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CPL § 200.50: Court of Appeals Clarifies Requirements of Factual Statement in Indictment

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within the boundaries of parental discretion.[123] Finally, the recognition of such a cause of action would have supported a claim for contribution, thereby preventing the tortured application of *Dole*.[124] In view of the confusion and possible inequity which seem likely to result,[125] it is hoped that the Court of Appeals will reexamine its position.

John F. Farmer

CRIMINAL PROCEDURE LAW

CPL § 200.50: Court of Appeals clarifies requirements of factual statement in indictment

Section 200.50 of the CPL sets forth the requisite form and content of an indictment and mandates that it contain a "plain and concise factual statement" which supports all elements of the crime charged with sufficient preciseness to afford the defendant notice of the conduct for which he stands accused.[126] The absence of specific

[123] *See* 46 N.Y.2d at 343, 385 N.E.2d at 1275, 413 N.Y.S.2d at 347 (Gabrielli, J., concurring); note 108 and accompanying text *supra*. Judge Gabrielli noted that the major difficulty the courts have faced in negligent supervision cases has been the establishment of an acceptable standard of good parental care. 46 N.Y.2d at 343, 385 N.E.2d at 1275, 413 N.Y.S.2d at 347 (Gabrielli, J., concurring). This difficulty is drastically reduced, however, when the parental conduct can be classified as grossly negligent. *Id.* (Gabrielli, J., concurring). In the event of egregious parental conduct within the parent-child relationship, the weighty policy considerations in respect to harmonious family relations become subordinated to the more compelling interests of providing a remedy for the injured child and allocating to a marginally negligent third party his rightful share of the damages. *See id.* at 344, 385 N.E.2d at 1276, 413 N.Y.S.2d at 348 (Gabrielli, J., concurring).

Moreover, it is submitted that, were the Court to define a standard of care to be applied to parents whose conduct toward their children is considered gross, reckless or wanton, parents would not be faced with an undue burden of shielding themselves from liability. While a cognizable action for mere negligent supervision might cause parents to be overprotective and "result in a society of reliant individuals, incapable of making responsible judgments respecting the propriety of their own actions," 42 BROOKLYN L. REV. 125, 136 (1975), it is unlikely that those concerns would develop under Judge Gabrielli's gross negligence standard.

[124] *See* notes 84 & 110 and accompanying text *supra*.

[125] *See* notes 113-114 and accompanying text *supra*.

[126] CPL § 200.50(7)(a) (Supp. 1978-1979) states that an indictment must contain

> [a] plain and concise factual statement in each court which, without allegations of an evidentiary nature,
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> (a) asserts facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision to clearly apprise the defendant or defendants of the conduct which is the subject of the accusation . . . .

The Court of Appeals, in People v. Farson, 244 N.Y. 413, 155 N.E. 724 (1927), stated that an indictment would be sufficient

statutory guidelines has led to conflicting results by lower courts in their efforts to formulate minimum requirements regarding the content of the factual statement.[127] Recently, in *People v. Iannone*,[128]

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if it identifies the charge against the defendant so that his conviction or acquittal may prevent a subsequent charge for the same offense; notifies him of the nature and character of the crime charged against him to the end that he may prepare his defense; and enables the court upon conviction to pronounce judgment according to the right of the case.

Id. at 417, 155 N.E. at 725; *see* CPL § 200.50, commentary at 236 (McKinney 1971); A. WEBER, NEW YORK CRIMINAL PROCEDURE 62 (1947).

The CPL defines an indictment as a "written accusation by a grand jury, . . . filed with a superior court, which charges one or more defendants with the commission of one or more offenses, at least one of which is a crime, and serves as a basis for prosecution thereof." CPL § 1.20(3), (19); *see* People v. R., 78 Misc. 2d 616, 356 N.Y.S.2d 1006, 1008-09 (Sup. Ct. N.Y. County), *aff'd*, 47 App. Div. 2d 599, 365 N.Y.S.2d 998 (1st Dep't 1974); CPL § 200.10 (Supp. 1978-1979). *See generally* Ludwig, *Improving New York's New Criminal Procedure Law*, 45 ST. JOHN'S L. REV. 387, 410-14 (1971).

Although the fifth amendment to the United States Constitution requires indictment by grand jury, this provision does not apply to the states. Hurtado v. California, 110 U.S. 516 (1884). Thus, a defendant in a state proceeding derives any right to grand jury indictment from state constitutions. *See id.* The New York Constitution provides that "[n]o person shall be held to answer for a capital or otherwise infamous crime . . . unless on indictment of a grand jury." N.Y. CONST. art. 1, § 6. Prior to its 1974 amendment, the right to an indictment was deemed non-waivable. Simonson v. Cahn, 27 N.Y.2d 1, 4, 261 N.E.2d 246, 247, 313 N.Y.S.2d 97, 99 (1970). In 1974, however, the section was amended to allow a person to waive indictment "with the consent of the district attorney," for crimes not "punishable by death or life imprisonment." N.Y. CONST. art. 1, § 6.

Under the former Code of Criminal Procedure, two types of indictments were authorized. The "long form" indictment of CCP § 275, which required the title of the action, the name or description of the defendant and a plain concise statement of the acts or omission constituting the crime, contained many of the same elements as § 200.50 of the CPL. The use of a "short form" indictment, on the other hand, merely required that the indictment contain no more than a bare statement of the crime charged without any factual allegations. *See* CCP § 295-b (1958); L. PAPERNO & A. GOLDSTEIN, CRIMINAL PROCEDURE IN NEW YORK § 164 (1960).

The constitutionality of the "short form" indictment was sustained in People v. Bogdanoff, 254 N.Y. 16, 171 N.E. 890 (1930). The *Bogdanoff* majority reasoned that, since a bill of particulars was required if requested by a defendant, any inadequacy in the indictment could be corrected by the district attorney's clarification of the acts constituting the crime. *Id.* at 24, 171 N.E. at 893. The dissent argued that the "short form" indictment did not give the defendant adequate notice of the charges against him because it did not require the acts constituting the crime to be stated. *Id.* at 37, 171 N.E. at 898 (Crane, J., dissenting). The dissent did not consider the bill of particulars a sufficient safeguard to protect these rights because the defendant was forced to request it, and, "[n]ot having been found on the oath of the grand jury, a bill of particulars cannot cure the failure of the indictment to sufficiently inform the defendant of the charge against him." *Id.* at 38, 171 N.E. at 898 (Crane, J., dissenting). With the enactment of the CPL, the "short form" indictment was eliminated. Ch. 996, § 200.50; [1970] N.Y. Laws 2 (McKinney) (current version at CPL § 200.50 (Supp. 1978-1979)).

[127] Some courts concluded that § 200.50(7) requires a more detailed statement of facts than was required under the CCP. *E.g.*, People v. Cook, 81 Misc. 2d 235, 239, 365 N.Y.S.2d 611, 616 (Onondaga County Ct. 1975); People v. Ebasco Serv., Inc., 77 Misc. 2d 784, 787-88, 354 N.Y.S.2d 807, 811 (Sup. Ct. Queens County 1974). Similarly, other courts found that §

the Court of Appeals concluded that, under section 200.50(7), an indictment need only contain a statement alleging that the defendant committed every element of the crime for which he has been indicted at a particular time and place.[129] The *Iannone* Court held, however, that the defendants' failure either to object to the sufficiency of the factual statement or request a bill of particulars at the proper time barred appellate review of the merits.[130]

In *Iannone,* two defendants were separately indicted and tried for conspiracy and criminal usury.[131] Both indictments, carefully following the language of the applicable section of the Penal Law, asserted facts supporting every material element of the crimes.[132] One defendant moved to dismiss the indictment at sentencing, contending "that it failed to set forth facts which constitute a crime."[133]

200.50(7) precludes the mere recitation of the language of the criminal statute. *E.g.,* People v. Barnes, 44 App. Div. 2d 740, 740, 354 N.Y.S.2d 459, 461 (3d Dep't 1974); People v. Fernandez, 93 Misc. 2d 127, 134-35, 402 N.Y.S.2d 940, 946-47 (Sup. Ct. Queens County 1978); People v. Smith, 90 Misc. 2d 495, 497, 395 N.Y.S.2d 931, 932-33 (Oneida County Ct. 1977); *see* People v. Hines, 60 App. Div. 2d 656, 400 N.Y.S.2d 559 (2d Dep't 1977).

In contrast, other courts have permitted an indictment to parallel the criminal statute, provided the statute defined the crime. *E.g.,* People v. Barton, 51 App. Div. 2d 1044, 1044, 381 N.Y.S.2d 329, 330 (2d Dep't 1976); People v. Schwenk, 92 Misc. 2d 331, 335-36, 400 N.Y.S.2d 291, 294-95 (Suffolk County Ct. 1977); People v. D'Arcy, 79 Misc. 2d 113, 118, 359 N.Y.S.2d 453, 463 (Alleghany County Ct. 1974).

[128] 45 N.Y.2d 589, 384 N.E.2d 656, 412 N.Y.S.2d 110 (1978).

[129] *Id.* at 599, 384 N.E.2d at 663, 412 N.Y.S.2d at 116.

[130] *Id.* at 600, 384 N.E.2d at 663, 412 N.Y.S.2d at 117.

[131] *Id.* at 592, 384 N.E.2d at 659, 412 N.Y.S.2d at 113; *see* N.Y. PENAL LAW §§ 105.00, 190.40 (Supp. 1978-1979); note 132 *infra.* Two actions were decided by the *Iannone* Court — *People v. Iannone* and *People v. Corozzo.*

[132] 45 N.Y.2d at 592, 384 N.E.2d at 659, 412 N.Y.S.2d at 112-13. The indictments in each case were very similar. Defendant Iannone was indicted by an instrument which read as follows:

> AND THE GRAND JURY AFORESAID, by this Indictment, further accuse the above named defendants of the crime of CRIMINAL USURY, in violation of section 190.40 of the Penal Law, committed as follows: The defendants, acting in concert and in aid of one another, from and between, in and about August of 1974 to December of 1974, in the County of Suffolk, not being authorized and permitted by law to do so, knowingly charged, took and received money as interest on a loan of a sum of money from a certain individual at a rate exceeding twenty-five percentum per annum and the equivalent rate for a shorter period.

Id. at 592, 384 N.E.2d at 659, 412 N.Y.S.2d at 112. The text of the indictment paralleled the wording of section 190.40 of the New York Penal Law, which states:

> A person is guilty of criminal usury in the second degree when, not being authorized or permitted to do so, he knowingly charges, takes or receives any money or other property as interest on the loan . . . , at a rate exceeding twenty-five per centum per annum or the equivalent rate for a longer or shorter period.

N.Y. PENAL LAW § 190.40 (McKinney 1975). Courts have been in conflict over whether an indictment which restates the penal law is valid. *See* note 127 *supra.*

[133] 45 N.Y.2d at 592-93, 384 N.E.2d at 659, 412 N.Y.S.2d at 112-13.

The lower court's denial of the motion was affirmed by the appellate division.[134] The second defendant appealed after a jury trial and first argued that the indictment was insufficient before the Court of Appeals.[135]

A unanimous Court of Appeals affirmed both convictions.[136] Judge Gabrielli, writing for the Court, noted that although no question of law had been preserved for their consideration, if the merits had been reached, the indictments would have been upheld as sufficient.[137] Judge Gabrielli observed that, while the indictment *qua* document has traditionally protected several constitutionally guaranteed rights,[138] the state constitution does not require that this be accomplished exclusively by the indictment.[139] As long as some means of protecting these substantive guarantees are provided, the form of such provisions is immaterial.[140] Recognizing that there are sufficient safeguards with respect to some of these rights,[141] the *Iannone* Court emphasized that by virtue of section 200.90 of the CPL,[142] which establishes the right to demand a bill of particulars,

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[134] *Id.* at 592, 384 N.E.2d at 659, 412 N.Y.S.2d at 113.

[135] *Id.*

[136] *Id.* at 601, 384 N.E.2d at 664, 412 N.Y.S.2d at 118.

[137] *Id.* at 593, 384 N.E.2d at 659, 412 N.Y.S.2d at 113; *see* note 150 *infra*.

[138] *Id.* at 594, 384 N.E.2d at 667, 412 N.Y.S.2d at 113. Judge Gabrielli noted that the indictment has traditionally served three functions. It notified the defendant of the charges to permit him to prepare a defense. *Id.*, 384 N.E.2d at 660, 412 N.Y.S.2d at 114 (citing People v. Armlin, 6 N.Y.2d 231, 234, 160 N.E.2d 478, 480, 184 N.Y.S.2d 179, 181 (1959)). The indictment also ensured, to some extent, that the defendant is in fact tried for the specific crime which led to an indictment by the grand jury. 45 N.Y.2d at 594-95, 384 N.E.2d at 660, 412 N.Y.S.2d at 114. Finally, the indictment guarded against the possibility of the defendant being tried twice for the same crime. *Id.* (citing People v. Williams, 243 N.Y. 162, 165, 153 N.E. 35, 36 (1926)).

[139] 45 N.Y.2d at 595, 384 N.E.2d at 661, 412 N.Y.S.2d at 114.

[140] *Id.*

[141] *Id.* at 598, 384 N.E.2d at 662, 412 N.Y.S.2d at 116. The Court emphasized that the significance of the indictment as the traditional vehicle for the protection of a defendant's fundamental rights, *see* note 138 *supra*, has been lessened by modern procedures. *Id.* As noted by the Court, discovery in criminal cases provided by article 240 of the CPL has made it less imperative that the indictment contain specific information, and the fear of double jeopardy has been diminished by the practice of keeping full records of the proceedings. 45 N.Y.2d at 598, 384 N.E.2d at 662, 412 N.Y.S.2d at 116. Furthermore, the Court observed that a defendant may move the court to allow him to inspect the grand jury minutes if he believes that the indictment charges him with a crime differing from that on which the grand jury heard evidence. *Id.; see* CPL § 210.30 (1971). It should be noted, however, that the granting of such motions is within the trial courts' discretion. *Id.* § 210.30(4).

[142] CPL § 200.90 (1971 & Supp. 1978-1979). The function of a bill of particulars is to provide clarification of matters stated in the indictment, People v. Davis, 41 N.Y.2d 678, 679-80, 363 N.E.2d 572, 573, 394 N.Y.S.2d 865, 867 (1977), and is not intended to serve as an alternative means of discovery or to enlighten the defendant to the prosecutor's proof. People v. Raymond G., 54 App. Div. 2d 596, 387 N.Y.S.2d 174 (3d Dep't 1976); *see* CPL § 200.90(3)

a defendant is fully capable of obtaining information necessary to prepare his defense.[143] Noting that this right had been a material consideration in sustaining the constitutionality of the discontinued "short form" indictment of the CCP, which required no more than a recitation of the crime charged,[144] the Court opined that these considerations were still compelling.[145] According to the Court, the essential purpose of the indictment *qua* document is merely to apprise the defendant of the crime for which he has been indicted, and therefore " 'the indictment need only allege where, when and what the defendant did.' "[146] While declaring that utilizing the statutory language defining the crime in the factual statement would generally suffice,[147] the Court warned that with some broadly-phrased statutes, greater specificity would be required.[148] In such instances, Judge Gabrielli cautioned the lower courts to safeguard the defendant's right to be notified of the charges against him and of his right to acquire further information either by a bill of particulars or discovery.[149] Addressing the issue whether the defendants waived their

(1971). The information that the prosecutor is obligated to furnish a defendant is strictly limited to the particulars requested by the defendant and approved by the court in its discretion. *See* CPL § 200.90(3); People v. Raymond G., 54 App. Div. 2d 596, 387 N.Y.S.2d 174 (3d Dep't 1976).

[143] 45 N.Y.2d at 597-98, 384 N.E.2d at 662, 412 N.Y.S.2d at 116; *see* People v. Fitzgerald, 45 N.Y.2d 574, 384 N.E.2d 649, 412 N.Y.S.2d 102 (1978); notes 145-146 *infra.*

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

[145] 45 N.Y.2d at 597-98, 384 N.E.2d at 662, 412 N.Y.S.2d at 115-16. CPL § 200.90(3) provides in part: "[I]f the court is satisfied that any or all of the items of information requested are necessary to enable the defendant adequately to prepare or conduct his defense, it must grant the motion as to every such necessary item." The *Iannone* Court viewed the effect of this provision and the sections of the CCP relating to "short form" indictments as the same, 45 N.Y.2d at 597-98, 384 N.E.2d at 662, 412 N.Y.S.2d at 116, since under the CCP the trial court also was required to determine whether the information requested was necessary. *Id.* Coupled with the other safeguards provided by the CPL, *see* note 141 *supra,* the Court concluded that an indictment lacking a detailed factual statement is not unconstitutional. 45 N.Y.2d at 598-99, 384 N.E.2d at 662-63, 412 N.Y.S.2d at 116.

[146] *Id.* at 598, 384 N.E.2d at 662-63, 412 N.Y.S.2d at 116 (quoting R. PITLER, NEW YORK CRIMINAL PRACTICE UNDER THE CPL 302 (1972)). Recognizing that the requirements of CPL § 200.50(7) are similar to the long form indictment, 45 N.Y.2d at 598, 384 N.E.2d at 663, 412 N.Y.S.2d at 116; *see* note 126 *supra,* the Court concluded that indictments are sufficient if they "charge each and every element of the crime . . . , and allege that the defendants committed the acts which constitute that crime at a specified place during a specified time period." 45 N.Y.2d at 599, 384 N.E.2d at 663, 412 N.Y.S.2d at 116; *accord,* People v. Fitzgerald, 45 N.Y.2d 574, 384 N.E.2d 649, 412 N.Y.S.2d 102 (1978).

[147] 45 N.Y.2d at 599, 384 N.E.2d at 663, 412 N.Y.S.2d at 116.

[148] *Id.* at 599, 384 N.E.2d at 663, 412 N.Y.S.2d at 117; *see* note 158 *infra.*

[149] 45 N.Y.2d at 599-600, 384 N.E.2d at 663, 412 N.Y.S.2d at 117. The Court further warned that prosecutors should avoid using indictments that, although technically sufficient, would not provide sufficient information to allow a defendant to properly prepare for trial,

right to review,[150] the Court held that, absent any assertion by the defendant that he was not informed of the crime with which he was charged, the failure to object to the insufficiency of the indictment at the proper time resulted in a waiver.[151]

By employing the same rationale which supported the constitutionality of the "short form" indictment it is submitted that the *Iannone* Court improperly resurrected this type of indictment and interpreted CPL 200.50 contrary to the intent of the draftsmen. The staff comments of the commission charged with the revision of the CCP indicate that the simplified indictment was not retained because it failed to afford adequate notice to the defendant of the nature of the crime charged.[152] Moreover, the draftsmen of the CPL were of the opinion that the sole function of an indictment was not merely to provide notice.[153] It additionally should provide a factual

since they might impinge on "the defendant's right to be informed of the accusations against him." *Id.* at 599, 384 N.E.2d at 663, 412 N.Y.S.2d at 117.

[150] *Id.* at 600-01, 384 N.E.2d at 664, 412 N.Y.S.2d at 118 (citing People v. Soto, 44 N.Y.2d 683, 376 N.E.2d 907, 405 N.Y.S.2d 434 (1978) (mem.)). The Court addressed the issue whether an insufficient factual statement was a jurisdictional defect. This question was significant because if a defective factual statement resulting in a jurisdictional defect, the trial court's lack of jurisdiction could be raised at any time and would not be waived by failure to make a timely objection. The Court found that an indictment contains a jurisdictional defect if, "in essence, . . . it does not effectively charge the defendant with the commission of a particular crime." 45 N.Y.2d at 600, 384 N.E.2d at 664, 412 N.Y.S.2d at 118.

[151] 45 N.Y.2d at 600, 384 N.E.2d at 663-64, 412 N.Y.S.2d at 117; *see* People v. Case, 42 N.Y.2d 98, 99-100, 365 N.E.2d 872, 873, 396 N.Y.S.2d 841, 842 (1977); People v. Scott, 3 N.Y.2d 148, 152-53, 143 N.E.2d 901, 904, 164 N.Y.S.2d 707, 711-12 (1957); People v. Koffroth, 2 N.Y.2d 807, 140 N.E.2d 742, 159 N.Y.S.2d 828 (1957); CPL § 255.20 (Supp. 1978-1979).

[152] The legal staff of the State of New York Temporary Commission on Revision stated that the "short form" indictment was to be eliminated because it informed "the accused nothing about the nature of the crime charged." PROPOSED NEW YORK CRIMINAL PROCEDURE LAW 170-71 (1967) [hereinafter cited as PROPOSED CPL], *reprinted in* N.Y. CRIM. PROC. LAW, art. 200, commission staff comment at 115 (Consol. 1979) [hereinafter cited as PROPOSED CPL, *reprinted in* CLS]. By discarding the "short form" indictment, the draftsmen of the CPL apparently hoped to insure that a defendant is tried for the crime for which the grand jury has issued the indictment and to avoid situations where a defendant is not given sufficient notice of the crimes with which he is charged. *See, e.g.*, People v. Langford, 16 N.Y.2d 32, 209 N.E.2d 537, 261 N.Y.S.2d 873 (1965); People v. Berkowitz, 14 Misc. 2d 384, 178 N.Y.S.2d 119 (Kings County Ct.), *aff'd*, 7 App. Div. 2d 1031, 184 N.Y.S.2d 710 (2d Dep't 1959). Accordingly, the draftsmen of the CPL required that the indictment contain a factual statement. *See* PROPOSED CPL, *supra*, at 171, 172, *reprinted in* CLS at 115.

[153] The draftsmen of the CPL believed that "[t]he primary function of an indictment is to inform the defendant of the crime with which he is charged, and that it should do so with sufficient fullness and clarity to enable him to prepare for trial . . . ." PROPOSED CPL, *supra* note 152, at 172, *reprinted in* CLS at 146; *see* People v. Armlin, 6 N.Y.2d 231, 234, 160 N.E.2d 478, 480, 189 N.Y.S.2d 179, 181 (1969); People v. Farson, 244 N.Y. 413, 416, 155 N.E.2d 724, 725 (1927). In addition, it was intended that the indictment enable the defendant to utilize the judgment as a bar to subsequent prosecution and permit the court to determine

statement which on its face would "permi[t] the trial court to determine whether the facts alleged [were] legally sufficient to support a conviction."[154]

Notwithstanding *Iannone's* questionable interpretation of subsection 7, it appears that the decision will have a significant effect on defendants' rights. *Iannone* indicates that an indictment need not always give notice of the specific acts constituting the crime charged. As a consequence, a defendant frequently may have the burden of requesting a bill of particulars.[155] Use of the bill of particulars in this manner has been criticized in the past because it "leaves the district attorney to determine of what the defendant is accused."[156] It is possible, therefore, that a defendant could be

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whether sufficient facts exist to support conviction. *See* PROPOSED CPL, *supra* note 152, at 172, *reprinted in* CLS at 146.

[154] PROPOSED CPL, *supra* note 152, at 172 *reprinted in* CLS, at 146. In contrast to the function of an indictment, the revision commission staff noted:

> The sole function of a bill of particulars is to define more specifically the crime or crimes charged in the indictment, or, in other words, to provide clarification of certain matters set forth in the pleading . . . . A bill of particulars cannot, of course, serve to amend an indictment, nor can it cure a defective pleading.

PROPOSED CPL, *supra* note 152, at 179, *reprinted in* CLS at 185.

A strong argument can be made in support of the theory that the draftsmen of the CPL intended an insufficient factual statement to be a jurisdictional defect. Section 210.25 of the CPL provides that an indictment should not be dismissed where the indictment can be cured by amending technical flaws pursuant to § 200.70. Four substantive defects of an indictment, however, cannot be amended: failure to state an offense, legal insufficiency of the factual statement, misjoinder of offenses, and misjoinder of defendants. CPL § 200.70(2) (Supp. 1978-1979). Moreover, the latter defects may be grounds for dismissal of an indictment. *See, e.g.*, People v. Smith, 90 Misc. 2d 495, 395 N.Y.S.2d 931 (Oneida County Ct. 1977); People v. Tripp, 79 Misc. 2d 583, 360 N.Y.S.2d 752 (Delaware County Ct.), *aff'd*, 46 App. Div. 2d 743, 360 N.Y.S.2d 1015 (3d Dep't 1974). Since the intent of the draftsmen of § 200.70 was to "avoid technical objections not affecting a *substantial* right of the defendant," PROPOSED CPL, *supra* note 152, at 177, *reprinted in* CLS at 174 (emphasis added), it can be argued that the draftsmen considered the factual statement to be an essential part of the indictment and, where insufficient, as a jurisdictional ground for dismissal. People v. Smith, 90 Misc. 2d 495, 497, 395 N.Y.S.2d 931, 932 (Oneida County Ct. 1977); *accord*, People v. Clough, 43 App. Div. 2d 451, 454, 353 N.Y.S.2d 260, 264 (3d Dep't 1974); People v. Bottcher, 93 Misc. 2d 417, 419, 402 N.Y.S.2d 934, 936 (Sup. Ct. Queens County 1978). *But see* People v. Grimsley, 60 App. Div. 2d 980, 980-81, 401 N.Y.S.2d 643, 644 (4th Dep't 1978) (mem.).

[155] Of course, the burden also will be on the defendant to commence discovery, or request that the grand jury minutes be reviewed in order to determine the exact crime with which he is charged. *See* note 141 *supra*.

[156] People v. Bogdanoff, 254 N.Y. 16, 39, 171 N.E. 890, 899 (1930) (Crane, J., dissenting). Judge Crane noted that "[a] bill of particulars is not . . . a part of the indictment. Not having been found on the oath of the grand jury, a bill of particulars cannot cure the failure of the indictment to sufficiently inform the defendant of the [crime charged]." *Id.* at 38. (Crane, J., dissenting); *see* People v. Berkowitz, 14 Misc. 2d 384, 390, 178 N.Y.S.2d 119, 127 (Kings County Ct. 1958), *aff'd*, 7 App. Div. 2d 1031, 184 N.Y.S.2d 710 (2d Dep't 1959). This view was adopted by the draftsmen of the CPL. *See* note 154 *supra*.

convicted of a crime other than the one for which he was indicted.[157] The *Iannone* Court's admonition to the lower courts to safeguard defendants' rights through use of discovery and the bill of particulars does not appear to adequately resolve the above problems.[158]

John F. Finston

- *CPL § 220.60(3): Defendant denied full evidentiary hearing on motion to withdraw guilty plea where court record contains no indication of unfulfilled out-of-court promise*

Section 220.60(3) of the CPL provides that a criminal defendant may, in the discretion of the court, withdraw a guilty plea prior to the imposition of sentence.[159] The reluctance to exercise this dis-

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[157] *See* note 146 *supra.*

[158] 45 N.Y.2d at 599-600, 384 N.E.2d at 663, 412 N.Y.S.2d at 117. Although the defendants in *Iannone* did not assert actual prejudice, the Court noted that, where this occurs because of the paucity of information in an indictment and the defendant is actually unaware of the crime with which he is charged, a conviction might not be sustained. *Id.* In such a case, reviewability of the indictment may be necessary to ensure a fair opportunity for the defendant to prepare a defense.

[159] CPL § 220.60(3) (Supp. 1978-1979) states that:

> At any time before the imposition of sentence, the court in its discretion may permit a defendant who has entered a plea of guilty to the entire indictment or to part of the indictment to withdraw such plea, and in such event the entire indictment, as it existed at the time of the plea of guilty, is restored.

Plea negotiations often have been categorized in two groups. In "charge bargaining" the prosecutor may offer the defendant a reduced charge, with its concomitant lesser sentence, in exchange for a plea of guilty. A variation on this method is the offer to dismiss some of the charges against the defendant or to forego additional charges which might validly be made. *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978); Santobello v. New York, 404 U.S. 257 (1971). In contrast, "sentence bargaining" involves an agreement by the prosecutor to recommend a particular disposition to the sentencing court after the defendant has pleaded guilty to the offense as originally charged. *See* People v. Selikoff, 35 N.Y.2d 227, 318 N.E.2d 784, 360 N.Y.S.2d 623 (1974), *cert. denied,* 419 U.S. 1122 (1975); Berger, *The Case Against Plea Bargaining,* 62 A.B.A.J. 621, 621 (1976); Borman, *The Chilled Right to Appeal from a Plea Bargain Conviction: A Due Process Cure,* 69 NW. U.L. REV. 663, 664-65 (1974).

By entering a plea, a defendant waives certain constitutional guarantees, *see* Brady v. United States, 397 U.S. 742, 755 (1970); Boykin v. Alabama, 395 U.S. 238, 242-43 (1969); Kercheval v. United States, 274 U.S. 220, 223 (1927), including the right against self-incrimination, *see* Malloy v. Hogan, 378 U.S. 1, 3 (1964), to trial by jury, *see* Duncan v. Louisiana, 391 U.S. 145, 149 (1968), to confront and cross-examine witnesses of the state, *see* Pointer v. Texas, 380 U.S. 400, 403 (1965), to compel the presence of witnesses on his behalf, *see* Washington v. Texas, 388 U.S. 14, 18-19 (1967), to require the government to prove their case beyond a reasonable doubt, *see In re* Winship, 397 U.S. 358 (1970), and to have only constitutionally obtained evidence used as part of the prosecution's case, *see, e.g.,* Mapp v. Ohio, 367 U.S. 643 (1961). The right to plea bargain, however, is not a constitutional right, Weatherford v. Bursey, 429 U.S. 545 (1977), and not all constitutional rights