material that might have been available to him; focusing on the bill that was due Mr. Costa [sic] -- Mr. Costa -- he will say in light of Maria's illness there was no hurry on the bill, and mayor was focused on Maria's illnesses and put the payment of the bill on the back burner and really did not think there was any immediatecy to pay it, although he had every intention to pay it.

Furthermore, his problem of terms of focus and the problems with the bill, was tremendously compounded by BlueCross and BlueShield's refusal to pay the medical bills for the doctor in New York at Columbia Presbyterian Hospital, and he would receive bill after

bill from Medicare, BlueCross/BlueShield showing large balances that were due; and this -- and this caused him to realize that he might have to get a major loan, not twenty-thousand loan, but a major loan, not only to pay for the medical bills, but also to pay Mr. Costa. And the medical bills just -- were not resolved for a long period of time after Mrs. Perez's surgery.

He will further testify of his lack of involvement in the home improvement project, and that, principally Mr. Costa interacted with Maria Perez and that he had little, if anything, to do with it because most of the time he was off and running at City Hall, getting home late in the day from his school board duties, and his many, many obligations as the mayor of the City of Hartford. And he seldom saw Mr. Costa at the house or his workman at the house.

He'll further testify that he -- when he asked Mr. Costa for the bill, Mr. Costa told him that it was going to run between twenty-six and twenty-eight-thousand-dollars, and he was stunned by that amount. And he'll testify concerning that, in support of his claim, that he had every intention to pay the bill, otherwise he would not have been stunned by the amount that Mr. Costa quoted him.

He'll testify that when he finally got the bill from Mr. Costa he did not read the bill; he did not analyze the bill. He simply saw that the amount was

twenty-thousand-plus, and he was relieved that it wasn't twenty-six or twenty-eight-thousand. And there was no knowledge, on his part, that the bill was incomplete and misleading or whatever. He just saw that number, twenty-thousand, and he was pleased that it was -- it was in that ballpark.

He'll testify that the decision to turn over the bill -- the invoice, through counsel, to the office of the Chief State's Attorney was in no way intended to mislead the state, it simply was in an attempt to show the state what they asked for, which was the bill he received from Mr. Costa.

He'll further testify, Your Honor, that his involvement with Costa regarding the Park Street -- regarding the Park Street project, he'll further testify concerning his decision to get Mr. Charles Crocini involved in the project. He'll testify as to the projects delay, and that it was an important project to him for many reasons. Once it was -- it was a project to benefit that Latino community, of which he was obviously a part and a leader; and also a source of pride to be able to develop something that had not been developed over the years by any predecessor mayors.

He'll testify concerning his decision to accept and follow Charles Crocini's decision or recommendation to send the May 16, 2006 letter to United States Fidelity/Saint Paul's Insurance Company, and he will

deny that accusation made by Mr. Patel that there was an episode in his office where he was shaking a letter and saying what the F is this; that never occurred, he will testify in his own defense.

He will further testify that his decision not to assist Mr. Costa in his quest for the payment of claims and extras, and many of which were detailed in the lawsuit and other documents, that he did not, in any way, participate to help Mr. Costa get those paid.

He'll testify about his concern of a delay on the Park Street project -- if the project were delayed by terminating Mr. Costa, and the tremendous problems it would cause him, not only in his service to the Latino community, but also politically by the reaction among the merchants and other people who were interested in the project.

He will further testify that there were many more projects and issues that required his time and attention during the 2005/2007 period of time when Park Street was going on, including the school building projects, the library construction controversy, and issues of violent crime in the City of Hartford; and that when compared -- with these problems compared to the Park Street streetscape project, the Park Street project was a minor project in terms of his priorities at the City of Hartford and the enormity of the other projects that he was involved in, including the eleven

school projects, which were budgeted at between four-hundred and five-million dollars.

He will further testify that the -- that practice of supporting businessmen like -- minority businessmen or contractors, like USA Contractors, was one of his top priorities as a mayor and as a candidate for mayor, and in following through with that commitment, he would make efforts to make sure that they got their approved invoices paid in a timely manner out of the treasurer's office.

He will testify as to the reasons he took to help get some of Mr. Costa's approved invoices paid. He will testify that he has devoted his life to public service, and further testify that he is not interested in worldly possessions or the accumulation of wealth or other material things.

He will also testify that his religious convictions guide his conduct, and those convictions would not, in any way, permit him to accept a bribe or to do anything that not only -- or to fabricate evidence, or anything else that would violate his more code.

Regarding the larceny by extortion counts, Your Honor, the defendant --

THE COURT: The flipside, why not offer testimony on that.

MR. SANTOS: Precisely. This -- he would not

offer testimony because of a number of reasons. One of which is the credibility of Joseph Citino. The defendant is of the view that Mr. Citino is not a believable witness, is a convicted felon, is a bully, and, in fact, is a person who threatened the mayor when he didn't get his way with regard to the Davis Building development. So he will rely to a large extent on the credibility -- a lack of credibility of Mr. Citino.

He will further rely upon the audio tape, that is in evidence, that details in essentially substantial form, although there are a couple of issued there too, but substantially lays out his defense with regard to why he wanted Mr. Giles to remain until the construction project begin; that is in evidence, there's no need to deal with that.

The other issue of importance in that charge is Mr. Giles' rights vis-à-vis 1143 Main Street. The testimony in there is very strong, that a lot of pretty intelligent people thought that Mr. Giles had rights to that property, either in the form of a lease, or in the form of a contract, or in the form of management agreement. The evidence is clear, for example, that Mr. Concilio prepared a document that talked about the lease. Mr. Palmieri, early on -- this is evidence -- these are in evidence, produced a document that indicated that Mr. Giles had certain rights. Mr. Kardaras, the lawyer representing Mr. Giles, thought he

had certain rights; and that the fact that he had a sublease to LAZ, LAZ thought he had certain -- he had a lease, and Giles represented in the sublease with LAZ that he had a lease. And remarkable, that five-year lease -- when the approach was made to Giles by Citino, thorough Mr. Concilio to try to workout something, the balance that was due on that lease if it had gone to term, was one-hundred-six-thousand-dollars. The full value of it was one-thirty-five, but at the time, it was a-hundred-and-six-thousand-dollars.

The testimony is in with -- regarding to the Redevelopment Agency minutes, and the fact that, obviously, at some point in time Mr. Giles had rights to that property; he had his rent reduced at that property; he then had his rent reduced again.

So the essence of the defense is that everyone reasonably believed that Mr. Giles had rights, and that those rights had to be considered as part of the transaction, and that the request that he be allowed to park there until the building came down and the project began, it's based upon the testimony of other people and other exhibits and there's no need for the defendant to get on the stand and talk about that.

The downside, Your Honor, of Mr. Perez getting on the stand to testify on this charge of larceny by extortion --

THE COURT: I think that's the important side,

why he has to refrain.

MR. SANTOS: I rely upon the arrest warrant affidavit, in those areas where the state spends a lot of time detailing all of these favors that Mr. Perez did for Mr. Giles. First, 1214 Main Street, that is going to be revisited on cross-examination if he takes the stand. The reduction of his rent as -- over at 1143 Main Street will be attacked; the increase in his eviction fees that were given to Giles, that will be attacked; the removal of large amounts of garbage from Giles' business location, that will be attacked. The fact that Giles was trying to sell, in his warehouse -- or make an arrangement of his warehouse for storage, this will be attack.

Now that's bad enough, because now we're getting into conduct that the jury has not heard about except 1214 Main Street, and that is going to paint the picture -- a negative picture of the mayor that would not be the case if we were just dealing with bribery count.

And in addition, Your Honor, we would have this problem if he took the stand. We have the emails, the most powerful evidence that the state has are these emails that Citino sent to the mayor's office; March 15th -- I think March 5th, March 16th, April 23rd -- and those emails would permit a cross-examination to go on for a long period of time; did you read this, did you

read this, did you see this, I mean, we could imagine how devastating that type of cross is going to be. And that is something that we feel is one of the -- one of the principle reasons that we elect not to testify on that count.

So I'm sure I haven't thought of everything --

THE COURT: You thought of quite a bit though.

MR. SANTOS: Thank you.

THE COURT: State.

MR. ALEXY: Thank you, Your Honor. Again, I'll take up the last matter first.

The standard, as the Court is aware, is that the defendant must make a convincing showing that he has important testimony to give on one count, and that he has a strong need to refrain from testifying on the other. The last items that counsel mentioned was uncharged misconduct evidence, which he claims the defendant would be cross-examined on.

First of all, the state has not offered any uncharged misconduct evidence as laid out in the affidavit -- has not offered that on direct and the state has rested its case on that; second, the Court has not even ruled on the admissibility of the uncharged misconduct evidence, and the defense has not asked the Court to rule on that.

Second, moving to the -- well, and so in essence he has not presented a -- he has not satisfied the

second prong of the test the Court must make with regard to a strong need to refrain from testifying in the second set of charges.

Each day the jury has come in -- and the defense itself has requested that the Court instruct the jury that these charges, these two sets of charges, are to be considered separately. The Court has given that instruction and I'm sure the Court will give that instruction at the end of the case. The jurors are presumed to follow those instructions, so the jury will be able to separate the two cases. They have been presented in a very orderly fashion, and the closing arguments will be presented in an orderly fashion; which leads me over into the first area, which is the strong need to testify as to the counts involving fabricating evidence and the bribery.

In many of the instances cited by the defendant, and I'll just name a few, efforts to make home improvements himself; that his wife's illness had an affect on his conduct, this is evidence that has already brought out through cross-examination --

THE COURT: Perhaps he wants to bring it out himself.

MR. ALEXY: But them it would be cumulative and there is --

THE COURT: I don't know if I would ever view a defendant's testimony as cumulative; certainly that's a

defendant's choice, and the defendant's choice alone. But I don't know if any court has ever considered what the defendant says is -- they might consider it cumulative as other evidence when considering harmless error and an admission or a *Miranda* type situation, to that extent it might be cumulative.

MR. ALEXY: Well it would be cumulative with regard to the strong need to testify in one case versus the other, and this is essentially the same argument that the defense has made at the prior motion to severe.

THE COURT: Actually, it's not. This is the first time I've heard it, that's why it's unique.

MR. ALEXY: Well then I'll address all the other points.

If he wants to -- there's been cross-examination as to why -- let me withdraw that.

There are other witnesses available who could testify with regards to why he lied to Inspector Sullivan. I've already indicated that there's been evidence regarding efforts to make home improvement himself; that he repeatedly requested a bill; that his wife's illness had an influence on the conduct; and there's been no evidence so far of the BlueCross/BlueShield bills, although the reason I don't believe -- I know we had received a document that was going to be offered, I don't know if that has been

introduced and marked as an exhibit yet.

THE COURT: Not yet.

MR. ALEXY: That his wife, Maria Perez, was responsible for the home repairs, she's certainly available to testify and --

THE COURT: That's questionable; continue.

MR. ALEXY: That he was stunned on the amount of the bill that Carlos Costa presented him; there was extensive cross-examination on that.

There was cross-examination with regard to Inspector Sullivan regarding what the bill purported to be that he received. And there was -- the mayor would have -- with regard to explaining why that he had Crocini send the final letter would, in fact, contradict his own witness, Mr. Crocini, who said he did it on his own.

So the state's position is he has failed to establish the strong need to testify as to the one set of charges, and the need to not testify as to the other set of charges. I would refer the court to the case of *US versus Freeland*, which is at 141, F, 3rd 1223, 1998 case, where the Court indicated that -- and this is on page 1228: That much of the defendant's testimony was corroborated by other witnesses and by physical evidence. In the case -- in that the defendant's testimony is of debatable significance.

And I submit that in this case that much has bee

corroborated of what he claims he wishes to testify to, and therefore, it would be of debatable significance, and being of debatable significance, does not satisfy the first prong that the Court must consider.

THE COURT: And now the motion for severance and the motion for mistrial?

MR. ALEXY: With regard to the motion for severance, again, the Court has instructed the jury everyday as to the fact that these charges are separate and should be considered separately, and the Court I'm sure will instruct the jury at the end of the case to the same affect.

As I indicated before, the evidence has been presented in an orderly fashion, first, the one set of charges, and then the second set of charges; ff course, the jury is presumed to follow the Court's in considering them separately and -- that's with regard to the motion for severance. And the motion for severance does tie into the -- what we were discussing as far as the defendant's wanting to testify in one case versus the other. So that is also a motion that's in essence to severe the two cases.

He did request that the Court allow the case to proceed on one set of charges versus another. I've never come across -- and I have not come across any authority that that is acceptable, especially at this

stage of the proceedings now that we're at the end of the case. There's nothing in the Practice Book or any case law that I found that indicates that would be proper; and certainly not proper for the defense to decide which case is going to go to the jury.

With regarding to the mistrial, clearly, there's been no manifest necessity established by the defense, and again, there's been instructions given each day to the jury with regard to keeping the cases separate.

Just one moment please?

THE COURT: Certainly. Now how do you spell *Freland*, while you're doing that?

MR. ALEXY: *Freland*, F-R-E-L-A-N-D.

THE COURT: F-R-E- -- thank you.

MR. ALEXY: And I perhaps should point out that his jumping to -- again, his request or claim made to testify in the first set of charges but not the second, to the extent that he intends to talk about other business that he had to handle, which was distracting or what-have-you in the first case, that would certainly open the door to being cross-examined about the same thing in the second case. So he, himself, proposes to testify in such a way as to invoke both cases. And similarly, if he does choose to testify about the distractions of his wife's illness, that would also relate to his defense in the second part of the case, and any testimony offered as to why he did

not or was not able to read emails, would also cross over to both sides of the case. Thank you.

MR. SANTOS: Nothing further.

THE COURT: Let me just finish reading *Freeland* -- let me look at that portion of *Freeland.*

Motion for severance -- well, we'll deal with the motion for mistrial first; denied.

The motion for severance -- everyday it was made clear to this jury that there were two separate Information's. The instructions were explicit; they were pretty much the instructions that were requested by the defense. There's been no doubt throughout this that there have been two separate Information's; the bribery Information, and the larceny by extortion Information. At this point I'm not going to severe them.

The important question becomes the testimony. Now, what you offered today, Counsel, was in detail reasons why your client may want to testify in one case and not the other. And as I read the cases, they've never said the defendant doesn't have a right not to testify in one case and not the other; they all talk about before trial, when ruling on a motion for severance, the question is whether joining of the two trials is going to implicate that right to testify in both. But almost through all the cases there's a presumption that the defendant does have a right to

testify in each case, in neither case, or in one or the other case; nothing says he can't or she can't. All it says is a decision has to be made as to how that's going to be done.

The question is whether the defendant wants to testify in one case and not the other, that's how it becomes so important in the motion for severance; not whether the defendant has a right to or not, but whether the defendant wants to. And in this case, the defendant has made a showing as to why he wants to offer testimony in one case and not the other.

To say now, when the defendant is deciding whether to testify -- well, the cases are two separate cases. It would be contrary to everything that I've been telling the jury throughout this entire trial; they are two separate cases. He can make a decision in one case about tactics in one, and make a decision in another case about the tactics in another; it's his decision as to whether he wants to testify in one case and not the other.

Now, if he does testify in one case and not the other -- the case he would want to is the bribery and not the larceny by extortion, the cross-examination is limited to the case he is testifying about, because once again, I've told the jury everyday, these are two separate cases. The state presented its evidence everyday as two separate cases.

The only time the evidence was presented together were very minor witnesses during the defense case who may have been asked one or two questions that were a crossover, but that was the only time and even then the jury was instructed, these are two separate cases. It's not whether the defendant can or can't, it's whether the defendant wants to. And that's a decision that has to be made with counsel and the defendant, it's not a decision that the Court's going to make as to which trial he wishes to testify -- or which Information he wishes to testify about. It's his choice and his choice only. He can testify as to both, neither, or either one.

MR. SANTOS: May I just say, Your Honor, I understand what Your Honor is saying, but to -- course the problem is in terms of prejudice and this is laid out in our papers.

THE COURT: Well, you asked for a ruling, I gave you the ruling. If you wish to testify --

MR. SANTOS: Right.

THE COURT: -- that is your option.

Now once again, this is the first time this has been pointed out, and you've made the record as to why you want to but remember, I asked before do you even need to make the record at this point as to why you want to or is it your choice. I think it was your choice as to what you wanted to do.

HHD-CR09-628569T HHD-CR09-635038T	: SUPERIOR COURT
STATE OF CONNECTICUT	: JUDICIAL DISTRICT
V.	: HARTFORD, CONNECTICUT
EDDIE A. PEREZ	: JUNE 11, 2010

C E R T I F I C A T I O N

I hereby certified the foregoing pages are a true and correct transcript of the audio recordings of the above-referenced case, heard in Superior Court, Judicial District of Hartford, Connecticut, before the Honorable Julia D. Dewey, Judge on June 11, 2010.

Karen Kobylenski

Court Recording Monitor

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HHD-CR09-628569T HHD-CR09-635038T	: SUPERIOR COURT
STATE OF CONNECTICUT	: JUDICIAL DISTRICT
V.	: HARTFORD, CONNECTICUT
EDDIE A. PEREZ	: JUNE 17, 2010

B E F O R E :

THE HONORABLE JULIA D. DEWEY, JUDGE

A P P E A R A N C E S :

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Christopher Alexy, Esq.
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REPRESENTING THE DEFENDANT

Hubert Santos, Esq.
Hope Seeley, Esq.

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THE COURT: All right. Counsel last evening I received your request for supplemental instructions or for changes in instructions. All of your objections are certainly preserved. You have copies for the clerk, correct, of the written one? Thank you. And the jury will be provided with a written supplement for some of them. Thank you.

Have the jury come in.

(Jury enters the courtroom)

MR. SANTOS: May we approach the bench one moment, Your Honor?

THE COURT: Certainly.

(Sidebar)

THE COURT: All right. Ladies and gentlemen, after consultation with counsel I'm going to provide some clarification for some of the concepts you received yesterday and it's in writing, because you do have the rest of the instructions in writing.

On page ten I refer to the essence of a crime; there is no technical essence of any crime, all the elements are equally important. You must find every element in order for the defendant to become guilty of a crime.

On page eleven, I instructed concerning consideration. Please note that with respect to the final consideration, that the defendant provided Mr. Crocini to act as an intermediary, that action must

have been as consideration for the defendant's consideration, opinion, recommendation, or vote. It must have been as consideration for the fact that Carlos Costa allegedly performed work at the defendant's home, not an act done in the ordinary course of municipal management.

Further, it's not necessary that the state prove all the elements of the alleged acts were done as consideration for the benefit received. It is sufficient that the state prove that the defendant solicited or accepted a benefit from Carlos Costa for any decision, opinion, recommendation, or both.

On pages 24 and 27 I refer to affirmative defenses; they are technically defenses. On the same page, I state that the jury should find the defendant not guilty of renunciation. It should appropriately -- that should read as appropriate, conspiracy, or attempt the crimes themselves.

And finally, as I've already instructed throughout the course of the trial, there are two sets of charges at issue in this case; that is the first set of charges involving the counts of bribe receiving and fabricating physical evidence, which I say I just charged you on, and the second set of charges involving the allegations of an attempt to commit larceny by extortion and conspiracy to commit larceny be extortion, which I am about to charge you on.

These cases were joined for the convenience of trial but they are separate cases. I remind you that the two cases must be considered separately, in other words, the evidence that has been presented by the state relating to the charge of bribe receiving and fabricating physical evidence may not be considered by you in regard to the second case.

Likewise, the evidence the state introduced as relating to the charge of attempted larceny by extortion and conspiracy to commit larceny by extortion, cannot be considered at all by you in regard to the first case. They are two separate cases and each case must stand on its own proof that was introduced for that charge.

Now with that I'm going to release you to the jury room. We are not going to be calling you back formally into session. If you wish to have a break notify the marshal. There will a marshal outside the door at all times today. When you break you all break together. You cannot deliberate when one of you is out of the room.

I'm going to suggest you have your lunch sometime at around eleven. You can pick the time that you want to have -- eleven, sometimes at around one, but pick the time, and once again at the end of the day at 4:30 I'll be calling you back in.

With that, if there are any questions, if you

want any read backs, notify the marshal in writing. Thank you.

(Jury leaves the courtroom)

THE COURT: You'll be call if there are any questions.

MS. SEELEY: Your Honor, can we be heard for a moment?

THE COURT: Yes.

MS. SEELEY: First of all, in terms of the new -- what Your Honor just instructed, I would note that were you say on page 11 I instructed -- please note with respect to the final consideration of the defendant provided Mr. Crocini to act as an intermediary, that action must have been as consideration for the defendant's consideration, opinion, recommendation, or vote. And I would argue that the statutes says it must be that the action must have been as consideration for the defendant's decision, opinion, recommendation, or vote.

THE COURT: Have the jury come back in. I'll --

MS. SEELEY: The language is the statute.

THE COURT: I'll have them come in and say decision.

MS. SEELEY: I apologize.

THE COURT: No, no. You're right. When you're right, you're right.

MR. SANTOS: Your Honor, please, I'm sorry to

interrupt. May I just consult Attorney Seeley a second?

THE COURT: Yes.

MR. SANTOS: There may be one other issue.

THE COURT: Hold on a second before they come in.

Say whatever you wish, Counsel.

MR. SANTOS: Yes, Your Honor. I understand that the jury in all likelihood may understand this but Your Honor goes on at the next sentence: It must have been as consideration for the fact that Carlos Costa allegedly performed work at the defendant's home. It's not that he performed work, that he performed work as a benefit, in other words, for free or whatever discount or something. But the mere fact that he performed work at the defendant's home I don't believe would be the appropriate instruction, because it has to be a benefit.

THE COURT: Noted, Counsel.

MR. GAILOR: I think it is a benefit one way or the other.

THE COURT: Have them come in.

(Jury enters the courtroom)

THE COURT: I'm so sorry to do this to you; the jurors are present.

I made an error when discussing page 11. It's the defendant's decision, opinion, recommendation or

both; that's what the statute reads, his decision, not recommendation. Thank you.

(Jury leaves the courtroom)

MS. SEELEY: Your Honor, just to make the record --

THE COURT: Yes.

MS. SEELEY: I would ask that Your Honor's original -- initial instructions that were provided to counsel during the charging conference held two days ago be made a Court Exhibit or --

THE COURT: I think they are. I have the clerk automatically do that. Anything that is provided in open court is made a Court Exhibit.

MS. SEELEY: Thank you.

And then secondly, in terms of what was sent to Your Honor last night and filed obviously this morning --

THE COURT: Please make sure that that's part of the record as well.

MS. SEELEY: But in terms of the record, on the request for re-instruction and our objection where we laid out on page 2,3,4,5, and 6; our objection as to charging about Mr. Crocini at all. I just want that official denied as opposed to noted.

THE COURT: Officially denied.

MS. SEELEY: And then --

THE COURT: -- verse denoted.

MS. SEELEY: -- lastly, in terms of again for the record, now that it has been denied, we'll file a motion for mistrial on those very same grounds.

THE COURT: Denied.

MR. GAILOR: Just to make something -- to put something on the record as well, Your Honor, I just want to clarify that with respect to Counsel's argument. Counsel's argument was that the -- they had requested something during the -- in the bill of particulars and Mr. Crocini's name was not mentioned in the bill of particulars.

Your Honor denied the bill of particulars because what the state charged was sufficient to comply with the bill of particulars, and the further request was requiring the state to go above and beyond what it was required to do. The fact that -- so the state provided all the specification that was necessary; the arguments that were made and the instructions are in compliance with the request for bill of particulars. The defendant had adequate notice of Mr. Crocini's involvement with this through the arrest warrant affidavit and with discovery. I just wanted to put that on the record.

THE COURT: I am going to note I did anticipate the motion for mistrial, and it pretty much tracks what you have provide last evening --

MS. SEELEY: That's correct, Your Honor.

THE COURT: -- including the two exhibits --

MS. SEELEY: That's correct, Your Honor.

THE COURT: -- which you had. Because when I printed it out --

MS. SEELEY: It went on and on.

THE COURT: I realized that the affidavit had been attached and it does track and you certainly have made your record, Counsel.

MS. SEELEY: Thank you; appreciate it.

THE COURT: All right, with that we wait.

(Court recessed and reconvened)

THE COURT: All right. Ladies and gentlemen we have another note from the jurors. On page 12 of the instructions, is presenting equal to fabricating, in reference to the statute he presents any document in reference to the element: The defendant fabricated physical evidence; the inclination is no.

MR. SANTOS: Can I hear that again, Your Honor? Sorry.

THE COURT: Quote, is presenting equal to fabricating?

MR. SANTOS: Right.

THE COURT: No. Because you can present a perfectly legitimate document, that doesn't mean you fabricated the document.

MR. GAILOR: True.

THE COURT: However, do you have a copy of that

statute? Let me look and see; they're referring to page 12, I want to see --

MR. GAILOR: Right. That's what I'm trying -- where they are on page 12.

The first reference I see to it, Your Honor, is in element three.

THE COURT: Well actually the first is in element two: The defendant fabricated physical evidence.

MS. SEELEY: Correct.

THE COURT: You can present a document, but it is not necessarily fabricating is what I'm going to tell them. And that was your defense, you can present a document and the document is not fabricated.

MR. GAILOR: Your Honor, just to clarify for the record; this was part of my objection previously when the Court instructed the jury that the second element is that the defendant fabricated physical evidence --

THE COURT: Which is the quote from --

MR. GAILOR: Excuse me, Your Honor?

THE COURT: A quote from the instructions that must be given but because --

MR. GAILOR: I -- I understand.

THE COURT: Yes.

MR. GAILOR: The -- as its written there, it seems to suggest that the defendant had to take some act of fabrication, as opposed to what the element

which is required which could be, simply, presented. That's part of the basis of my objection is that there is no separate element that the person fabricate the document. The statute is called fabricating physical evidence, and if believing that an official proceeding was about to be instituted, he presented any document knowing it to be false with the purpose to mislead a public servant.

THE COURT: There has to be a document though is what that element is.

MR. GAILOR: There has to be a document --

THE COURT: There has to be a document.

MR. GAILOR: I agree, but to the extend that it says that it's -- to the extent that it says that the defendant fabricated the physical evidence --

THE COURT: There has to be physical evidence.

MR. GAILOR: I -- there's no question that it has to be physical evidence and I agree with Your Honor on that. It says --

THE COURT: But there's also no question it -- fabricating and presenting are not the same.

MR. GAILOR: No, but I also don't think that there's a separate element of fabricating.

THE COURT: But there is a separate element of there must be physical evidence.

MR. GAILOR: I agree with that, but I guess that part of my concern is that the question sort of raises

the issue of whether there's a separate element of fabricating.

THE COURT: Well it depends on how you emphasis the word fabricated physical evidence or fabricated physical evidence; it's physical evidence. He fabricated physical evidence.

MR. GAILOR: Okay. I just --

THE COURT: Yes.

MR. GAILOR: I understand the Court's position, I just --

THE COURT: Yes.

MR. GAILOR: My position is if it could be made clear that fabrication is not a separate element of the crime.

THE COURT: You have to make something.]

MR. GAILOR: Well not necessarily. You can present a document knowing it to be false without having made it.

THE COURT: Well -- but presenting and fabricating are not the same.

MR. GAILOR: I would agree with that, Your Honor.

THE COURT: Yes.

MR. GAILOR: However --

THE COURT: And that was their question and that's the question that's going to be answered that they are not the same. Have them come in.

I understand your position and I will note that -- I'll have those that modify, look at that language.

MR. GAILOR: Thank you.

THE COURT: And Counsel, make sure that all the copies of the instructions are there, because I said they were but --

MS. SEELEY: I will, thank you, Your Honor.

THE COURT: If they aren't, I have extra copies.

MS. SEELEY: Thank you, Your Honor.

(Jury enters the courtroom)

THE COURT: And in answer to your question, the question is: Is presenting equal to fabricating? No.

Is that simple enough? That was your only question? All right. That was the question asked, that the question answered. Thank you.

(Jury leaves the courtroom)

THE COURT: Court Exhibit, and that was given to us at 10:23?

THE CLERK: 10:32, Your Honor.

THE COURT: 10:32. All right, recess.

(Court recessed and reconvened)

THE COURT: Good afternoon. We do have a note from the jury who have asked: Your Honor, we are at a good point in our deliberations to stop for the day, would that be okay? Of course it would be okay. I'm not going to force them to deliberate if they don't

want to. So I'm going to call them in and have them come back at 9:30 tomorrow morning. Again, tomorrow is a short day because one of them had a prior commitment.

MR. GAILOR: And just for clarification, will Your Honor want to bring them in the courtroom before they send -- before you send them out tomorrow morning?

THE COURT: I always do that just to see if anything happened overnight.

MR. GAILOR: Okay.

THE COURT: And I think it's better that they see us and know that we're interested as well.

MR. GAILOR: Yes, Your Honor.

THE COURT: Rather than just leave them on their own.

(Jury enters the courtroom)

THE COURT: Good afternoon all. Sorry it took ten minutes to get us all together. Yes, you certainly can stop your deliberation now if you feel you're at a good point, and return tomorrow.

I'm going to remind you tomorrow is a half-day; I was anticipating you leaving at around 12:30 before any traffic or any issues because we want you there in time for the graduations that you're going to. I'm not sure what time the graduation is, but I know it involves some work in advance. So if you could be here at 9:30 tomorrow.

You're in the middle of deliberation; you can't

deliberate without each other. I know you can repeat these after me, but it is important that I keep reminding you. Please don't talk to anyone about it and don't let anyone approach you or talk to you; ignore any media; don't do any research; do not deliberate until you're together in a group. The marshals will escort you out of the building; have a good evening and we'll see you here tomorrow morning at 9:30. Thank you.

(Jury leaves the courtroom)

THE COURT: And we will see all of you at 9:30 tomorrow morning. Thank you.

(Court adjourned)

HHD-CR09-628569T HHD-CR09-635038T	: SUPERIOR COURT
STATE OF CONNECTICUT	: JUDICIAL DISTRICT
V.	: HARTFORD, CONNECTICUT
EDDIE A. PEREZ	: JUNE 17, 2010

C E R T I F I C A T I O N

I hereby certified the foregoing pages are a true and correct transcript of the audio recordings of the above-referenced case, heard in Superior Court, Judicial District of Hartford, Connecticut, before the Honorable Julia D. Dewey, Judge on June 17, 2010.

Karen Kobylenski

Court Recording Monitor

Certification does not apply to photocopies

MUST BE SIGNED IN BLUE INK