Responsibility implied that a showing of intent, either directly or by conduct, must be established; inadvertence was insufficient.

What the future law will be in respect to malpractice actions in light of the Code of Professional Responsibility is unsettled at this time. Fear of such actions will undoubtedly impair the zeaolusness and independent judgment of the lawyer. It should not be further impaired by permitting malpractice actions to broaden the scope of disciplinary actions.[172]

There certainly are valid reasons why a lawyer will choose one course of action over another in the handling of a client's affairs. The lawyer must communicate to the client, *in language the client understands*, what the various available courses of action are and why the particular course of action was chosen over the others, before the action is taken. If this is not done and the matter does not turn out as the client anticipated, the client believes the alternative courses were not considered or the lawyer did not know they even existed. If told after the fact, the client will think the lawyer is attempting to excuse what the client now believes was the incompetent manner in which his legal matter was handled. Over half of the complaints received by the Committee on Professional Ethics and Conduct of the Iowa State Bar Association are filed because the lawyer failed to *properly* communicate with the client. Today, in light of Canon 6, it is especially important that the lawyer takes the time to adequately communicate with the client during all phases of the handling of the client's legal affairs.

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172. Of course, the lawyer must comply with DR 6-101(A)(1) and (2). This imposes an affirmative duty on the lawyer. The failure to comply with this affirmative duty will imply the requisite intent needed for a disciplinary action.

SURVEY OF IOWA CRIMINAL LAW

Mark E. Schantz†

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I. Introduction

Criminal appeals continue to occupy a major proportion of the Iowa Supreme Court's caseload. In the period covered by this survey,[1] the court rendered opinions in over 150 criminal cases. It is not the purpose of this article to "digest" all of the decisions; rather it is intended to describe the more significant holdings, to place the decisions in the context of developing

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1. The Survey covers the period from July of 1975 through June of 1976. The opinions may be found in volumes 232-243 of the *Northwestern Reports, Second Series.*

doctrine, in Iowa and elsewhere, and to raise questions concerning the soundness of the reasoning in or the policy implications of some of the more controversial decisions.

II. Substantive Law

A. *Constitutional Challenges to Statutes*

1. *Sodomy*

The Iowa Supreme Court significantly limited the scope of the state's sodomy law in a 5-4 decision in *State v. Pilcher*,[2] and may have avoided it entirely. The court ruled that the sodomy statute[3] was unconstitutional "as an invasion of fundamental rights, such as the personal right of privacy, to the extent it attempts to regulate through use of criminal penalty consensual sodomitical practices performed in private by adult persons of the opposite sex."[4] The court held at least that the statute was unconstitutional as applied to the factual situation on record,[5] but made clear that it was not deciding whether it was equally unconstitutional to punish similar acts practiced by consenting adults of the same sex.[6] Nothing in the opinion suggests, however, that the state may not constitutionally punish acts of forcible sodomy or consensual sodomitical acts between an adult and a minor under a properly drafted statute.

The four dissenters protested rather persuasively, however, that the effect of the majority's reasoning was to declare the statute unconstitutional on its face and that constitutional objections would now be raised to prosecutions in homosexuality, adult-minor, and forcible sodomy cases.[7] While the dissenters agreed with the majority that the statute would be unconstitutional as applied to married couples, they argued that the statute could still be constitutionally applied to punish sodomitical acts between non-married consenting adults. The dissent pointed out that the majority's holding represents the first time that any court of last resort in the United States has stated that sodomitical acts between consenting non-married adults in private may not be prohibited.[8]

The majority derived its rationale from the Supreme Court decisions in *Griswold v. Connecticut*[9] and *Eisenstadt v. Baird*.[10] The majority opinion stated that *Griswold* stood for the proposition that the state may not interfere

2. 242 N.W.2d 348 (Iowa 1976).
3. Iowa Code § 705.1 (1975). Section 705.1 provides in pertinent part: "Whoever shall have carnal copulation in any opening of the body except sexual parts, with another human being, . . ., shall be deemed guilty of sodomy."
4. State v. Pilcher, 242 N.W.2d 348, 359 (Iowa 1976).
5. *Id.* at 360.
6. *Id.* at 359. The author finds the majority's reasoning persuasive but can conceive of no cogent rationale for focusing on the sex of the partners when classifying acts of consensual oral sex among unmarried adult persons.
7. *Id.* at 360-61.
8. *Id.* at 363.
9. 381 U.S. 479 (1965).
10. 405 U.S. 438 (1972).

with the private sexual relations of married couples[11] and that *Eisenstadt* prohibited treating married couples and non-married consenting adult couples differently in terms of regulation of sexual activity.[12] While other state courts have uniformly accepted this interpretation of *Griswold*, the dissent pointed out that *Eisenstadt* has frequently been interpreted to mean only that the state may not interfere with the right of married or single persons to bear children and does not preclude regulation of other sexual activity between unmarried persons.[13]

Under Iowa's revised criminal code, effective January 1, 1978, only sodomitical acts involving force, a child, or a person with a mental defect will be proscribed.[14] Sodomy prosecutions are comparatively rare. However, in view of the doubt as to whether there remains any legal basis for prosecuting forcible sodomy under the current statute, the legislature would be wise to expedite the effective date of this particular section.

2. *Prostitution*

An equal protection attack on the state's prostitution statute[15] was rejected by the court in *State v. Price*.[16] A Black Hawk County district court judge, relying upon *State v. Kueny*,[17] had declared the word "lewdness" in the statute to be vague and then held that the remainder of the statute denied women equal protection because it had previously been held that only a woman could be a prostitute.[18] The Supreme Court of Iowa agreed that "prostitution" under section 724.1 referred only to women but concluded that "lewdness" referred to both men and women.[19] Thus, on its face, the statute did not discriminate against men or women. The court then held that "lewdness," when used in reference to a woman charged with "lewdness and prostitution," drew its meaning from the word "prostitution,"[20] and the word "lewdness," as it referred to

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11. State v. Pilcher, 242 N.W.2d 348, 357 (Iowa 1976).
12. *Id.* at 358.
13. *Id.* at 365. *See also* Annot., 58 A.L.R.3d 636, 639-40 (1974); State v. Lair, 301 A.2d 748 (N.J. 1973), for a similar interpretation. The New York Supreme Court has upheld a state statute prohibiting sodomitical acts between consenting, non-married adults, but specifically excluding married couples from such regulation. In doing so, the court said the *Eisenstadt* decision was limited to the fundamental right to bear children. *See* People v. Mehr, 383 N.Y.S.2d 798 (1976); People v. Rice, 383 N.Y.S.2d 799 (1976).
14. IOWA CRIMINAL CODE § 901, 1976 Iowa Acts. Sodomitical acts are accorded similar treatment under the Model Penal Code. *See* MODEL PENAL CODE § 213.2 (Proposed Official Draft 1962).
15. Iowa Code section 724.1 (1975) provides, "If any person, for the purpose of prostitution or lewdness, resorts to, uses, occupies, or inhabits any house of ill fame . . . or if any person be found . . . leading a life of prostitution or lewdness, such person shall be imprisoned in the penitentiary not more than five years."
16. 237 N.W.2d 813 (Iowa 1976).
17. 215 N.W.2d 215 (Iowa 1974). In *Kueny*, the court declared unconstitutional the state's lewdness statute, Iowa Code section 725.1 (1973), since repealed by the state legislature. In State *ex rel.* Faches v. N.D.D., Inc., 228 N.W.2d 191 (Iowa 1975), the court held unconstitutionally vague the word "lewdness" in the state's nuisance law, Iowa Code section 99.1 (1973), but upheld the rest of statute under the doctrine of severability.
18. State v. Price, 237 N.W.2d 813, 814-15 (Iowa 1976).
19. *Id.* at 817. *See* State v. Rayburn, 170 Iowa 514, 153 N.W. 59 (1915).
20. State v. Price, 237 N.W.2d 813, 817 (Iowa 1976).

the female defendant in *Price*, was, therefore, not unconstitutionally vague. While acknowledging that "lewdness" may be vague in reference to a man charged under the statute, the court held that a female defendant had no standing to raise the issue.[21] Accordingly, a female defendant cannot sustain an equal protection challenge so long as the validity of the statute's application to males remains unresolved.

The equal protection issue will be eliminated under the revised criminal code because the provisions governing prostitution, pimping and pandering have been couched in terms which prohibit those activities by males and females alike.[22]

The court in *Price* went on to reject an argument that the statute violated the defendant's right of privacy:

> Prostitution implicates more than private sexual relations between consenting adults. It affects others including the community. Although usually transacted in private, it is nevertheless business which is frequently negotiated in public. Although intimate, it is impersonal. . . . It may be a factor in the spread of venereal disease or have a close relationship with other criminal activity.[23]

3. *Criminal Trespass*

Iowa's criminal trespass statute[24] survived constitutional attack in *State v. Williams*.[25] The defendant led a group of demonstrators into the Waterloo School superintendent's office to demand redress for the use of a racially objectionable story in a junior high speech class. The evidence indicated that the demonstrators refused to leave when ordered to do so by the police, refused to permit the superintendent to leave his office or carry on with his work, and caused property damage in excess of $100. The court easily concluded that the defendant's activities were not themselves protected by the first amendment and were punishable under any construction of the statute.[26]

Somewhat surprisingly, the entire court agreed that the defendant had standing to mount a facial attack on the statute for vagueness and overbreadth, *i.e.*, to complain of potentially unconstitutional applications to others.[27] It is not obvious that the criminal trespass statute on its face purports to regulate

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21. *Id.*
22. IOWA CRIMINAL CODE, S.F. 85, §§ 2501-2503, 1976 Iowa Acts ch. 1245. Section 2501 provides: "Prostitution. A person who sells or offers for sale his or her services as a partner in a sex act, or who purchases or offers to purchase such services, commits an aggravated misdemeanor."
23. State v. Price, 237 N.W.2d 813, 818 (Iowa 1976).
24. IOWA CODE § 729.1 (1975). Criminal trespass includes "entering upon or in property without legal justification or without the implied or actual permission of the owner . . . with the intent . . . to use, remove therefrom, alter, damage, harass, or place thereon anything animate or inanimate" or "entering upon or in property for the purpose or with the effect of unduly interfering with the lawful use of the property by others."
25. 238 N.W.2d 302 (Iowa 1976).
26. State v. Williams, 238 N.W.2d 302, 306 (Iowa 1976).
27. *Id.* at 306, 309.

speech or expressive conduct or otherwise satisfies the criteria which must be met before a facial attack has been permitted by the United States Supreme Court.[28]

Reaching the merits of the defendant's vagueness attack, the majority held that the terms "harass," "harassing," "unduly" and "without legal justification" were sufficiently precise in this statutory context. The defendant relied heavily upon *Coates v. Cincinnati*,[29] in which the United States Supreme Court had struck down a municipal ordinance prohibiting three or more persons from assembling in a manner "annoying" to persons passing by because the ordinance provided no ascertainable standard of conduct. The majority distinguished *Coates* on the ground that "annoying" conduct could be inadvertent, whereas "harrassing" conduct was necessarily intentional.[30]

A strong three-justice dissent focused on the fact that section 729.1(2)(a) defines a criminal trespass to include: "entering upon or in property . . . with the intent to . . . harass . . . without the implied or actual permission of the owner, lessee, or person in lawful possession." The dissent argued that as written the statute prohibits an otherwise lawful act of entry if one possesses only an "harassing" state of mind, a prohibition which leaves excessive discretion in its application.[31] That would seem to be a fair and fatal criticism of the statute as written. It should be noted, however, that the majority has now interpreted this portion of the statute to require proof of intentionally harassing conduct *after* entry upon the property and a defendant would be entitled to jury instructions reflecting that construction and further defining the meaning of harassing conduct.[32]

4. *Marijuana*

In *State v. Leins*,[33] the court aligned itself with a majority of other state courts in rejecting a shotgun constitutional attack on the criminalization of marijuana. Among the grounds raised by the defendants were: (1) that Iowa's marijuana statutes violated the people's right to pursuit of happiness under the ninth amendment[34] (basically a right-to-privacy argument); (2) that the statu-

28. In Broadrick v. Oklahoma, 413 U.S. 601, 612-13 (1973), Justice White articulated four situations in which facial overbreadth claims have been entertained: (1) where "statutes which, by their terms seek to regulate 'only spoken words;' " (2) "where the Court thought rights of association were ensnared in statutes which . . . might result in burdening innocent associations;" (3) "where statutes, by their terms, purport to regulate the time, place and manner of expressive or communicative conduct;" and (4) "where such [expressive or communicative] conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights."

29. 402 U.S. 611 (1971).

30. State v. Williams, 238 N.W.2d 302, 307 (Iowa 1976).

31. *Id.* at 310.

32. *Id.* at 307. After canvassing several dictionary definitions, the court observed: "Each alternative involves some overt, intentional, persistent action. Unknowing harassment is precluded."

33. 234 N.W.2d 645 (Iowa 1975).

34. State v. Leins, 234 N.W.2d 645, 646 (Iowa 1975).

tory ban on marijuana is unreasonable in light of the mere taxation of alcohol and tobacco[35] (an equal protection argument); and (3) that placing marijuana in a class, with such drugs as LSD, as a dangerous drug[36] is unreasonable[37] (also an equal protection argument).

All of the grounds were rejected rather summarily. In rejecting the privacy argument, the court pointed out that the defendant was charged with delivering marijuana, and, in any event, the decisions of the United States Supreme Court in *Griswold v. Connecticut*,[38] and *Stanley v. Georgia*,[39] "do not invalidate statutes prohibiting possession of contraband" in the home.[40] The court also cited footnote eleven in *Stanley*: "What we have said in no way infringes upon the power of the State or Federal government to make possession of other items, such as *narcotics*, firearms, or stolen goods a crime."[41] It has been pointed out, however, that this footnote is really not applicable to marijuana statutes since marijuana is not a narcotic.[42] Nevertheless, the court's position in *Leins* is consistent with the view taken in *State v. Pilcher*,[43] that the *Griswold* right of privacy is limited to sexual matters.[44]

In rejecting the first equal protection challenge, the court simply asserted that the differentiation of alcohol and tobacco from marijuana was not patently arbitrary nor without rational relationship to a legitimate governmental interest.[45] No court has accepted the argument that the use of marijuana may not be completely forbidden so long as tobacco and alcohol are generally available. The traditional reply to this argument has been that it is "no requirement of

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35. *Id.* at 647.

36. The Iowa Uniform Controlled Substances Act, Iowa Code, chapter 204 (1975), was adopted by the state legislature in 1971 and is based on the Federal Drug Abuse Act, 21 U.S.C. section 801 *et seq.* (1970), which has been adopted in approximately 41 other states. Iowa Code section 204.204(3) lists marijuana as a Schedule I controlled substance along with LSD and 15 other drugs, including heroin, morphine and codeine.

37. State v. Leins, 234 N.W.2d 645, 647 (Iowa 1975).

38. 381 U.S. 479 (1965).

39. 394 U.S. 557 (1969).

40. State v. Leins, 234 N.W.2d 645, 646 (Iowa 1976).

41. Stanley v. Georgia, 394 U.S. 557, 568 n.11 (1969) (emphasis added).

42. Soler, *Of Cannabis and the Courts: A Critical Examination of Constitutional Challenges to Statutory Marijuana Prohibition*, 6 CONN. L. REV. 601, 696-97 (1974) [hereinafter cited as Soler].

43. 242 N.W.2d 348 (Iowa 1976).

44. State v. Pilcher, 242 N.W.2d 348, 357 (Iowa 1976). However, the Alaska Supreme Court has recently accepted the argument that the right to privacy guarantees an adult the right to possess marijuana for personal consumption in his home. *See* Ravin v. State, 537 P.2d 494 (Alas. 1975). The Alaska court said the possession or ingestion of marijuana is in itself not a fundamental right but such use combined with the sanctity of the home does become fundamental. The court stated that there is no firm evidence that the use of marijuana is either dangerous or harmless and that "mere scientific doubts" are not sufficient to show a substantial relationship between intrusion into an individual's home and a legitimate governmental interest. However, the court said that the state did have a legitimate interest in keeping the highways safe from intoxicated drivers and that, therefore, the prohibition as to possession of marijuana in a car was upheld. *See also* State v. Kantner, 493 P.2d 306, 311, 313 (Hawaii 1972) (concurring and dissenting opinions); People v. Sinclair, 194 N.W.2d 878, 895 (Mich. 1972) (concurring opinion) where the right-to-privacy argument, although not accepted by a majority of either of the two courts, did gain some support.

45. State v. Leins, 234 N.W.2d 645, 647 (Iowa 1976).

equal protection that all evils of the same genus be eradicated or none at all."[46] Nevertheless, an argument can be made that it is irrational to classify marijuana as a Schedule I controlled substance while excluding alcohol and tobacco. The criteria under section 204.202 for listing a drug as a Schedule I controlled substance are: (1) has high potential for abuse; and (2) has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision. Both tobacco and alcohol would seem to fit these criteria if marijuana does.[47] The obvious purpose of chapter 204 is to prevent the uncontrolled use of such substances. The United States Supreme Court indicated in *Morey v. Doud*[48] that when a particular member of a class is exempted from restrictions under a statute, the critical question is whether such exemption is rational in view of the purpose of the statute.[49] If *Morey v. Doud* provides the appropriate analytical framework, it is difficult to rebut the argument that marijuana users are denied equal protection because the exclusion of alcohol and tobacco is irrational in view of the purpose of the prohibition. Certainly the issue required more serious treatment than it was afforded.

The court in *Leins* also concluded that marijuana may reasonably be classified with such drugs as LSD. Where the classifications including marijuana have been struck down, it has not generally been because marijuana was classified *with* other more dangerous drugs but because marijuana was classified *as* a narcotic.[50] In Iowa, marijuana is not included within the definition of a narcotic drug.[51] The Connecticut Superior Court, however, recently struck down a statutory scheme which placed marijuana in the same classification with amphetamines and barbituates but separate from narcotic drugs.[52] The court reasoned that because alcohol and tobacco, which are "probably more destructive

46. Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949). *See also* Ravin v. State, 537 P.2d 494, 512 n.4 (Alas. 1975); United States v. Kiffer, 477 F.2d 349, 355 (2d Cir.), *cert. denied*, 414 U.S. 831 (1973).

47. Soler, *supra* note 40, at 637.

48. 354 U.S. 457, 469 (1957). *Morey v. Doud* was expressly overruled in New Orleans v. Dukes, 96 S. Ct. 2513 (1976). However, the basis for overruling was that *Morey* represented the application of an overly strict standard of review to an exclusively economic regulation. The Controlled Dangerous Substances Act would not seem appropriately characterized as an exclusively economic regulation because of the serious criminal penalties involved and because the ingestion of substances, while perhaps not a "fundamental right," would seem to involve personal rather than merely economic liberty.

49. *See* Soler, *supra* note 40, at 637-38 for a discussion of this analysis.

50. *See* People v. McCabe, 49 Ill. 2d 338, 275 N.E.2d 407, 414 (1971) (defining marijuana as a narcotic drug under ILL. REV. STAT. ch. 38, § 22-1 (1969) held to be a denial of equal protection); People v. Sinclair, 387 Mich. 91, —, 194 N.W.2d 878, 887 (1972) (defining marijuana as a narcotic under MICH. COMP. LAWS § 335.151 (1970) violates equal protection). Michigan has since adopted a classification scheme similar to that of Iowa. *See* MICH. COMP. LAWS § 335.306, .315 (1975).

51. IOWA CODE § 204.101(17) (1975).

52. State v. Anonymous, 32 Conn. Supp. 324, 355 A.2d 729 (1976). General Statutes of Connecticut section 19-480 (1974), concerning imposition of penalties, refers in paragraph (a) to narcotic drugs and in paragraph (b) to all other controlled substances, including marijuana, amphetamines and barbituates. The penal section of the Iowa Controlled Substances Act is similar. *See* IOWA CODE § 204.401(1)(a), (b) (1975).

in their effects on society than marijuana," were not included under the statute, and because it was obvious the legislature only intended to prohibit those psychoactive drugs which have a serious or harmful effect upon the public health and welfare, the "substantial difference" between the effects of marijuana and the effects of amphetamines and barbituates made it irrational to group the drugs in the same classification.[53] This issue, too, seemed to merit more attention than it received in *Leins*.

B. *Specific Offenses*

1. *Homicide*

Iowa's felony-murder statute requires that the murder be "committed in the perpetration or attempt to perpetrate" a specified felony.[54] A question can arise under that formulation as to the *duration* of the felony, *i.e.*, as to whether a prior felony is closely enough related to a subsequent killing in time, place and causal connection. In *State v. Connor*,[55] the supreme court approved an instruction imposing liability if the felony and murder "were parts of one continuous series of acts connected with each other" and held that it was not error to refuse an instruction that the death must have occurred in the immediate perpetration, actual commission and immediate escape from the felony.[56] While it may be questioned whether this vague "res gestae" rule provides much guidance to the jury, it is followed by a majority of jurisdictions.[57]

Another aspect of the application of the felony-murder rule to Connor seems worthy of note. Connor was convicted of first-degree murder solely on the theory that he aided and abetted the *robbery* of the male companion of the victim of the brutal rape-murder.[58] One George Nowlin was convicted of felony-murder for the killing of the female[59] and premeditated murder for the killing of the male robbery victim.[60] The jury did not receive the case on the theory that Connor aided and abetted the *homicide*, or even the rape. Nothing in the

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53. State v. Anonymous, 32 Conn. Supp. 324, —, 355 A.2d 729, 740-41 (1976). However, the Connecticut Supreme Court recently overturned the superior court's decision. *See* State v. Rao, 20 CRIM. L. REP. (BNA) 2051 (Conn. Oct. 20, 1976). In a conclusory opinion, the supreme court stressed the "ongoing dispute" as to whether marijuana is harmful, the "magnitude" of current problems with drugs, the "obvious care" of the Connecticut legislature in drafting the statute, and the presumption of the statute's constitutionality, and stated the statute was rational and reasonable. One justice, however, said it was clear that marijuana was less harmful than alcohol and tobacco and amphetamines and barbituates and said the state could not regulate its private use in the home. *See also* United States v. Maiden, 355 F. Supp. 743 (D. Conn. 1973) (the court rejected the same argument advanced by the same defendants with respect to the Federal Drug Abuse Act, 21 U.S.C. § 841 (1970)).

54. Iowa Code section 690.2 (1975) provides: "All murder . . . which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem, or burglary, is murder in the first degree. . . ."

55. 241 N.W.2d 447 (Iowa 1976).

56. State v. Connor, 241 N.W.2d 447, 463 (Iowa 1976).

57. *See* Annot., 58 A.L.R.3d 851 (1974).

58. 241 N.W.2d at 461.

59. State v. Nowlin, 244 N.W.2d 597 (Iowa 1976).

60. State v. Nowlin, 244 N.W.2d 591 (Iowa 1976).

court's summary of the evidence suggests that Connor was aware of the possibility that the robbery might escalate into a rape or that Nowlin might kill the victims to conceal the crimes or for any other reason.

All this is standard felony-murder doctrine, not peculiar to Iowa. The felony-murder doctrine creates strict liability for killings that occur during the perpetration of a felony. Because the principal may be convicted of first-degree murder for a killing which occurs in the perpetration of a felony without any other showing of express or implied malice, it follows that accessories to the underlying felony may also be convicted of first-degree murder without any showing of a homicidal state of mind.[61] While the homicide must be causally related to the principal's felonious act, that act is attributable to the accomplice on standard principles of accessorial liability. The vice, then, is in the strict liability feature of felony-murder doctrine.

That vice is well-illustrated by this case. Nowlin apparently could have been convicted of first-degree murder without reliance upon the felony-murder doctrine and the prosecution utilized it, one may surmise, primarily for its tactical advantages. On the other hand, the trial court gave the *Connor* jury only two alternatives: guilty of first-degree murder under a felony-murder theory or not guilty.[62] That ruling implies and the record suggests that there was insufficient evidence to warrant a conviction on the theory that Connor aided and abetted the homicide. The upshot, of course, is that both Connor and Nowlin were convicted of the most serious offense known to the law on a record which suggests stark differences in their relative moral culpability. And so it is with the felony-murder rule: where punishment for first-degree murder is appropriate, resort to a felony-murder theory is seldom necessary; where resort to the felony-murder theory is necessary to obtain a conviction, first-degree murder is seldom an appropriate result. In "cleaning up" the revised criminal code, the legislature would do well to eliminate this unfortunate relic.[63]

2. *Burglary*

A case in which there was a dispute over whether an offense occurred "in the nighttime" provided an occasion to reaffirm some venerable precedent in the burglary area. In *State v. Billings*,[64] the Iowa Supreme Court reaffirmed that "nighttime" is "a period between sunset and sunrise during which there is not daylight enough by which to discern a man's face."[65] An instruction that

61. *See* W. Lafave & A. Scott, CRIMINAL LAW § 365, at 517 (West 1972).
62. 241 N.W.2d at 461.
63. England abolished the felony-murder rule in 1957. Ohio seems to have managed adequately without it. The Model Penal Code abolished the rule in its traditional form, providing only that evidence a killing occurred during a forcible felony creates a rebuttable presumption of "depraved-heart" recklessness. MODEL PENAL CODE § 210.2 (1962). *See generally* W. Lafave & A. Scott, CRIMINAL LAW § 371, at 560 (West 1972).
64. 242 N.W.2d 726 (Iowa 1976).
65. State v. Billings, 242 N.W.2d 726, 729 (Iowa 1976).

defined "nighttime" as simply "the period between sunset and sunrise" was held reversible error.[66] The court divided sharply, however, over the question of whether breaking and entering is a necessarily included offense of burglary. An element of burglary under section 708.1 of the Iowa Code is that the offense occur "in the nighttime." The definition of breaking and entering in section 708.8 includes the words "in the daytime," but the court held that these words are merely descriptive rather than an element of the offense. The court relied upon two nineteenth century decisions[67] which treat breaking and entering as a degree of burglary and on the rather compelling point that it would be absurd to require the state to prove that a breaking occurred in the daytime when it is clearly the legislative policy to regard nocturnal activity as more serious.[68] Because the jury might have concluded the offense occurred other than in the nighttime, the majority concluded that it was reversible error not to instruct them on the lesser offense of breaking and entering.[69]

3. *Receiving Stolen Property*

The court also reaffirmed that a person need not actually know that property was stolen to be convicted of receiving stolen property, despite the use of the word "knowing" in section 712.1.[70] In *State v. Sheffey*,[71] the court approved the instruction that actual knowledge was not needed "but only that the facts and circumstances known to him [the defendant] were sufficient to satisfy him that the property had been so obtained, or to cause him to believe the said coins had been obtained by larceny."[72] It was made clear, however, that this is a subjective test; it is not sufficient that a reasonable person would have concluded in the circumstances that the property was stolen.[73]

4. *Carrying a Concealed Weapon*

The motive of a person charged with carrying a concealed weapon[74] is a material element of the offense if the instrument is not one of the weapons specifically delineated as offensive or dangerous in section 695.2.[75] The court's decision in *State v. Juergens*[76] will apparently require a trial court to modify

66. *Id.*
67. State v. Jordan, 87 Iowa 86, 54 N.W. 63 (1893); State v. Frahn, 73 Iowa 355, 35 N.W. 451 (1887).
68. State v. Billings, 242 N.W.2d 726, 732-33 (Iowa 1976).
69. *Id.* at 733.
70. Iowa Code section 712.1 (1975) provides in pertinent part: "If any person receive or aid in concealing any stolen money, goods, or property . . . knowing the same to have been so obtained. . . ."
The most recent interpretation had been in *State v. Friend*, 210 Iowa 980, 230 N.W. 425 (1930). *See also* State v. VanTreese, 188 Iowa 984, 200 N.W. 570 (1924); State v. Feuerhaken, 96 Iowa 299, 65 N.W. 299 (1895).
71. 234 N.W.2d 92 (Iowa 1975).
72. State v. Sheffey, 234 N.W.2d 92, 96-97 (Iowa 1975).
73. *Id.* at 97.
74. Iowa Code § 695.2 (1975).
75. Weapons specifically listed are: "dirk, dagger, sword, pistol, revolver, stiletto, metallic knuckles, pocket billy, sandbag, skull cracker, slug shot." *Id.*
76. 240 N.W.2d 647 (Iowa 1976).

Uniform Jury Instruction Number 530.3 by eliminating the language: "The object or purpose of carrying a concealed weapon is immaterial in this case. . . ."[77]

5. *Embezzlement*

In *State v. Billings*,[78] it was held that intent to defraud is an element of failure to return a rented motor vehicle. The ruling was clearly required by the plain language of section 710.14(3).[79]

6. *Controlled Substances*

In *State v. Monroe*,[80] the court shifted the burden of proving whether a person delivered drugs as an accommodation from the defendant to the state. Section 204.410 of the Code provided as written that a defendant who had pled guilty or had been found guilty of a drug delivery charge could seek to establish "by clear and convincing evidence" that the delivery was made as an accommodation to another individual. If the defendant proved this, he would be sentenced under section 204.401(3) for the indictable misdemeanor possession offense rather than under the felony provisions of section 204.401(2) relating to delivery. The court felt compelled to overrule its prior decisions[81] upholding the constitutionality of this arrangement because of the United States Supreme Court's decision in *Mullaney v. Wilbur*.[82] The Iowa court held that the accommodation statute denied due process by unconstitutionally shifting the burden of proof to defendants.[83] Rather than voiding the entire statute, however, the court excised from the statute the words placing the burden on defendant and determined that a viable statute resulted under which the state was required to prove beyond a reasonable doubt that the defendant was not an accommodator.[84] In addition, the court stated that because *Mullaney* requires

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77. State v. Juergens, 240 N.W.2d 647, 650 (Iowa 1976).
78. 242 N.W.2d 726 (Iowa 1976).
79. Iowa Code section 710.14(3) provides in pertinent part: "Whoever, after consenting to the use of a motor vehicle, . . . under a written agreement to redeliver the same . . . shall, with intent to defraud, abandon such vehicle or willfully refuse or willfully neglect to redeliver such vehicle as agreed, shall be guilty. . . ."
80. 236 N.W.2d 24 (Iowa 1975).
81. State v. Deanda, 218 N.W.2d 649 (Iowa 1974); State v. Frank, 214 N.W.2d 915 (Iowa 1974); State v. Vietor, 208 N.W.2d 894 (Iowa 1973).
82. 421 U.S. 684 (1975). In *Mullaney*, the Court held that the Maine rule shifting the burden to defendants in murder trials to prove by a fair preponderance of the evidence that they acted in the heat of passion in order to refute the presumption that they acted with malice aforethought denied defendants due process. Mullaney v. Wilbur, 421 U.S. 684, 688 (1975). In so holding, the Court said that when a distinction that affects punishment is drawn between crimes, it cannot be required that a defendant prove the fact upon which the distinction turns; rather the prosecutor must shoulder the burden of establishing the crucial fact beyond a reasonable doubt. *Id.* at 698. *See also In re* Winship, 397 U.S. 358, 364 (1970).
83. State v. Monroe, 236 N.W.2d 24, 34 (Iowa 1975).
84. *Id.* at 37. The words excised from the statute are in brackets:
If the convicted person [establishes by clear and convincing evidence that he] delivered or possessed with intent to deliver a controlled substance only as an accom-

that the accommodation issue be treated as an element of the offense and because the offense is of a class triable by jury at common law, the Constitution also requires that the accommodation issue be heard by a jury.[85] The court determined, however, that the accommodation issue may be resolved at a separate proceeding similar to the procedure for determining whether a defendant may be sentenced as a habitual criminal.[86] The court specified that its holding shifting the burden of proof to the state required complete retroactivity, but that the jury trial requirement applied only to trials begun after the date of filing of the *Monroe* decision.[87]

The retroactive impact of *Monroe* was minimized somewhat by the court's holding in *State v. Miller*[88] that the defendant retains the burden, after pleading guilty to or being found guilty of delivery of a controlled substance, to request an accommodation hearing.[89] The court correctly interpreted *Mullaney* as speaking only to the "burden of persuasion" and not to the "burden of going forward with the evidence." However, the analogy between producing evidence and requesting a hearing is not perfect, and it seems less than completely clear that it would be constitutional for a state to adopt a bifurcated procedure under which, for example, a defendant could be charged and convicted for murder and then be required to request a separate hearing to determine whether he was guilty only of manslaughter. In any event, the legislature would be wise, both in terms of judicial economy and fairness, to amend chapter 204 to provide that accommodation delivery be treated as a lesser included offense of delivery, and that, where evidence of accommodation is presented, the issue be resolved by the jury in the primary proceeding.

In *State v. McNabb*,[90] the court was presented for the first time with the need to define "accommodation" within the meaning of section 204.410 and adopted a restrictive construction: "[t]he words '. . . only as an accommodation to another individual . . .' as used in this section mean to furnish, as a favor to the recipient, something the recipient desires."[91] The court held that the wording of the statute did not require the state to prove either that the defendant sold the drugs for profit or sold the drugs to induce another individual to become addicted to them. Rather, the court said that the words in the statute describ-

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modation to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled or counterfeit substance to become addicted to or dependent upon the substance. . . .

IOWA CODE § 204.410 (1975).

85. State v. Monroe, 236 N.W.2d 24, 37 (Iowa 1975).

86. *Id.*

87. *Id.*

88. 241 N.W.2d 909 (Iowa 1976).

89. State v. Miller, 241 N.W.2d 909, 911 (Iowa 1976).

Section 201.410 of the Iowa Code states that, "Any person who enters a plea of guilty or is found guilty of a violation of sec. 204.401, subsections 1 or 2, may move for and the court shall grant a further hearing . . . ."

90. 241 N.W.2d 32 (Iowa 1976).

91. State v. McNabb, 241 N.W.2d 32, 35 (Iowa 1976).

ing these two situations were only "examples" of non-accommodation and that even if these two situations are not proved, non-accommodation may still be shown if facts establish otherwise that delivery was not an accommodation.[92] Thus, a finding of non-accommodation in *McNabb* was upheld on evidence which showed that McNabb did not sell amphetamines for profit nor to induce drug dependency but only to recoup money he had paid for some pills.[93]

Under *McNabb*, the state would be entitled to an instruction equivalent to the following:

> The burden is on the state to show beyond a reasonable doubt that the defendant did not deliver (manufacture or possess with intent to deliver) these drugs to another individual only as an accommodation. The words "only as an accommodation" are used to mean to furnish, as a favor to the recipient, something the recipient desires. Non-accommodation includes, but is not limited to, situations in which the defendant has sold the drugs for profit or has delivered them with intent to induce the recipient into drug dependency.

The regulatory scheme for controlled substances provided by section 204.401(3) makes knowing possession of a controlled substance an offense "unless such substance was obtained directly from, or pursuant to, a valid prescription . . . ." In *State v. Gibbs*,[94] the court concluded that lack of a prescription should not be treated as an element of the offense which the prosecution must prove as part of its prima facie case, but rather the fact of a prescription should be regarded as an affirmative defense.[95] It was again correctly perceived that *Mullaney v. Wilbur*[96] does not present obstacles to traditional concepts of allocating the burden of going forward with the evidence.[97] *Gibbs* does seem to require that once the defendant produces some evidence of a valid prescription, the state must prove lack of a prescription beyond a reasonable doubt.[98] While this may well be a desirable result, it is not completely clear that it is compelled by *Mullaney v. Wilbur*. The recent summary rejection of the claim that the Constitution requires the state to negate a claim of insanity beyond a reasonable doubt suggests that some courts may attempt to draw the difficult line between issues which are elements of the offense and issues which are affirmative defenses.[99]

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92. *Id.*
93. *Id.*
94. 239 N.W.2d 866 (Iowa 1976).
95. State v. Gibbs, 239 N.W.2d 866, 868 (Iowa 1976). Iowa Code section 204.401 (3) provides: "It is unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly from, or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice . . . ." Iowa Code section 204.507(1) states, "It is not necessary for the state to negate any exemption or exception set forth in this chapter . . . the proof of entitlement to any exemption or exception by the person claiming its benefit shall be a valid defense."
96. 421 U.S. 684 (1975).
97. State v. Gibbs, 239 N.W.2d 866, 868-69 (Iowa 1976).
98. *Id.* at 869.
99. *See, e.g.*, Buzynski v. Oliver, 538 F.2d 6 (1st Cir. 1976). For a thoughtful argu-

7. *Operating a Motor Vehicle Under the Influence*

In *State v. Jansen*,[100] the court again struggled with an instruction attempting to explain that the presumption of intoxication from a blood alcohol of .10 percent is merely a permissible inference which does not shift to the defendant the burden of going forward with the evidence. The court suggested omitting in the future the challenged phrase ("However, such inference is not conclusive, but is rebuttable.")[101] but found no reversible error when the instructions were viewed as a whole.[102]

The court approved the use of the Field Alcohol Indicator Test (FAIT)[103] to determine whether there is probable cause to arrest for OMVUI.[104] Because FAIT is a qualitative rather than a quantitative measure of the presence of alcohol in a person's system,[105] its use can be requested prior to the offer of one of the chemical tests under the implied consent provisions of chapter 321B of the Code.[106] However, neither the results of FAIT nor the facts of taking or refusing the test are admissible in evidence.[107]

II. Procedural Law

A. *Pretrial Issues*

1. *Discovery*

A defendant in a simple misdemeanor case is not authorized to take discovery depositions. In *State v. Brown*,[108] the court refused to extend to misdemeanor cases its ruling in *State v. Peterson*,[109] which interpreted section 781.10 of the Code to permit defendants charged with indictable offenses to depose prosecution witnesses. The court maintained that the reasons for allowing defendants charged with indictable offenses to take depositions do not apply in simple misdemeanor cases. In such cases where are no minutes of testimony, and thus defendants need not depose witnesses to determine if their testi-

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ment that *Mullaney* principles should apply to affirmative defenses, see Note, 64 Georgetown L.J. 871 (1976).

100. 239 N.W.2d 564 (Iowa 1976).

101. State v. Janssen, 239 N.W.2d 564, 566 (Iowa 1976).

102. *Id.* at 567. The court distinguished this instruction from those given in *State v. Hansen*, 203 N.W.2d 216 (Iowa 1972), and *State v. Prouty*, 219 N.W.2d 675 (Iowa 1974), where the following clause was given in addition to the instruction in *Janssen*: "It [the inference] may be overcome or rebutted by evidence to the contrary." That clause was struck down as impermissibly shifting the burden of proof.

103. Also known as Field Alcohol Intoxication Test and Field Alcohol Investigation Test.

104. State v. Young, 232 N.W.2d 535, 538 (Iowa 1975).

105. *Id.* at 537.

106. Iowa Code §§ 321B.3-.4 (1975).

107. 232 N.W.2d at 537-38.

108. 243 N.W.2d 854 (Iowa 1976).

109. 219 N.W.2d 665 (Iowa 1974).

mony will extend beyond the scope of the minutes.[110] A five-justice concurring opinion preferred to base the result on a literal construction of section 602.62 of the Code, which establishes procedures for criminal cases heard before judicial magistrates.[111]

In *State v. Hall*,[112] the court held that defendants are not entitled to a complete transcript of grand jury proceedings prior to trial, rejecting the argument that when a transcript is kept it becomes the minutes of testimony required to be attached to the indictment and made available to the defendant by sections 772.3 and 772.4 of the Code. "Minutes" continues to be construed as a summary of the witness's testimony.[113] As a practical matter, of course, the expense of deposing prosecution witnesses may be reduced by a prosecution policy of providing defense counsel with portions of the grand jury transcript.

The court, however, took a different view of disclosing grand jury transcripts *after* trial, apparently holding that the defense, on motion, is entitled to an *in camera* inspection to determine whether the prosecution withheld any exculpatory evidence.[114]

The court held in *State v. Sheffey*[115] that the burden is on the defendant to show "need" for disclosure of the identity of a confidential informant. While acknowledging that disclosure will almost always be material when the informant is a witness or participant in the alleged criminal act,[116] the court stopped short of adopting a per se rule for such situations.[117] Where, as here, the defendant presents no defense and points to no conflicting evidence, the burden of demonstrating need is not met.[118]

2. *Grand Jury*

Theoretically, the function of the grand jury is to protect the citizenry by screening cases to determine whether the state's evidence warrants a trial. If it can perform this function at all, it can do so only if the prosecutor presents the evidence with a degree of impartiality. In *State v. Hall*,[119] the court was presented with the appellate court's dilemma in coping with what was forthrightly characterized as "prosecutorial misconduct" before the grand jury.[120] While retaining the position that ordinarily an indictment may only be set aside

110. State v. Brown, 243 N.W.2d 854, 856 (Iowa 1976).
111. *Id.* at 857.
112. 235 N.W.2d 702 (Iowa 1975).
113. State v. Hall, 235 N.W.2d 702, 715 (Iowa 1975).
114. *Id.* at 731.
115. 243 N.W.2d 555 (Iowa 1976).
116. State v. Sheffey, 243 N.W.2d 555, 558 (Iowa 1976).
117. *Id.* at 559.
118. *Id.* The court cited *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957), where it was held that disclosure of an informer's identity is required where such disclosure is "relevant and helpful to the defense of an accused, or is essential to a fair determination of the cause."
119. 235 N.W.2d 702 (Iowa 1975).
120. State v. Hall, 235 N.W.2d 702, 712 (Iowa 1975).

on the statutory grounds enumerated in sections 776.1[121] and 773.6[122] of the Code, the court indicated that such misconduct could conceivably constitute a violation of due process. However, for a constitutional violation to be made out, the defendant must demonstrate prejudice with respect to his conviction.[123] A fair trial, in short, renders prosecutorial misconduct before the grand jury harmless error. This view reflects well-accepted principles of appellate review. Unfortunately, the court suggests no other remedies for misconduct before the grand jury, such as direct discipline of the attorney. In the absence of such remedies, there is little reason to cling to the dubious hope that a grand jury will perform its theoretical function, and the legislature would be wise to eliminate the time and expense required by its use.[124]

3. *Speedy Indictment*

In *Bergman v. Nelson*,[125] the court reiterated[126] that a juvenile transferred to adult court must be indicted within 30 days[127] of the date he is transferred for prosecution as an adult, rejecting the suggestion that pretrial release affects the time at which one is deemed "held to answer" under the statute.[128]

The court in *State v. Burton*[129] held that the 30-day indictment period for an individual charged with two separate offenses arising out of the same incident does not begin to run on the second offense until the defendant is held to answer on that charge. In *Burton*, the defendant was first held to answer

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121. Section 776.1 of the Iowa Code provides that the following grounds may be the basis for a motion to set aside the indictment:

> 1. When it is not endorsed "a true bill" and the endorsement signed by the foreman of the grand jury as prescribed by this Code.
> 2. When the names of all witnesses examined before the grand jury are not endorsed thereon.
> 3. When the minutes of the evidence of the witnesses examined before the grand jury are not returned therewith.
> 4. When it has not been presented and marked "filed" as prescribed by this Code.
> 5. When any person other than the grand jurors was present before the grand jury when the question was taken upon the finding of the indictment.
> 6. When any person other than the grand jurors was present before the grand jury during the investigation of the charge, except as required or permitted by law.
> 7. That the grand jury were not selected, drawn, summoned, impaneled, or sworn as prescribed by law, except as hereinafter provided.

IOWA CODE § 776.1 (1975).

122. Section 773.7 provides as follows:

> If it appears from the bill of particulars furnished under section 773.6 that the particulars stated do not constitute the offense charged in the indictment, or that the defendant did not commit that offense, or that a prosecution for that offense is barred by the statute of limitations, the court may and on motion of defendant shall set aside the indictment. . . .

IOWA CODE § 773.7 (1975).

123. State v. Hall, 235 N.W.2d 702, 712-13 (Iowa 1975).
124. *See* Note, 57 IOWA L. REV. 1354 (1972).
125. 241 N.W.2d 14 (Iowa 1976).
126. *See* State v. White, 223 N.W.2d 173 (Iowa 1974).
127. The 30-day period is mandated by Iowa Code section 795.1 (1975).
128. Bergman v. Nelson, 241 N.W.2d 14, 16 (Iowa 1976).
129. 231 N.W.2d 577 (Iowa 1975).

on a burglary with aggravation charge on December 14, 1973. This charge was voluntarily dismissed on February 22, 1974, after the filing of an information on February 19, 1974, charging defendant with robbery with aggravation. Thus, the information on the second charge was not filed until more than 30 days after the defendant had been held to answer on the first charge.[130] The court reasoned that the two charges were separate and distinct offenses and that the state is not limited to a single charge out of one incident.[131] Because it is often possible to allege that a particular transaction violated more than one statutory prohibition, this decision, while otherwise soundly grounded in reason and precedent, creates fairly broad potential for eroding the spirit of chapter 795. However, the court did allude to the possibility that a different result might be reached if there was evidence that the second charge was filed as a subterfuge and noted that the Constitution may place limits on the piecemeal filing of charges.[132]

4. *Speedy Trial*

A retrial following a mistrial must be held within 60 days from the date of the mistrial, absent a showing of good cause.[133] Although regarding the speedy trial provisions of section 795.2 as inapplicable in terms to the mistrial situation,[134] the court reached an equivalent result by adopting the rationale of the Nebraska Supreme Court: the time for retrial following a mistrial must be reasonable; the legislature has determined what is a reasonable period for the initial trial by adopting the 60-day rule; therefore, 60 days is also a reasonable period for retrial.[135]

The court in *Wright* also reaffirmed its earlier rejection of the demand-waiver rule[136] by holding that failure of the defense to object to the scheduling of trial beyond the 60-day limit did not constitute good cause for the delay.[137] However, the demand-waiver door may have been opened a crack by the decision in *State v. Potts*.[138] In attributing delay beyond the statutory period to the tactics of defense counsel, the court seemed to rely, *inter alia*, on the failure of defendant or his counsel, who were present in open court when the trial

130. State v. Burton, 231 N.W.2d 577, 578 (Iowa 1975). The court also indicated that the 60-day speedy trial period on the robbery charge did not commence until the information on that charge was filed. *See* IOWA CODE § 795.2 (1975).
131. State v. Burton, 231 N.W.2d 577 (Iowa 1976). The court interpreted *Ashe v. Swenson*, 397 U.S. 436 (1970) as barring maintenance of a second prosecution based on a single transaction only if an essential issue had been adversely decided to the state in an earlier prosecution.
132. State v. Burton, 231 N.W.2d 577 (Iowa 1976). The reference was to the principles of United States v. Marion, 404 U.S. 207 (1971).
133. State v. Wright, 234 N.W.2d 99 (Iowa 1975).
134. *Id.* at 103.
135. *Id.* The Nebraska decision is State v. Fromkin, 174 Neb. 849, 120 N.W.2d 25 (1963).
136. State v. Gorham, 206 N.W.2d 908 (Iowa 1973).
137. State v. Wright, 234 N.W.2d 99, 104 (Iowa 1975).
138. 240 N.W.2d 654 (Iowa 1976).

date was set,[139] to express a desire for an earlier setting.[140] It would be unfortunate if this decision spawned a new body of tacit waiver doctrine in the speedy trial area. Hopefully, trial courts will respond instead by conducting on-the-record colloquys with the defense when pretrial complexities create problems in conforming to the 60-day rule.

5. *Speedy Disposition of Interstate Detainers*

In *State v. Wood*[141] the court was presented with its first occasion for interpreting the Interstate Agreement on Detainers (IAD), incorporated into the Code as chapter 759A. A preliminary information on a robbery charge was filed against Wood in Black Hawk County on February 28, 1973. On March 6, 1973, Wood was arrested in Wisconsin on an unrelated parole violation charge and subsequently incarcerated there. On August 29, 1973, the prosecution's key witness was flown to Wisconsin where he made a positive identification of Wood. On November 19, 1973, Wood wrote the Black Hawk County Attorney requesting action on the charge. The county attorney took no formal action against Wood between February 23, 1973, and January 29, 1974, when a detainer was filed with the Wisconsin authorities.[142]

The IAD requires that a person imprisoned in another state be brought to trial on any pending indictment, information or complaint within 180 days of giving written notice to the prosecutor that he desires disposition of the Iowa charges.[143] In a strict but fair interpretation of the IAD, the court held that (1) a prisoner can invoke the IAD only *after a detainer* has actually been filed and (2) the 180-day period commences when the formal request for disposition of the detainer is mailed to the prosecutor.[144]

Wood apparently did not present the question of whether the prosecutor was under an obligation to trigger the IAD by prompt filing of a detainer. Obviously, unless there is some such obligation, the IAD as construed in *Wood* fails to achieve fully the goal of alleviating the problems faced by a prisoner with charges pending in another state.[145] The ABA Standards obligate a prosecutor who knows a person is incarcerated in another jurisdiction to cause a detainer to be filed.[146] Furthermore, as the court may have recognized, failure to file a detainer would not necessarily preclude a finding that the constitutional right to a speedy trial has been abridged.[147] Under existing Iowa law, however, it is difficult to construct an argument that the prosecutor is generally obligated

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139. *State v. Wright* was distinguished on this ground. State v. Potts, 240 N.W.2d 654, 657 (Iowa 1976).
140. State v. Potts, 240 N.W.2d 654 (Iowa 1976).
141. 241 N.W.2d 8 (Iowa 1976).
142. State v. Wood, 241 N.W.2d 8, 10-11 (Iowa 1976).
143. IOWA CODE § 759A.1, art. III(a) (1975).
144. State v. Wood, 241 N.W.2d 8, 12-13 (Iowa 1976).
145. IOWA CODE § 759A.1, art. I (1975).
146. ABA STANDARDS *Speedy Trial* § 3.1(a)(ii) (1968).
147. *See* Smith v. Hooey, 393 U.S. 374 (1969). The due process theory of United States v. Marion, 404 U.S. 307 (1971), would also be potentially applicable.

to file a detainer because the provisions of chapter 795 are not triggered until the defendant is "held to answer,"[148] which, as *Wood* illustrates, often will not have happened. The legislature should consider amendments which would obligate prosecutors to file detainers when they have the requisite knowledge and bring Iowa law into conformity with the ABA Standards.

6. *Exclusion of Evidence*

a. *Search and Seizure*

i. *Search Warrants*

In *State v. Hamilton*,[149] the court concluded that a search warrant that authorized police to search for and seize hashish and "any and all controlled substances" proscribed under Iowa law described with sufficient particularity the items to be seized and was not an impermissible "general" warrant.[150] This holding is not terribly disturbing in the abstract and, as the court noted, there are similar decisions in other jurisdictions.[151] What is rather disturbing is the highly abstract nature of the reasoning employed.

Probable cause to search for hashish was solidly based on the fact that a trained dog in a New York airport had detected drugs in a package mailed from Germany to Des Moines. The package was opened in New York, found to contain hashish, and forwarded as addressed to Hamilton's home in Des Moines. No other information presented to the issuing magistrate suggested that other controlled substances were currently located in the place to be searched. Without any detailed analysis of the particular facts before it, the court concluded that it was reasonable to infer that probable cause existed to believe other drugs were present.[152] If that inference is reasonable here, it would seem that it will always be reasonable to infer possession of contraband X from reasonable grounds for believing possession of contraband Y. That leaves with little substance the general rule that a warrant may authorize seizure of only those items for which there is probable cause.[153]

The court then considered the particularity argument as if it were a "void-for-vagueness" attack on the language "other controlled substances," and seemed to address the question of whether the magistrate could have used more precise language.[154] The answer to that question is obvious: the magistrate could not be more specific because he had no basis for believing any other particular substance was in the house. While the court refers to the horror of "general warrants," it never focuses on how the particularity requirement is meant to prevent that evil, namely by limiting the *scope* of the search in time

148. *See* State v. Mays, 204 N.W.2d 862 (Iowa 1973).
149. 236 N.W.2d 325 (Iowa 1975).
150. State v. Hamilton, 236 N.W.2d 325, 327-29 (Iowa 1975).
151. *See, e.g.*, People v. McGill, 528 P.2d 386 (Colo. 1974).
152. State v. Hamilton, 236 N.W.2d 325, 328 (Iowa 1975).
153. *See, e.g.*, State v. Sagner, 506 P.2d 510 (Ore. App. 1973).
154. State v. Hamilton, 236 N.W.2d 325, 328 (Iowa 1975).

and place.[155] Once the officers executing the warrant have located the items named in the warrant the *search* must cease. Furthermore, they are to search only in places where it is reasonable to believe the described items may be found. *Hamilton* illustrates the point well. Had the police been authorized to seize only hashish, they could have searched only in places where the hashish might have been and only for a period sufficient to find it if it was there. Under the warrant issued, the police could have looked virtually anywhere in the house (including tearing slip covers from the furniture?) to discover other controlled substances, and the permissible duration of the search would have been virtually unlimited.

In *State v. Bean*,[156] however, the court found it necessary to examine the facts more concretely to uphold a search warrant against a claim of "stale" probable cause; viewed abstractly, a lapse of 27 days between the observations of stolen property which were critical to a finding of probable cause and the issuance of a warrant would ordinarily render the warrant untimely. In examining the circumstances, the court conceded that the stolen property was readily movable, which weighed against the timeliness of the warrant, but reasoned that a considerable quantity of property had been stolen, that all the evidence was "not likely to disappear" during the 27 days and that a "continual violation makes timeliness less essential."[157]

A recent comment suggests that four factors should be analyzed to determine whether a warrant is timely: (1) the nature of the activity; (2) the length of the activity; (3) the nature of the property to be seized; and (4) the number and quality of the observations.[158] In *Bean*, only the movability of the property stolen would weigh heavily against issuance of the warrant, while the facts that a large amount of the property was apparently being held by the defendant for sale and that a reliable informant had twice observed the stolen property would favor issuance.[159] Nevertheless, the commentator suggests that where the time of the observation is not evident from the face of the affidavit but must be implied, only a one week lapse between the implied time of the observation and the issuance of the warrant should be allowed.[160]

ii. *Warrantless Searches*

A person may be searched without a warrant and the search validated as

155. *See, e.g.*, United States v. Highfill, 334 F. Supp. 700 (E.D. Ark. 1971); State v. Hawkins, 463 P.2d 858 (Ore. 1970).
156. 239 N.W.2d 556 (Iowa 1976).
157. State v. Bean, 239 N.W.2d 556, 559-60 (Iowa 1976).
158. Comment, 59 IOWA L. REV. 1308, 1311-13 (1974) [hereinafter cited as IOWA Comment]. *See also* United States v. Rahn, 511 F.2d 290 (10th Cir. 1975); United States v. Guinn, 454 F.2d 29 (5th Cir. 1972); Durham v. United States, 403 F.2d 190 (9th Cir. 1968).
159. State v. Bean, 239 N.W.2d 556, 558-60 (Iowa 1976). *See also* United States v. Harris, 403 U.S. 573 (1971), summarily dismissing a staleness question where the information may have been 14 days old but the criminal activity allegedly had been occurring for two years.
160. IOWA Comment, *supra* note 163, at 1323.

incident to a lawful arrest even though a formal arrest has not been made at the time of the search, the court held in *State v. Harvey*.[161] The critical question, the court correctly insisted, is not whether formal words of arrest have been uttered, but rather whether probable cause to arrest existed prior to the search.[162] Here, the court resolved a close probable cause question in favor of the state.[163]

In *State v. Knutson*,[164] the Iowa Supreme Court held that the renter of an apartment may validly consent to the police searching an area of the apartment occupied by a "casual houseguest." In *Knutson*, the defendant had been occupying regularly for three or four weeks the corner of a basement—containing a bed and two chairs—and had also stayed there overnight on two or three occasions previously.[165] The woman renter, who occupied the top floor of the apartment with her three small children, gave police permission to search the defendant's "corner," and police discovered on the bed a zipper and some stained clothing which tied defendant to a rape case. The court stressed that the basement was not partitioned, that the woman entered the basement at will and had washed the defendant's sheets once (although she generally left the corner alone) and that defendant was only a guest. Because the woman, therefore, had at least a mutual right of access[166] the defendant had not established the necessary exclusive right to the corner. *Knutson* is in accord with the United States Supreme Court ruling in *United States v. Matlock*[167] and the main body of law in the consent-search area.[168]

iii. *Investigatory Stops*

In its seminal decision in *State v. Cooley*,[169] the court adopted the following standard for assessing whether the police possess the necessary facts to justify an investigatory stop on less than probable cause: ". . . an investigatory stop of a motor vehicle is constitutionally permissible only if the stopping officer has specific and articulable cause to reasonably believe criminal activity is afoot. By the same token, circumstances evoking mere suspicion or curiosity will not

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161. 242 N.W.2d 330 (Iowa 1976).
162. State v. Harvey, 242 N.W.2d 330, 339 (Iowa 1976). *See also* United States v. Clemons, 503 F.2d 486 (8th Cir. 1974); United States v. Skinner, 412 F.2d 98 (8th Cir. 1969).
163. State v. Harvey, 242 N.W.2d 330, 339-41 (Iowa 1976).
164. 234 N.W.2d 105 (Iowa 1975).
165. State v. Knutson, 234 N.W.2d 105, 106 (Iowa 1976).
166. *Id.* at 107.
167. 415 U.S. 164 (1974).
168. *See* Wefing & Miles, *Consent Searches and the Fourth Amendment: Voluntariness and Third-Party Problems*, 5 SETON HALL L. REV. 211 (1974). There is authority, however, that an area specifically set aside for a houseguest may not validly be searched with the mere consent of the homeowner, United States v. White, 268 F. Supp. 998 (D.D.C. 1966), nor may the personal effects of a guest (such as an overnight bag) be searched with the mere consent of the homeowner, United States v. Poole, 307 F. Supp. 1185 (E.D. La. 1969).
169. 229 N.W.2d 755 (Iowa 1975).

suffice."[170] In *State v. Donnell*,[171] unlike *Cooley*, the court found that standard satisfied. In *Donnell*, police observed a van traveling very slowly at 2 a.m. in three residential areas of Clear Lake, a small town that had recently been subject to a number of house burglaries in the winter months during which many residents are absent. The court concluded that these facts (plus the fact that the van was not known to the officer and was the type of vehicle that might be used for transporting household furniture) provided police with the requisite reasonable suspicion to make an investigatory stop of the vehicle.[172]

Another investigatory stop case, *State v. Billings*,[173] presented more serious "reasonable suspicion" problems. The defendant was stopped at 10:00 p.m. as he pulled out of the parking lot of the Des Moines Holiday Inn. An officer "saw defendant drinking from a can the officer believed contained beer."[174] Again relying on *Cooley*,[175] the court said the stop was justified because the officers "had specific and articulable cause to believe defendant was consuming beer on a public highway in violation of Iowa Code § 123.46."[176] The opinion does not, however, identify the "specific and articulable" basis of the officer's belief that the can contained beer. This may have simply been a drafting oversight, but if taken at face value, this decision implies that every person who is sighted in a car with a can, including a soft drink can, is subject to an investigatory stop.

b. *Interrogation*

In *State v. Collins*,[177] the court held that if a defendant requests the court to order a psychiatric examination and then volunteers incriminating information to the psychiatrist, the psychiatrist may testify concerning the defendant's statements at trial despite the absence of *Miranda* warnings.[178] The court, in

170. State v. Cooley, 229 N.W.2d 755, 760 (Iowa 1975). The standard is adapted from Terry v. Ohio, 392 U.S. 1 (1967). Clearly, the facts in *Cooley* did not support the stop that was made: police officers in a high crime area had merely observed the defendant walk two or three times between his parked car and a tavern and talk to an individual who allegedly dealt in drugs. The defendant then got in the car, also occupied by a woman and her two-year-old son, and the car drove away with the woman driving. The other "suspicious" facts cited by police were that the car had an out-of-county license and the three persons in the car were white while the area they were in was predominantly black.

171. 239 N.W.2d 575 (Iowa 1976).

172. State v. Donnell, 239 N.W.2d 575, 578 (Iowa 1976). After stopping the car, the police observed a marijuana roach on the floor. This led to a search of defendant, who was discovered to have 51 amphetamine tablets on his person. When taken to the police station to be booked, defendant was discovered to have credit cards stolen from a burglarized home in his wallet. Based on this, a search warrant was issued for the defendant's apartment, and the search turned up several items stolen from a farm home. The defendant was convicted of receiving stolen property. *Id.* at 577-78.

173. 242 N.W.2d 726 (Iowa 1976).

174. State v. Billings, 242 N.W.2d 726, 728 (Iowa 1976).

175. State v. Cooley, 229 N.W.2d 755 (Iowa 1975).

176. State v. Billings, 242 N.W.2d 726, 729 (Iowa 1976).

177. 236 N.W.2d 376 (Iowa 1975).

178. Miranda v. Arizona, 384 U.S. 436 (1966).

distinguishing its prior ruling in *State v. Cullison*,[179] stressed that the defendant was not being subjected to custodial interrogation and that the psychiatrist was not questioning the defendant on behalf of the police.

Apparently only the *Miranda* warning issue was properly preserved for appeal, but Justice Rawlings prepared a thoughtful concurring opinion which should be examined by all defense counsel whose clients may require psychiatric examination. His opinion explores solutions to the dilemma created by the need for a defendant to make full disclosure to a psychiatrist in order to generate a meaningful evaluation on the one hand and the privilege against self-incrimination on the other. He suggests that the physician-patient privilege has a role in protecting the defendant against premature disclosures of damaging admissions to psychiatrists[180] and suggests a bifurcated trial for those situations in which the psychiatrist is unable to testify on the insanity issue without disclosing incriminating statements of the defendant.[181]

Defense counsel should also consider the possibility of seeking a private psychiatric examination at state expense under the provisions of section 775.5 of the Code.[182] The psychiatrist would then ordinarily be regarded as the agent of the attorney for purposes of asserting the attorney-client privilege.[183]

7. *Double Jeopardy*

In *State v. Buckley*,[184] a sharply divided court held for the first time that a defendant in Iowa may be reprosecuted following a successful appeal by the State if he had not been placed in jeopardy. To reach this result, the majority was forced to overrule an 1876 decision foreclosing reprosecution after any successful appeal by the State[185] and to read an exception into the broad language of section 793.20 of the Code based upon an historical analysis of the intent of the legislature in 1860.[186] While the result is probably desirable on policy grounds,[187] the majority's reasoning is less than irresistible and it may have been preferable simply to call the legislature's attention to the problem.

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179. 215 N.W.2d 309 (Iowa 1974).
180. State v. Collins, 236 N.W.2d 376, 381 (Iowa 1976). *See* State v. Evans, 454 P.2d 976 (Ariz. 1969).
181. State v. Collins, 236 N.W.2d 376, 383 (Iowa 1976).
182. *See* State v. McGhee, 220 N.W.2d 908 (Iowa 1974).
183. *See* City & County of San Francisco v. Superior Court, 37 Cal. 2d 227, 231 P.2d 26 (1951).
184. 232 N.W.2d 266 (Iowa 1975).
185. State v. Buckley, 232 N.W.2d 266, 271 (Iowa 1975). *See* State v. Kinney, 44 Iowa 444 (1876).
186. State v. Buckley, 232 N.W.2d 266, 269-71 (Iowa 1975). Iowa Code section 793.20 (1975) provides: "If the state appeals, the supreme court cannot reverse or modify the judgment so as to increase the punishment, but may affirm it, and shall point out any error in the proceedings or in the measure of punishment, and its decision shall be obligatory as law."
187. *See* ABA STANDARDS *Criminal Appeals* § 1.4(a)(ii) (1970), which allows reprosecution following successful appeals from several pretrial orders, including dismissal for denial of a speedy trial. *See also* 18 U.S.C. § 3731 (1970).

B. *Guilty Pleas*

1. *Plea Taking Requirements*

The Iowa Supreme Court has required a trial judge to fulfill certain specific requirements before accepting a defendant's guilty plea. In *State v. Sisco*,[188] the court held that a judge must personally address a defendant and determine: (1) whether the defendant understands the charge made against him; (2) whether the defendant is aware of the penal consequences of his plea; (3) whether the guilty plea is entered voluntarily; and (4) whether there is a factual basis for the plea.[189] Additionally, in *Brainard v. State*,[190] the court made clear that before accepting a guilty plea a trial judge must also by personal colloquy inform a defendant of (1) his privilege against self-incrimination, (2) his right to trial by jury, and (3) his right to confront his accusers; and determine that the defendant understands that these rights are waived by a plea of guilty.[191] In several recent cases the court refined the *Sisco* and *Brainard* requirements.

In *State v. Oberbreckling*,[192] the court restated that it is not mandatory for a judge to explain each element of the crime charged to a defendant if the record reflects that the defendant understood the elements and the nature of the charge against him. Here, it was sufficient that the judge ascertained that the defendant had read and understood the indictment and minutes of the grand jury testimony, which sufficiently described the crime and how it was committed.[193]

While it is preferable for the judge to explain the elements, minimal compliance with the *Sisco* requirement is achieved by having the county attorney read to a defendant part of the information detailing the elements of the crime charged.[194]

In *State v. Parrish*,[195] the court held that if one judge fulfills the *Sisco* requirements at the proceeding at which the guilty plea is entered, it is not necessary for the *Sisco* inquiry to be repeated at the sentencing hearing even if a different judge presides.

However, the mere fact that a defendant has entered guilty pleas to the same offense on previous occasions does not eliminate the necessity for the judge to determine anew that the defendant understands the penal consequences of the current guilty plea.[196]

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188. 169 N.W.2d 542 (Iowa 1969).
189. State v. Sisco, 169 N.W.2d 542, 550-51 (Iowa 1969). Similar requirements are to be found in Fed. R. Crim. P. 11(c), (d) and (f) (1975). *See also* McCarthy v. United States, 394 U.S. 459 (1969).
190. 222 N.W.2d 711 (Iowa 1974).
191. Brainard v. State, 222 N.W.2d 711, 717-18 (Iowa 1974). *See also* Boykin v. Alabama, 395 U.S. 238 (1969).
192. 235 N.W.2d 121 (Iowa 1975).
193. State v. Oberbreckling, 235 N.W.2d 121, 122 (Iowa 1975).
194. State v. Townsend, 238 N.W.2d 351, 355 (Iowa 1976).
195. 232 N.W.2d 511 (Iowa 1975).
196. State v. Johnson, 234 N.W.2d 878, 879 (Iowa 1975).

In *State v. Woolsey*,[197] the court held that a trial judge need not explain to a defendant as a penal consequence of the plea that, because convicted of other felonies, he would be ineligible for a deferred sentence under Iowa law.[198] The court also stated that it was not necessary in every case for the judge to explain Iowa's indeterminate sentencing law to the defendant but clearly implied that, if the defendant had not in fact understood, the plea would have been invalid.[199]

Finally, in *State v. Rhodes*,[200] the court held that a judge need not inform a defendant that a plea of guilty would operate as a waiver of a pending motion to suppress. While this ruling reflects the general view, the court might have been wise to advise trial judges that making a careful record concerning such a pending motion will promote finality by insulating the plea from collateral attack on the ground of ineffective assistance of counsel.

2. *Plea Withdrawal*

In an unfortunate exercise in backtracking, the court has now made clear that a judge is not always required to permit withdrawal of a guilty plea entered pursuant to a plea agreement if the judge subsequently decides not to sentence in accordance with the agreement. Withdrawal must be permitted unless four conditions are met: (1) the judge must renounce any participation in the bargain; (2) the judge must deny any inclination to be bound by the agreement; (3) such renunciation and denial must be made known to the defendant; and (4) the defendant thereafter must enter or affirm his plea of guilty.[201] This stance is an apparent retreat from the position taken by the court in *State v. Fisher*,[202] where it was stated: "In brief, prior to entry of judgment, trial court, having elected not to honor the aforesaid plea bargain, neither so advised defendant nor accorded him related opportunity to stand on his guilty plea or move to withdraw same. Upon the record here made we cannot say defendant's guilty plea was voluntarily entered."[203] The *Fisher* opinion also cited with apparent approval rule 4.1(e) of the ABA Standards, The Function of the Trial Judge, which provides that a judge should permit withdrawal of the plea if the judge decides not to proceed in accordance with a plea-bargain agreement.[204]

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197. 240 N.W.2d 651 (Iowa 1976).
198. *See* IOWA CODE § 789A.1 (1975).
199. State v. Woolsey, 240 N.W.2d 651, 654 (Iowa 1976).
200. 243 N.W.2d 544 (Iowa 1976).
201. State v. Parrish, 232 N.W.2d 511, 515 (Iowa 1975). *See also* State v. Townsend, 238 N.W.2d 351, 357 (Iowa 1976).
202. 223 N.W.2d 243 (Iowa 1974).
203. State v. Fisher, 223 N.W.2d 243, 246 (Iowa 1974).
204. ABA STANDARDS *The Function of the Trial Judge* § 4.1(c) (1972), provides: "If the plea agreement contemplates the granting of charge or sentence concessions by the trial judge, he should: . . .

(iii) permit withdrawal of the plea (or, if it has not yet been accepted, withdrawal of the tender of the plea) in any case in which the judge determines not to grant the charge or sentence concessions contemplated by the agreement."

Three justices in *Parrish* favored strict compliance with this rule.[205]

It should be noted, however, that *Parrish* and *Townsend* do not prohibit a judge from permitting withdrawal of a guilty plea if the judge subsequently decides not to abide by a plea-bargain agreement. In every case involving a plea agreement, defense counsel should now raise, on the record, the question of whether withdrawal will be permitted. If the court indicates to the defendant that withdrawal may be or will be permitted if the agreement is not followed, then an opportunity to withdraw is required. In *State v. Griffin*,[206] the defendant was told prior to acceptance of his plea that the court would "probably" allow the defendant to withdraw his plea if the agreement was not followed.[207] However, after deciding to reject the plea-bargain agreement, the trial court refused to permit withdrawal. The supreme court ruled that such a plea may not have been voluntary.[208]

C. *Trial Issues*

1. *Jury Selection*

Petit jurors in Iowa are to be selected from qualified electors, *i.e.*, persons *eligible* to vote.[209] In *State v. Williams*,[210] the court ruled that using a list of *registered* voters complied with the statute and that, while it may be desirable, it is not necessary to resort to such supplementary sources as telephone directories, tax rolls, or public utility billing lists.[211] The court also rejected an argument that the exclusive use of voter registration lists violates the constitutional right to an impartial jury; defendant must establish, prima facie, that the selection procedure systematically excludes an identifiable community group.[212]

2. *Right to Counsel*

In *Jackson v. Auger*,[213] the court again expressed its disapproval of "dual representation," *i.e.*, one lawyer representing persons jointly charged, but held

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205. State v. Parrish, 232 N.W.2d 511, 516 (Iowa 1976). Fed. R. Crim. P. 11(e)(4) (1975) also requires that the court must inform the defendant if the plea agreement has been rejected and must afford the defendant the opportunity to withdraw the guilty plea. Iowa Code § 777.15 (1975) clearly would permit such withdrawals: "At any time before judgment, the court may permit the plea of guilty to be withdrawn and other plea or pleas substituted."

206. 238 N.W.2d 780 (Iowa 1976).

207. *Id.*

208. *Id.* at 781.

209. Iowa Code section 609.1(2) (1975) provides that petit jurors are to be selected from "a list of names and addresses of electors equal to one-eighth of the whole number of qualified electors in the county as shown by the election registers of the previous general election."

210. 243 N.W.2d 658 (Iowa 1976).

211. *Id.* at 661.

212. *Id.* at 662. The court cited, *inter alia*, Taylor v. Louisiana, 419 U.S. 522 (1975), and Apodaca v. Oregon, 406 U.S. 404 (1972). In the latter case the Court said the Constitution "forbids . . . systematic exclusion of identifiable segments of the community from jury panels." *Id.* at 413.

213. 239 N.W.2d 180 (Iowa 1976).

that it does not automatically deny a defendant his sixth amendment right to effective representation. A defendant need not demonstrate actual prejudice from the dual representation, but does have the burden of demonstrating a substantial possibility of prejudicial conflict of interest.[214]

3. *Right of Confrontation*

The court held in *State v. Blackwell*[215] that a defendant charged with a felony has both a constitutional right under the sixth amendment and a statutory right[216] to be personally present at all stages of trial proceedings, although consent to being absent or misconduct may result in a waiver of this right.[217] Here, a melee involving defendant, his relatives, other spectators and sheriff's deputies occurred outside the courtroom during the noon recess on the second day of the defendant's trial and was observed by at least two jurors. Following the recess, court was reconvened in the absence of the defendant, but in the presence of his counsel, and the judge polled the jurors concerning the melee to determine whether they felt they could still be fair and impartial.[218] The court stated that a defendant is entitled to be present at these events and, unless there is a waiver by consent or misconduct, a presumption of prejudice arises from a defendant's absence. Such prejudice may be rebutted if, as here, the record shows that the proceedings in the defendant's absence beyond a reasonable doubt did not create any reasonable possibility of prejudice.[219] In other words, the strict *Chapman v. California*[220] standard for harmless constitutional error must be satisfied.[221]

4. *Criminal Evidence*

a. *Hearsay*

Letters from a third person found in the possession of a defendant are generally not admissible over a hearsay objection.[222] If it can be shown that statements in the letter were acted upon, however, they may be received on the theory that they constitute "adoptive admissions."[223] The opinion in *State v. Ham-*

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214. *Id.* at 183. For an extensive discussion of this issue, see Annot., 34 A.L.R.3d 470 (1970).

215. 238 N.W.2d 131 (Iowa 1976).

216. Iowa Code section 777.19 (1975) provides: "If a felony is charged, the defendant must be personally present at the trial, but the trial of a misdemeanor may be had in his absence, if he appears by counsel."

217. State v. Blackwell, 238 N.W.2d 131, 136 (Iowa 1976).

218. *Id.* at 132.

219. *Id.* at 137.

220. 386 U.S. 18 (1967).

221. *See* United States v. Reynolds, 489 F.2d 4, 8 (6th Cir. 1973), for a discussion of the harmless-error doctrine in the context of defendant's absence from trial proceedings.

222. *See* Poy Coon Tom v. United States, 7 F.2d 109, 110 (9th Cir. 1925); Packer v. United States, 106 F. 906, 910 (2d Cir. 1901). *See also* WHARTON'S CRIMINAL EVIDENCE § 570, at 441 (12th ed. 1955).

223. WHARTON'S CRIMINAL EVIDENCE § 570, at 441 (12th ed. 1955).

ilton[224] purports to apply these rules, but its rather loose reasoning could create mischief if not carefully and narrowly read.

Michael Hamilton was charged with possession of hashish with intent to deliver after accepting a postal delivery of a package containing the substance addressed to a "Hamton" and bearing a return address to one Rynearson, APO, New York. Four letters addressed to Hamilton were found in a dresser drawer in Hamilton's house, three of which bore the same return address. The letters described drug transactions between the sender and "Mike" in some detail. One letter indicated that a package would be sent in the name of "Mike Hamton." The prosecution did not call as a witness anyone purporting to be the sender, nor, apparently, proffer foundation proof of unavailability. All four letters were admitted over a hearsay objection.[225]

The state contended the letters were admissible as declarations against penal interest, but the court, indicating a willingness to consider adding "penal" interests to the traditional exception, did not find it appropriate to resolve the question on that theory because it had not been shown that the declarant was unavailable and because they found the letters admissible on the adoptive admission theory.[226]

The opinion stresses at one point that Hamilton "acted upon" the contents of the letters by accepting the package mailed to "Mike Hamton."[227] That would seem to justify admission of the *one* letter proposing use of that alias. Whether that would justify admission of the contents of all *four* letters is more dubious. Such doubts may explain the more troublesome efforts to justify admission. The court strenuously denies any dilution of its decisions repudiating the "tacit admission" rule,[228] but then proceeds to attach significance to "the absence of any disclaimer by defendant" and refers with apparent approval to a textual discussion entitled "Admissions by Conduct: Silence."[229] Moreover, the court attaches significance to the fact that the communications manifest a "continuing course of correspondence between defendant and Rynearson." However, the only evidence of correspondence from defendant to Rynearson, from all that appears, is Rynearson's letters. Ordinarily one cannot bootstrap

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224. 236 N.W.2d 325 (Iowa 1975).
225. State v. Hamilton, 236 N.W.2d 325, 326-27 (Iowa 1975).
226. *Id.* at 333.
227. *Id.*
228. *Id.* at 330. *See* State v. Menke, 227 N.W.2d 184 (Iowa 1975); State v. Kelsey, 201 N.W.2d 921 (Iowa 1972).
229. State v. Hamilton, 236 N.W.2d 325, 333 (Iowa 1975). The disturbing paragraph reads as follows:

> It is to us evident these communications clearly manifested (1) a continuing course of correspondence between defendant and Rynearson; (2) the carrying out of an illegal transaction or venture by these two parties over an appreciable period of time; (3) an absence of any disclaimer by defendant; and (4) a familiarity which invited freedom of correspondence and open discussion. See McCormick on Evidence, § 270 at 654 (2d ed. 1972).

In context, it is rather clear that McCormick would require foundation proof of these special circumstances by extrinsic evidence and would not permit the letters "to speak for themselves."

out of a hearsay problem by relying upon the truth of the challenged statements themselves.[230]

Letters such as these should probably be admitted via a declaration against penal interest exception if a proper foundation is laid. They should not be admitted on a vague admission by silence theory. Hopefully, the court will confine the *Hamilton* admission by adoption rule to situations in which there is a clear showing such letters were acted upon affirmatively.

b. *Expert Testimony*

The court has recently made clear that a police "expert" may not give his opinion as to whether a quantity of drugs seized from a defendant was being possessed with intent to deliver rather than for personal use.[231] In the most recent case, *State v. Ogg*,[232] four justices dissented from a holding that it was reversible error for a trial court to allow a policeman to state, "In my opinion, 46 tablets of LSD far exceeds what one might possess for personal use," in response to a question inquiring whether the pills possessed would be "more or less than that which would be considered for personal use."[233] The majority concluded that the evidence was objectionable because the officer was permitted to express an outright opinion as to defendant's guilt on one of the essential elements of the crime and thus, was within the rule that an expert may not express an opinion on a matter of domestic law.[234] The dissent contended that the question really did not call for an opinion on a matter of law because the officer was not required to apply the law or to assume a definition of any legal term.[235] Treating the question as calling for an opinion on an ultimate fact, the dissent expressed concern that the court was retreating from its stance in *Grismore v. Consolidated Products Co.*,[236] authorizing expert testimony on such questions. It is the opinion of this author that the majority reached the right result for the wrong reasons. Thoughtful commentators have long recognized that neither the rule against opinions on matters of law nor the rule against opinions on ultimate facts provide a trial court with any meaningful guidance.[237] Thus, in some situations it may be appropriate to ask an expert witness for an opinion about another person's intent.[238] Of course, if the thrust of the question here was directed at the defendant's actual state of mind, it is doubtful if a police officer would qualify as an expert. However, a properly trained or an

230. *Cf.* Murphy Auto Parts v. Ball, 249 F.2d 508 (D.C. Cir. 1957), *cert. denied*, 355 U.S. 392 (1958).
231. State v. Oppedal, 232 N.W.2d 517 (Iowa 1975); State v. Horton, 231 N.W.2d 36 (Iowa 1975).
232. 243 N.W.2d 620 (Iowa 1976).
233. State v. Ogg, 243 N.W.2d 620, 621 (Iowa 1976).
234. *Id.*
235. *Id.* at 624.
236. 5 N.W.2d 646 (Iowa 1942).
237. *See* Ladd, *Expert Testimony*, 5 VAND. L. REV. 414 (1952). *See also* 3 WEINSTEIN'S EVIDENCE ¶ 704(01) (1975).
238. *See, e.g.*, State v. Gramenz, 126 N.W.2d 285 (Iowa 1964).

experienced officer might well qualify as an expert on the use or sale of drugs and could well provide information that would assist the jury: What is the street value of a tablet of LSD? In what units is LSD typically sold? How frequently does a typical user take LSD? How many tablets are taken at one time?[239] The difficulty with the opinion expressed in *Ogg* is that it is too conclusory to be rationally helpful to the jury.[240] Some opinions that fall within the ultimate fact or opinion on a matter of law rule are helpful to the trier of fact; this one was not and should have been excluded.

In a ruling similar to *Ogg*, the court in *State v. Droste*[241] held that a chemist witness for the state may not be asked to compare the results of a breath test taken of defendant with the statutorily allowable limits; the jury is to draw its own conclusions from the evidence.[242] Here, too, the real problem is that the opinion is not helpful because the jury needs no assistance from a chemist in doing simple arithmetic.

c. *Other Crimes*

In *State v. Oppedal*,[243] the court ruled that it was reversible error to permit testimony that three pounds of marijuana were seized from an individual allegedly making delivery to defendant when the only crime defendant was charged with was possession of eight other baggies of marijuana with intent to deliver. The seizure of the three pounds was a fortuitous incident, which occurred just as police were seizing the eight baggies pursuant to a search warrant.[244] The court clearly set its face against an elastic interpretation of the res gestae exception to the general rule against admission of other crimes evidence. Evidence of other crimes may be admitted on a res gestae theory only when the crimes are so closely related, in point of time and place, and so intimately associated with each other, that they form one continuous transaction.[245]

5. *Judicial Impartiality*

a. *Change of Venue*

In *State v. Smith*,[246] the court held that where a defendant seeks a change of venue due to prejudice of the presiding judge,[247] he must show that the judge

239. *See, e.g.*, State v. Boyd, 224 N.W.2d 609 (Iowa 1974); State v. Lynch, 197 N.W. 2d 186 (Iowa 1972), *cert. denied*, 409 U.S. 1116 (1973) (permitting a police expert to testify to the manner in which marijuana is packaged and measured for resale purposes).
240. *See generally* FED. R. EVID. 702 and accompanying commentary.
241. 232 N.W.2d 483 (Iowa 1975).
242. State v. Droste, 238 N.W.2d 483, 488 (Iowa 1975).
243. 232 N.W.2d 517 (Iowa 1975).
244. State v. Oppedal, 232 N.W.2d 517 (Iowa 1975).
245. *Id.* at 522-23.
246. 242 N.W.2d 320 (Iowa 1976).
247. *See* IOWA CODE § 778.2 (1975). The court indicated that it would construe the statute in light of the standards for disqualification of a judge found in Iowa Code of Judicial Conduct, Canon 3(C)(1)(a) (1975).

has a personal bias or prejudice, as distinguished from judicial predilection. Definite views on the law contrary to defendant's position "create no personal bias since they do not stem from an extrajudicial source."[248]

b. *Conduct of Trial*

In a remarkably toothsome and straight-forward opinion, the court in *State v. Larmond*[249] held that a clear showing of judicial partiality toward the state requires a new trial with no requirement that defendant demonstrate that the judge's actions prejudiced the jury. Defendant need only show that the trial court discarded its "mantle of impartiality."[250] The court also took the view that while the defense is generally required to object to the judge's prejudicial action during the trial in order to preserve error, where the judge is overbearing and oppressive and defense counsel is inexperienced the court will review the claim of prejudice even in the absence of a proper record.[251]

Similarly, the court ruled in *State v. Glanton*[252] that judge may not assist defense counsel in presenting a case, even where defense counsel are law student interns. The court said that "it is ordinarily a dangerous practice for a presiding judge to contribute his efforts in an attempt to equalize what he perceives to be disparity in the trial ability of opposing counsel."[253]

On the other hand, in *State v. Johnson*,[254] the court held that a judge's prejudicial remarks in chambers to defendant and his counsel are not sufficient for reversal of a conviction in the absence of a showing that the judge deviated from a course of neutrality before the jury. Thus, while under *State v. Larmond* actual prejudice of the jury due to judicial impartiality need not be shown, *State v. Johnson* requires that the judge's prejudicial actions at least occur in the jury's presence.[255]

6. *Jury Deliberations*

Tape recordings introduced into evidence should generally not be taken into the jury room, even at the request of the jury, the court said in *State v.*

248. State v. Smith, 242 N.W.2d 320, 324 (Iowa 1976).
249. 244 N.W.2d 233 (Iowa 1976).
250. State v. Larmond, 242 N.W.2d 233, 236 (Iowa 1976). The court again took the Iowa Code of Judicial Conduct as a point of departure.
251. *Id.* at 237. The trial judge in *Larmond* showed courtesy to the state's witnesses but was extremely gruff with defense witnesses; during examination of state witnesses, he nodded his head in agreement and said "Uh, huh," but when defense witnesses testified, he shook his head and said "No!" and "Hump;" and during closing argument by the prosecutor, he severely admonished defendant for whispering to his counsel.
252. 231 N.W.2d 31 (Iowa 1975).
253. State v. Glanton, 231 N.W.2d 31, 35 (Iowa 1975). In *Glanton*, the judge continually sustained defense objections on grounds not raised, told defense counsel when to object and advised them not to cross-examine a witness.
254. 243 N.W.2d 598 (Iowa 1976).
255. In *Johnson*, the judge told defendant in chambers "I don't believe you. You are a liar, Mr. Defendant, and you are an absconder;" and also, "If the jury believes you that's their problem." State v. Johnson, 243 N.W.2d 598, 601-02 (Iowa 1976).

Baumann.[256] Both section 784.1 of the Code and Iowa Rule of Civil Procedure 198 exclude depositions from the materials a jury may take with it during its deliberations, and the intent of these rules is to exclude evidence which might be overemphasized.[257] By analogy to depositions, the court expressed fear that tape recordings might assume a disproportionate importance in relation to other oral testimony for which jurors are required to call upon their recollections.[258] However, the court did not foreclose the possibility of such recordings ever being allowed in the jury room.[259]

The disposition of another issue in *Baumann* is more troubling. The jury had not only requested that it be permitted to take tapes into the jury room, it also inquired: "Is there any way we can hear the tapes again?" Without notifying either counsel or defendant, the trial court summarily rejected the request. With little analysis of either the record or section 784.2, which could be read to *require* the trial court to grant the request,[260] the court simply held that the question was within the sound discretion of the trial judge. The trial

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256. 236 N.W.2d 361 (Iowa 1975).

257. State v. Baumann, 236 N.W.2d 361, 366 (Iowa 1975).

258. *Id.*

259. *Id.* *See* State v. Triplett, 79 N.W.2d 391 (Iowa 1957), in which the court gave short shrift to the claim that it was error to permit a recording of defendant's confession to be taken into the jury room.

260. Iowa Code § 784.2 (1975) provides:

> Report for information. After the jury has retired for deliberation, if there be any disagreement as to any part of the testimony, or if it desires to be informed on any point of law arising in the cause, it must require the officer to conduct it into court, and, upon its being brought in, *the information required must be given* as provided by law, in the presence of or after oral notice to the county attorney and defendant's counsel. (Emphasis added).

It is interesting to note that the drafters of the Revised Iowa Criminal Code read section 784.2 as mandatory rather than permissive, as can clearly be inferred from the changes made in the successor provision. Iowa Rule of Criminal Procedure 17(5)(g), provides:

> After the jury has retired for deliberation, if there be any disagreement as to any part of the testimony, or if it desires to be informed on any point of law arising in the cause, it must require the officer to conduct it into court, and upon its being brought in, *the information required may be given, in the discretion of the trial court.* . . . (Emphasis added).

Statutes virtually identical to Section 784.2 exist in other jurisdictions, and there is a division of opinion concerning whether the trial judge has any discretion to deny requests for review. *Compare* People v. Malone, 173 Cal. App. 2d 234, 343 P.2d 333 (Ct. App. 1959); People v. Lorenz, 16 App. Div. 2d 135, 226 N.Y.S.2d 4 (App. Div. 1962) (both mandatory); *with* Lutins v. State, 194 So. 803 (Fla. 1940); State v. Hines, 307 P.2d 887 (Utah 1957) (both discretionary).

At one point in *Baumann*, the court seems to suggest that Section 784.2 applies only to "testimony," i.e., the sworn statements of a competent witness, which in a strict sense the tapes were not. Not only would this distinction be highly formalistic, it would also cause the court's vital analogy to depositions to collapse. In rejecting the jury's request to take the tapes into the jury room as exhibits, the court reasoned that, like a deposition, the tapes could "assume a disproportionate importance in relation to *other trial testimony*." State v. Baumann, 236 N.W.2d 361, 366 (Iowa 1975). (Emphasis added). If tapes are analogous to testimony for purposes of rejecting defendant's argument under Section 784.1, they should be similarly analogous when evaluating the argument under Section 784.2.

Finally, it should be noted that there is ample authority rejecting a claim by a defendant that it was improper to permit rereading of certain testimony on request of the jury. *See* State v. Strable, 228 Iowa 886, 293 N.W. 441 (1940); State v. Perkins, 143 Iowa 55, 120 N.W. 62 (1909); State v. Hunt, 112 Iowa 509, 84 N.W. 525 (1900). Section 784.2 was in existence prior to these decisions.

appears to have involved a hotly-contested dispute over whether the defendant was entrapped into selling marijuana. The jury may well have concluded that the entrapment issue turned upon whether the defendant or a paid informant was telling the truth. The two tapes, one introduced by the state and one by the defendant, were of obvious importance in resolving that question. Nor is it implausible that jurors might have difficulty understanding tape recorded conversations in one playing. Unless the court means to be understood as saying that the trial judge has absolute discretion in such matters, it seems this situation required an explanation as to why denial of the request was not an abuse of discretion.[261]

In *State v. Hall*,[262] the court held that mere consumption of alcohol by the jury during its deliberations without a showing that the drinking prejudiced the jury is not sufficient to overturn a verdict of guilty. Eight jurors had consumed one cocktail each during a dinner break after the case went to the jury.[263] While condemning any consumption of alcohol, the court held that there must be some showing that the alcohol affected the jurors' judgment.[264] One can readily understand the court's reluctance to overturn a homicide conviction on what many would regard as technical grounds, given the limited drinking involved. Nonetheless, one need not be particularly puritanical to have some reservations concerning the court's disposition of this claim. By requiring a showing of actual prejudice from drinking during deliberations, the court renders its strong condemnation merely hortatory. As *Hall* itself illustrates, absent a showing of intoxication, the defense will never be able to demonstrate the required effect on the *judgment* of the jurors. Moreover, the court's treatment of the relevant Iowa precedent is disturbing in just this respect. As the court acknowledges, an early decision, *State v. Baldy*,[265] had held that a showing that one juror drank one glass of beer or ale during deliberations required a new trial without a further showing of actual prejudice. However, the *Hall* opinion then suggests that the strict *Baldy* rule was modified by *State v. Phillips*[266] to require a showing of prejudice. *Phillips*, however, was a case involving a prosecution for possession of intoxicating liquor with intent to sell. An issue at the trial was whether the beverages introduced as exhibits contained alcohol. The exhibits were taken to the jury room and sampled by the jury. It was at the time of

261. Even in jurisdictions where a review of the testimony is discretionary, there is authority recognizing abuses of discretion. *See, e.g.*, United States v. Rabb, 453 F.2d 1012 (3d Cir. 1971); United States v. Jackson, 257 F.2d 41 (3d Cir. 1958); People v. Briggman, 316 N.E.2d 121 (Ill. App. 1974). *See also* ABA STANDARDS *Trial by Jury*, § 5.2 and commentary thereto (1968), indicating that all reasonable requests for review of the evidence should be granted. The reported decisions do not seem to distinguish between testimony and tape recordings with respect to the propriety of jury review. *See, e.g.*, Sears v. United States, 343 F.2d 139 (5th Cir. 1965); Cranfill v. State, 235 S.W.2d 146 (Tex. Crim. 1950).

262. 235 N.W.2d 702 (Iowa 1975).

263. State v. Hall, 235 N.W.2d 702, 730 (Iowa 1975).

264. *Id.*

265. 17 Iowa 39 (1864).

266. 212 Iowa 1332, 236 N.W. 104 (1931).

decision a settled rule that the smelling and tasting of the beverage in question was not prejudicial. It was in this context that the *Phillips* court said that the trial judge had to determine whether the jury had gone beyond "tasting" to what could fairly be called "drinking." The *Phillips* opinion certainly does not state in so many words that it would be necessary to show actual prejudice if the facts clearly showed the jurors had been drinking. The *Baldy* rule is not even discussed in *Phillips*, much less explicitly modified.

The court in *Hall* also cites an annotation for the general rule that drinking alone, without a showing of prejudice, will not suffice to avoid a verdict.[267] Not mentioned is the statement in the same annotation that the use of intoxicating liquor by a juror *during deliberations* is generally sufficient to require a new trial.[268] In other words, the cases frequently distinguish between drinking during recess in the trial and drinking during deliberations.[269]

Finally, in focusing exclusively on the effect of drinking on the jurors' *judgment*, the court ignores another troublesome aspect of jury drinking: its effect upon respect for and confidence in the courts and the integrity of the jury system.[270] While in some cases that concern might seem wholly theoretical, in the totality of the circumstances surrounding the *Hall* trial, that concern is disturbingly real.

D. *Sentencing*

1. *Defendant's Presence*

Section 789.3 of the Code indicates that it is not mandatory for a defendant to be present for sentencing in a misdemeanor case.[271] However, the court in *State v. Welfort*[272] concluded that it was an abuse of discretion to impose a jail term in defendant's absence.[273] Defendant's acquiescense in imposition of a

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267. Annot., 7 A.L.R.3d 1040, 1050 (1966).

268. *Id.* at 1059-60.

269. *See, e.g.*, State v. Bruce, 48 Iowa 530 (1878). This distinction is also made in some of the decisions cited by the court as requiring a showing of prejudice. *See, e.g.*, Laudermilk v. State, 494 P.2d 341 (Okla. Cr. Ct. App. 1972); State v. Ovitt, 229 A.2d 237 (Vt. 1967). Indeed, the only decision that directly supports the court's holding is Kealoha v. Tanaka, 370 P.2d 468 (Hawaii 1962).

270. *See* People v. Lee Chuck, 20 P. 719 (Cal. 1889).

271. Iowa Code section 789.3 (1975) provides: "When judgment is pronounced, if the conviction be for a felony, the defendant must be personally present; if for a misdemeanor, he need not."

272. 238 N.W.2d 781 (Iowa 1976). *See also* State v. Hendricks, 240 N.W.2d 640 (Iowa 1976).

273. It is not completely clear whether the court is saying that a misdemeanant has a right to be present for sentencing. State v. Howarth, 30 N.W. 389 (1886), and State v. Hughes, 4 Iowa 554 (1857), reject the argument that defendant has a right to be present in a misdemeanor case. Nor does the court articulate the grounds for its conclusion that it was improper for the defendant to be absent. It can be argued that Mempa v. Rhay, 389 U.S. 128 (1967), requires by implication that the defendant be present. *See* United States v. Huff, 512 F.2d 66, 71 (5th Cir. 1975). The desirability of having the defendant present is so obvious that it is taken for granted by the ABA Standards. *See* ABA STANDARDS *Sentencing Alternatives and Procedures*, §§ 5.4 and 5.6 (1968).

deferred sentence in his absence cannot be considered a waiver for all purposes if the judge changes his mind and imposes a jail term.[274]

2. *Deferred Sentences*

A defendant does not qualify for a deferred sentence under section 789A.1[275] of the Code if he uses a dangerous weapon in the commission of a crime, even if the weapon is not used against a person, the court held in *State v. Hesford*.[276] Defendant had pleaded guilty to malicious injury to a building after he admitted firing a shotgun blast through the window of a car dealership.[277] The court concluded that a shotgun falls in the category of a weapon which is dangerous without any reference to the intent of the person using it and that the statute focuses on the capability of such a weapon and not upon whether it is actually used against a person.[278] Because such a weapon may be used in a dangerous manner in the commission of any crime, the actual crime charged need not be classified as an offense against the person.[279]

3. *Sentencing Procedure*

In *State v. Horton*,[280] the court reaffirmed its position that a trial court need not state on the record the reasons for imposing an incarcerative sentence. A trial judge is required to state reasons for imposing a sentence only when probation is granted.[281] In the absence of a statement of reasons, the appellate court is required to search the record to determine if the trial court abused its discretion by imposing the sentence it did.[282] A thoughtful concurring opinion presents a cogent case for adopting the position of the ABA Standards that a statement of reasons should always be required.[283]

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274. State v. Welfort, 238 N.W.2d 781, 782 (Iowa 1976).

275. Iowa Code section 789A.1(c) (1975) provides that a person may not be given a deferred sentence if:

> the defendant used, threatened to use or displayed in a threatening manner a dangerous weapon during the commission of an offense. Dangerous weapon means any instrument or device designed primarily for use in inflicting death or injury upon a human being or living creature, and which is capable of inflicting death upon a human being when used in the manner for which it was designed. Dangerous weapon also includes any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon anyone and which, when so used, is capable of inflicting death upon a human being.

276. 242 N.W.2d 256 (Iowa 1976).

277. State v. Hesford, 242 N.W.2d 256 (Iowa 1976).

278. *Id.* at 258.

279. *Id.* at 258-59.

280. 231 N.W.2d 36 (Iowa 1975).

281. State v. Horton, 231 N.W.2d 36, 39 (Iowa 1975). As *Horton* illustrates, this procedure requires the supreme court to speculate concerning possible bases for the sentence.

282. Iowa Code section 789A.1(2) (1975) provides: "The Court shall file a specific written statement of its reasons for and the facts supporting its decision to defer judgment or to suspend sentence and its decision on the length of probation."

283. *See* ABA STANDARDS *Appellate Review of Sentences*, § 2.3(c) (1968); ABA STANDARDS *Sentencing Alternatives and Procedures*, § 35.6(ii) (1968).

State v. Peckenschneider[284] provides an illuminating case study of the need for adopting the ABA Standards. After the defendant had pleaded guilty to receiving stolen goods, the trial court refused probation and imposed an indeterminate sentence.[285] The court in a 5-4 decision affirmed the sentence on the following record. Defendant was 52 years old, self-employed, owned his own home, had children age 12 and 8, and had no prior criminal record.[286] The parole agent recommended probation, stating in the presentence report: "the present offense represents a radical departure from a lifetime which could be considered as exemplary until now."[287] Nevertheless, the trial court imposed the prison sentence in an apparent attempt to halt an "epidemic" of break-ins: ". . . they wouldn't be breaking in if they couldn't sell the things they stole, and we have got to put a stop to it in this town. If I condone it, there will be more break-ins. And therefore, I refuse to give you a parole at this time."[288] While conceding the defendant "appears to be an excellent parole risk,"[289] the majority concluded the trial court had not abused its "wide discretion." While the majority appeared to accept defendant's contention that this deterrence rationale alone would not warrant incarceration in view of the multiple criteria listed in section 789A.1 of the Code, they went on to add that it "cannot be said there were no other factors" considered in denying probation.[290] Of course, the reason this could not be said was precisely because the court has refused to require lower courts to articulate their sentencing rationale.

Four dissenters in *Peckenschneider* argued that the trial court had abused its discretion in refusing the defendant probation. The dissenters relied upon section 789A.1 which specifies factors to be considered by the trial court in determining sentence: the age of defendant, his prior criminal record, his employment circumstances, his family circumstances, the nature of the offense, whether a dangerous weapon or force was used and "such other factors as shall be appropriate."[291] In addition, the dissent argued that the trial court had not followed the requirement that sentences be "individualized"[292] and had inappropriately viewed a probationary sentence as "condoning" the offense.[293]

The most serious vice inherent in excessive sentencing discretion is inequity. It may be less important whether probation was the "right" sentence for Peckenschneider than whether it was the sentence that would typically be given to others similarly situated. The case illustrates the need for techniques and standards which will begin to structure, not eliminate, sentencing discretion.

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284. 236 N.W.2d 344 (Iowa 1975).
285. State v. Peckenschneider, 236 N.W.2d 344, 346 (Iowa 1975).
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.* at 348.
290. *Id.*
291. IOWA CODE § 789A.1 (1975).
292. State v. Peckenschneider, 236 N.W.2d 344, 352 (Iowa 1975). *See* State v. Jackson, 204 N.W.2d 915 (Iowa 1973).
293. State v. Peckenschneider, 236 N.W.2d 344, 352-53 (Iowa 1975).

4. *Multiple Punishment*

In two recent cases, the court wrestled with the problem of multiple convictions for related offenses arising out of "the same incident." In *State v. Birkestrand*,[294] the defendant was convicted of a felony, possession of marijuana with intent to deliver, after which he pled guilty to a separate information charging him with possession of LSD, an indictable misdemeanor. Both charges grew out of the same search of his premises. The defendant was sentenced first on the misdemeanor and granted probation. Sentencing on the felony had been delayed at his request and when time for sentencing eventually arrived he voiced the objection of double punishment.[295] The court rejected the claim by reference to the so-called "same-evidence" test.[296] Because the lesser offense was not necessarily included in the greater, two different controlled substances being involved, conviction of the one was no bar to conviction of the other.[297]

In *State v. Criswell*,[298] defendant was charged with a single information with robbery with aggravation and assault with intent to commit murder, both charges apparently arising out of the same transaction. Upon conviction of both charges, he was sentenced to 25 and 30 years respectively, the terms to run consecutively. Applying the "same-evidence" test once again, the court concluded that robbery was not necessarily an included offense of assault with intent to commit murder and thus conviction of one was no bar to conviction of the other.[299] Little attention was given to the most serious problem in the case: the propriety of consecutive sentences. In *Criswell*, the opinion does not discuss the facts of the case and concludes without citation that Iowa statutes permit consecutive sentences in such a situation.[300] While the "same-evidence" test may be adequate to resolve problems of multiple convictions, it really does not reach the consecutive sentence issue. For example, under the combined holdings of *Birkestrand* and *Criswell*, it would be permissible to impose consecutive sentences on each of eight charges arising out of one incident in which a person was discovered in possession with intent to deliver of eight different controlled substances. Given the difficulty of the problem and the court's reluctance to review sentences that fall within statutory limits, legislative specification of criteria for the imposition of consecutive sentences would seem the most desirable solution.[301]

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294. 239 N.W.2d 353 (Iowa 1976).
295. State v. Birkestrand, 239 N.W.2d 353, 362 (Iowa 1976).
296. *Id.* at 364. *See* Gore v. United States, 357 U.S. 386 (1958); Blockburger v. United States, 284 U.S. 299 (1932).
297. State v. Birkestrand, 239 N.W.2d 353 (Iowa 1976).
298. 242 N.W.2d 259 (Iowa 1976).
299. State v. Criswell, 242 N.W.2d 259, 260-61 (Iowa 1976).
300. *Id.* at 261.
301. For possible models, see Proposed Federal Criminal Code, section 703 (1971), Model Penal Code section 7.06 (1962), ABA Standards *Sentencing Alternatives and Procedures* section 3.4 (1968).

E. *Post-Trial Issues*

1. *Appeal*

a. *Preservation of Error*

In *State v. Davis*,[302] the court ruled that a defendant ordinarily must object at trial to the use of evidence in violation of a favorable pretrial ruling on a motion in limine in order to preserve the issue for appeal. A motion in limine will suffice by itself to preserve error only in two exceptional situations:[303] (1) where the defendant's motion in limine has been rejected by the trial court, resolving the issue in a manner such that "it is beyond question" that the challenged evidence will be admitted at trial, and the evidence is admitted;[304] and (2) where the motion in limine is granted after hearing, and the disputed evidence is not admitted at trial.[305]

An objection of improper venue must be raised prior to trial or it is deemed waived under a 1973 amendment to section 753.2 of the Code, interpreted for the first time in *State v. Donnelly*.[306] The prior statute[307] had been interpreted to mean that venue was a jurisdictional issue[308] which could be raised at any time prior to submission of the case to the jury.[309]

If a county attorney intends to call witnesses other than those listed in the minutes of testimony, he is required by section 780.10 to give the defense written notice of such additional witnesses four days prior to trial or the witnesses will not be allowed to testify.[310] However, section 780.11 provides that the additional witnesses may be allowed to testify if the prosecutor moves for leave to introduce such evidence and establishes that he was unable to give the four-day notice "because of insufficient time . . . since he learned said evidence could be obtained" and that he exercised "diligence."[311] Section 780.12 then provides that if the court sustains the prosecutor's motion to introduce the witness' testimony, "the defendant shall elect whether said cause shall be continued

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302. 240 N.W.2d 662 (Iowa 1976). In *Davis*, the trial court granted a motion in limine directed at precluding any reference to defendant's prior convictions. However, defendant failed to object at trial when on cross-examination one of the state's witnesses made reference to "prior things he (defendant) had been involved in."

303. State v. Davis, 240 N.W.2d 662, 663 (Iowa 1976).

304. *See* State v. Miller, 229 N.W.2d 762, 768 (Iowa 1976).

305. *See* Gustafson v. Iowa Power & Light Co., 183 N.W.2d 212, 214 (Iowa 1971).

306. 242 N.W.2d 295 (Iowa 1976). Iowa Code section 753.2 (1975) provides: "Criminal actions shall be tried in the county in which the crime is committed, except as otherwise provided by law. All objections to place of trial are waived by a defendant unless he objects thereto prior to trial."

307. Iowa Code section 753.2 (1971) provided: "The local jurisdiction of the district court is of offenses committed within the county in which it is held, and of such other cases as are or as may be provided by law."

308. *See* State v. Warren, 212 N.W.2d 509 (Iowa 1973); State v. Evely, 228 N.W.2d 196 (Iowa 1975).

309. Lamb v. Davis, 244 Iowa 231, 56 N.W.2d 481 (1953).

310. IOWA CODE § 780.10 (1975).

311. IOWA CODE § 780.11 (1975).

on his motion, or the witness shall then testify."[312] In *State v. Sevcik*,[313] the court held that section 780.12 requires a defendant to exercise his right to a continuance or he will be deemed to have waived any objection to the granting of the section 780.11 motion.[314] A dissent objected that this ruling leaves a defendant without a remedy if the trial court disregards the requirements of section 780.11 by permitting a county attorney to introduce testimony for which the four-day notice has not been given.[315]

While the failure to object to proposed instructions does not preclude a defendant from urging an error in instructing the jury in a motion for new trial, an express statement that there are no objections to the instructions will operate as a waiver. In *State v. Rosewall*,[316] the trial court had submitted the offense of operating a motor vehicle without the consent of the owner[317] as a lesser included offense of larceny of a motor vehicle,[318] although it seemed clear that the evidence did not support one of the elements of the lesser offense.[319] The court thought it was unfair for a defendant to participate in submission of a lesser-included offense as a trial tactic to avoid the greater offense, with knowledge that if he is convicted of the lesser offense it will be set aside.[320]

b. *Appeals From Magistrate's Court*

In *State v. Dunham*[321] the court held that although under the unified court system a magistrate's court has become part of the district court, a defendant must still give notice to the magistrate of an appeal from magistrate's court to district court. Such notice is explicitly required by statute,[322] and giving written notice to the district court clerk does not satisfy the requirement.[323]

2. *Post-Conviction Relief*

Under chapter 663A as construed by the court, any ground for relief presented in the post-conviction petition which was not raised at trial, on appeal, or in a prior collateral attack on the conviction is "waived" unless "sufficient

312. Iowa Code § 780.12 (1975).
313. 239 N.W.2d 571 (Iowa 1976).
314. State v. Sevcik, 239 N.W.2d 571, 572-74 (Iowa 1976).
315. *Id.* at 574.
316. 239 N.W.2d 171 (Iowa 1976).
317. Iowa Code § 321.76 (1975).
318. Iowa Code § 321.82 (1975).
319. *See* State v. Smith, 223 N.W.2d 223 (Iowa 1974); State v. Habhab, 209 N.W.2d 73 (Iowa 1973); State v. Hawkins, 203 N.W.2d 555 (Iowa 1973).
320. State v. Rosewall, 239 N.W.2d 171, 175 (Iowa 1976). The court does not elaborate upon the basis for its apparent belief that counsel was playing ducks and drakes with the trial court, *i.e.*, that counsel knew the submission of the lesser offense was clearly erroneous.
321. 232 N.W.2d 475 (Iowa 1975).
322. Iowa Code section 762.43 (1975) provides: "The defendant may take an appeal, by giving notice orally to the magistrate that he appeals, or by delivering to the magistrate not later than 10 days thereafter, a written notice of appeal. . . ."
323. State v. Dunham, 232 N.W.2d 475, 477 (Iowa 1975).

reasons" appear why it was not raised.[324] In *Rinehart v. State*,[325] the court held that the burden of pleading and proving "sufficient reason" for non-waiver is on the petitioner.[326] The court also expressed the view that a waiver of a ground for relief can occur whether or not the petitioner made a knowing and intelligent decision not to raise the issue in the prior proceeding.[327] The upshot of *Rinehart* and its predecessors is that a person who claims his conviction was obtained in violation of his constitutional rights will ordinarily be able to seek federal habeas corpus relief without first presenting his constitutional claim to the state courts under chapter 663A.[328]

It would appear by implication from *Zacek v. Brewer*,[329] however, that a petitioner can establish "sufficient reason" for not raising a claim in a prior proceeding and avoid the "waiver" bar, if it appears that neither defendant nor his counsel could have known of the claim for relief because the police kept from them the information upon which it was based.[330] Reaching the merits, the court held Zacek's guilty plea invalid because neither he nor his counsel had been informed of police activity which would have rendered a substantial quantity of the evidence against him vulnerable to a motion to suppress.[331] While a *valid* guilty plea ordinarily waives constitutional challenges to the admissability of evidence, the court recognized that the validity of the plea depends upon meaningful advice from effective counsel and that an attorney may be rendered ineffective by actions of state agents and through no fault of his own.[332]

In *State v. Sims*,[333] the court specifies the elements which must be established to obtain post-conviction relief under section 663A.2(4) of the Code on the ground of newly discovered evidence:[334] (1) the evidence was discovered after judgment; (2) the evidence could not have been discovered earlier in the

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324. Iowa Code section 663A.8 (1975) provides:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground . . . not raised . . . may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reasons was not asserted or was inadequately raised in the original, supplemental, or amended application.

See Carstens v. Rans, 210 N.W.2d 663 (Iowa 1973); Horn v. Haugh, 209 N.W.2d 119 (Iowa 1973). *See also* McElhaney v. Auger, 238 N.W.2d 797 (Iowa 1976).

325. 234 N.W.2d 649 (Iowa 1975).

326. Rinehart v. State, 234 N.W.2d 649, 657 (Iowa 1975).

327. *Id.* at 656.

328. 28 U.S.C. § 2254 (1970) requires a petitioner to exhaust available state remedies. But if petitioner faces a fatal procedural obstacle to a hearing, he need not make the idle gesture of seeking state relief. Wilwording v. Swenson, 404 U.S. 249, 250 (1971); Fay v. Noia, 372 U.S. 391, 434-35 (1963). *See also* United States *ex rel.* Williams v. Brantley, 502 F.2d 1383, 1385-86 (7th Cir. 1974); Smith v. Wolff, 506 F.2d 556, 558-59 (8th Cir. 1974); Losieau v. Sigler, 421 F.2d 825 (8th Cir. 1970).

329. 241 N.W.2d 41 (Iowa 1976).

330. Zacek v. Brewer, 241 N.W.2d 41, 46-47 (Iowa 1976).

331. *Id.* at 53.

332. *Id.* at 50-52.

333. 239 N.W.2d 550 (Iowa 1976).

334. Iowa Code section 663A.2(4) (1975) provides that grounds for post-conviction relief are present when there "exists evidence of material facts, not previously presented and heard, that require vacation of the conviction or sentence in the interest of justice."

exercise of due diligence; (3) the evidence is material to the issue, not merely cumulative or impeaching; and (4) the evidence would probably change the result of the trial if a new trial is granted.[335] These are the same requirements a defendant must fulfill when making a motion for a new trial prior to final judgment,[336] except in that situation the evidence must have been discovered after trial and before judgment.[337]

3. *Probation Revocation*

a. *Deferred Sentence*

An order revoking probation granted under the deferred sentencing statute, section 789A.1,[338] is reviewable on direct appeal, the court held in *State v. Farmer*.[339] While it had previously been held than an order revoking a probation granted *after* imposition of sentence must be challenged in post-conviction proceedings,[340] probation granted as part of a deferred sentence comes prior to judgment, and an order revoking it is interlocutory in nature.[341]

b. *Hearing Requirements*

The court had occasions to interpret the decisions of the United States Supreme Court concerning due process in probation revocation[342] in *Rheuport v. State*[343] and *State v. Tech*.[344] In *Morrisey v. Brewer*[345] the United States Supreme Court suggested that two hearings are required: a preliminary hearing to determine probable cause and a final hearing on the merits of revocation.[346] In *Tech*, the court concluded that the preliminary hearing is unnecessary if the probationer is not in custody or otherwise deprived of his conditional freedom.[347] *Gagnon v. Scarpelli*[348] also requires that the final hearing address: 1) whether the conditions of probation have been violated and 2) whether there were circumstances of mitigation and/or whether dispositional alternatives short of revocation are appropriate.[349] While noting that these issues are analytically discrete, the court in *Rheuport* held that it was not error to consider them both

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335. State v. Sims, 239 N.W.2d 550, 554-55 (Iowa 1976).
336. Iowa Code section 787.3(8) (1975) provides for a motion for new trial based on newly-discovered evidence ("When from any other cause the defendant has not received a fair and impartial trial.").
337. *See* State v. Farley, 226 N.W.2d 1, 3 (Iowa 1975).
338. Iowa Code § 789A.1 (1975).
339. 234 N.W.2d 89 (Iowa 1975).
340. *See* State v. Rheuport, 225 N.W.2d 122 (Iowa 1975).
341. State v. Farmer, 234 N.W.2d 89, 90 (Iowa 1975).
342. Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).
343. 238 N.W.2d 770 (Iowa 1976).
344. 240 N.W.2d 658 (Iowa 1976).
345. 408 U.S. 471 (1972).
346. Morrissey v. Brewer, 408 U.S. 471, 479-80 (1972).
347. State v. Tech, 240 N.W.2d 658, 661 (Iowa 1976). *See also* United States v. Strada, 503 F.2d 1081, 1084 (8th Cir. 1974).
348. 411 U.S. 778 (1973).
349. Gagnon v. Scarpelli, 411 U.S. 778, 784 (1973).

in a single hearing.[350] Finally, the court held in *Rheuport* that *Morrissey*'s requirement that the factfinder enter a written statement of reasons for revocation may be satisfied by an on-the-record oral statement in the presence of the defendant.[351]

CONCLUSION

The period surveyed was not marked by the kind of "blockbuster" decisions that have broad impact on the day-to-day practice of criminal law. There were no decisions comparable to *State v. Peterson*[352] or *State v. Martin*.[353] The Supreme Court of Iowa confronted a number of novel questions, however, the implications of which merit the attention of the bar, the bench and the legislature.

In contrast to the decisions of the United States Supreme Court, one does not observe any sharp changes of direction; in the main the Iowa court continues to chart a moderately conservative course. Occasionally moved by a spirit of reform, the court also seems restrained by the pressure of numbers and the consequent concern over the impact of "excessive" reversals. While receptive to arguments grounded in such generally progressive sources as the ABA Standards and the Federal Rules of Evidence, the court has stopped well short of wholesale incorporation of their provisions. Nor has it yet revealed an inclination to accept the invitation of Mr. Justice Brennan to rely extensively on the provisions of the Iowa Constitution as a counterbalance to the more questionable Burger Court interpretations of the United States Constitution.[354]

Finally, while the reasoning of particular opinions has been questioned herein, it is the author's opinion that the work of the Iowa Supreme Court in the criminal area as a whole increasingly reflects an intensive and extensive research base, more sophisticated modes of analysis, and greater sensivity to the realities of the criminal justice system.

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350. Rheuport v. State, 238 N.W.2d 770, 773 (Iowa 1976).
351. *Id.* at 775.
352. 219 N.W.2d 665 (Iowa 1974).
353. 217 N.W.2d 536 (Iowa 1974).
354. *See* Address by Justice Brennan to the New Jersey State Bar Association of May 22, 1976, *excerpted in* 62 A.B.A.J. 993 (1976).