St. John's Law Review

Volume 60
Number 3 *Volume 60, Spring 1986, Number 3*

Article 14

June 2012

CPL § 200.40(1): Confessions Must Be Substantially Similar as to Their Content, Regardless of Their Reliability, in Order to be Found Interlocking so as to Defeat a Motion for Severance in a Criminal Proceeding

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CRIMINAL PROCEDURE LAW

CPL § 200.40(1): Confessions must be substantially similar as to their content, regardless of their reliability, in order to be found interlocking so as to defeat a motion for severance in a criminal proceeding

Section 200.40 of the New York Criminal Procedure Law[1] permits two or more defendants to be jointly charged[2] in a single indictment, but allows the court, in its discretion,[3] to order separate

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[1] CPL § 200.40(1) (McKinney Supp. 1986). Section 200.40(1) provides in pertinent part:

> 1. Two or more defendants may be jointly charged in a single indictment provided that:
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> (a) all such defendants are jointly charged with every offense alleged therein; or
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> (b) all the offenses charged are based upon a common scheme or plan; or
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> (c) all the offenses charged are based upon the same criminal transaction . . . .
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> Even in such case, the court, upon motion of a defendant or the people . . . may for good cause shown order in its discretion that any defendant be tried separately from the other or from one or more or all of the others. Good cause shall include, but not be limited to, a finding that a defendant or the people will be unduly prejudiced by a joint trial. . . . Upon such a finding of prejudice, the court may order counts to be tried separately, grant a severance of defendants or provide whatever other relief justice requires.

Id. This provision was derived from § 391 of the 1881 Code of Criminal Procedure as amended in 1926 which reinstated the common law rule. *See* CPL § 200.40, commentary at 440 (McKinney 1982). The 1926 provision read: "[d]efendants, jointly indicted, may be tried separately or jointly in the discretion of the court." Ch. 461, § 391, [1926] N.Y. Laws 810.

[2] *See* CPL § 200.40(1) (McKinney Supp. 1986). Policy considerations weigh in favor of joint trials as they reduce the witnesses' onerous tasks of appearing in multiple suits and promote prosecutorial and judicial economy. *See id.* commentary at 82-83. Indeed the trend indicates a strong presumption that "defendants joined together should be tried together". Dawson, *Joint Trials of Defendants in Criminal Cases: an Analysis of Efficiencies and Prejudices*, 77 MICH. L. REV. 1379, 1381 (1978-79). However, this policy must be balanced against a defendant's substantive rights so that he is not denied a fair trial. *See* People v. Rowley, 119 Misc. 2d 86, 87, 462 N.Y.S.2d 366, 367 (N.Y.C. Crim. Ct. Kings County 1983).

[3] CPL § 200.40(1) (McKinney Supp. 1986). *See* People v. La Belle, 18 N.Y.2d 405, 409, 222 N.E.2d 727, 729, 276 N.Y.S.2d 105, 108 (1966); People v. Ward, 107 App. Div. 2d 892, 895, 483 N.Y.S.2d 838, 841 (3d Dep't 1985) (mem.); People v. Rodriguez, 91 App. Div. 2d 591, 592, 457 N.Y.S.2d 268, 269 (1st Dep't 1982). When exercising its discretion, the court must consider whether: "a separate trial will 'impede or assist the proper administration of justice in a particular case and secure to the accused the right of a fair trial'." *La Belle*, 18 N.Y.2d at 411, 222 N.E.2d at 730, 276 N.Y.S.2d at 109 (quoting People v. Snyder, 246 N.Y. 491, 496, 159 N.E. 408, 410 (1927)); *see* People v. Donovan, 53 App. Div. 2d 27, 30, 385 N.Y.S.2d 385, 387 (3d Dep't 1976). Generally, an appellate court will not substitute its discretion for the trial court's. *See* People v. Doran, 246 N.Y. 409, 424, 159 N.E. 379, 385

proceedings when justice so requires.[4] When a defendant in a joint trial has made an extrajudicial confession, it may be entered in evidence against him[5] but, since it constitutes impermissible hearsay against the other defendant, the court is required to instruct the jury to use the inculpatory statement only against the declarant.[6] Separate trials are constitutionally mandated, however, when a codefendant's extrajudicial confession implicating the defendant is to be introduced in evidence, and the codefendant does not intend to testify.[7] The Supreme Court has held that in such a situation, the defendant's Sixth Amendment right of confrontation[8] is impaired

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(1927); People v. Schwarz, 10 App. Div. 2d 17, 20, 196 N.Y.S.2d 472, 475 (1st Dep't 1960). The trial court's discretion, however, is not absolute, *see* People v. Payne, 35 N.Y.2d 22, 26, 315 N.E.2d 762, 764, 358 N.Y.S.2d 701, 705 (1974); People v. Valdez, 97 App. Div. 2d 778, 778, 468 N.Y.S.2d 187, 188 (2d Dep't 1983) (mem.), and may be overturned if abused. *See* People v. Bornholdt, 33 N.Y.2d 75, 87, 305 N.E.2d 461, 467, 350 N.Y.S.2d 369, 378 (1973), *cert. denied*, 416 U.S. 905 (1974); *La Belle*, 18 N.Y.2d at 409, 222 N.E.2d at 729, 276 N.Y.S.2d at 108. Even if prejudice is not apparent at the outset of a case, an appellate court may review a lower court's determination if substantial rights were in fact abrogated. *See* People v. Burrelle, 21 N.Y.2d 265, 270, 234 N.E.2d 431, 432, 287 N.Y.S.2d 382, 384 (1967) (quoting People v. Fisher, 249 N.Y. 419, 427, 164 N.E. 336, 339 (1928)).

[4] *See* CPL § 200.40(1) (McKinney Supp. 1986). The court may order separate trials upon motion of a defendant or the people. *See id.* The motion for severance must be made before the trial, *see* People v. Downs, 77 App. Div. 2d 740, 742, 431 N.Y.S.2d 197, 199 (3d Dep't 1980) (mem.), within the period set forth by section 255.20. *See* CPL § 255.20(1) (McKinney 1982). Section 255.20(1) provides in pertinent part: "all pretrial motions shall be served or filed within forty five days after arraignment and before commencement of trial, or within such additional time as the court may fix upon application of the defendant made prior to entry of judgment." *Id.* The court, however, "in the interest of justice, and for good cause shown, may, in its discretion, at any time before sentence, entertain and dispose of the motion on the merits." CPL § 255.20(3) (McKinney 1982); *see* People v. Lowry, 8 App. Div. 2d 956, 957, 190 N.Y.S.2d 571, 573 (2d Dep't 1959) (mem.). However, if the issue of severance is not raised at or before trial, it may not be the basis for an appeal. *See* CPL § 470.05(2) (McKinney 1983).

Severances are provided for in the statute in recognition of the real possibility of prejudice to a party to a joint proceeding. *See* CPL § 200.40, commentary at 437 (McKinney 1982). *See also infra* notes 7-10 and accompanying text (right of confrontation); *supra* note 2, (policy reasons supporting joint trials). *See generally* People v. Owens, 22 N.Y.2d 93, 238 N.E.2d 715, 291 N.Y.S.2d 313, (1968) (prejudicial error to force codefendant to claim privilege against self incrimination; severance should have been granted upon showing of need to call codefendant); People v. Carter, 86 App. Div. 2d 451, 450 N.Y.S.2d 203, (2d Dep't 1982) (severance mandated because defendant unfairly prejudiced codefendant).

[5] *See* RICHARDSON ON EVIDENCE § 231 (J. Prince 10th ed. 1973). An extrajudicial confession is an admission and as such it is a true exception to the hearsay rule. *See id.*

[6] *See* MCCORMICK ON EVIDENCE 152 (E. Cleary 3d ed. 1984); RICHARDSON ON EVIDENCE, *supra* note 5, at § 232.

[7] *See* Bruton v. United States, 391 U.S. 123 (1968); *infra* note 10.

[8] *See* U.S. CONST. amend. VI. The Sixth amendment of the Constitution provides: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." *Id.* This right is primarily secured by affording a defendant the

because the defendant is deprived of his right to cross examine his codefendant[9] while a "substantial risk" exists that the jury, despite instructions to the contrary, will consider the extrajudicial confession of the codefendant in assessing the guilt of the defendant.[10] This constitutional restriction does not arise, however, when both defendants make confessions which "interlock".[11] Recently in *Peo-*

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opportunity to cross-examine witnesses. *See* Delaney, *Sixth Amendment Issues at Trial, Twelfth Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1981-1982*, 71 GEO. L.J. 663, 664 (1982). The confrontation clause is not merely a rule of procedure but a fundamental right designed to secure a fair trial to a criminal defendant. *See* Note, *Inculpatory Statements Against Penal Interest and the Confrontation Clause*, 83 COLUM. L. REV. 159, 183-84 (1983). Thus, in order to ensure a fair trial for the defendant, courts must require that the "evidence used to prove a defendant's guilt meet a greater standard of reliability than that which. . . would show his innocence." *Id.* at 184.

[9] *See* Bruton v. United States, 391 U.S. 123, 126 (1968). When the witness against the defendant is his codefendant, that codefendant may not be required to take the stand. *See* U.S. CONST. amend. V.

[10] *See* Bruton v. United States, 391 U.S. 123, 126 (1968). In *Bruton*, a joint trial resulted in the convictions of both the defendant and the codefendant. *Id.* at 124. A witness had been allowed to testify that the codefendant orally confessed committing the crime with the defendant. *Id.* The trial judge advised the jury that this testimony was not to be used in assessing the defendant's guilt. *Id.* at 125. On appeal, the codefendant's conviction was set aside on the grounds that the oral confession should not have been admitted, but the conviction of the defendant was affirmed in light of the jury instructions. *Id.* at 124-25. The *Bruton* court determined that since the defendant could not cross-examine his codefendant, limiting instructions to the jury was not an "adequate substitute for [the] petitioner's constitutional right of cross-examination" because the hearsay evidence would have a "devastating" effect on his case. *Id.* at 137. Since a 'substantial risk' existed that the jury could be influenced by the extrajudicial statement of the codefendant, *id.* at 126, adding 'substantial weight' to the prosecutor's case against the defendant, *id.* at 128, the Court ruled that severance was required. *Id.* at 137.

[11] *See* Parker v. Randolph, 442 U.S. 62 (1979) (plurality opinion); People v. Berzups, 49 N.Y.2d 417, 425, 402 N.E.2d 1155, 1158, 426 N.Y.S.2d 253, 256-57 (1980); People v. Mc Neil, 24 N.Y.2d 550, 552, 249 N.E.2d 383, 384, 301 N.Y.S.2d 503, 504, *cert. denied* 396 U.S. 937 (1969). *But see infra* note 40 (*Parker* dissent argued interlocking exception to *Bruton* should be rejected).

In his concurring opinion to *Parker*, Justice Blackmun, pointing out that the plurality never defined interlocking confessions, stated:

> Unfortunately, it is not clear that the new approach mandates even an inquiry whether the confessions interlock. . . .The principal opinion . . . simply assumes the interlock. It thus comes close to saying that so long as all the defendants have made some type of confession which is placed in evidence, *Bruton* is inapplicable without inquiry into whether the confessions actually interlock and the extent thereof.

Parker, 442 U.S. at 80 (Blackmun, J., concurring). One author has interpreted the *Parker* plurality as holding such a test to be that so long as both defendants have confessed, one need not inquire as to whether the confessions interlock in order to avert a *Bruton* violation. *See* Dawson, *supra* note 2, at 1421.

In New York, however, confessions "interlock" if they are "almost identical," *see Mc Neil*, 24 N.Y.2d at 552, 249 N.E.2d at 383-84, 301 N.Y.S.2d at 504, or "substantially simi-

ple v. Cruz and *People v. Brims*,[12] two cases consolidated on appeal, the Court of Appeals affirmed the lower courts' refusal to grant separate trials, holding that confessions are interlocking if they are substantially similar as to their content, "regardless of differences in their comparative reliability."[13]

In *Cruz*, the defendant and his brother, the codefendant, were jointly indicted for the felony murder of a gas station attendant.[14] A third accomplice was the victim of a suspected homicide five months after the felony murder.[15] The brother of the dead accomplice suspected the defendant and the codefendant of that latter crime.[16] He informed the authorities during the investigation of his brother's homicide that both the defendant and the codefendant had confessed their role in the earlier crime to him.[17] Subsequently, in a 22 minute video tape, the codefendant confessed to the authorities that he and his brother had participated in the felony murder.[18] At trial, the dead accomplice's brother testified, implicating both defendants, and the codefendant's videotaped confession was received in evidence with proper limiting instructions.[19]

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lar." *See* People v. Smalls, 55 N.Y.2d 407, 415, 434 N.E.2d 1063, 1066, 449 N.Y.S.2d 696, 699 (1982); People v. Safian, 46 N.Y.2d 181, 184, 385 N.E.2d 1046, 1047, 413 N.Y.S.2d 118, 120 (1978), *cert. denied* 443 U.S. 912 (1979). A defendant's confession does not interlock with his codefendant's if the codefendant's incriminating admission fills a material gap in the People's evidence against the defendant. *See Smalls*, 55 N.Y.2d at 415, 434 N.E.2d at 1067, 449 N.Y.S.2d at 700; People v. Burns, 84 App. Div. 2d 845, 847, 444 N.Y.S.2d 671, 674 (2d Dep't 1981) (mem.).

When interlocking confessions are introduced in evidence, *Bruton* does not apply. *See Parker*, 442 U.S. at 75. Since both defendants have confessed, the extrajudicial statement of either cannot have the devastating effect upon the other that was feared in *Bruton*. *See id.* at 73. Additionally, the defendant's right to cross-examine his codefendant is less valuable to him since his own words inculpate him. *See id.* Lastly, the codefendant's confession is no longer suspect when the defendant's own unchallenged statement corroborates it. *See id.*

[12] 66 N.Y.2d 61, 485 N.E.2d 221, 495 N.Y.S.2d 14 (1985).

[13] *Id.* at 65, 74, 485 N.E.2d at 223, 229, 495 N.Y.S.2d at 16, 22.

[14] *See id.* at 65, 485 N.E.2d at 223, 495 N.Y.S.2d at 16.

[15] *See id.*

[16] *See id.* at 75, 485 N.E.2d at 230, 495 N.Y.S.2d at 23 (Kaye, J., dissenting).

[17] *See id.* at 65, 485 N.E.2d at 223, 495 N.Y.S.2d at 16. The brother of the dead accomplice informed the police that the defendant and codefendant had come to his home immediately following the crime, and that the defendant was wounded and had confessed to him at that time. *Id.* The decedent's brother also claimed that the codefendant told him about the crime, but in less detail than the defendant. *Id.* The defendant, however, denied confessing to the decedent's brother. People v. Cruz, 119 Misc. 2d 1080, 1082, 465 N.Y.S.2d 419, 421 (Sup. Ct. Bronx County 1983).

[18] *See Cruz*, 66 N.Y.2d at 66, 71, 485 N.E.2d at 223, 227, 495 N.Y.S.2d at 16, 20.

[19] *See id.* at 66, 485 N.E.2d at 223, 495 N.Y.S.2d at 16. The People also offered police testimony, forensic evidence, photographs establishing the crime and medical evidence of

The defendant did not offer any evidence.[20]

In *Brims*, three accomplices were indicted for multiple charges arising out of a burglary and related homicides.[21] The defendant confessed to two lay individuals: his cousin, who had driven to and from the crime scene but was never charged as an accomplice, and a prisoner, whom the defendant had met while incarcerated for an unrelated crime.[22] Both the cousin and the prisoner testified at the trial.[23] The homicide victim's daughter, a codefendant who had assisted in the preparation for the crimes but was not present when they actually occurred, confessed to the police that she had unlocked the door to her parents' home so that the other two accomplices could burglarize it.[24] This confession was entered in evidence against her at the trial.[25] None of the defendants took the stand.[26]

In both cases, the defendants' motions for severance prior to trial were denied.[27] In each case the defendants were tried jointly with their codefendants and subsequently found guilty.[28] Both decisions were affirmed without opinion.[29] The defendants urged reversal claiming, *inter alia*, that the content of their confessions did not "interlock" with those of their codefendants and that even if they did, the codefendants' confessions made to the police were more reliable, thus more credible, than their own alleged confessions made to individuals having motives to lie.[30] The defendants

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the bullet's trajectory, thus corroborating the evidence contained in the confessions. *See id.* at 66, 485 N.E.2d at 223,495 N.Y.S.2d at 16-17.

[20] *See id.* at 66, 485 N.E.2d at 224, 495 N.Y.S.2d at 17.

[21] *See id.* at 67, 485 N.E.2d at 224, 495 N.Y.S.2d at 17.

[22] *See id.* at 67-68, 485 N.E.2d at 224-25, 495 N.Y.S.2d at 17-18.

[23] *See id.*

[24] *See id.* at 67, 485 N.E.2d at 224, 495 N.Y.S.2d at 17.

[25] *See id.* There was substantial corroborating evidence against the defendant: blood stains found in the cousin's car supported his testimony with respect to the defendant; the ski mask and the gun used during the perpetration of the crime were found in the place the cousin had indicated; the blood found on the defendant's sneakers was of the same rare blood type as one of the victims and the defendant tried to establish an alibi that his own witness failed to support. *Id.* at 67-68, 485 N.E.2d at 225, 495 N.Y.S.2d at 18.

[26] *See id.* at 67, 485 N.E.2d at 224, 495 N.Y.S.2d at 17.

[27] *See id.* at 64, 485 N.E.2d at 222, 495 N.Y.S.2d at 15. The defendant in *Cruz* was given leave to renew his motions at the termination of the trial evidence; the motion was once more denied. People v. Cruz, 119 Misc. 2d 1080, 1082, 465 N.Y.S.2d 419, 421 (Sup. Ct. Bronx County 1983).

[28] *See Cruz*, 66 N.Y.2d at 64, 485 N.E.2d at 222, 495 N.Y.S.2d at 15.

[29] *See* People v. Cruz, 104 App. Div. 2d 1060, 481 N.Y.S.2d 934 (1st Dep't 1984); People v. Brims, 105 App. Div. 2d 1164, 482 N.Y.S.2d 406 (2d Dep't 1984).

[30] *Cruz*, 66 N.Y.2d at 64, 485 N.E.2d at 222, 495 N.Y.S.2d at 15 (1985). Cruz argued that he was entitled to a reversal because he was denied a fair trial, as applied in New York

argued that, under those circumstances, the jurors must have improperly used the codefendants' reliable confessions to resolve any doubts about the defendants' guilt.[31]

In affirming, the Court of Appeals held that reliability would not be considered to determine whether confessions interlocked.[32] Judge Simons, writing for the court, noted that to be interlocking, confessions had to be substantially similar as to their content and could not fill material gaps in the proof against the defendant.[33] Thus, the court found that the two sets of confessions interlocked.[34] As to the reliability issue, Judge Simons noted that the

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courts. *See id.* at 72, 485 N.E.2d at 228, 495 N.Y.S.2d at 21. The fair trial standard is violated when a codefendant's admission fills material gaps in the prosecutor's case against the defendant resulting in "the impairment of substantial rights." People v. Payne, 35 N.Y.2d 22, 27-28, 315 N.E.2d 762, 765-66, 358 N.Y.S.2d 701, 706-07 (1974). Nevertheless, when sufficient independent evidence exists to warrant the jury's determination, the defendant is not denied a fair trial. *Cruz*, 66 N.Y.2d at 72, 485 N.E.2d at 228, 495 N.Y.S.2d at 21 (citing People v. Fisher, 249 N.Y. 419, 426, 164 N.E.2d 336, 338 (1928)). The court concluded that the defendant was not denied a fair trial since the evidence against him was independent of his codefendant's admissions. *Cruz*, 66 N.Y.2d at 72, 485 N.E.2d at 228, 495 N.Y.S.2d at 21.

In *Brims*, the defendant claimed that he was prejudiced because he was denied the right to call his codefendant to the stand. *Id.* at 73, 485 N.E.2d at 228, 495 N.Y.S.2d at 21. There was, however, no evidence to show that the codefendant would testify on the defendant's behalf nor that the testimony would tend to exculpate the defendant. *See id.* To warrant severance, the defendant must not only show that he intends to call the codefendant as a witness, but that he reasonably needs to do so. *See* People v. Owens, 22 N.Y.2d 93, 98, 238 N.E.2d 715, 718, 291 N.Y.S.2d 313, 317 (1968); People v. Villalobos, 108 App. Div. 2d 887, 887, 485 N.Y.S.2d 382, 382 (2d Dep't 1985)(mem.); People v. Kampshoff, 53 App. Div. 2d 325, 339, 385 N.Y.S.2d 672, 682 (4th Dep't 1976), *cert. denied*, 433 U.S. 911 (1978).

Brim's final contention was that the defendants' antagonistic defenses mandated severance. *See Cruz*, 66 N.Y.2d at 73, 485 N.E.2d at 229, 495 N.Y.S.2d at 22. In antagonistic defense cases, severance is required only if a joint trial is unfairly prejudicial and "substantially impairs" the defendant's defense. *Id.*; *see* People v. La Belle, 18 N.Y.2d 405, 409, 222 N.E.2d 727, 729, 276 N.Y.S.2d 105, 108 (1966); Dawson, *supra* note 2, at 1422-25.

[31] *Cruz*, 66 N.Y.2d at 64, 485 N.E.2d at 222, 495 N.Y.S.2d at 15.

[32] *See id.* at 65, 485 N.E.2d at 223, 495 N.Y.S.2d at 16. The Court noted that in prior decisions confessions had been found to interlock although one was oral and the other written, *see id.* at 72, 485 N.E.2d at 227, 495 N.Y.S.2d at 20 (citing People v. Woodward, 50 N.Y.2d 922, 923, 409 N.E.2d 926, 926, 431 N.Y.S.2d 452, 452 (1980) (mem.), and although one was short and the other long. *See id.* (citing People v. Safian, 46 N.Y.2d 181, 189, 385 N.E.2d 1046, 1050, 413 N.Y.S.2d 118, 123 (1978)). Judge Simons also observed that the Second Circuit had concluded that confessions interlocked even though one was made to the authorities while the other was addressed to lay individuals. *See id.* (citing Tamilio v. Fogg, 713 F.2d 18, 20 (2d Cir. 1983)).

[33] *See Cruz*, 66 N.Y.2d at 70, 485 N.E.2d at 226, 495 N.Y.S.2d at 19-20.

[34] *See id.* at 71, 485 N.E.2d at 227, 495 N.Y.S.2d at 20. The Court found that the Cruz confessions coincided as to time, place, participants, motive and essential facts and that the codefendant's longer statement did not contradict or alter the defendant's admission. *See id.* As to *Brims*, the Court noted that the content of the confessions was "markedly different" because the codefendant was not present during the commission of the crime. *See id.*

court had already rejected the contention that a confession's unreliability should defeat its interlocking nature[35] and that the Supreme Court had indicated a tolerance for differences in the reliability of confessions.[36] The court concluded that the defendants' confessions were not unreliable as a matter of law and that the credibility issue properly required a jury's determination.[37]

In her dissent, limited to the *Cruz* case, Judge Kaye maintained that the codefendant's confession added substantial weight to the prosecutor's case against the defendant, in contravention of his sixth amendment rights.[38] Furthermore, the dissent argued that the confessions should not have been found to interlock since material gaps in the proof against the defendant, as to credibility,

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Nevertheless, to the extent that the codefendant had knowledge of the crime, her statement interlocked with the two confessions made by the defendant. *See id.*

[35] *See id.* at 71, 485 N.E.2d at 227, 495 N.Y.S.2d at 20. The court cited *People v. Woodward*, 50 N.Y.2d 922, 923, 409 N.E.2d 926, 926, 431 N.Y.S.2d 452, 452 (1980), as authority for rejecting a consideration of the reliability of a confession when determining its interlocking nature. *See id.* The *Woodward* Court, however, determined: "[t]hat a defendant's confession was oral while that of his codefendant was written is *a factor to be considered* . . . but by itself is not enough to make the [*Bruton*] rule rather than the [*McNeil*] exception apply." 50 N.Y.2d at 923, 409 N.E.2d at 926, 431 N.Y.S.2d at 452 (emphasis added). It is submitted that the reliability issue was considered in *Woodward* and that the *Cruz* Court, by enunciating a per se rule that reliability would not be considered, has altered the holding of its cited authority.

[36] *See Cruz*, 66 N.Y.2d at 72, 485 N.E.2d at 227, 495 N.Y.S.2d at 20. In *Parker v. Randolph*, the dissent raised the possibility of unreliable confessions. *See* 442 U.S. 62, 84 (Stevens, J., dissenting). The *Cruz* court determined therefore that because "differences in the scope and reliability of the confessions" had been "anticipated," the Supreme Court's acceptance of interlocking confessions indicated that such differences would be "tolerated." 66 N.Y.2d at 72, 485 N.E.2d at 227, 495 N.Y.S.2d at 20. It is submitted that the issue of reliability was not before the *Parker* Court; thus, the Court's decision not to address this matter in dictum should not be construed to signify that unreliable confessions would be "tolerated." "The Supreme Court has not definitely settled the issue of the admissibility of codefendants' interlocking confessions when neither testifies at trial." Delaney, *supra* note 8, at 669. *See also* Marcus, *The Confrontation Clause and Co-defendant Confessions: The Drift from Bruton to Parker v. Randolph*, 1979 U. ILL. L.F. 559, 588 (*Parker* plurality left many questions unanswered). One author has commented that the Court should "apply the Confrontation Clause to find error whenever a non-testifying co-defendant's statement implicates a defendant." *Id.* at 590.

[37] *See Cruz*, 66 N.Y.2d at 72, 485 N.E.2d at 227, 495 N.Y.S.2d at 20; *see also* People v. Anthony, 24 N.Y.2d 696, 702, 249 N.E.2d 747, 749, 301 N.Y.S.2d 961, 964 (1969) (jury findings not disturbed unless incredible as matter of law or insufficient evidence). *But see infra* note 41 and accompanying text (this author's view that when codefendant's damaging statement in evidence, jury determination of credibility issue a sham).

[38] *Cruz*, 66 N.Y.2d at 74-75, 485 N.E.2d at 229-30, 495 N.Y.S.2d at 22 (Kaye, J., dissenting); *see also supra* note 8-10 and accompanying text (sixth amendment right of confrontation violated if codefendant's confession adds substantial weight to case against defendant and defendant denied opportunity to cross-examine codefendant).

were inevitably filled by impermissible reference to the codefendant's confession.[39]

The constitutional right of confrontation was restricted in interlocking confession cases because impeaching one's codefendant was viewed as less crucial when the defendant's "own admission of guilt [stood] before the jury unchallenged."[40] When a confession is contested, however, it is submitted that its reliability should be considered in determining whether it "interlocks" with another confession. The defendant's right to cross examine the witness, to whom he allegedly confessed, is rendered meaningless in a joint trial because the jury may impermissibly refer to the codefendant's confession to resolve doubts about the defendant's guilt which may have arisen upon cross-examination.[41] Thus the credibility issue is in effect wrested from the jury's determination. It is submitted that in such a situation the defendant is effectively denied the right to impeach both the testifying witness and the nontestifying codefendant. Therefore, if there is a substantial possibility that the defendant never made the extrajudicial admission and there is no other direct evidence connecting the defendant to the crime, it is suggested that the confessions should not be found to interlock, and severance should be granted.

In *Brims*, it is suggested that had the reliability of the defendant's confessions been considered, it would not have defeated their interlocking nature because (1) there was overwhelming evidence

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[39] *See Cruz*, 66 N.Y.2d at 75, 485 N.E.2d at 229, 495 N.Y.S.2d at 22 (Kaye, J., dissenting); *see also supra* note 11 and accompanying text (codefendant's confession does not interlock with defendant's if it fills material gaps in proof against defendant).

[40] Parker v. Randolph, 442 U.S. 62, 73 (1979). *See supra* note 11 and accompanying text (rationale of *Parker* plurality). The dissent in *Parker* rejected the interlocking exception to *Bruton* arguing that evidence of an extrajudicial confession "is not an acceptable reason for depriving [a defendant] of his constitutional right to confront the witnesses against him." *Parker*, 442 U.S. at 84 (Stevens, J., dissenting). Furthermore, "[a] defendant's decision to confess does not necessarily imply a relinquishment of his right to cross-examine an accuser. Although he may vitiate the value of that right by confessing, the decision to exercise the right, no matter how futile, should be left to the defendant's discretion." Note, *Evidence: the Right of Confrontation and the Admission of Interlocking Confessions at a Joint Trial*, 26 WAYNE L. REV. 1591, 1606 (1980).

[41] A defendant has the right to challenge his own confession, but when other confessions are admitted in evidence, the jury may conclude all are true. People v. McNeil, 24 N.Y.2d 550, 556, 249 N.E.2d 383, 386, 301 N.Y.S.2d 503, 507, (Fuld, C.J., dissenting), *cert. denied*, 396 U.S. 937 (1969). For a jury to expunge from their minds the evidence against the codefendant when determining the guilt of the defendant is "the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else." Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932).

corroborating the confessions;[42] (2) the codefendant's confession merely described the preparation to the crimes,[43] thus it could not add substantial weight to the evidence against the defendant; and (3) the witnesses testifying against the defendant could not have known the details of the crimes independently of the defendant's own inculpatory words since there was no allegation the other two accomplices had ever revealed those details to the witnesses.

In *Cruz*, however, it is submitted that judicial consideration of the reliability issue would have led to the determination that the confessions did not interlock and that the defendant was entitled to a separate trial. Since the testimony of the witness to whom the defendant allegedly confessed was the only direct evidence connecting the defendant to the crime,[44] its credibility was of paramount importance. Yet credibility was directly in issue because the testifying witness had a strong motive to fabricate the confession and because he could have discovered the details of the crime without the defendant's alleged admission.[45] It is submitted that the jury could not properly assess the weight to be accorded this testimony once the codefendant's video taped confession was admitted in evidence.

A judicial hypothesis about a defendant's probable guilt after viewing the totality of admissible and inadmissible evidence should not justify denying a defendant his substantive rights to a fair trial. The integrity of the legal system must be maintained, not merely to assure "bad men" a fair trial, but to ensure that the innocent might go free. A per se rule that confessions whose content

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[42] *See Cruz*, 66 N.Y.2d at 68, 485 N.E.2d at 225, 495 N.Y.S.2d at 18; *see also supra* notes 19, 25. (specifying corroborative evidence).

[43] *See Cruz*, 66 N.Y.2d at 71, 485 N.E.2d at 227, 495 N.Y.S.2d at 20. *See supra* notes 24-25 and accompanying text.

[44] *See Cruz*, 66 N.Y.2d at 75, 485 N.E.2d at 229, 495 N.Y.S.2d at 22-23 (Kaye, J., dissenting).

[45] The witness waited five months before reporting the confession to the police. *Id.* at 65, 485 N.E.2d at 223, 495 N.Y.S.2d at 16. He had a compelling motive to harm the defendant in as much as he believed the defendant to be his brother's murderer. *See id.* at 75, 485 N.E.2d at 230, 495 N.Y.S.2d at 23 (Kaye, J., dissenting). Under oath the witness testified that he did not know how his brother, who resided with him, earned his living, yet he explained his five month silence by saying that his brother was a participant in the crime. *Id.* It is submitted that since the witness could have learned of the details of the crime independently of the defendant — his brother or the defendant's brother could have revealed them to him — the confession may very well have been a fabrication.

is substantially similar interlock, regardless of their comparative reliability, is antithetical to that end.

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PENAL LAW

Penal Law § 265.02(4): Criminal possession of a weapon in the third degree—defendant bears burden of production as to "home or place of business" exception

Under section 265.02(4) of the Penal Law,[1] a person possessing a loaded firearm is guilty of a class D felony, unless "such possession takes place in such person's home or place of business."[2] New York courts have held that the home or place of business exception

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[1] N.Y. PENAL LAW § 265.02 (McKinney 1980). Section 265.02 provides in pertinent part:

A person is guilty of criminal possession of a weapon in the third degree when:

. . .

(4) He possesses any loaded firearm. Such possession shall not . . . constitute a violation of this section if such possession, takes place in such person's home or place of business.

Criminal possession of a weapon in the third degree is a class D felony.

Id.. Mere possession of a firearm, regardless of whether it is loaded or where it is possessed is a class A misdemeanor. *See* § 265.01(1) (McKinney Supp. 1986).

[2] N.Y. PENAL LAW § 265.02(4) (McKinney 1980). The exception for possession of a loaded firearm in one's home or place of business reflects a conscious effort to balance society's need to restrict illegal weapons and the individual's need to protect himself and his property. *See* People v. Rondon, 109 Misc. 2d 394, 395, 439 N.Y.S.2d 803, 804 (Sup. Ct. N.Y. County 1981); People v. McWilliams, 96 Misc. 2d 648, 651, 653-54, 409 N.Y.S.2d 610, 612, 614 (Nassau County Ct. 1978). Courts have generally applied the place of business exception when a defendant's personal property interests are at stake. *See, e.g.*, People v. Santana, 77 Misc. 2d 414, 415, 354 N.Y.S.2d 387, 389 (N.Y.C. Crim. Ct. Queens County 1974) (taxicab is driver's place of business); People v. Anderson, 74 Misc. 2d 415, 419, 344 N.Y.S.2d 15, 19 (N.Y.C. Crim. Ct. Bronx County 1973) (same). *But see* People v. Levine, 42 App. Div. 2d 769, 769, 346 N.Y.S.2d 756, 756 (2d Dep't 1973) (mem.) (exception inapplicable when taxi-driver unnecessarily brandished loaded gun in argument with another motorist).

Courts will not apply the place of business exception if possession of the weapon is incidental or irrelevant to legitimate protection of property. *See, e.g.*, People v. Fearon, 58 App. Div. 2d 1041, 1041, 397 N.Y.S.2d 294, 294 (4th Dep't 1977) (mem.) (where defendant shot co-worker, exception did not apply merely because shooting occurred at place of employment), People v. Francis, 45 App. Div. 2d 431, 434, 358 N.Y.S.2d 148, 152 (2d Dep't 1974) (United States postal worker could not take advantage of exception where he was not required by his superiors to protect government property), *aff'd on other grounds*, 38 N.Y.2d 150, 341 N.E.2d 540, 379 N.Y.S.2d 21 (1975); People v. Rondon, 109 Misc. 2d 394, 399, 439 N.Y.S.2d 803, 808 (Sup. Ct. N.Y. County 1981) (director of not-for-profit corporation does not fall within exception unless authorized by corporate employer to carry weapon).