KATZ, J., with whom, PALMER, J., joins, concurring. I agree with the majority's conclusion that the judgment of conviction of the defendant, Larry Davis, must be affirmed, despite the improper consolidation of the charges in one case pertaining to the victim Victoria Standberry (Standberry case) with the charges in two other cases pertaining to the victims Lenwood E. Smith, Jr., and Leonard Hughes (Smith and Hughes cases). I write separately, however, for two reasons.

First, I take this opportunity to revisit the liberal presumption in favor of joinder that has been applied under our case law. In my view, the uniform application of such a presumption, irrespective of whether the evidence in each case would be cross admissible, cannot be reconciled with the well established rule barring evidence of other crimes as inherently prejudicial unless that evidence would be legally relevant to the case on some other basis. I therefore propose a refinement to the rule, under which joinder is presumptively favored *only* when the substantive evidence would be cross admissible in independent prosecutions; in the absence of such cross admissibility, prejudice is presumed and joinder will be proper only when the *Boscarino* factors[1] demonstrate that the risk of prejudice is *substantially* reduced. This approach is both consistent with our treatment of uncharged misconduct evidence and recognizes the reality that a defendant faces when forced to defend against multiple charges—the presumption that he has a bad character and a propensity for criminal behavior, which in turn is likely to influence improperly the jury's deliberations.

Second, I take this 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?

In accordance with those inquiries, in the present case, I would conclude that the trial court abused its discretion in consolidating the cases because it was evident at the outset that the more brutal conduct alleged in the Standberry case might compromise the jury's ability to consider the charges in the other two cases. I nonetheless would conclude that the defendant has failed to sustain his burden of proving that this impropriety constituted harmful error because the total-

ity of the record provides us with a fair assurance that the improper consolidation did not affect the outcome.

I

Our case law on joinder consistently has recognized a long-standing rule of evidence, under which admission of evidence of other crimes categorically is proscribed unless that evidence is legally relevant to some other issue in the case. See, e.g., *State* v. *Pollitt*, 205 Conn. 61, 69, 530 A.2d 155 (1987); *State* v. *Boscarino*, 204 Conn. 714, 721–22, 529 A.2d 1260 (1987); *State* v. *Jonas*, 169 Conn. 566, 572–73, 363 A.2d 1378 (1975), cert. denied, 424 U.S. 923, 96 S. Ct. 1132, 47 L. Ed. 2d 331 (1976); *State* v. *Oliver*, 161 Conn. 348, 361, 288 A.2d 81 (1971); *State* v. *Silver*, 139 Conn. 234, 240–41, 93 A.2d 154 (1952). Although one could argue that the exceptions tend to swallow the rule; see Conn. Code Evid. § 4-5 (b);[2] this court has not wavered from firm application of this rule when an exception is not demonstrated. See, e.g., *State* v. *Randolph*, 284 Conn. 328, 356–62, 933 A.2d 1158 (2007). Despite our rigid adherence to this rule of evidence, the court often has stated that a universal presumption in favor of joinder and against severance applies, irrespective of whether the evidence pertaining to one offense would be admissible as proof of the other offenses joined. See, e.g., id., 338; *State* v. *McKenzie-Adams*, 281 Conn. 486, 521, 915 A.2d 822, cert. denied, U.S. , 128 S. Ct. 248, 169 L. Ed. 2d 148 (2007); *State* v. *Ellis*, 270 Conn. 337, 375, 852 A.2d 676 (2004); *State* v. *Delgado*, 243 Conn. 523, 532, 707 A.2d 1 (1998); *State* v. *Chance*, 236 Conn. 31, 38, 671 A.2d 323 (1996), writ of habeas corpus denied sub nom. *Chance* v. *Kupec*, United States District Court, Docket No. 3:96CV2204, 1998 U.S. Dist. LEXIS 18997 (D. Conn. November 17, 1998); *State* v. *Jones*, 234 Conn. 324, 344, 662 A.2d 1199 (1995). Such a uniform presumption seems to me to be in direct conflict with our adherence to fundamental rules of evidence.

As the District of Columbia Circuit Court of Appeals explained in *Drew* v. *United States*, 331 F.2d 85, 89–90 (D.C. Cir. 1964), a case often cited in this court's case law on joinder:[3] "It is a principle of long standing in our law that evidence of one crime is inadmissible to prove disposition to commit crime, from which the jury may infer that the defendant committed the crime charged. Since the likelihood that juries will make such an improper inference is high, *courts presume prejudice and exclude evidence of other crimes unless that evidence can be admitted for some substantial, legitimate purpose. The same dangers appear to exist when two crimes are joined for trial, and the same principles of prophylaxis are applicable.*[4]

"Evidence of other crimes is admissible when relevant to (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to

each other that proof of the one tends to establish the other, and (5) the identity of the person charged with the commission of the crime on trial. When the evidence is relevant and important to one of these five issues, it is generally conceded that the prejudicial effect may be outweighed by the probative value.

"If, then, under the rules relating to other crimes, the evidence of each of the crimes on trial would be admissible in a separate trial for the other, the possibility of 'criminal propensity' prejudice would be in no way enlarged by the fact of joinder. When, for example, the two crimes arose out of a continuing transaction or the same set of events, the evidence would be independently admissible in separate trials. Similarly, if the facts surrounding the two or more crimes on trial show that there is a reasonable probability that the same person committed both crimes due to the concurrence of unusual and distinctive facts relating to the manner in which the crimes were committed, the evidence of one would be admissible in the trial of the other to prove identity. In such cases the prejudice that might result from the jury's hearing the evidence of the other crime in a joint trial would be no different from that possible in separate trials." (Emphasis added.)

That court and others, therefore, have endorsed a rule that "requires a severance of offenses that are purportedly of the 'same or similar character' unless evidence of the joined offenses would be mutually admissible in separate trials or, if not, unless the evidence is sufficiently 'simple and distinct' to *mitigate the dangers otherwise created by such a joinder*." (Emphasis added.) *United States* v. *Halper*, 590 F.2d 422, 431 (2d Cir. 1978). Indeed, commentators generally have been critical of joinder in the absence of cross admissibility. See *United States* v. *Foutz*, 540 F.2d 733, 738 n.4 (4th Cir. 1976) (citing federal treatises and American Bar Association's Project on Minimum Standards for Criminal Justice suggesting that joinder of similar offenses, when evidence is not cross admissible, generally should not be permitted). The proposition in *United States* v. *Halper*, supra, 431, that the prejudice must be "mitigated" to make joinder proper implicitly acknowledges a presumption in such cases that must be overcome.

The tension between this reasoning and this court's uniform presumption in favor of joinder has grown appreciably since this court's decision in *State* v. *King*, 187 Conn. 292, 445 A.2d 901 (1982), wherein the court reconciled a conflict between the statute authorizing joinder of offenses of the "same character"; General Statutes § 54-57; and the rule of practice permitting joinder of dissimilar offenses; Practice Book § 41-19 (formerly § 829); in favor of the rule of practice. *State* v. *King*, supra, 296–98 (concluding that rule of practice permissibly expanded circumstances in which joinder

could be proper because it regulates court procedure and does not infringe on any substantive right); see J. Bruckmann, G. Nash & J. Katz, Connecticut Criminal Caselaw Handbook (1989) p. 142 ("[t]he conflict arising from the failure [of § 54-57] to provide for consolidation of dissimilar cases was settled in [*King*] . . . in favor of [the rule of practice]"). Although *King* recognized that the more liberal rule of practice on joinder "should be read in light of [now Practice Book § 41-18] permitting severance if prejudice may result"; (internal quotation marks omitted) *State* v. *King*, supra, 296; it opened the door to joinder of many more offenses that might not be cross admissible and hence increased the risk of prejudice to the defendant.

In my view, it also is significant that the presumption in favor of joinder is based on the rationale that it fosters judicial economy. See *State* v. *Ellis*, supra, 270 Conn. 375. This court has failed to acknowledge in *King* or subsequent cases, however, that the interests favoring joinder may weigh differently when both the offenses are dissimilar and the evidence is not cross admissible. As one treatise observed: "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. 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. Moreover, the only realistic benefit to the defendant from joinder—receiving a speedier trial because of the reduced pressure on criminal dockets—is likely to be outweighed in dissimilar cases by the possibility that joinder may infringe on the defendant's right to pursue different defenses or his right to testify as to one offense and not the other, and even in similar cases where the evidence is not cross admissible by the possibility that joinder may instill the presumption that the defendant has a bad character and a propensity for criminal behavior.

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, 126 S. Ct. 1103, 163 L. Ed. 2d 915 (2006); see also id. (concluding that trial court nonetheless did not abuse its discretion in denying defendant's motion to sever because "[a]ny prejudice [he] suffered by having the two robbery charges joined into one trial is substantially mitigated by the fact that much of the evidence of one robbery would be admissible in the other"). 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."[5] *Drew* v. *United States*, supra, 331 F.2d 91.

II

I next turn to the question of the proper standard to be applied by the reviewing court in deciding whether joinder was proper. In my view, the court improperly has conflated what should be a two-pronged inquiry: (1) whether the trial court abused its discretion; and (2) whether that impropriety constituted harmful error. We apply this rubric to every other claim of nonconstitutional error, and I see no reason to do otherwise in our review of a claim of improper joinder.

In 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.*"[6] (Emphasis added; internal quotation marks omitted.) *State* v. *Castelli*, 92 Conn. 58, 63, 101 A. 476 (1917); accord *State* v. *Holup*, 167 Conn. 240, 245, 355 A.2d

119 (1974) ("Because a preliminary motion for separate trials obviously must be decided before the actual trial, the merits of the motion can be determined only on the basis of whether at that time it appears that injustice is likely to result unless separate trials are held. It is for this reason that in support of such a motion the court must be fully informed of any and all circumstances which indicate that justice 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 danger 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.[7] See, e.g., *State* v. *Oliver*, supra, 161 Conn. 360–62 (finding "no error in the preliminary ruling by the court which denied the defendant's motion for separate trials on the two counts [of indecent assault] in the light of the circumstances as they were then before the court" when it was only after evidence had been adduced at trial that it became apparent that one victim's identification had been tainted; ultimately reversing judgment and remanding for new trial on independent ground that there was substantial likelihood that inadmissible identification had been substantial factor in jury's verdict of guilt as to other offense); *State* v. *Klein*, 97 Conn. 321, 324–25, 116 A. 596 (1922) ("In the present case two confessions or statements were offered, besides other evidence of lesser consequence, and admitted against one or two of the accused. None of this evidence, except as to one confession, was known to the court at the time these motions [for separate trials] were heard and decided. . . . With the fact of the single confession before it, we cannot say that the court abused its discretion in denying these motions." [Citation omitted.]).

Although the dispositive question is prejudice, that question is viewed from a predictive perspective when considering whether the trial court had abused its discretion when acting on the motion to join or sever, but is viewed from a fully informed perspective when determining whether improper joinder was harmful: "The test for the trial court is whether substantial injustice *is likely to result* unless a separate trial be accorded. The test for this court is whether the denial of the motion for a separate trial *has resulted* in substantial injustice to the accused." (Emphasis added.) *State* v. *Klein*, supra, 97 Conn. 324.

In *State* v. *Boscarino*, supra, 204 Conn. 714, the court applied three factors when determining whether joinder had been proper: (1) whether 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"; id., 723; (2) whether "[t]he prejudicial impact of joinder in these cases was 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"; id.; 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." Id. *Boscarino* did not make clear, however, that these factors are pertinent in determining both whether the trial court's decision was proper in the first instance and whether the defendant received a fair trial despite improper joinder.[8] See *State* v. *Herring*, 210 Conn. 78, 96 n.16, 554 A.2d 686 (1989) ("Several of the factors that we stressed in [*Boscarino*] require hindsight in determining whether the defendant received a fair trial. While it may be relevant to consider whether the defendant raised the question of prejudice at trial or requested appropriate curative instructions, the effect of a denial of severance may be difficult to predict in advance of the actual testimony at trial."), cert. denied, 492 U.S. 912, 109 S. Ct. 3230, 106 L. Ed. 2d 579 (1989). The court's failure to make this point exacerbated a tendency in our case law to conflate the requisite inquiry, considering the totality of the record at the conclusion of trial, rather than first considering the evidence as it appeared to the trial court at the time it ruled on the motion. See, e.g., *State* v. *Horne*, 215 Conn. 538, 548–51, 577 A.2d 694 (1990) (determining that evidence adduced at trial exposed defendant to prejudice and then considering whether trial court's instruction was adequate to mitigate that prejudice); *State* v. *Bell*, 188 Conn. 406, 411, 450 A.2d 356 (1982) ("[s]ince the state was able to present the evidence in an orderly manner and since it appears that the jury was not confused and was able to consider the evidence as to each charge separately and distinctly, it is clear that the trial court did not abuse its discretion in permitting a single trial"); *State* v. *Jonas*, supra, 169 Conn. 571 ("our analysis must focus on the nature of the evidence produced at the trial").

Whether the trial court abused its discretion in joining offenses in the first instance, however, cannot resolve the question of whether such an improper ruling requires reversal. It is a well settled rule that, "[w]hen a trial error in a criminal case does not involve a consti-

tutional violation the burden is on the defendant to demonstrate the harmfulness of the court's error." (Internal quotation marks omitted.) *State* v. *Iban C.*, 275 Conn. 624, 640, 881 A.2d 1005 (2005); accord *State* v. *Smith*, 280 Conn. 285, 307, 907 A.2d 73 (2006) ("When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . We have recently stated that a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." [Citation omitted; internal quotation marks omitted.]). I can find no rationale in our case law to justify a different analytical framework for improper joinder than that which we apply in every other type of nonconstitutional impropriety, wherein the court engages in a two part inquiry to determine first whether there was an impropriety, and second whether the impropriety was harmful error in light of the record as a whole.[9] Indeed, the only time the court does not apply a two step analysis is in the limited class of claims that constitutes structural error, wherein the claim "is not susceptible to a harmless error analysis . . . ." (Internal quotation marks omitted.) *State* v. *Brown*, 279 Conn. 493, 505, 903 A.2d 169 (2006).

Instructive in this regard is this court's decision in *State* v. *Hamilton*, 228 Conn. 234, 235, 636 A.2d 760 (1994), wherein the issue was "the proper standard for appellate review of a trial court's denial of a motion for continuance to retain private counsel." The court noted: "The determination of whether to grant a request for a continuance is within the discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion." (Internal quotation marks omitted.) Id., 239. The court then explained the proper standard of review as follows: "In appellate review of matters of continuances, federal and state courts have identified multiple factors that appropriately may enter into the trial court's exercise of its discretion. Although the applicable factors cannot be exhaustively catalogued, they generally fall into two categories. *One set of factors focuses on the facts of record before the trial court at the time when it rendered its decision.* From this perspective, courts have considered matters such as: the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request; the defendant's personal responsibility for the timing of the request; the likelihood that the denial would substantially impair the defendant's ability to defend himself; the availability of other, adequately equipped and prepared counsel to try the case; and the adequacy of the representation already being afforded to the defendant.

. . . Another set of factors has included, as part of the inquiry into a possible abuse of discretion, a consideration of the prejudice that the defendant actually suffered by reason of the denial of the motion for continuance. . . . For purposes of assessing actual prejudice, the focus is on the adequacy of the defendant's legal representation subsequent to the trial court's ruling, as distinguished from its likely adequacy as determined by the trial court at the time of its ruling on the motion for continuance. . . .

"Although our past rulings on this question have not been entirely consistent . . . the decision of the Appellate Court in this case affords us the opportunity to clarify that an appellate court should limit its assessment of the reasonableness of the trial court's exercise of its discretion to a consideration of those factors, on the record, that were presented to the trial court, or of which that court was aware, at the time of its ruling on the motion for a continuance.

"In the event that the trial court acted unreasonably in denying a continuance, the reviewing court must also engage in harmless error analysis. If a claim on appeal is nonconstitutional in nature, 'the burden of establishing that harm resulted from a trial court error rests on the appellant. . . . When a continuance has been requested to obtain new counsel after a trial has begun, the defendant must show, on appeal, that the improper denial of the motion demonstrably prejudiced his ability to defend himself.' " (Citations omitted; emphasis added.) Id., 240–42. In a footnote appended to the last sentence quoted from *Hamilton*, the court noted: "We recognize that this analysis has, in the past, been effectuated under the rubric of 'abuse of discretion' . . . and that this has led to inconsistency in the application of the standard. For purposes of clarification, therefore, we now term the assessment of actual prejudice to the defendant's case as 'harmless error analysis.' " (Citations omitted.) Id., 242 n.4.

I would make clear, as the court did in *Hamilton*, that the reviewing court must not conflate the distinct inquiries relating to abuse of discretion and harmful error. The reviewing court first must determine whether the trial court abused its discretion in light of the information before the court when it ruled on the motion. If there was such an abuse of discretion, the reviewing court then must determine whether the defendant has established that, in light of the totality of evidence at trial and the trial court's subsequent instructions to the jury, the impropriety constituted harmful error.

III

Applying this analytical framework to the present case, I would conclude that the trial court abused its discretion in denying the defendant's motion to sever because the evidence in the cases was not cross admis-

sible and application of the *Boscarino* factors would not have demonstrated that the risk of prejudice from joinder of the more brutal allegations in the Standberry case with those in the other cases was "substantially reduced." Upon review of the totality of the record, however, I further would conclude that the defendant has failed to prove that this impropriety was harmful error.

At the outset, I note that the pertinent inquiry is whether the evidence regarding the improperly joined case, involving the defendant's premeditated "revenge" shooting of Standberry, compromised the jury's ability to consider fairly the charges against him of first degree robbery and larceny in the Smith case. I agree with the defendant that the trial court's remedial instructions were not sufficient to mitigate the prejudice caused by the improper joinder in this case. The general instructions for the jury to keep the evidence in each case separate, which must be given whenever legally unrelated cases are joined in a single trial, did not address the particular prejudice at issue here. See *State* v. *Horne*, supra, 215 Conn. 552–53 ("The trial court also asked the jury somehow to ignore the obviously inflammatory nature and impact of the sexual assault. It failed, however, to instruct the jury about the difficulties of this assignment at the outset of the trial, despite its initial agreement to the defendant's request that the court make such an instruction. The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." [Internal quotation marks omitted.]); see also *State* v. *Boscarino*, supra, 204 Conn. 724–25 ("[A] curative instruction is not inevitably sufficient to overcome the prejudicial impact of [inadmissible other crimes] evidence. . . . In the circumstances of these cases, we 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.]). Harmful error analysis, however, does not begin and end with this limited aspect of the record. Cf., e.g., *State* v. *Thompson*, 266 Conn. 440, 456, 832 A.2d 626 (2003) (concluding that, although admission of certain testimony was abuse of discretion, it was harmless error because, inter alia, state's attorney did not emphasize or rely upon testimony during closing argument and there was significant other evidence of defendant's guilt); *State* v. *Hafford*, 252 Conn. 274, 297, 746 A.2d 150 ("[t]his court has held in a number of cases that when there is independent overwhelming evidence of guilt, a constitutional error would be rendered harmless beyond a reasonable doubt" [internal quotation marks omitted]), cert. denied, 531 U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000). The dispositive question in harmful error analy-

sis is whether we have a fair assurance that the defendant received a fair trial. See *State* v. *Smith*, supra, 280 Conn. 307.

The defendant in the present case did not contest that Smith had been robbed, nor did he suggest that Smith had a motive to lie. Rather, the sole defense was misidentification. The evidence regarding Smith's identification, however, was quite strong. Smith had ample opportunity to observe the defendant that night. Smith testified that, when he first had been approached by the defendant at a club on the night of the robbery, the defendant looked familiar from previous contact some time earlier. Smith and the defendant spoke for approximately twenty minutes before leaving the club. After they left the club together in Smith's car, the defendant sat in the passenger's seat directly next to Smith for approximately twenty more minutes. Smith testified that the defendant had referred to himself as "Lord Devine" or "Devine," and the defendant stipulated to the fact that he had been known by those names since the late 1990s. Approximately two months after the robbery, Smith identified the defendant from a photographic array. Although the defendant attempted to attack inconsistencies between Smith's statement to the police on the night of the robbery and his subsequent statement two months after the robbery, those inconsistencies either were unrelated to identification or were insignificant matters, such as whether Smith had said that the defendant had "a braid" or "braids" of hair sticking up. Thus, the state's evidence in the Smith case was extremely strong and was not impeached in any substantive manner.

Finally, I note, as did the majority, that the jury deliberated and rendered its verdict of guilty in the Smith case prior to its deliberations in the Standberry case. This chronology further diminished the likelihood that the more brutal facts in the Standberry case played a role in the jury's deliberations in the Smith case. Given the totality of the record, I would conclude that the court has a fair assurance that the improper joinder did not affect the verdict in the Smith case. Accordingly, I respectfully concur in the judgment.

[1] See *State* v. *Boscarino*, 204 Conn. 714, 722–24, 529 A.2d 1260 (1987); see also *State* v. *Ellis*, 270 Conn. 337, 375, 852 A.2d 676 (2004) (citing *Boscarino* "factors").

[2] Section 4-5 of the Connecticut Code of Evidence provides in relevant part: "Evidence of Other Crimes, Wrongs or Acts Inadmissible To Prove Character; Admissible for Other Purposes; Specific Instances of Conduct

"(a) Evidence of other crimes, wrongs or acts inadmissible to prove character. Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character or criminal tendencies of that person.

"(b) When evidence of other crimes, wrongs or acts is admissible. 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 crime, or to corroborate crucial prosecution testimony. . . ."

[3] See *State* v. *Horne*, 215 Conn. 538, 546, 577 A.2d 694 (1990); *State* v. *Pollitt*, supra, 205 Conn. 68; *State* v. *Boscarino*, supra, 204 Conn. 722, 724;

State v. *King*, 187 Conn. 292, 298, 301, 445 A.2d 901 (1982); *State* v. *Oliver*, supra, 161 Conn. 361.

[4] In *Drew* v. *United States*, supra, 331 F.2d 88, the court noted that English courts applied a similar presumption: "This question has been considered many times by the federal courts, the state courts, and the courts of England. In *Queen* v. *King*, [1897] 1 Q.B. 214, 216, Hawkins, J., said . . . I pause here to express my decided opinion that it is a scandal that an accused person should be put to answer such an array of counts containing, as these do, several distinct charges. Though not illegal, it is hardly fair to put a man upon his trial on such an indictment, for it is almost impossible that he should not be grievously prejudiced as regards each one of the charges by the evidence which is being given up on the others." (Internal quotation marks omitted.)

[5] "A presumption is equivalent to prima facie proof that something is true. It may be rebutted by sufficient and persuasive contrary evidence. A presumption in favor of one party shifts the burden of persuasion to the proponent of the invalidity of the presumed fact." *Salmeri* v. *Dept. of Public Safety*, 70 Conn. App. 321, 339, 798 A.2d 481, cert. denied, 261 Conn. 919, 806 A.2d 1055 (2002).

Consistent with current practice, the party moving for joinder or severance would bear the initial burden of proof. Under the refined rule, however, if the state moves for joinder, it would need to establish either that the substantive evidence is cross admissible, at which point the presumption in favor of joinder would attach, or that the *Boscarino* factors demonstrate that the risk of prejudice is substantially reduced. If the defendant moves for severance, he would need to demonstrate that the evidence is not cross admissible, at which point the presumption against joinder would attach. The burden then would shift to the state to rebut that presumption by proving that application of the *Boscarino* factors demonstrates that the risk of prejudice is substantially reduced. Cf. *State* v. *Rodriguez*, 210 Conn. 315, 326, 554 A.2d 1080 (1989) ("[w]here an accused makes a plausible claim that his constitutional right to a fair trial may be violated because the jury is not impartial, the burden is upon the state to rebut the presumption of prejudice that denies a fair trial").

[6] The trial court does have an independent obligation to inquire about the evidence supporting the charges to ascertain whether joinder is proper. This court has noted: "In the exercise of a wise discretion, the court should ascertain by inquiry, if counsel do not develop it, the character of the evidence to be offered by the [s]tate affecting one and not the rest of the accused, in order to see whether the introduction of evidence against one accused will be antagonistic to the defenses of the other accused, and whether the joint trial will be prejudicial to the rights of any of the accused." *State* v. *Klein*, 97 Conn. 321, 324, 116 A. 596 (1922).

[7] 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. See *State* v. *Jennings*, 216 Conn. 647, 657–58, 583 A.2d 915 (1990). Therefore, I reject the implicit suggestion in *State* v. *Horne*, 215 Conn. 538, 553, 577 A.2d 694 (1990), that a trial court may consider the effect of such instructions when determining whether joinder is proper in the first instance. See id. ("[t]he trial court may, on retrial, in the careful exercise of its discretion, consolidate the three robberies that did not involve the sexual assault if the trial court issues adequate instructions to the jury, at the beginning and during the course of the proceedings as warranted, to keep the facts of each robbery separate, thereby minimizing the risk that the jury would commingle the facts"); see also *State* v. *Randolph*, supra, 284 Conn. 368 ("[u]pon remand, if the state again moves to consolidate the . . . cases for trial, it is left to the considered judgment of the trial court to determine whether consolidation would be appropriate under *State* v. *Boscarino*, supra, 204 Conn. 722–24, in accordance with the principles articulated in the body of this opinion, including, of course, the precepts that the evidence in each case is not cross admissible to establish a common scheme or plan, and that an order of consolidation must be accompanied by adequate and proper jury instructions cautioning the jury to consider the evidence in each case separately and independently").

[8] *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. See *State* v. *Boscarino*, supra, 204 Conn. 722–23. Moreover, the court did not address whether a reviewing court should consider factors other than jury instructions when determining whether, despite improper joinder, the defendant had received a fair trial. For example, in our harmful error review in other types of nonconstitutional error, the court has considered whether there is overwhelming evidence of the defendant's guilt. See, e.g., *State* v. *Thompson*, 266 Conn. 440, 452, 456, 832 A.2d 626 (2003) (concluding that, although trial court abused its discretion when it allowed one witness to testify as to credibility of another witness, improper evidentiary ruling was harmless error in light of substantial evidence of defendant's guilt); *State* v. *Brown*, 187 Conn. 602, 612, 447 A.2d 734 (1982) (overwhelming evidence of defendant's guilt rendered improper admission of statement by defendant's accomplice harmless error).

[9] See, e.g., *State* v. *Calabrese*, 279 Conn. 393, 411, 902 A.2d 1044 (2006) (considering harmful error after determination that trial court abused discretion in excluding certain evidence); *State* v. *Pinder*, 250 Conn. 385, 429, 736 A.2d 857 (1999) (considering harmful error after assuming, arguendo, trial court abused discretion in failing to permit jury to cease deliberations); *State* v. *Valentine*, 240 Conn. 395, 404, 692 A.2d 727 (1997) (considering harmful error after determination that trial court abused discretion in excluding extrinsic evidence of prior inconsistent statement); *State* v. *Tatum*, 219 Conn. 721, 737–38, 595 A.2d 322 (1991) (considering harmful error after determination that trial court abused discretion in refusing to instruct on substantive use of witness' prior inconsistent statements); *State* v. *Brown*, 187 Conn. 602, 611, 447 A.2d 734 (1982) (considering harmful error after determination that trial court abused discretion in admitting statement of defendant's accomplice); *State* v. *Ruth*, 181 Conn. 187, 196, 435 A.2d 3 (1980) (considering harmful error after determination that trial court abused discretion in failing to charge on subject of evaluating credibility of self-confessed accomplices who testified against defendant).