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Penal Law Art. 140: Intent to Commit Specific Object Crime Not Element of Burglary Prosecution and Hence Disclosure of Specific Object Crime Not Required in Bill of Particulars

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ownership exception, it appears that the *Salla* Court has expanded the scope of the privileges and immunities clause beyond that envisioned by the Supreme Court.[95] In the wake of *Salla,* it seems that any attempt by the state to afford employment advantages to residents must unqualifiedly satisfy the substantial reason test. Therefore, even though the Court suggested that a narrowly drawn resident-hire statute might survive constitutional scrutiny,[96] its conclusion that nonresidents are not a peculiar source of New York's unemployment problem precludes the satisfaction of the substantial reason test and thus suggests that future resident-hire legislation similarly will be found violative of the privileges and immunities clause.[97]

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PENAL LAW

Penal Law art. 140: Intent to commit specific object crime not element of burglary prosecution and hence disclosure of specific object crime not required in bill of particulars

To secure a conviction for burglary in New York, the prosecu-

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[95] *See* Hicklin v. Orbeck, 437 U.S. 518, 529 (1978). Although the most vigorous attack on the proprietary interest exception was given in *Toomer* where it was referred to as a "fiction," 334 U.S. at 402, the Court nevertheless articulated the need for a continued viable predicate for state regulation in privileges and immunities cases: "The inquiry [in determining the validity of discrimination] must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *Id.* at 396.

[96] 48 N.Y.2d at 523-24, 399 N.E.2d at 914, 423 N.Y.S.2d at 882-83.

[97] The net effect of the *Salla* holding, it appears, is to deter viable state action in alleviating its unemployment problems. Such a result was criticized in C.D.R. Enterprises, Ltd. v. Board of Educ., 412 F. Supp. 1164 (E.D.N.Y. 1976), *aff'd,* 429 U.S. 1031 (1977), wherein a three-judge court held section 222 unconstitutional on equal protection and due process grounds with respect to aliens. Taking issue with the majority's reasoning, Judge Platt stated:

> [I]f the State of New York enacts legislation creating and funding additional jobs and makes them available to all comers at a time when unemployment is widespread (as it is today) there will be an influx of non-New Yorkers, both citizens and aliens, seeking such jobs and New York's desirable objective of eliminating unemployment within its borders will have been frustrated and defeated despite considerable taxpayer expense . . . . [T]his course merely compounds, and in no way alleviates, the problem which New York is legitimately and properly attempting to correct, and that it can only discourage New York and other states from taking any action to reduce unemployment.

412 F. Supp. at 1174 (Platt, J., dissenting).

tion must allege and prove that the defendant knowingly and unlawfully entered or remained in a building "with intent to commit a crime therein."[98] Until recently, however it was unsettled whether the state was required to establish that a defendant possessed the intent to commit a specific crime, as distinguished from a general intent to commit crime.[99] In *People v. Mackey*,[100] the Court of Appeals resolved this uncertainty, holding that in a burglary prosecution, it was unnecessary for the state to allege or establish with particularity the object crime intended and, therefore, the defendant was not entitled to a bill of particulars specifying that information.[101]

Defendant Mackey was indicted for burglary in the second degree and rape in the first degree.[102] The burglary charge tracked the language of New York's burglary statute, alleging that the defendant "knowingly enter[ed] and unlawfully remain[ed] in the dwelling of [the complainant] with intent to commit a crime therein,"[103] but failed to particularize the object crime.[104] Consequently, before trial, Mackey filed a motion for a bill of particulars,[105] requesting that the prosecution identify the particular

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[98] N.Y. PENAL LAW §§ 140.20, .25, .30 (McKinney 1975).

[99] *See* note 123 *infra*.

[100] 49 N.Y.2d 274, 401 N.E.2d 398, 425 N.Y.S.2d 288 (1980).

[101] *Id.* at 278-80, 401 N.E.2d at 400-02, 425 N.Y.S.2d at 290-91.

[102] *Id.* at 277, 401 N.E.2d at 400, 425 N.Y.S.2d at 289.

[103] *Id.*

[104] *Id.*

[105] At common law a bill of particulars was unnecessary in criminal cases since "the early form of accusation was informative to a fault." 2 F. WHARTON, CRIMINAL PROCEDURE § 355 (12th ed. 1975). In New York, CPL § 200.90 provides that a defendant in a criminal case may move for a bill of particulars, the granting of which will be discretionary with the court. CPL § 200.90(1) (1971). The request must

> specify items of factual information desired by the defendant which pertain to the charge, or the substance of defendant's conduct encompassed by the charge, and which are not recited in the indictment, and must allege that the defendant cannot adequately prepare or conduct his defense without such information.

Id. (2) (Pam. 1979). The sole function of a bill of particulars, however, is to clarify specific aspects of the indictment; it may not be used as a discovery device to compel the prosecution to disclose evidentiary material, People v. Davis, 41 N.Y.2d 678, 679-80, 363 N.E.2d 572, 573, 394 N.Y.S.2d 865, 867 (1977); People v. Raymond G., 54 App. Div. 2d 596, 596, 387 N.Y.S.2d 174, 175 (3d Dep't 1976); CPL § 200.90(3) (1971); PROPOSED NEW YORK CRIMINAL PROCEDURE LAW § 100.80(2), commission staff comment at 179-80 (1967), *reprinted in* N.Y. CRIM. PROC. LAW, art. 200, at 185 (Consol. 1979), or its theory of prosecution, People v. Smalley, 64 Misc. 2d 363, 365-66, 314 N.Y.S.2d 924, 927-28 (Schuyler County Ct. 1970); People v. Jordan, 128 N.Y.S.2d 457, 460 (N.Y.C. Gen. Sess. N.Y. County 1953). The granting of the motion is conditioned, moreover, on the court's satisfaction "that any or all of the items of information requested are necessary to enable the defendant adequately to prepare

crime that he allegedly intended to commit upon entry.[106] This motion was denied by the trial court,[107] and Mackey was subsequently convicted of second degree burglary and coercion.[108] The Appellate Division, Second Department, affirmed[109] and the defendant appealed.

On appeal, a divided Court of Appeals affirmed the decision of the appellate division. Writing for the majority,[110] Judge Meyer noted that while the sufficiency of an indictment which parrots the general language of the penal law may be conditioned on the availability of a bill of particulars,[111] "the [only] particulars to which a defendant indicted by such a document is entitled are the particu-

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or conduct his defense," CPL § 200.90(3) (1971); *see* CPL § 200.90, commentary at 292-93 (1971), not merely on a showing that the information sought would be "useful" to the defendant. People v. Wayman, 82 Misc. 2d 959, 961, 371 N.Y.S.2d 791, 794 (New Windsor J. Ct. 1975); CPL § 200.90, commentary at 292 (1971).

[106] 49 N.Y.2d at 277, 401 N.E.2d at 400, 425 N.Y.S.2d at 289. The request for particulars was part of an omnibus motion which also sought to have the indictment dismissed and to preclude the use by the prosecution of the defendant's prior convictions to impeach his credibility. *Id.*

[107] *Id.* In addition to denying the motion for particulars, the trial court denied the motion to dismiss the indictment and refused to preclude the use of prior convictions to impugn the defendant's credibility. *Id.*

[108] *Id.* at 281 n.3, 401 N.E.2d at 402 n.3, 425 N.Y.S.2d at 292 n.3.

[109] 64 App. Div. 2d 873, 407 N.Y.S.2d 770 (2d Dep't 1979), *aff'd*, 49 N.Y.2d 274, 401 N.E.2d 398, 425 N.Y.S.2d 288 (1980).

[110] Judge Meyer was joined by Chief Judge Cooke and Judges Jones, Wachtler and Gabrielli. Judge Fuchsberg authored a dissenting opinion in which Judge Jasen concurred.

[111] 49 N.Y.2d at 278, 401 N.E.2d at 400, 425 N.Y.S.2d at 290. Recently, in People v. Iannone, 45 N.Y.2d 589, 384 N.E.2d 656, 412 N.Y.S.2d 110 (1978), and People v. Fitzgerald, 45 N.Y.2d 574, 384 N.E.2d 649, 412 N.Y.S.2d 102 (1978), the Court held legally sufficient indictments which recited the statutory elements of the crime charged but failed to factually substantiate the allegations. People v. Iannone, 45 N.Y.2d at 597-98, 384 N.E.2d at 662, 412 N.Y.S.2d at 115-16; People v. Fitzgerald, 45 N.Y.2d at 580, 384 N.E.2d at 652, 412 N.Y.S.2d at 105. The availability of a bill of particulars, the Court noted, insured that the defendant could obtain the necessary information concerning the substance of the allegations to enable him to adequately prepare a defense. People v. Iannone, 45 N.Y.2d at 597-98, 384 N.E.2d at 662, 412 N.Y.S.2d at 115-16; People v. Fitzgerald, 45 N.Y.2d at 580, 384 N.E.2d at 652, 412 N.Y.S.2d at 105. Hence, the Court concluded, the factual deficiencies in the indictments did not justify the dismissal of the charges. People v. Iannone, 45 N.Y.2d at 598-99, 384 N.E.2d at 663, 412 N.Y.S.2d at 116; People v. Fitzgerald, 45 N.Y.2d at 580, 384 N.E.2d at 653, 412 N.Y.S.2d at 106. One commentator has noted that in light of the recent cases, "[t]he [CPL § 200.90(2) (1971)] requirement for providing 'the substance of defendant's conduct' in a bill of particulars thus makes compatible and in most cases acceptable the barest and sparest accusatory instrument formulation." CPL § 200.90, commentary at 153 (Pam. 1979). Although there is authority for the proposition that a bill of particulars may buttress an otherwise insufficient indictment, *see* People v. Bogdanoff, 254 N.Y. 16, 28-29, 171 N.E. 890, 894 (1930), this position has been criticized. *See* CPL § 200.90, commentary at 292 (1971); *The Survey*, 53 ST. JOHN'S L. REV. 803, 837-39 (1979).

lars of the crime charged . . . ."[112] Since the present burglary statute requires only a knowing entry "with intent to commit a crime,"[113] and since its predecessor statutes were framed in similarly nonspecific terms,[114] the majority reasoned that an intent to commit a specific crime is not an element of the crime of burglary in New York.[115] Therefore, the Court concluded, the denial of a motion for particulars seeking such information did not raise a due process issue[116] and, hence, did not constitute a basis for reversal.[117]

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[112] 49 N.Y.2d at 278, 401 N.E.2d at 401, 425 N.Y.S.2d at 290; *cf.* People v. Raymond G., 54 App. Div. 2d 596, 596, 387 N.Y.S.2d 174, 175 (3d Dep't 1976) (trial court's refusal to require prosecution to specify which portion of building allegedly entered by defendant was proper exercise of discretion).

[113] N.Y. PENAL LAW § 140.25 (McKinney 1975).

[114] Prior New York burglary statutes required as a prerequisite to conviction that the defendant-intruder possess the intent to commit "some crime," Penal Law 1881, §§ 496-497 (current version at N.Y. PENAL LAW §§ 140.25, 140.30 (McKinney 1975)), "a crime," Penal Law 1881, § 498 (current version at N.Y. PENAL LAW § 140.20 (McKinney 1975)), and "any crime," Penal Law 1881, § 505 (current version at N.Y. PENAL LAW § 140.20 (McKinney 1975)).

[115] 49 N.Y.2d at 278-79, 401 N.E.2d at 401, 425 N.Y.S.2d at 290-91. In the absence of controlling case law in New York, *see* note 123 *infra*, the majority summarily dismissed as unpersuasive authority of other jurisdictions which require specificity in a burglary indictment. 49 N.Y.2d at 280, 401 N.E.2d at 401-02, 425 N.Y.S.2d at 291. In support of its construction of the statute, the *Mackey* Court stated that had the legislature intended to require the intent to commit a particular crime, it could have easily so provided. *Id.* The majority noted, moreover, that its interpretation of the statute was in accord with the practice commentary of Professor Arnold Hechtman, which states that "[t]he prosecution need not establish what particular crime the intruder intended to commit." N.Y. PENAL LAW § 140.20, commentary at 37 (McKinney 1975).

[116] Although a grand jury indictment is not required in state prosecutions by the Federal Constitution, Hurtado v. California, 110 U.S. 516, 538 (1884), the due process clause of the fourteenth amendment requires that an accused be adequately informed of the nature of the allegations against him. Wilkinson v. Haynes, 327 F. Supp. 967, 969 (W.D. Mo. 1971); Hammond v. Brown, 323 F. Supp. 326, 348 (N.D. Ohio), *aff'd on other grounds*, 450 F.2d 480 (6th Cir. 1971); *cf.* People v. Iannone, 45 N.Y.2d 589, 594, 384 N.E.2d 656, 668, 412 N.Y.S.2d 110, 114 (1978) (sixth amendment requires defendant have fair notice of accusations against him). *See generally*, 2 F. WHARTON, CRIMINAL PROCEDURE § 355 at 278 (12th ed. 1975). For a discussion of the sufficiency of criminal indictments, see Note, *Indictment Sufficiency*, 70 COLUM. L. REV. 876 (1970).

[117] 49 N.Y.2d at 279, 401 N.E.2d at 401-02, 425 N.Y.S.2d at 291. The majority contended that requiring specification of the object crime would impose an onerous burden on the prosecution and would transform "the trial of a burglary indictment [into] an exercise in hairsplitting . . . ." *Id.* at 279, 401 N.E.2d at 401, 425 N.Y.S.2d at 291. Even the dissent acknowledged that such a requirement would create difficulty where the object crime is not consummated. *Id.* at 284, 401 N.E.2d at 404, 425 N.Y.S.2d at 294 (Fuchsberg, J., dissenting in part).

The problems of proving the requisite specific intent in a burglary prosecution were discussed by the Court of Appeals in McCourt v. People, 64 N.Y. 583 (1876). Writing the

In a vigorous dissent, Judge Fuchsberg characterized the majority's construction of the burglary statute as "literal and hypertechnical,"[118] observing that most jurisdictions interpreting similarly worded statutes have required the indictment to particularize the object crime.[119] Such a requirement, the dissent contended, was more consistent with the objectives of modern pleading—to facilitate defense preparation and to minimize the element of surprise.[120] Moreover, Judge Fuchsberg urged that the failure to

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opinion of the Court in *McCourt*, Judge Andrews stated:

> Whether the criminal intent existed in the mind of a person accused of crime at the time of the commission of the alleged criminal act, must of necessity be inferred and found from other facts which in their nature are the subject of specific proof; and . . . must, ordinarily, be left to the jury to determine, from all the circumstances, whether the criminal intent existed.
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> In some cases . . . it may be, and often is, a matter of great difficulty to determine whether the accused committed the act charged with a criminal purpose.

Id. at 586-87. Recently, the Court of Appeals held that the requisite intent to commit a crime "could be inferred beyond a reasonable doubt from the circumstances of the breaking." People v. Gilligan, 42 N.Y.2d 969, 969, 367 N.E.2d 867, 867, 398 N.Y.S.2d 269, 269 (1977).

[118] 49 N.Y.2d at 283, 401 N.E.2d at 404, 425 N.Y.S.2d at 293 (Fuchsberg, J., dissenting in part). Judge Fuchsberg argued that in light of the ambiguity on the face of the burglary statute, the Court's holding was "too conclusory by far." *Id.* at 282, 401 N.E.2d at 403, 425 N.Y.S.2d at 293. (Fuchsberg, J., dissenting in part).

[119] *Id.* at 283, 401 N.E.2d at 403, 425 N.Y.S.2d at 293 (Fuchsberg, J., dissenting in part). The common-law interpretation of the statutory language "intent to commit a crime" as requiring allegation and proof of an intent to commit a particular crime, *see* note 124 *infra*, has been endorsed by an overwhelming majority of jurisdictions that have addressed the question. *See* Adkins v. State, 389 P.2d 915 (Alaska 1964); People v. Schiaffino, 73 Cal. App. 357, 238 P. 725 (Ct. App. 1925); Henson v. People, 166 Colo. 428, 444 P.2d 275 (1968) (en banc); State v. Deedon, 56 Del. 49, 189 A.2d 660 (1963); Bays v. State, 240 Ind. 37, 159 N.E.2d 393 (1959); State v. Doran, 99 Me. 329, 59 A. 440 (1904); People v. Westerberg, 274 Mich. 647, 265 N.W. 489 (1936); Brumfield v. State, 206 Miss. 506, 40 So.2d 268 (1949) (en banc); State v. Norwood, 289 N.C. 424, 222 S.E.2d 253 (1976); Hooks v. State, 154 Tenn. 43, 289 S.W. 529 (1926); Lowe v. State, 163 Tex. Crim. 578, 294 S.W.2d 394 (Crim. App. 1956); Taylor v. Commonwealth, 207 Va. 326, 150 S.E.2d 135 (1966). *See also* United States v. Thomas, 444 F.2d 919 (D.C. Cir. 1971).

[120] 49 N.Y.2d at 283, 401 N.E.2d at 403-04, 425 N.Y.S.2d at 293. (Fuchsberg, J., dissenting in part). *See* United States v. Thomas, 444 F.2d 919, 923 (D.C. Cir. 1971). *See generally* 2 F. WHARTON, CRIMINAL PROCEDURE § 355 at 281 (12th ed. 1975). Judge Fuchsberg criticized the majority's reliance on the practice commentary to the statute, *see* note 115 *supra*, which he contended was a mere reiteration of the statutory language and devoid of analysis. 49 N.Y.2d at 282-83, 401 N.E.2d at 403, 425 N.Y.S.2d at 293 (Fuchsberg, J., dissenting in part). Moreover, the dissent disputed the Court's reliance on People v. Gilligan, 42 N.Y.2d 969, 367 N.E.2d 867, 398 N.Y.S.2d 269 (1977), as support for its construction of the statute. 49 N.Y.2d at 282-83, 401 N.E.2d at 403, 425 N.Y.S.2d at 293 (Fuchsberg, J., dissenting in part). The memorandum decision in *Gilligan*, according to the dissent merely stood for the proposition that the requisite intent to commit a crime in a burglary prosecution may be inferred from the circumstances of the breaking and, therefore, was not germane to whether

require particularity in either the indictment or its supplementary documents compromised a defendant's right to adequate notice of the charges against him[121] and impinged on his ability to later claim a prior jeopardy.[122]

People v. Mackey is the first definitive interpretation of New York's burglary statutes by the Court of Appeals.[123] Although it runs counter to both the common-law rule[124] and substantial au-

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such intent need be established with specificity. *Id.* (Fuchsberg, J., dissenting in part).

[121] 49 N.Y.2d at 283-84, 401 N.E.2d at 404, 425 N.Y.S.2d at 293-94 (Fuchsberg, J., dissenting in part). According to the dissent, failure to specify the object crime would result in inadequate notice of the charges encompassed by the indictment and thus would constitute a due process deprivation. *Id.* at 284, 401 N.E.2d at 404, 425 N.Y.S.2d at 294 (Fuchsberg, J., dissenting in part).

[122] *Id.* (Fuchsberg, J., dissenting in part). A double jeopardy problem would arise from the possibility that the prosecutor, unaware that the indictment was premised on a particular crime, may attempt to prove the intent to commit a different object crime. *Id.* (Fuchsberg, J., dissenting in part). *See generally* People v. Taylor, 43 App. Div. 2d 519, 519, 349 N.Y.S.2d 74, 75 (1st Dep't 1973) (per curiam). It is submitted, however, that this infirmity is a consequence of the unanimous holdings of the Court in *Iannone* and *Fitzgerald, see* note 111 *supra,* which allow a bill of particulars prepared by the prosecutor to factually supplement a broadly framed indictment, and not of the *Mackey* Court's construction of the burglary statute. *See The Survey,* 53 ST. JOHN'S L. REV. 803, 838-39 (1979).

[123] Mason v. People, 26 N.Y. 200 (1863), is the only case in which the Court of Appeals has addressed the sufficiency of a burglary indictment which did not specify with particularity the object crime. Despite dictum in *Mason* that a burglary indictment which did not particularize the object crime was fatally deficient, the narrow holding of the Court was that the defendant's objection to the sufficiency of the indictment was not timely made and, therefore, failed to preserve a question of law for Court of Appeals review. *Id.* at 201. *But see* People v. Patterson, 39 N.Y.2d 288, 295, 347 N.E.2d 898, 902, 383 N.Y.S.2d 573, 577 (1976), *aff'd,* 432 U.S. 197 (1977); People v. Hassin, 48 App. Div. 2d 705, 705, 368 N.Y.S.2d 253, 254 (2d Dep't 1975). Six of the eight remaining judges sitting in the case, however, observed that "the indictment was good, and that the objection to it would have been unavailing if taken in time." 26 N.Y. at 203; *see* People v. Bneses, 91 Misc. 2d 625, 627-28, 398 N.Y.S.2d 507, 509 (Sup. Ct. N.Y. County 1977). Subsequent to *Mason,* only two lower court cases have ruled on the sufficiency of a burglary indictment which did not allege with specificity the object crime of the breaking and entering. In People v. Smith, 90 Misc. 2d 495, 395 N.Y.S.2d 931 (Oneida County Ct. 1977), the court held defective on its face a burglary indictment which failed to particularize the object crime. *Id.* at 495-97, 395 N.Y.S.2d at 932-33. In People v. Bneses, 91 Misc. 2d 625, 398 N.Y.S.2d 507 (Sup. Ct. N.Y. County 1977), the court ruled that an indictment which failed to particularize the ulterior crime was not subject to dismissal insofar as the defect could be cured by a bill of particulars without prejudice to the defendant. *Id.* at 627, 398 N.Y.S.2d at 508-09.

[124] At common law, burglary was defined as "the breaking and entering the dwelling house of another in the night, with intent to commit some felony within the same." II F. WHARTON, CRIMINAL LAW § 968 (12th ed. 1932). It was settled that the prosecutor was required to allege and prove the crime intended to be committed by the intruder. W. CLARK & W. MARSHALL, LAW OF CRIMES § 13.06 (7th ed. 1967); J. MILLER, CRIMINAL LAW § 108 at 337-39 (1934). *See* II F. WHARTON, *supra,* §§ 1026-1027.

thority in other jurisdictions,[125] it is submitted that the *Mackey* Court has correctly construed the language of the statute, thus avoiding the imposition of a stricter burden of proof on the prosecution than was intended by the legislature. It is clearly conceivable that in a given case, a defendant's conduct upon entry may be sufficiently ambiguous to give rise to an inference of an intent to commit either of two mutually exclusive object crimes.[126] If a criminal purpose can be proved beyond a reasonable doubt by the circumstances of the breaking, the burglary prosecution should not fail for the inability of the prosecution to establish with specificity the intended ulterior crime.[127]

Having concluded that intent to commit a specific crime is not an element of the crime of burglary, it is apparent that the *Mackey* Court's denial of the defendant's request for specification was consistent with Court of Appeals precedent[128] and with the legislatively defined purpose of a bill of particulars.[129] While the Court's prior decisions in *People v. Iannone* and *People v. Fitzgerald*[130] established that a bill of particulars is available as of right to materially supplement a nonspecific indictment,[131] that right to particularization extends only to those facts underlying the essential elements of the crime charged.[132] Since the crime intended upon

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[125] *See* note 119 *supra.*

[126] For example, consider the hypothetical of an intruder, armed with a shotgun, who is apprehended shortly after breaking into an occupied residence. Presuming that it is established at trial that the intruder had a motive for killing both the owner and his dog, it is conceivable that the jury may be convinced that the defendant was possessed *in the alternative* of the intent to commit murder or to violate N.Y. AGRIC. & MKTS. LAW § 353 (McKinney 1972) (misdemeanor to maim, mutilate or kill any animal). Hence, despite the success of the prosecutor in establishing beyond a reasonable doubt through circumstantial evidence that the defendant broke and entered "with intent to commit a crime," *see generally* People v. Gilligan, 42 N.Y.2d 969, 969, 367 N.E.2d 867, 867, 398 N.Y.S.2d 269, 269 (1977), the prosecution might fail if required to establish the intent to commit *a specific* object crime beyond a reasonable doubt because of the ambiguity of the defendant's conduct.

[127] *See* note 126 *supra.*

[128] *See* note 111 *supra.*

[129] *See* note 105 *supra.*

[130] *See* note 111 *supra.*

[131] The recent amendment of CPL § 200.90, ch. 413, § 1, [1979] N.Y. Laws 932 (McKinney), which allows a motion for particulars to request specific information concerning "the substance of defendant's conduct encompassed by the charge," *id.*, constitutes a codification of the decisions in *Iannone, Fitzgerald* and *People v. Jackson,* 46 N.Y. 721, 385 N.E.2d 1296, 413 N.Y.S.2d 369 (1978). Memorandum of Office of Court Administration, *reprinted in* [1979] N.Y. Laws 1891 (McKinney).

[132] CPL § 200.90(3) (1971).

entry was not an issue to be proved by the prosecution or rebutted by the defendant,[133] it seems that the refusal to require the disclosure of such information was clearly within the trial court's discretion.[134]

Notwithstanding that, in light of its definitive interpretation of the burglary statute, the Court's finding that no abuse of discretion occurred appears sound, it is submitted that the *Mackey* Court erred in failing to promulgate guidelines to which the lower courts could refer in exercising such discretion in the future. Indeed, the majority's acknowledgment that the denial of the defendant's motion may have been erroneous had it "demanded the basis upon which the People would contend that he intended to commit a crime,"[135] suggests that the Court has implicitly sanctioned the practice of penalizing a defendant who asks the wrong question. Clearly, in the wake of *Iannone* and *Fitzgerald,* which placed the onus on the defendant to seek clarification of a deficient indictment by requesting a bill of particulars, the Court's failure to require that such requests be liberally construed increases the possibility that a defendant may be unfairly surprised at trial and consequently rendered incapable of rebutting the prosecution's evidence.[136]

Richard V. Silver

PUBLIC OFFICERS LAW

Compensation of public employees disclosable to union official under Freedom of Information Law

New York's Freedom of Information Law (FOIL)[137] was enacted to ensure public access to all records generated and compiled by state governmental agencies.[138] Specifically exempted from

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[133] *See* note 115 and accompanying text *supra.*

[134] *See generally* People v. Iannone, 45 N.Y.2d 589, 597-98, 384 N.E.2d 656, 662, 412 N.Y.S.2d 110, 115-16 (1978); People v. Rubin, 170 Misc. 969, 971, 11 N.Y.S.2d 405, 407-08 (N.Y.C. Gen. Sess. N.Y. County 1939).

[135] 49 N.Y.2d at 280, 401 N.E.2d at 402, 425 N.Y.S.2d at 291 (citation omitted).

[136] *See* note 111 and accompanying text *supra.*

[137] N.Y. PUB. OFF. LAW §§ 84-90 (McKinney Supp. 1979-1980).

[138] Fink v. Lefkowitz, 47 N.Y.2d 567, 571, 393 N.E.2d 463, 465, 419 N.Y.S.2d 467, 470 (1979); Gannett Co. v. County of Monroe, 59 App. Div. 2d 309, 311, 399 N.Y.S.2d 534, 535 (4th Dep't 1977), *aff'd,* 45 N.Y.2d 954, 383 N.E.2d 1151, 411 N.Y.S.2d 557 (1978); D'Allessandro v. Unemployment Ins. Appeal Bd., 56 App. Div. 2d 762, 763, 392 N.Y.S.2d 433, 435 (1st Dep't 1977). *See also* Baumgarten v. Koch, 97 Misc. 2d 449, 450-51, 411