

SURVEY OF IOWA LAW  
IOWA CRIMINAL LAW

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Nothing herein is to be construed as an official opinion or expression of policy of the Attorney General.—Ed.

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##### I. STATISTICAL SUMMARY

This survey covers the period of March 1972 through July 1973,<sup>1</sup> during which time the Iowa supreme court filed a total of 141 reported opinions<sup>2</sup> in criminal cases.<sup>3</sup> In the 140 cases with decisions on the merits,<sup>4</sup> the supreme court affirmed the lower court 69.5 percent of the time and upheld the State's appellate claim 70.2 percent of the time. Nine of every ten decisions were

1. For earlier surveys, see Dunahoo, *Survey of Iowa Criminal Law*, 21 DRAKE L. REV. 488 (1972) (covering Jan. 1970-Feb. 1972) and Yeager, *Survey of Iowa Criminal Law*, 20 DRAKE L. REV. 118 (1970) (covering the year 1969).

2. These opinions may be found in volumes 195-209 of the Northwestern Reports, Second Series. Because of the supreme court's division into two five-justice panels effective October 1972, the number of criminal law opinions recently has increased significantly. The average number thereof per month has been: 7.4 (January 1970-February 1972), 10.1 (March 1972-July 1973), and 11.0 (October 1972-July 1973). The supreme court has sat *en banc* in 16 of the 99 reported criminal law cases decided after September 1972.

3. Twelve postconviction relief petitions and two habeas corpus petitions, while triggering civil proceedings, are included in this survey total of 141 cases because of their raising of criminal law issues in these particular cases.

Not included elsewhere in this survey (or in the statistics) are the topics of extradition and forfeiture, both of which are civil proceedings which directly relate to criminal matters in some cases.

For recent developments concerning extradition, see *Hughes v. Waters*, 204 N.W.2d 599 (Iowa 1973) and *Hill v. Houck*, 195 N.W.2d 692 (Iowa 1972).

For recent developments concerning forfeiture proceedings, see *Robinson v. Hanrahan*, 93 S. Ct. 30 (1972); *McReynolds v. Municipal Court*, 207 N.W.2d 792 (Iowa 1973); *State v. One Certain Conveyance*, 207 N.W.2d 547 (Iowa 1973); and *State v. Kaufman*, 201 N.W.2d 722 (Iowa 1972).

4. One case was dismissed without a decision on the merits because the appeal was taken before a final judgment. See *State v. Coughlin*, 200 N.W.2d 525 (Iowa 1972) (trial court's order granting defendant's motion to set aside jury verdict of guilty is not a final judgment from which an appeal can be taken by the State; Iowa R. Crv. P. 331 is inapplicable to criminal cases).

But see *State v. Richmond*, 207 N.W.2d 546 (Iowa 1973), *Bruno v. Haugh*, 206 N.W.2d 436 (Iowa 1973), *Holland v. Brewer*, 206 N.W.2d 436 (Iowa 1973), and *Melka v. Houge*, 206 N.W.2d 85 (Iowa 1973) (summary affirmance per curiam "AFFIRMED, see rule 348.1, Rules of Civil Procedure" in cases presenting no error and supreme court feels an opinion would have no precedential value).

unanimous, with the court experiencing an overall agreement rate of 96.2 percent.<sup>5</sup> All but eight of the 141 survey cases were tried or heard on the district court level.

5.	Survey Period (3/72-7/73) (141 cases)	1972-73 Term (9/72-7/73) (110 cases)
a) <u>DISPOSITIONS</u>		
Affirmances	98	75
(appels)	(97)	(74)
(certiorari)	(1)	(1)
Reversals	43	35
(appels)	(39)	(32)
(certiorari)	(4)	(3)
Affirmance rate	69.5%	68.2%
Reversal rate	30.5%	31.8%
(Note: The affirmance rate for the previous period of January 1970-February 1972 was 75.0 percent.)		
b) <u>WINNING PARTIES</u>		
State	99	77
Defendant	42	33
State's winning rate	70.2%	70.0%
Defendant's winning rate	29.8%	30.0%
(Note: The State's winning rate for the previous period of January 1970-February 1972 was 76.9 percent.)		
c) <u>VOTING PATTERNS</u>		
9-0 Decisions	32	12
8-0 Decisions	10	2
7-0 Decisions	2	2
5-0 Decisions	82	82
8-1 Decisions	4	2
7-1 Decisions	1	0
4-1 Decisions	1	1
7-2 Decisions	1	1
6-2 Decisions	1	1
6-3 Decisions	3	3
5-4 Decisions	4	4
Agreement rate	96.2%	95.1%
Disagreement rate	3.8%	4.9%
(Note: The justices' agreement rate for the previous period of January 1970-February 1972 was 92.6 percent.)		
d) <u>DISSENTING VOTES</u> (Note: All Justices did not participate in all cases)		
Justice Harris	3	3
Justice LeGrand	1	0
Justice McCormick	6	6
Justice Mason	4	3
Chief Justice Moore	3	3
Justice Rawlings	5	4
Justice Rees	3	3
Justice Reynoldson	3	3
Justice Uhlenhopp	7	7
Total	35	32

For a comparable statistical summary for the period of January 1970-February 1972, see Dunahoo, *Survey of Iowa Criminal Law*, 21 *DRAKE L. REV.* 488, 490-92 (1972).

Of the 126 convictions contested on their merits, the supreme court affirmed 91 (or 74.6 percent). Of the 35 convictions reversed, only 24 were remanded for new trial.<sup>6</sup> In other actions, the court upheld the sentence imposed in five cases but ordered resentencing in four others; affirmed (on a State's appeal solely to clarify the point of law) the granting of a directed verdict; and upheld an order revoking probation. Finally, in three cases in which the respective defendants had not yet been tried, the court sustained a writ of certiorari challenging the overruling of one defendant's motion to dismiss for lack of speedy trial, reversed the overruling of another defendant's application for change of venue, and reversed the failure to overrule a third defendant's demurrer.<sup>7</sup>

A total of forty-eight reversible errors<sup>8</sup> were committed in the forty-three

6. Two of these cases were remanded for dismissal of the charges because of denial of speedy trial. See *State v. Gorham*, 206 N.W.2d 908, 915 (Iowa 1973) and *State v. Hanysh*, 208 N.W.2d 718 (Iowa 1973). The remaining nine cases were expressly or impliedly remanded for entry of judgments of acquittal because of insufficiency of the evidence for conviction. Three of these were reversed because of their resting on circumstantial evidence which at best raised suspicion as to the respective defendant's guilt. See *State v. Jellema*, 206 N.W.2d 679 (Iowa 1973), *State v. Streit*, 205 N.W.2d 742 (Iowa 1973), and *State v. Barnes*, 204 N.W.2d 827 (Iowa 1973). Five other cases were reversed because of failure of proof of an essential element of the respective crime. See *State v. Miller*, 204 N.W.2d 834 (Iowa 1973) (no competent evidence of defendant operating the vehicle in prosecution for O.M.V.U.I.); *State v. Creighton*, 201 N.W.2d 471 (Iowa 1972) (no evidence introduced as to defendant operating the vehicle in O.M.V.U.I. case); *State v. McGuire*, 200 N.W.2d 832 (Iowa 1972) (no proof that defendant intentionally simulated intoxication); *State v. Hoffer*, 197 N.W.2d 368 (Iowa 1972) (no competent proof of defendant's license still being suspended at the time he was arrested for driving while operator's license under suspension); and *State v. Smith*, 196 N.W.2d 439 (Iowa 1972) (larceny in the nighttime requires proof that property was stolen from within a vessel, building, or vehicle and not from the outside of same). In the remaining case, both the wrong charge was brought and the wrong venue was set. See *State v. Durham*, 196 N.W.2d 428 (Iowa 1972) (larceny is not committed when owner consents to defendant's taking of his property even though the consent is for purposes of apprehending defendant). As to whether *Durham* could be retried on the proper charge, see *State v. Cook*, 158 N.W.2d 26 (Iowa 1968) and *State v. Folger*, 204 Iowa 1296, 210 N.W. 580, 582 (1926).

7.

	Affirmed On Appeal	Reversed On Appeal	Remanded for New Trial or Other Proceedings
CONVICTIONS	(91)	(35)	(24)
by Court	4	5	4
by Guilty Plea	18	1	1
by Jury	69	29	19
OTHER	(7)	(7)	(6)
Acquittal by jury	1	0	—
Pretrial orders	0	3	2
Probation revocation	1	0	—
Sentencing	5	4	4
TOTAL	98	42	30

8. See also *State v. Kelsey*, 201 N.W.2d 921, 927 (Iowa 1972) concerning successful application of the harmless error rule, to wit: Consequently, the question posed is whether admission into evidence of the one item of hearsay instantly involved [i.e., defendant's tacit admission] compels a reversal of this case. We are satisfied it does not. . . . A review of the record fairly shrieks the guilt of this defendant. It is consequently inconceivable that

cases reversed by the supreme court, including three errors in one case!<sup>9</sup> Of these, eleven of the errors occurred on rulings on pretrial matters, while thirty-three errors were made during the trial, and the remaining four errors on sentencing policy. The eleven errors made on pretrial matters consisted of: overrulings of motions to dismiss for lack of speedy trial in three cases;<sup>10</sup> an overruling of defendant's demand for a jury trial on a multi-count contempt charge;<sup>11</sup> overrulings of defendant's motion to suppress illegally obtained evidence in three cases;<sup>12</sup> the overruling of defendant's application for change of venue;<sup>13</sup> the acceptance of a guilty plea notwithstanding an improper colloquy;<sup>14</sup> the refusal to overrule defendant's demurrer;<sup>15</sup> and the failure to sustain defendant's demurrer and then to order an amendment to the county attorney's information.<sup>16</sup> The thirty-three errors during trial included: the empanelling of a tainted jury panel;<sup>17</sup> the State's improper admission of evidence of other crimes in two cases;<sup>18</sup> a defective foundation for admission of the State's breath test evidence in an O.M.V.U.I. case;<sup>19</sup> a prosecutor's improper comment

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admission of the hearsay here involved, mentioning neither names, dates nor places, could have possibly influenced the jury to reach an improper verdict. We therefore hold the admission of such hearsay was harmless beyond a reasonable doubt.

*But see* State v. Davis, 196 N.W.2d 885 (Iowa 1972) (harmless error not applied to improperly admitted evidence of another crime in a prosecution for vehicular manslaughter) and State v. Miller, 204 N.W.2d 834 (Iowa 1973) (reversal of conviction because of admission of hearsay evidence where there was no competent evidence as to an essential element). *See also* State v. Ware, 205 N.W.2d 700 (Iowa 1973) (harmless error inapplicable, as a matter of law, to admission of unconstitutionally-obtained confession) and State v. Sloan, 203 N.W.2d 225, 227 (Iowa 1972) (harmless error not proven here beyond a reasonable doubt since "error in instructing the jury is presumed to be prejudicial unless the contrary appears from a review of the whole case").

9. *See* State v. Smiley, 201 N.W.2d 730 (Iowa 1972).

10. *See* State v. Hanysh, 208 N.W.2d 718 (Iowa 1973), State v. Gorham, 206 N.W.2d 908 (Iowa 1973), and Keever v. Bainter, 195 N.W.2d 526 (Iowa 1972), as discussed in text accompanying notes 514-39 *infra*.

11. *See* Sarich v. Haverkamp, 203 N.W.2d 260 (Iowa 1972), as discussed in text accompanying notes 72-82 *infra*.

12. *See* State v. Johnson, 203 N.W.2d 126 (Iowa 1972) (defective affidavit for a search warrant), as discussed in text accompanying note 485 *infra*. *See also* State v. Rowland, 202 N.W.2d 98 (Iowa 1972) and State v. Williams, 201 N.W.2d 710 (Iowa 1972) (both involving improper foundation for breath test evidence in O.M.V.U.I. cases), as discussed in text accompanying notes 277-88 *infra*.

13. *See* Pollard v. District Court, 200 N.W.2d 519 (Iowa 1972), as discussed in text accompanying notes 504-09 *infra*.

14. *See* State v. Clary, 203 N.W.2d 382 (Iowa 1973), as discussed in text accompanying note 542 *infra*.

15. *See* State v. Vietor, 208 N.W.2d 894 (Iowa 1973) (burden of proof rests on defendant in accommodation hearing under Uniform Controlled Substances Act), as discussed in text accompanying notes 99-108 *infra*.

16. *See* State v. Lavin, 204 N.W.2d 844 (Iowa 1973) (Iowa's obscenity statute is constitutional but scienter must be alleged in indictment and proved), as discussed in text accompanying notes 213-19 *infra*.

17. *See* State v. Lunsford, 204 N.W.2d 613 (Iowa 1973), as discussed in text accompanying notes 577-80 *infra*.

18. *See* State v. Wright, 203 N.W.2d 247 (Iowa 1972) (prosecution for statutory rape), as discussed in text accompanying notes 318-20 *infra* and State v. Davis, 196 N.W.2d 885 (Iowa 1972) (prosecution for vehicular manslaughter), as discussed in text accompanying notes 194-97 *infra*.

19. *See* State v. Hansen, 203 N.W.2d 216 (Iowa 1972), as discussed in text accompanying notes 285-87 *infra*.

on defendant's refusal to take a breath test in another O.M.V.U.I. case;<sup>20</sup> the admission of the State's evidence of defendant's bad character notwithstanding a proper foundation therefor;<sup>21</sup> the exclusion of defendant's proffered evidence in three cases;<sup>22</sup> improper limitation on defendant's examination of witnesses for equivocation and unresponsiveness;<sup>23</sup> failure to declare mistrials in two cases;<sup>24</sup> failure to direct the verdict in nine cases;<sup>25</sup> and improper jury instructions in ten cases.<sup>26</sup> The four errors involving the sentencing process<sup>27</sup> included: the trial court's failure to exercise judicial discretion by sentencing defendant according to a judicial district-wide sentencing policy of a twenty-day minimum jail sentence (subject to probation) notwithstanding the lack of a statutory minimum;<sup>28</sup> the trial court's entry of judgment and sentence ordering an indigent defendant to make *immediate* payment of the fine or to be imprisoned for default thereof;<sup>29</sup> denial of postconviction relief to a defendant claiming

20. See *State v. Hall*, 203 N.W.2d 375 (Iowa 1973), as discussed in text accompanying notes 282-84 *infra*.

21. See *State v. Sill*, 199 N.W.2d 47 (Iowa 1972), as discussed in text accompanying notes 654-58 *infra*.

22. See *State v. McDaniel*, 204 N.W.2d 627 (Iowa 1973) (evidence of statutory rape prosecutrix's other promiscuous acts admissible as to someone else besides defendant being her attacker), as discussed in text accompanying notes 321-22 *infra*. *State v. Smiley*, 201 N.W.2d 730 (Iowa 1972) (improper exercise of judicial discretion to exclude, as too remote, defendant's proffered evidence of heavy drinking earlier that evening by gang members who started the altercation, with defendant's assault-and-battery conviction arising out of defendant's attempt to break up the fighting in his tavern); as discussed in text accompanying notes 642-43 *infra* and *State v. Johnson*, 196 N.W.2d 563 (Iowa 1972) (evidence of restitution admissible in prosecution for false drawing and uttering as to lack of intent to defraud), as discussed in text accompanying notes 135-38 *infra*.

23. See *State v. Smiley*, 201 N.W.2d 730 (Iowa 1972), as discussed in text accompanying notes 5-97.

24. See *State v. Vickroy*, 205 N.W.2d 748 (Iowa 1973) (improper opening and closing arguments by prosecutor), as discussed in text accompanying notes 682-87 *infra* and *State v. Ware*, 205 N.W.2d 700 (Iowa 1973) (illegally-obtained confession introduced into evidence), as discussed in text accompanying notes 663-67 *infra*.

25. See note 6 *supra*.

26. See *State v. Dunn*, 199 N.W.2d 104 (Iowa 1972) (collateral issues improperly interjected); *State v. Hansen*, 203 N.W.2d 216 (Iowa 1972) (unconstitutional *conclusive* application of statutory presumption of intoxication); *State v. Hawkins*, 203 N.W.2d 555 (Iowa 1973) (revision of test for giving of instruction on lesser included offense); *State v. Hocker*, 201 N.W.2d 74 (Iowa 1972) (improper exception under hunting by artificial light statute); *State v. Hutton*, 207 N.W.2d 581 (Iowa 1973) (unconstitutional *conclusive* application of statutory presumption of intoxication); *State v. McGranahan*, 206 N.W.2d 88 (Iowa 1973) (defective definition of reasonable doubt); *State v. Mays*, 204 N.W.2d 862 (Iowa 1973) (improper to give instruction on aiding and abetting where no evidentiary support that more than one person was involved); *State v. Milliken*, 204 N.W.2d 594 (Iowa 1973) (improper emphasis on evidence adverse to defendant); *State v. Sill*, 199 N.W.2d 47 (Iowa 1972) (diminished responsibility because of voluntary intoxication can vitiate specific intent and thus lead to acquittal); and *State v. Sloan*, 203 N.W.2d 225 (Iowa 1972) (unconstitutional *conclusive* application of statutory presumption of intoxication). For a further discussion of each of the above, see part III, § B, subsec. 5 *infra*.

27. See also *State v. Milliken*, 204 N.W.2d 594 (Iowa 1973) (trial courts must avoid making improper reference in sentencing colloquy to court's inability to impose a jail sentence except if an indigent defendant could not pay the fine when, as here, the only possible penalties were imprisonment in the penitentiary or a fine or both but not imprisonment in the county jail).

28. See *State v. Jackson*, 204 N.W.2d 915 (Iowa 1973), as discussed in text accompanying notes 828-31 *infra*.

29. See *State v. Snyder*, 203 N.W.2d 280 (Iowa 1972), as discussed in text accompanying notes 823-24 *infra*.



his two sentences, under the peculiar circumstances, must only run concurrently rather than consecutively;<sup>30</sup> and improper resentencing under the new Uniform Controlled Substances Act for a crime committed under the former Uniform Narcotics Act.<sup>31</sup>

## II. SUBSTANTIVE LAW

### A. General Principles

Various general principles concerning substantive criminal law were dealt with during the survey period. These included: corroboration of an accomplice's testimony, the scope of aiding and abetting, and the setting of venue in the proper county.

#### 1. Accomplice

Various aspects of the law concerning corroboration of an accomplice's testimony<sup>32</sup> were discussed during the survey period. Repeating the general rule that an accomplice is a witness who "could be charged with and convicted of the specific offense for which an accused is on trial,"<sup>33</sup> the court held in *State v. Armstrong*<sup>34</sup> that the fact that the State's witness was defendant's accomplice in an earlier transaction in which they participated in a similar but separate offense does not *ipso facto* make him an accomplice in the instant offense. In *State v. Houston*,<sup>35</sup> the court held that when defendant claims that certain State's witnesses aided and abetted in the crime "the burden was upon [defendant] to so prove by a preponderance of the evidence,"<sup>36</sup> rather than for the State to prove beyond a reasonable doubt that the State's witnesses were not defendant's accomplices. That the corroborative evidence can come from defendant himself was made clear in *State v. Williams*.<sup>37</sup> This may be by way of "his admissions, declarations, conduct, writings or other documentary evidence"<sup>38</sup>—but, of course, not through his tacit admissions.<sup>39</sup>

#### 2. Aiding and Abetting

Two survey cases illustrated diametrically-opposed appellate results on

30. See *Cleesen v. Brewer*, 201 N.W.2d 474 (Iowa 1972), as discussed in text accompanying notes 835-36 *infra*.

31. See *State v. Wiese*, 201 N.W.2d 734 (Iowa 1972), as discussed in text accompanying notes 837-40 *infra*.

32. See IOWA CODE § 782.5 (1973).

33. *State v. Armstrong*, 203 N.W.2d 269, 273 (Iowa 1972), quoting *State v. Jennings*, 195 N.W.2d 351, 356 (Iowa 1972).

34. *Id.*

35. 206 N.W.2d 687 (Iowa 1973).

36. *Id.* at 689.

37. 207 N.W.2d 98 (Iowa 1973).

38. *Id.* at 107.

39. *Id.*, citing *State v. Kelsey*, 201 N.W.2d 921 (Iowa 1972), as discussed in text accompanying notes 629-32 *infra*.

the issue of sufficiency of evidence to convict on the theory of aiding and abetting.<sup>40</sup>

The conviction for larceny in the nighttime was reversed in *State v. Barnes*,<sup>41</sup> with the supreme court stating: "One cannot be convicted of crime upon a theory of aiding and abetting unless there is sufficient evidence to show he assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it *prior to or at the time of its commission*."<sup>42</sup> Defendant and one Taylor had driven up to a gas station together and entered—with the announced purposes of Taylor to use the restroom and defendant to buy cigarettes. Coming into the office from outside to make change for defendant, the station attendant saw Taylor taking money from the station's money bag and defendant (with his back to Taylor) looking out the office door toward the attendant. Whereupon Taylor took flight, defendant remained there and requested his change. With defendant's stated purpose for his presence at the scene being lawful and there being no direct evidence that defendant saw or knew of the theft, the supreme court reversed the conviction because the circumstantial evidence was insufficient for the jury to find that he was acting as Taylor's lookout. The court said: "Even if we accept the State's claim defendant tried to protect Taylor after the theft, his conduct then would not be enough to prove his earlier complicity . . . ."<sup>43</sup> It added: "[S]ubsequent conduct is relevant only insofar as it tends to prove defendant's *prior* encouragement or participation. A defendant may not be convicted as a principal on a theory of aiding and abetting for conduct which would only make him an accessory *after* the fact."<sup>44</sup>

On the other hand, a conviction for false pretenses involving fraudulent insurance sales schemes was affirmed in *State v. Buttolph*.<sup>45</sup> Concerning the requisite knowledge of the crime prior to its commission, the supreme court said that such knowledge "may be inferred from circumstances surrounding the act . . . . [P]articipation may be shown by 'presence, companionship, and conduct before and after the offense is committed.'"<sup>46</sup> The court pointed out that the jury could find defendant fraudulently obtained insurance application forms, regularly met with fellow fraudulent insurance salesmen to split the premiums, and wrongfully endorsed victim-clients' checks. Other evidence indicated a common plan or scheme to sell fraudulent policies, as well as use of fictitious names, by defendant and his "business associates."

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40. See generally IOWA CODE § 688.1 (1973).

41. 204 N.W.2d 827 (Iowa 1972).

42. *Id.* at 828.

43. *Id.* at 829.

44. *Id.* at 828-29.

45. 204 N.W.2d 824 (Iowa 1972).

46. *Id.* at 825; accord *State v. Youngbear*, 203 N.W.2d 274, 280 (Iowa 1972) quoting *State v. Myers*, 158 N.W.2d 717, 720-21 (Iowa 1968): "Participation in criminal intent may be inferred from one's presence in and near the scene of the crime, and his conduct before and after the offense is committed."



### 3. Setting Venue

In a rare instance of venue being set in the wrong county, the opinion in *State v. Durham*<sup>47</sup> begins: "The wrong charge was brought against the defendant in the wrong county."<sup>48</sup> While in Des Moines (Polk County), one Mr. Geesaman, a resident of Indianola (Warren County), agreed to a bizarre get-rich-quick scheme by which he would give \$700 to a defendant, a resident of Des Moines, and be refunded \$2000. Purportedly defendant was involved with the mafia and Geesaman, although cooling on the scheme but fearing for his and defendant's well being, reluctantly turned the \$700 over to defendant merely as a loan. When defendant subsequently called Geesaman and said that both of them had been "ordered" to come up with another \$1500, Geesaman went to the police. By arrangement with the authorities, Geesaman then went to defendant's home and told him that Geesaman had been unable to get the money. Defendant responded: "You know as well as I do what is going to happen. That is why I carry this" (presumably a gun). Geesaman then told defendant he could get the money elsewhere but that defendant would have to come to Geesaman's house (in Indianola) to get it. Defendant then went to Indianola and was given the \$1500. "[T]his is the first of the events occurring in Warren County," the supreme court determined,<sup>49</sup> without further discussion other than noting that the reason for the payoff being made in Indianola was to raise a charge in Warren County.<sup>50</sup>

### B. Specific Crimes

#### 1. Abortion

The most celebrated recent development in substantive criminal law was the United States Supreme Court's voiding of state statutes (similar to *Iowa Code* section 701.1) which proscribe abortions during *all* states of pregnancy except when necessary to save the life of the mother. However, *Roe v. Wade*<sup>51</sup> further held that the expectant mother's right to an abortion is not absolute and she thus is not entitled to terminate her pregnancy "at whatever time, in whatever way, and for whatever reason she alone chooses," but rather "at some point the state interests as to protection of health, medical standards, and prenatal life, become dominant."<sup>52</sup>

47. 196 N.W.2d 428 (Iowa 1972).

48. *Id.* at 428.

49. *Id.* at 429.

50. The other three "venue-setting" decisions upheld the propriety of resorting to judicial notice in establishing venue. See *State v. Creighton*, 201 N.W.2d 471, 472 (Iowa 1972): "Venue was established by resorting to the helpful circumstantial evidence rule and the even more friendly principle that in deciding venue questions we may take judicial notice of the location of towns, geographical boundaries and certain designated places when shown to be within a certain distance of an established point;" accord *State v. Hackett*, 200 N.W.2d 493 (Iowa 1972) and *State v. Hackett*, 197 N.W.2d 569 (Iowa 1972).

51. 93 S. Ct. 705 (1973).

52. *Id.* at 727-28.

The following guidelines for a constitutional state criminal abortion statute were set forth in *Roe v. Wade*:

- (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
- (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health [e.g., qualifications of the person performing the abortion, licensure of that person, licensing of the facility where abortion is performed].
- (c) For the stage subsequent to viability [i.e., six months] the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.
- (d) The State may define the term "physician," . . . to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.<sup>53</sup>

The Supreme Court's conclusion that the section in the challenged Texas statute exempting abortions "for the purpose of saving the life of the mother" was unconstitutionally restrictive meant that the Texas abortion statutes, "as a unit, must fall." The mother-saving exemption "cannot be stricken separately, for then the State is left with a statute proscribing all abortion procedures no matter how medically urgent the case."<sup>54</sup> A three-judge federal district court subsequently held in a declaratory judgment that "the Iowa abortion statute is unconstitutional and of no force and effect."<sup>55</sup>

In the companion case of *Doe v. Bolton*,<sup>56</sup> the Supreme Court declared several procedural features of Georgia's "modern" anti-abortion statute unconstitutional. These included the following requirements as summarized in the opinion: "(1) that the abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals; (2) that the procedure be approved by the hospital staff abortion committee; and (3) that the performing physician's judgment be confirmed by the independent examinations of the patient by two other licensed physicians."<sup>57</sup> Additionally, the statutory limitation of abortions to "bona fide legal resident[s] of the State of Georgia"<sup>58</sup> was voided. Also voided was the statutory provision limiting abortions except where: (1) the expectant mother's life would be endangered or her health seriously and permanently injured; (2) the fetus likely would be born with a serious mental or physical defect; or (3) the pregnancy resulted from forcible or statutory rape.

53. *Id.* at 732-33.

54. *Id.* at 733.

55. *Doe v. Turner*, Civil No. 73-57-2 (S.D. Iowa, Aug. 3, 1973) (3 judge court).

56. 93 S. Ct. 739 (1973).

57. *Id.* at 747-48.

58. *Id.* at 753.

## 2. Arson

In *State v. Dunn*,<sup>59</sup> the court held that the State is not required in a prosecution for arson<sup>60</sup> to prove that defendant's unlawful burning of another's personal property stemmed from defendant's personal hostility or revenge towards the other person. To the contrary, the proof was that defendant was hired by the owner of a car to burn the car to enable the owner to collect the insurance proceeds. The court pointed out that, while arson requires willful and malicious burning, willfully means "purposely, deliberately, intentionally"<sup>61</sup> and that "the intentional doing of a 'wrongful act,' without justification or lawful excuse, will permit an inference of a wicked state of mind, i.e., legal malice, as opposed to actual malice."<sup>62</sup>

## 3. Assaults

Iowa Code section 694.1, prescribing penalties for assault and for assault and battery, was upheld in *State v. Vick*<sup>63</sup> against the contention that it was unconstitutionally vague for lack of statutory definition of these crimes. The supreme court utilized the familiar principle that common law elements are ascribed to crimes that are merely named but not defined in the Iowa Code.

## 4. Breaking and Entering

A conviction for breaking and entering<sup>64</sup> was upheld in *State v. Bone*,<sup>65</sup> notwithstanding the fact that neither the owner nor the tenant of the broken-into premises testified. "Want of consent by the owner or occupant to enter into his premises may be proved by circumstantial evidence,"<sup>66</sup> the court noted.<sup>67</sup>

## 5. Burglary

The supreme court took the occasion in *State v. Osborn*<sup>68</sup> to define night-

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59. 199 N.W.2d 104 (Iowa 1972).

60. See IOWA CODE § 707.3 (1973).

61. 199 N.W.2d at 107.

62. *Id.* at 108.

63. 205 N.W.2d 727 (Iowa 1973).

64. See IOWA CODE § 708.8 (1973).

65. 201 N.W.2d 80 (Iowa 1972).

66. *Id.* at 82.

67. See *State v. Hougland*, 197 N.W.2d 364, 365 (Iowa 1972): "'Breaking' means making an opening into a building by trespass and occurs when an intruder removes or puts aside some part of the structure relied on as an obstruction to intrusion. Opening an entrance door is a breaking." See also *State v. Mays*, 204 N.W.2d 862, 865 (Iowa 1973), quoting *State v. Jensen*, 245 Iowa 1363, 1373, 66 N.W.2d 480, 485 (1954): "[P]roof of defendant's possession of recently stolen property when it is also shown that the larceny took place in connection with a burglary is sufficient to warrant a conviction of breaking and entering." Cf. *State v. Osborn*, 200 N.W.2d 798, 805 (Iowa 1972): "It is apparent the possession of property recently stolen in connection with a burglary is not an 'essential element' of the crime of burglary, even though the unexplained possession of recently stolen property may give rise to an inference of the guilt of the possessor of the crime of larceny."

68. 200 N.W.2d 798 (Iowa 1972).

time within the burglary statute.<sup>69</sup> "It is the general rule, in the absence of a statutory provision to the contrary, that the 'nighttime,' within the definition of burglary, is, as was held at common law, a period between sunset and sunrise during which there is not daylight enough by which to discern a man's face,"<sup>70</sup> the court pointed out.<sup>71</sup>

## 6. Contempt of Court

a. *Trial by Jury.* Reversing *Newby v. District Court*,<sup>72</sup> the Iowa supreme court held in *Sarich v. Havercamp*<sup>73</sup> that trial courts can no longer *per se* deny a jury trial to defendants charged with contempt.<sup>74</sup> Rather, the view was adopted therein that "the penalty involved, that is, the statutorily authorized maximum penalty shall be the relevant criterion as the determination of a contemnor's right to a trial by jury, *vis-a-vis* the view the penalty actually imposed shall be determinative of the question."<sup>75</sup> *Sarich* had been charged with 28 counts of contempt of court for alleged violation of an injunction forbidding him from practicing dentistry. Thus facing the possibility of 14 years' imprisonment if convicted on all of these charges,<sup>76</sup> defendant demanded a jury trial, which was overruled. On trial to the court, he was convicted of five counts but was sentenced to only six months' imprisonment on these charges.

However, the instant judgment also revoked defendant's probation on a previous six-month sentence and the sentence on the instant charge was made to run consecutively with the serving of the earlier sentence. Thus, the supreme court concluded that either the "potential penalty" or "imposed penalty" criterion dictated vacating the judgment and remand for a trial by jury.<sup>77</sup>

By implication the pivotal time period for determining the right to a jury trial was set at six months, in light of the reference in *Sarich* to *Duncan v. Louisiana*,<sup>78</sup> which affords a sixth amendment right to trial by jury in State offenses carrying possible penalties exceeding six months' imprisonment unless the particular crime does not otherwise qualify as a petty offense, and to *Baldwin v. New York*,<sup>79</sup> which held that a contemnor cannot be denied "the important right to trial by jury where the possible penalty exceeds six months' imprisonment."<sup>80</sup> Because the maximum authorized imprisonment for con-

69. See IOWA CODE § 708.1 (1973).

70. 200 N.W.2d at 807, quoting *State v. Dougherty*, 186 Kan. 820, 821, 352 P.2d 1031, 1032 (1960).

71. See also note 63 *supra*.

72. "This court has repeatedly held for more than a hundred years that a person may be punished for contempt without a jury trial." *Newby v. District Court*, 259 Iowa 1330, 1342, 147 N.W.2d 886, 893-94 (1967).

73. 203 N.W.2d 260 (Iowa 1972).

74. See IOWA CODE § 665.2 (1973) and IOWA R. Crv. P. 330.

75. 203 N.W.2d at 268.

76. See IOWA CODE § 665.4 (1973).

77. 203 N.W.2d at 268.

78. 391 U.S. 145 (1968).

79. 399 U.S. 66 (1970).

80. *Id.* at 72-73.

viction of one count of contempt under Iowa law is six months,<sup>81</sup> there is still no right to jury trial unless defendant is charged with more than one count.<sup>82</sup>

b. *Violation of Injunction.* In *Sound Storm Enterprises, Inc. v. Keefe*,<sup>83</sup> the Iowa supreme court upheld contempt convictions against promoters of a rock music festival. Their contumacious acts consisted of violation of a modified temporary injunction which enjoined them from: (1) violating health and safety regulations under *Iowa Code* sections 444.18 and 332.23 as well as state health department regulations, and (2) committing or encouraging the committing of any public offense. Specifically, the first offense consisted of failing to obtain the requisite permits as well as noncompliance with the health and safety regulations whereas the second offense was based upon violation of *Code* section 204.13 (keeping a place resorted to for illegal using of narcotic drugs).

These dictates of the decree did not come within the general rule that "equity cannot enjoin the commission of criminal offenses."<sup>84</sup> Rather, as the supreme court explained: "[W]here as in this case a statutory enactment is regulatory in nature having for its primary purpose the promotion of public interest and welfare, then attendant criminality neither gives nor ousts jurisdiction in equity."<sup>85</sup>

Turning to the question of sufficiency of evidence to convict, the supreme court noted that "proof of contempt must be clear and satisfactory."<sup>86</sup> Such was the case here, with the court finding that "nothing more than futile token or simulated efforts were made by petitioners to effect compliance with the terms, spirit and intent of the restraining writs."<sup>87</sup> The "avalanche" was triggered by petitioners having launched the arrangements for the festival "before requisite health, sanitation and safety permits were secured or essential facilities arranged"<sup>88</sup> and subsequently concluded these arrangements after an adverse temporary restraining order. Discounting petitioners' claim they were unable to later stop the illegal activities (fostered by 20,000 persons contemporaneously swarming onto the scene), the court responded: "[P]etitioners created and brought on themselves the disability, if any, to comply with the aforesaid court orders." That is, "the situation did not change after issuance of the writs, but rather continued pursuant to petitioners' self-initiated premature plans and arrangements."<sup>89</sup> Finally, upholding both corporate and individual criminal liability, the court said it is clear that "where, [as here], writs are directed to the corporation and to its officers, agents or employees,

81. See *IOWA CODE* § 665.4 (1973).

82. Cf. *State v. Fagan*, 190 N.W.2d 800 (Iowa 1971) (right to jury trial on indictable misdemeanors).

83. 209 N.W.2d 560 (Iowa 1973).

84. *Id.* at 566.

85. *Id.*

86. *Id.* at 568.

87. *Id.*

88. *Id.*

89. *Id.*

all are equally amenable to punishment."<sup>90</sup>

### 7. Controlled Substances/Drugs

Several of the survey cases dealt with important issues of drug control.<sup>91</sup> While most of these involved interpretations of Iowa's former Uniform Narcotic Drug Act<sup>92</sup> and its former stimulant or depressant drug act,<sup>93</sup> the principles stated therein appear to be applicable to Iowa's successor statute, the Uniform Controlled Substances Act.<sup>94</sup>

a. *Exemptions for Lawful Use.* The constitutionality of placing the burden of proof on defendant to prove that he did not come within one of the exceptions of Iowa's former Uniform Narcotic Drug Act under which possession of narcotic drugs was not illegal was upheld in *State v. Lynch*.<sup>95</sup> While that statute (like the controlled substances act)<sup>96</sup> prohibited all possession of narcotic drugs except under certain enumerated circumstances, both statutes then expressly excuse the State from negating any exemption claimed by defendant. Rejecting defendant's claim that the State "should have been compelled to establish beyond a reasonable doubt that defendant *did not* come within any of the exceptions instead of casting on him the burden to show he *did*,"<sup>97</sup> the supreme court declared:

If an exception is material in arriving at the definition of the crime, it is generally held the State has the burden of showing the exception does not apply because it is then one of the essential elements of the offense. However, where the exception merely furnishes an excuse for what would otherwise be criminal conduct, the duty devolves upon the defendant to bring himself within the exculpatory provision.<sup>98</sup>

b. *Delivery/Sale.*

i. *Accommodation offense.* The constitutionality of the accommodation offense provision<sup>99</sup> in Iowa's new controlled substances act was upheld in *State v. Vietor*<sup>100</sup> against the principal contention that it improperly shifts the burden of proof to defendant. Essentially, this provision provides that following a conviction for delivery (or possession with intent to deliver), defendant may move for, and the court shall grant, a pre-sentence accommodation hearing at which the burden is on defendant to prove (by clear and convincing

90. *Id.* at 569.

91. See generally Dunahoo, *Iowa's Uniform Controlled Substances Act: A Coordinated Approach to Drug Control*, 21 DRAKE L. REV. 77 (1971).

92. See IOWA CODE ch. 204 (1971) (since repealed).

93. See IOWA CODE ch. 204A (1971) (since repealed).

94. See IOWA CODE ch. 204 (1973).

95. 197 N.W.2d 186 (Iowa 1972).

96. See IOWA CODE § 204.507 (1973).

97. 197 N.W.2d at 190.

98. *Id.*; accord *Horn v. Haugh*, 209 N.W.2d 119 (Iowa 1973).

99. See IOWA CODE § 204.410 (1973).

100. 208 N.W.2d 894 (Iowa 1973) (en banc).



evidence) that his offense was intended merely "as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient . . . to become addicted . . . ." If defendant carries his burden, then he shall be sentenced as if he had been convicted of simple possession (an indictable misdemeanor).

In *Vietor*, the trial court made a pretrial ruling that the accommodation offense provision in actuality created a second type of delivery offense, that is, delivery as an accommodation to another. Accordingly, he further ruled that a felony conviction for delivery under section 204.401 requires the State to prove to a jury beyond a reasonable doubt that the delivery was made with intent to profit thereby or to induce the recipient to become addicted. So viewed, the trial court did not hold these sections totally void, the constitutional infirmities being "cured" by his restructuring of the statute.

On the State's pretrial certiorari proceeding, the supreme court reversed (by a 5-4 vote) and thus left sections 204.401 and 204.410 intact. This court concluded section 204.410 "establishes only a postconviction sentencing procedure by which the convicted person may, if he so desires, offer evidence in mitigation of sentence."<sup>101</sup> Accordingly, this section "defines no crime [and] adds no essential elements to the crime defined in section 204.401 . . . ."<sup>102</sup> Meanwhile, section 204.401 was construed as creating "a separate and distinct crime without regard to the purpose or motive of the deliverer,"<sup>103</sup> with all of the essential elements of the crime of delivery being contained therein.<sup>104</sup>

Procedural aspects of the accommodation offense provision were dealt with in two other cases. In *State v. Still*,<sup>105</sup> the court pointed out that the terminology of section 204.410 "clearly indicates it is incumbent upon a convicted defendant to formally request a hearing before the court at the sentencing stage if he is to preserve error by reason of the trial court's failure to follow the provisions of this statute."<sup>106</sup> Thus, defendant's appellate claim of excessive sentence for failure to sentence under section 204.410 lacked merit since defendant had not moved for an accommodation hearing. Furthermore, the court held in *State v. McGranahan*<sup>107</sup> that in an accommodation hearing the trial court "was not bound to accept defendant's testimony because it was not contradicted."<sup>108</sup>

ii. *Lesser included offense.* It was held in *State v. Habhab*<sup>109</sup> that possession of marijuana was not a lesser included offense of the crime of sale of

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101. *Id.* at 898.

102. *Id.*

103. *Id.*

104. In another case decided the same day, the supreme court summarily affirmed by the same 5-4 vote defendant's conviction for delivery and the trial court's subsequent finding that "defendant failed to prove his alleged ground (accommodation) for mitigation of punishment." *State v. Thomas*, 208 N.W.2d 902 (Iowa 1973) (en banc).

105. 208 N.W.2d 887 (Iowa 1973).

106. *Id.* at 894.

107. 206 N.W.2d 88 (Iowa 1973).

108. *Id.* at 93.

109. 209 N.W.2d 73 (Iowa 1973) (en banc).

marijuana under Iowa's former narcotic drugs act. "Sale" therein had the statutory definition of "sale, barter, exchange, gift, or offer therefor,"<sup>110</sup> and accordingly "[a] showing of possession . . . was not required as an element of the offense."<sup>111</sup> Conceding that the evidence in the instant case "show[s] a possession of the marijuana in connection with its sale," the supreme court nevertheless pointed out that "this does not in itself make possession an included offense in the sale."<sup>112</sup> In other words, the existence of such evidentiary facts cannot supply an included offense "outside the elements of the major crime."<sup>113</sup> Thus, even under the revised lesser included offense test recently enunciated in *State v. Hawkins*,<sup>114</sup> "it is quite possible to commit one crime in the act of committing another and yet not have it an included offense. It is not included as a part of the elements of the major offense,"<sup>115</sup> the court explained. The definitional language in the new controlled substances act does not appear to command a different decision.

c. *Possession.*

i. *Control of premises.* In *State v. Reeves*,<sup>116</sup> the Iowa supreme court for the first time promulgated comprehensive guidelines as to what constituted possession under Iowa's former stimulant or depressant drug act. These guidelines were expressly made applicable to prosecutions for violation of Iowa's controlled substances act. They include:

- (1) Unlawful possession of narcotics is established by proof:
  - (a) that the accused exercised dominion and control (i.e., possession) over the contraband,
  - (b) that he had knowledge of its presence, and
  - (c) that the accused had knowledge that the material was a narcotic.
- (2) These necessary elements of unlawful possession may be established by circumstantial evidence and any reasonable inferences drawn from such evidence.
- (3) Proof of opportunity of access to a place where narcotics are found will not, without more, support a finding of unlawful possession.
- (4) But dominion and control (1-a) by the accused over the narcotics does not mean the narcotic needs to be found on his person, nor does it mean that he must have had sole and exclusive use of the premises on which drugs are found.

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110. See IOWA CODE § 204 (1971) (since repealed).

111. 209 N.W.2d at 75.

112. *Id.*

113. *Id.*

114. 203 N.W.2d 555 (Iowa 1973). For a further discussion of this case, see text accompanying notes 776-770, *infra*.

115. 209 N.W.2d at 75.

116. 209 N.W.2d 18 (Iowa 1973).

- (5) Constructive possession is all that is necessary and occurs when the accused maintains control or a right to control the narcotic; possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another.
- (6) If the premises on which the drugs are found are exclusively accessible to the accused and subject to his use, possession or control, knowledge of their presence on such premises (1-b) coupled with his ability to maintain dominion control (1-a) may be inferred.
- (7) Even if the accused does not have exclusive control of the hiding place possession may be imputed if he has not abandoned the narcotic and no other person has obtained possession.
- (8) Knowledge of the narcotic character (1-c) of the drug, as well as of their presence (1-b) may be shown by the conduct, behavior and declarations of the accused.<sup>117</sup>

Summarizing these principles, the supreme court said that the Iowa procedure in prosecutions for unlawful possession of controlled substances or drugs will be that "the State must establish beyond a reasonable doubt that the accused knew of the presence of such substances or premises occupied and controlled by him, either exclusively or jointly with others and the nature of the material."<sup>118</sup> However, the type of proof required varies according to whether the premises are in the exclusive or joint possession of the accused. If the accused exclusively possesses the premises on which the substances or drugs are found, "knowledge of their presence on such premises coupled with his ability to maintain control over such substances may be inferred." This inference of knowledge, of course, "is rebuttable and not conclusive;" however, "no further proof of knowledge by the State is required . . . ."<sup>119</sup> On the other hand, if the accused has only joint possession of the premises, "knowledge of the presence of the substances on the premises and the ability to maintain control over them by the accused will not be inferred but must be established by proof." This proof may be by way of evidence establishing the accused's actual knowledge, his incriminating statements or circumstantial evidence from which the jury "might lawfully infer knowledge . . . ."<sup>120</sup> Either way, the question of knowledge is one for the jury upon instructions embodying these principles.

ii. *Quantity of substance.* *State v. Grady*<sup>121</sup> established that even a miniscule quantity of a drug is sufficient to support a conviction for violation of

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117. *Id.* at 23.

118. *Id.* at 23.

119. *Id.*

120. *Id.*

121. 201 N.W.2d 493 (Iowa 1972).

Iowa's former narcotic drugs act, rather than requiring that a usable quantity be involved. Pointing out that the *Code* "defines marijuana, but makes no distinction as to the quantitative amount of marijuana in any gross substance containing the same," the court concluded, therefore, that the statute was "qualitative rather than quantitative . . . ." <sup>122</sup> Accordingly, it was immaterial in the instant prosecution for illegal sale of marijuana that there was "an insufficient quantity of marijuana in the exhibit to be used in the usual manner, that is, to be smoked," or "to produce a narcotic effect." <sup>123</sup> The terminology in the successor statute (the uniform controlled substances act) is similar, including the express language "any quantity" in several sections. <sup>124</sup>

#### 8. *Driving While Operator's License Under Suspension*

A conviction for driving while operator's license under suspension <sup>125</sup> was reversed in *State v. Hoffer* <sup>126</sup> because of lack of proof that defendant's license was still under suspension at the time he was driving. Effective April 19, 1970, defendant's driving privilege was suspended for ninety days, with the suspension to remain in effect until such time as he posted proof of financial responsibility. <sup>127</sup> Thus, the fixed suspension period expired July 18, 1970, and defendant was stopped on October 13, 1970, for a faulty headlight. The State's claim of sufficiency of evidence rested entirely on the ninety-day notice served on March 19, 1970, and "absence of license in defendant's possession at the time he was stopped." <sup>128</sup> The supreme court said: "It is as reasonable to believe defendant may have tolled the suspension by proving financial responsibility as not." <sup>129</sup> With the State having the burden of proving defendant's license was still suspended on October 13, 1970, there was insufficient evidence for a jury question since "[p]roof defendant's license might have been suspended at the time does not support a finding it was." <sup>130</sup> The only evidence of continued suspension of defendant's license was a police teletype message at the time defendant was stopped that he was under suspension. This message being hearsay, the State conceded that it was offered only to show the reason for arresting defendant and "not to establish the truth of the message." <sup>131</sup> Agreeing, the supreme court determined: "What the message said has no probative value on the issue of license suspension." <sup>132</sup>

#### 9. *Failure to Have Motor Vehicle Under Control*

A motorist's unreasonable speed while approaching a sharp curve was

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122. *Id.* at 496.

123. *Id.*

124. *See, e.g.,* IOWA CODE §§ 204.204(4), .208(2), and .210(2) (1973).

125. *See* IOWA CODE § 321A.32(1) (1973).

126. 197 N.W.2d 368 (Iowa 1972).

127. *See* IOWA CODE § 321A.18 (1973).

128. 197 N.W.2d at 369.

129. *Id.*

130. *Id.* at 370.

131. *Id.* at 369.

132. *Id.*

held in *State v. Nelson*<sup>133</sup> to be a proper basis for a conviction for failure to have motor vehicle under control. Code section 321.288 is essentially "a speed statute," the supreme court determined, adding that "[a] speed which is reasonable and proper under some circumstances may be excessive under others."<sup>134</sup>

#### 10. False Drawing and Uttering

a. *Evidence of Intent to Defraud.* That defendant is entitled to show restitution, not as a defense but as to evidence of drawer's lack of intent to defraud, in a prosecution for false drawing and uttering<sup>135</sup> was determined in *State v. Johnson*.<sup>136</sup> The reversible error occurred here during defendant's cross-examination of the person given the bad check. After the drawee stated that defendant had given him bad checks in the past and that defendant's father had paid them, defendant attempted to show restitution of the check instantly involved "for the limited purpose of aiding the jury in determining whether defendant acted with an intent to defraud."<sup>137</sup> Holding that such evidence could not be excluded, the supreme court added: "It would be proper to instruct the jury on the limited purpose for which it might consider such evidence."<sup>138</sup>

Another error occurred in this same case when the trial court excluded evidence of past transactions between defendant and the drawee involving bad checks. Defendant had attempted to show that because of defendant's previous bad checks to the drawee which subsequently were made good by defendant's father, the drawee was not deceived by the instant bad check. Holding the exclusion of such evidence to be error, the supreme court said: "For the [limited] purpose of determining whether defendant obtained the money by intentionally false representations, it was material to know defendant's relations to the bank and the manner in which the business between them had been carried on."<sup>139</sup>

b. *The Ten-Day Presumptive Evidence Rule.* The Code section 713.4 ten-day presumptive evidence rule was characterized in *State v. Mason*<sup>140</sup> as "merely articulat[ing] an evidentiary rule." Accordingly, "[f]ailure to pay the check after a ten-day notice is not an element"<sup>141</sup> of the crime of false uttering of a check and the trial court thus correctly refused to instruct that defendant could not be convicted unless he was served with a notice of non-payment at least ten days before filing of the charge. This crime, instead, is committed "when the check writer receives a thing of value, assuming all

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133. 207 N.W.2d 751 (Iowa 1973).

134. *Id.* at 753.

135. See IOWA CODE § 713.3 (1973).

136. 196 N.W.2d 563 (Iowa 1972).

137. *Id.* at 568.

138. *Id.* at 570.

139. *Id.* at 571.

140. 203 N.W.2d 292 (Iowa 1972).

141. *Id.* at 295.

other elements are present"<sup>142</sup> and *Code* section 713.4 does not accord a ten-day grace period to make restitution for a worthless check. Nor is defendant entitled to a ten-day notice, but then the State is precluded from the benefit of the rebuttable presumption of fraudulent intent. All that this provision imports is that failure of the maker or drawer of the check to pay the holder the amount due thereon within ten days after sufficient notice that the check has not been paid by the drawee constitutes "prima facie evidence of intent to defraud."<sup>143</sup> The State, of course, is free to elect to not rely on section 713.4, as it did instantly.<sup>144</sup>

### 11. *Flag Desecration*

The constitutionality of Iowa's flag desecration statute<sup>145</sup> was upheld in *State v. Farrell*,<sup>146</sup> against the twin contentions that the act is unconstitutionally overbroad and that it cannot constitutionally be applied to symbolic political protest.<sup>147</sup> Accordingly, defendant's conviction for burning a United States flag was upheld on an 8-1 vote. Applying the *United States v. O'Brien*<sup>148</sup> guidelines, the court agreed that "the State unquestionably has a compelling vital interest in preservation of the public peace, and in furtherance thereof may prohibit forms of conduct which constitute a threat thereto."<sup>149</sup> Declaring that section 32.1 "is no longer applicable to the utterance of pure speech,"<sup>150</sup> the court determined that this statute, as applied, "is directed to and regulates the form by which defendant's message was expressed, not the content thereof."<sup>151</sup> Thus, the court concluded that *Code* section 32.1, as here applied, "is sufficiently irrelative to suppression of free expression."<sup>152</sup>

That no evidence was presented disclosing that a breach of peace was committed or imminent was considered immaterial, "since the physical act of burning a United States flag is conduct which could reasonably be expected to provoke a breach of peace."<sup>153</sup> Moreover, only a minimal restriction on expression emanates from section 32.1, which is "no more than essential to a furtherance of the State's legitimate interest in maintaining public order."<sup>154</sup> The overbreadth challenge was not reached because of defendant's lack of standing under the *Raines* doctrine.<sup>155</sup>

142. *Id.*; accord *State v. Kimball*, 203 N.W.2d 296, 300 (Iowa 1972): "When the other elements exist, the crime under § 713.3 is complete whether or not the check is ever presented to the drawee."

143. See IOWA CODE § 713.4 (1973).

144. 203 N.W.2d 292, 295 (Iowa 1972).

145. IOWA CODE § 32.1 (1973).

146. 209 N.W.2d 103 (1973) (en banc).

147. This latter claim had not been asserted in *State v. Waterman*, 190 N.W.2d 809 (Iowa 1971).

148. 391 U.S. 367, 377 (1968).

149. 209 N.W.2d at 107.

150. *Id.* at 106, citing *Street v. New York*, 394 U.S. 576 (1969).

151. *Id.* at 107.

152. *Id.*

153. *Id.*

154. *Id.* at 108.

155. See *United States v. Raines*, 362 U.S. 17, 21 (1960): "[O]ne to whom appli-



12. *Going Armed with Intent*

That the State is not required in a prosecution for going armed with intent<sup>156</sup> to introduce proof of the particular person against whom defendant intended to use his gun was settled in *State v. Buchanan*.<sup>157</sup> The supreme court explained that Code section 695.1 "contains no requirement that a person going forth with a pistol have intent to shoot some particular person or class of persons. If he intends to use the weapon against the person of *someone* unlawfully, the intent element of the crime is satisfied."<sup>158</sup> Additionally, the fact that defendant had only proceeded a short distance from his home does not present a question of sufficiency of evidence. Indeed, "[t]he distance an armed individual goes from his home might be relevant upon the intent element in a proper case, but that would be a matter for the jury."<sup>159</sup>

13. *Hunting by Artificial Light*

In *State v. Hocker*,<sup>160</sup> the supreme court found error in the trial court's instruction in a prosecution for hunting by artificial light<sup>161</sup> that the jury should find defendant not guilty if it determined that he was on the premises in question at the request of the landowner for the purpose of tracking down animals that had been killing the owner's domestic animals. On this State's appeal following defendant's acquittal,<sup>162</sup> the supreme court said: "It was error to instruct on an exception to the statute which is plainly not present in its language."<sup>163</sup> Here, "[d]ogs were not being used" and "[n]o treed animal was being pursued"<sup>164</sup> (the only exceptions in the statute).

14. *Interference with the Administration of Justice*

The crime of interference with the administration of justice<sup>165</sup> was differentiated from that of resisting execution of process<sup>166</sup> in *State v. Graham*.<sup>167</sup> Any willful, improper obstruction of a law enforcement officer's effectuation of an administrative duty violates the former, the supreme court pointed out. An officer acts in an administrative capacity while engaged "in the performance of his duties required of him by a court order, judgment or decree, civil

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cation of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."

156. See IOWA CODE § 695.1 (1973).

157. 207 N.W.2d 784 (Iowa 1973).

158. *Id.* at 786.

159. *Id.*, citing *State v. Hunley*, 167 N.W.2d 645 (Iowa 1969).

160. 201 N.W.2d 74 (Iowa 1972).

161. See IOWA CODE § 109.93 (1973).

162. *Id.* § 793.9.

163. 201 N.W.2d 74, 75 (Iowa 1972).

164. *Id.*

165. See IOWA CODE § 723.1 (1973).

166. *Id.* § 742.1.

167. 203 N.W.2d 600 (Iowa 1973).

or criminal. . . ."<sup>168</sup> But when he acts or attempts to act "by virtue of his general authority he is performing an executive function."<sup>169</sup> Accordingly, any person "willfully resisting or opposing him in the carrying out of such functions would be violating Code § 742.1"<sup>170</sup> (i.e., resisting execution of process).

In *Graham*, the criminal conduct arose when the deputies were ordered (in a supplemental divorce decree) to take custody of two minor children from defendant's friend. Upon the deputies' inquiry at defendant's apartment, and advisement of the judicial decree,<sup>171</sup> defendant denied the children's presence and refused entry to the deputies—but the deputies thereupon got a warrant and the children were found therein. Defendant's conviction for interference with the administration of justice was affirmed since the sheriff's deputies were effectuating a judicial decree (for taking custody of minor children) and thus "any willful, improper obstruction of such administration of justice would constitute a violation of Code § 723.1 . . . ."<sup>172</sup>

### 15. *Larceny*

A larceny<sup>173</sup> conviction was reversed in *State v. Durham*<sup>174</sup> because the owner turned the property over to defendant.<sup>175</sup> "The owner's nonconsent has always been an indispensable element to the crime of larceny,"<sup>176</sup> the supreme court declared. In fact, as here, "even though an accused conceives a larcenous scheme, where it becomes known to the property owner and the property owner informs the police and furnishes the property for taking so as to apprehend the accused, the owner thereby consents to the taking and the accused is not guilty of larceny."<sup>177</sup>

### 16. *Larceny of a Motor Vehicle*

Overruling *State v. Everett*,<sup>178</sup> the supreme court held in *State v. Hawkins*<sup>179</sup> that operating a motor vehicle without the owner's consent<sup>180</sup> can be a lesser included offense of the crime of larceny of a motor vehicle.<sup>181</sup> Never-

168. *Id.* at 603.

169. *Id.*

170. *Id.*

171. "[I]t was the State's burden to prove, beyond a reasonable doubt, defendant acted 'intentionally' and 'knew' the officers were executing or attempting to execute a court order." *Id.* at 604.

172. *Id.* at 603.

173. See IOWA CODE § 709.1 (1973).

174. 196 N.W.2d 428 (Iowa 1972).

175. For the factual situation in *Durham*, see text accompanying notes 47-50, *supra*.

176. 196 N.W.2d at 430.

177. *Id.*, quoting 10 A.L.R.3d 1126. See also *State v. Aosssey*, 201 N.W.2d 731 (Iowa 1972) concerning defendant's allegedly mistaken belief that his accomplice had authority to remove the property and thus *mens rea* was lacking.

178. 157 N.W.2d 144 (Iowa 1968).

179. 203 N.W.2d 555 (Iowa 1973).

180. See IOWA CODE § 321.76 (1973).

181. *Id.* § 321.82.

theless, the court reiterated that "the evidence must justify the submission of the included offense" and thus "if there is no evidence from which the jury could find the defendant guilty of the included offense, then such included offense need not be submitted."<sup>182</sup> Applying this test to the instant facts, the court determined that "it would have been impossible for defendant to commit the offense charged without a showing of each element necessary to convict him of the lesser offense."<sup>183</sup> This was because the State's evidence showed that defendant had taken another's automobile without permission and had been apprehended while driving it. This without more would constitute the crime of operating a motor vehicle without the owner's consent, and proof of one additional element (*i.e.*, defendant's intent to permanently convert the automobile to his own use) was all that was necessary to constitute the crime of larceny of a motor vehicle.<sup>184</sup> Accordingly, defendant's conviction for larceny of a motor vehicle was reversed because of the failure to submit an instruction on the aforementioned lesser included offense.

### 17. *Larceny in the Nighttime*

That a theft must be made from *within* (and not from) a building, vessel, or motor vehicle in order to constitute larceny in the nighttime<sup>185</sup> was made clear in *State v. Smith*.<sup>186</sup> Reversing defendant's conviction for stealing a tire and rim from a wheel *on* an automobile, the supreme court noted: "There was no indication that defendant had entered the Buick passenger section, trunk, or engine compartment."<sup>187</sup> The court said that the word "in" is "more restrictive than 'from'. We believe that 'in' as used here means 'within a particular place' or 'on the interior or inner side: within.'"<sup>188</sup>

### 18. *Loitering*

In its first interpretations of anti-loitering statutes<sup>189</sup> since *Papachristou*

182. 203 N.W.2d at 557, quoting *State v. Marshall*, 206 Iowa 373, 375, 220 N.W. 106 (1928).

183. 203 N.W.2d at 557.

184. Contrastingly, in *State v. Everett*, 157 N.W.2d 144 (Iowa 1968) the factual situation was similar but the trial court (and the supreme court) refused to consider the evidence of the case, relying instead on an abstract proposition that it would have been possible for the motor vehicle to have been stolen without anyone operating it (*e.g.*, by using a crane and truck). "Proof of the operation of the car which is an essential element of section 321.76 would in such instances be irrelevant" and thus the crime of operating a motor vehicle without the owner's consent is not "necessarily included" in the crime of larceny of a motor vehicle, the court reasoned, notwithstanding the lack of evidence of any such bizarre events in the instant case. 157 N.W.2d at 149. Of course, if this hypothetical ever materializes, then *State v. Hawkins* would not require the submission of the lesser included offense, since the evidence of the case would indicate the lack of defendant's operating of the vehicle.

185. See IOWA CODE § 709.4 (1973).

186. 196 N.W.2d 439 (Iowa 1972).

187. *Id.* at 440.

188. *Id.*

189. IOWA CODE § 746.1 (1973) ("Vagrants" defined) was declared unconstitutional by the trial court and thus was not reviewed in the instant appeal of defendant's conviction under the municipal ordinance.

v. *City of Jacksonville*,<sup>190</sup> the Iowa supreme court upheld a distinguishable municipal ordinance<sup>191</sup> in *Henrichs v. Hildreth*.<sup>192</sup> Nevertheless, the court "suggested" certain guidelines for a constitutionally-acceptable anti-loitering ordinance. Specifically, the court held that such an ordinance like the instant one, is not unconstitutional on its face if it is "directed to those persons, grouped or assembled, who obstruct the free and open use of public walkways by pedestrians" and if it "is stated in sufficiently definite terms to enable all reasonable persons to know what conduct is proscribed and what acts will make them subject to the penalty provided."<sup>193</sup>

### 19. *Manslaughter*

A conviction for involuntary manslaughter<sup>194</sup> was reversed in *State v. Davis*<sup>195</sup> because of the State's testimony regarding defendant's invalid driver's license "in the absence of a showing of a causal relationship between the invalid license and the collision."<sup>196</sup> After the officer's bare statement indicating a separate offense, "[t]he subject was pursued no further. Whether defendant's license had expired or was invalid for other reasons does not appear."<sup>197</sup>

The supreme court also held in *Davis* that defendant is not entitled to an instruction on recklessness that "even if he was aware of a dangerous situation, recklessness would be shown only if he did not exercise the slightest care to avoid injury to others . . . ."<sup>198</sup> As to defendant's belated effort to stop, the supreme court reaffirmed:

One who, by his recklessness has created a hazard which he should have foreseen and guarded against, is not exonerated from the charge of gross indifference to the safety of others by a futile last minute effort to retrieve the situation and avoid the danger and injury. Such an attempt may have some bearing upon the degree of the indifference but it is not an absolute cleaning of the slate.<sup>199</sup>

It was further clarified in *Davis* that a death caused by a defendant who was driving "while under the influence" of an alcoholic beverage is a valid basis for involuntary manslaughter, the same as was the former foundational

190. 405 U.S. 156 (1972).

191. The instant ordinance reads:

It shall be unlawful for persons to collect, assemble or group together and after being so collected, assembled or grouped together, to stand, or loiter, on any sidewalk, parking or any street corner, or at any other place in the city to the hindrance or obstruction to free passage of any person or persons passing on or along any sidewalk or street in said city.

See Des Moines ordinance § 32-28.01.

192. 207 N.W.2d 805 (Iowa 1973).

193. *Id.* at 808, citing *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) and *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965).

194. See Iowa Code § 690.10 (1973).

195. 196 N.W.2d 885 (Iowa 1972).

196. *Id.* at 894.

197. *Id.*

198. *Id.* at 891.

199. *Id.*

crime of operating a motor vehicle while intoxicated. These two expressions (O.M.V.I. and O.M.V.U.I.) "mean essentially the same thing." And, even if they did not, "the State's manslaughter charge (predicated on defendant's driving while under the influence of intoxicants) involves involuntary manslaughter based on death resulting from the commission of a misdemeanor which is in itself wrongful (*malum in se*)."<sup>200</sup> On a related matter, the court also reiterated in *Davis* that "if the jurors were not persuaded defendant was intoxicated, they could still take his drinking into consideration under the charge of recklessness."<sup>201</sup>

## 20. Obscenity

In an octology of recent significant cases, the United States Supreme Court has made several revisions in the federal constitutional guidelines for state anti-obscenity prosecutions.

a. *The Tripartite Standard.* In *Miller v. California*,<sup>202</sup> the Supreme Court redefined "the standards which must be used to identify obscene material that a State may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment."<sup>203</sup> Specifically, the new basic guidelines for the trier of fact must be: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest [citations], (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."<sup>204</sup> Thus, the "Burger Court" discarded the "'utterly without redeeming social value' test of *Memoirs v. Massachusetts*"<sup>205</sup> in favor of the less stringent "lacks serious literary value" prong of the aforementioned three-part test.

i. *Statutory adjustments.* The Court thereupon added: "Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed."<sup>206</sup> Emphasizing that its function is not to propose specifics of State regulatory schemes, the Court said: "That must await their concrete legislative efforts."<sup>207</sup> Rather, the Court's role is "to define the area in which [the States] may chart their own course in dealing with

200. *Id.* at 890.

201. *Id.* at 891; see also *State v. Boner*, 203 N.W.2d 198, 201 (Iowa 1972): "[T]he question of intoxication may be considered as bearing upon the wilful and wanton misconduct of defendant in violating an ordinary law of the road."

202. 93 S. Ct. 2607 (1973).

203. *Id.* at 2612.

204. *Id.* at 2615.

205. *Id.*, citing *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

206. *Id.* at 2616.

207. *Id.* at 2615.



obscene material."<sup>208</sup> Dictating that "State statutes designed to regulate obscene materials must be carefully limited," the Court "confine[d] the permissible scope of such regulation to works which depict or describe sexual conduct."<sup>209</sup> That conduct "must be specifically defined by the applicable state law, as written or authoritatively construed," the Court added.<sup>210</sup> Whether violations of an existing generally-worded state obscenity statute (like Iowa's Code sections 725.1-.5) can be instantly prosecuted without benefit of legislative revisions to specifically detail the acts of sexual conduct expressly proscribed is not made clear. The abovementioned reference, in the alternative, to *construction* of the applicable State law suggests that prosecutions under existing generally-worded statutes may lie provided that the trial court properly instructs the jury that obscene references must relate to portrayal of acts of sexual conduct and the aforementioned three-part obscenity definition is incorporated therein. Nevertheless, prudent State legislatures should hasten to revise their applicable statutes.<sup>211</sup> Incidentally, the Supreme Court lightened their burdens in justifying legislative controls of obscene materials. In *Kaplan v. California*, the Court said: "States need not wait until behavioral experts or educators can provide empirical data before enacting controls of commerce in obscene materials unprotected by the First Amendment or by a constitutional right to privacy. We have noted the power of a legislative body to enact

208. *Paris Adult Theatre I v. Slaton*, 93 S. Ct. 2628, 2633 (1973).

209. *Miller v. California*, 93 S. Ct. 2607, 2614-15 (1973).

210. *Id.* at 2615.

211. The proposed sections on obscenity in the Final Report of the Iowa Criminal Code Review Study Committee, which was submitted to the general assembly in January 1973, provide:

Sec. 2505. *NEW SECTION. FURNISHING PORNOGRAPHY TO MINORS.* A person commits a serious misdemeanor when he knowingly exhibits or furnishes to any minor under seventeen years of age any play, dance, or other performance, or any picture, writing, recording, or other form of communication, which consists in whole or part of any of the following:

1. A description, portrayal, or exhibition emphasizing human genitalia, or the pubes, whether covered or not, which goes beyond customary limits of candor in such matters.

2. A sex act, or sexual contact between humans and animals, or masturbation, or a simulation of any of these.

3. Sadistic or masochistic practices.

Nothing in this section prohibits the use of appropriate material for educational purposes in any accredited school, or in any educational program in which the minor is participating with the informed consent of his parent or guardian. Nothing in this section prohibits the attendance of minors at an exhibition or display of art works with the informed consent of his parent or guardian.

Sec. 2506. *NEW SECTION. PUBLIC DISPLAY OF OFFENSIVE SEXUAL MATERIAL.* A person commits a serious misdemeanor when he knowingly exhibits or displays or permits to be exhibited or displayed any of the following in such a manner that such exhibit or display is easily visible from any street, sidewalk or thoroughfare, or from any transportation facility, or from any residence when he knows that the owner of such residence objects to such exhibit or display:

1. Human genitals or pubes without a full opaque covering, or any graphic or pictorial depiction thereof, or any depiction of the covered male genitals in a discernibly erect state.

2. An actual or simulated sex act, or sexual contact between humans and animals, or masturbation, or any graphic or pictorial depiction thereof.

3. Any depiction of sadistic or masochistic practices.



such regulatory laws on the basis of unprovable assumptions."<sup>212</sup>

ii. *The Iowa standard.* Four months prior to this Supreme Court ocology, the Iowa supreme court in *State v. Lavin*<sup>213</sup> upheld the constitutionality of Iowa's obscenity statute<sup>214</sup> on the sole basis that trial courts must incorporate the standards of *Memoirs v. Attorney General*.<sup>215</sup> That is, the State must establish the obscene nature of the questioned material through proof (beyond a reasonable doubt) of the coalescence of the three factors of the then-existing federal constitutional standard of *Memoirs v. Attorney General*. Accordingly, the latest pronouncement of the Iowa supreme court includes a requirement that the State prove, *inter alia*, that "the material is utterly without redeeming social value,"<sup>216</sup> whereas the new applicable federal constitutional standard is less stringent (*i.e.*, that the material "lacks serious literary . . . value").<sup>217</sup> This leaves open to question whether Iowa trial courts can immediately apply the new federal standard or whether they must apply the former federal standard incorporated in *State v. Lavin* in the interim until a test case is prosecuted and appealed to the Iowa supreme court. It appears that the Iowa supreme court will adjust its obscenity test, since all that it required in *Lavin* were the minimal federal constitutional requirements of the first amendment (as the latter was currently interpreted by the United States Supreme Court at that time), and *Miller v. California*<sup>218</sup> has now lessened these minimal federal constitutional requirements. No State constitutional issues were raised or discussed in *Lavin*. Indeed, the Iowa supreme court left little doubt that its approach in *Lavin* was dictated by the federal constitutional standard:

The decisions of the United States Supreme Court also make plain that a state statute like ours will stand if the courts of the state incorporate the *Memoirs*' requirements in the application of [the] statute . . . .

The ultimate question on this issue, therefore, is whether we will apply the *Memoirs*' definition in the application of our statute. We believe we should do so . . . . [C]ourts should construe statutes to avoid unconstitutionality if they reasonably can.<sup>219</sup>

b. *The "Community".* Another major revision made in *Miller v. California* was to eliminate the heretofore constitutional requirement that a "national" standard be utilized in determining whether contemporary community standards are offended by the allegedly obscene material. Specifically, the Court stated in *Miller*: "We hold the requirement that the jury evaluate the materials with reference to 'contemporary standards of the

212. 93 S. Ct. 2680, 2684 (1973); *accord* *Paris Adult Theatre I v. Slaton*, 93 S. Ct. 2628, 2636-37 (1973).

213. 204 N.W.2d 844 (Iowa 1973).

214. See Iowa CODE § 725.5 (1973): "Whoever sells . . . any obscene, lewd, indecent, lascivious, or filthy book . . . ."

215. 383 U.S. 413 (1966).

216. *State v. Lavin*, 204 N.W.2d 844, 848 (Iowa 1973).

217. *Miller v. California*, 93 S. Ct. 2607, 2615 (1973).

218. *Id.*

219. 204 N.W.2d 844, 849 (Iowa 1973).

State of California' . . . is constitutionally adequate."<sup>220</sup> Whether the new non-national standard must only be a statewide standard or whether an individualized city-by-city standard can be applied was not made clear.<sup>221</sup> Moreover, the Iowa supreme court noted in *Lavin* that the then-existing *Memoirs* standards incorporate "contemporary national community standards,"<sup>222</sup> but it is expected to follow the federal court's lead once the specific non-national standard is figured out.

c. *No Immunity for "Adult" Materials.* The Supreme Court clearly rejected any demarcation of the application of obscenity laws on the basis of the age of the intended customer. Refusing to carve out an exception from obscenity laws for materials distributed only to consenting adults, the Supreme Court said in *Paris Adult Theatre I v. Slaton*:<sup>223</sup> "We categorically disapprove the theory . . . that obscene, pornographic films acquire constitutional immunity from state regulation simply because they are exhibited for consenting adults only."<sup>224</sup> A similar stance was taken concerning "adult" books in *Kaplan v. California*, to wit: "[C]ommercial exposure and sale of obscene materials to anyone, including consenting adults, is subject to state regulation."<sup>225</sup>

d. *Obscene Words, Pictures, Conduct.* That the new obscenity standards are applicable to pictureless "adult" books was made clear in *Kaplan v. California*, with the Supreme Court holding that "expression by words alone can be legally 'obscene' in the sense of being unprotected by the First Amendment."<sup>226</sup> The book in question contained no pictures but instead consisted entirely of repetitive explicit descriptions of "[a]lmost every conceivable variety of sexual contact, homosexual and heterosexual."<sup>227</sup> Applying the obscenity standards without distinction as to "the medium of the expression," the Supreme Court pointed out: "Obscenity can, of course, manifest itself in conduct, in the pictorial representation of conduct, or in the written and oral description of conduct."<sup>228</sup>

220. *Miller v. California*, 93 S. Ct. 2607, 2620 (1973), accord *Kaplan v. California*, 93 S. Ct. 2680, 2685 (1973).

221. The confusion arises because of the following conflicting statements, in addition to the aforementioned reference to "contemporary standards of the State of California": "Under a national Constitution, fundamental First Amendment limitations of the powers of the States do not vary from community to community" and "our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation . . . ." Contrastingly, the Court also observed: "The adversary system, with lay jurors as the usual ultimate factfinders in criminal prosecutions, has historically permitted triers-of-fact to draw on the standards of their community" and "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of *Maine* or *Mississippi* accept public depiction of conduct found tolerable in *Las Vegas*, or *New York City*." *Id.* at 2618-19 (emphasis added).

222. *State v. Lavin*, 204 N.W.2d 844, 848 (Iowa 1973) (emphasis added).

223. 93 S. Ct. 2628 (1973).

224. *Id.* at 2635.

225. 93 S. Ct. 2680, 2685 (1973).

226. *Id.* at 2683.

227. *Id.*

228. *Id.* at 2684.

Two other recent United States Supreme Court decisions are illustrative of the application of obscenity standards to conduct and to words. In *California v. LaRue*,<sup>229</sup> the Court held that it was constitutionally permissible for States to broadly regulate "obscene" live entertainment in State-licensed liquor establishments (e.g., go-go girls in taverns),<sup>230</sup> notwithstanding whether such broad censorship if applied across the board to all other mediums of expression could pass muster under the first and fourteenth amendments. "[T]he broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals,"<sup>231</sup> the Court pointed out. In *Cohen v. California*,<sup>232</sup> the Court reversed a conviction under a State statute proscribing "disturbing the peace . . . by . . . offensive conduct . . . ." The prosecution was based upon defendant's wearing of a jacket inscribed "Fuck the Draft." The Court majority pointed out that "this is not . . . an obscenity case" since no one's prurient interest would be aroused by "this vulgar allusion to the Selective Service System" and since an illegal obscene expression "must be, in some significant way, erotic."<sup>233</sup>

e. *Expert Testimony/Best Evidence.* The Supreme Court also countenanced not requiring "expert" affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence."<sup>234</sup> In *Paris Adult Theatre I v. Slaton*, in which the two films were exhibited to the trial court, the Supreme Court noted: "The films, obviously, are the best evidence of what they represent."<sup>235</sup> Likewise, in *Kaplan v. California*, the book not only was received in evidence, but also read, in its entirety, to the jury as well as being inspected by each juror. Approving, the Supreme Court rejected "any constitutional need for 'expert' testimony on behalf of the prosecution, or for any other ancillary evidence of obscenity, once the allegedly obscene materials themselves are placed in evidence."<sup>236</sup> Nevertheless, defendant "should be free to introduce appropriate expert testimony," the Court added.<sup>237</sup>

f. *Seizure of Allegedly Obscene Materials.* Three alternative ways of seizing a film for a judicial determination as to obscenity were discussed. In *Heller v. New York*,<sup>238</sup> the Supreme Court upheld the policy of a magistrate,

229. 93 S. Ct. 390 (1972).

230. See also *City of Kenosha v. Bruno*, 93 S. Ct. 2222 (1973) (municipal corporation is not a "person" under 42 U.S.C. § 1983 and thus cannot be sued for denial of petitioners' liquor license because of alleged nude dancing at their retail liquor establishments; i.e., nude go-go dancers in taverns).

231. *California v. LaRue*, 93 S. Ct. 390, 395 (1972).

232. 403 U.S. 15 (1971).

233. *Id.* at 20.

234. *Paris Adult Theatre I v. Slaton*, 93 S. Ct. 2628, 2634 (1973).

235. *Id.* The films were shown in court in this case. A presumably acceptable alternative approach of arranging a private showing of the contested film in the theater itself for the jury was followed in a recent California jury trial on whether the movie "Deep Throat" is obscene. See *Des Moines Register*, July 21, 1973, p. 3-S, col. 8.

236. *Kaplan v. California*, 93 S. Ct. 2680, 2685 (1973).

237. *Id.*

238. 93 S. Ct. 2789 (1973).

at the police's prompting, to attend the public showing of an allegedly obscene movie and then issue a search warrant for seizure of the film, without benefit of a prior adversary hearing. However, these guidelines must be followed: (1) only one copy of the film must be seized, (2) the exhibitor must be permitted, upon his request, to copy the seized film when no other copies are available to him for continued showing, and (3) a *prompt* judicial determination of the obscenity issue in an adversary hearing must be made at the request of any interested party.<sup>239</sup>

On the other hand, the Supreme Court held in *Roaden v. Kentucky*<sup>240</sup> that the fourth amendment is violated by a warrantless seizure of an allegedly obscene film being regularly shown to the public even though the seizure is made incident to the arrest of the exhibitor by a law enforcement officer who has viewed the film as a customer. Relying on its earlier decisions in *Marcus v. Search Warrant*<sup>241</sup> and *Lee Art Theater v. Virginia*<sup>242</sup> that an officer's mere *conclusory* allegations cannot support a warrant for seizing allegedly obscene material, the Supreme Court held that "a *fortiori*, the officer may not make such a seizure with no warrant at all."<sup>243</sup> Taking judicial notice of a film's susceptibility to destruction, alteration, or removal to another jurisdiction, the Court nevertheless said: "But . . . where films are scheduled for exhibition in a commercial theater open to the public, procuring a warrant based on a prior judicial determination of probable cause of obscenity need not risk loss of the evidence."<sup>244</sup> Thus, there were no "now or never" exigent circumstances justifying the warrantless seizure.

A third approach—a civil injunction of the exhibition of obscene materials pursuant to a state's caselaw—was approved of in *Paris Adult Theatre I v. Slaton*.<sup>245</sup> Indicating that such a proceeding must incorporate the definition of "obscene materials" used in the criminal (obscenity) statute, the Court opined that the civil injunction proceeding "provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation."<sup>246</sup> In the instant case, however, the continued exhibition of the films was not enjoined. Nevertheless, a temporary injunction was granted *ex parte* "restraining petitioners from destroying the films or removing them from the jurisdiction," with petitioners further ordered "to have one print each of the films in court on January 13, 1971, together with the proper viewing equipment."<sup>247</sup>

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239. See also *Alexander v. Virginia*, 93 S. Ct. 2803 (1973) (no sixth amendment right to trial by jury in state civil obscenity forfeiture proceedings).

240. 93 S. Ct. 2796 (1973).

241. 367 U.S. 717 (1961).

242. 392 U.S. 636 (1968).

243. *Roaden v. Kentucky*, 93 S. Ct. 2796, 2802 (1973).

244. *Id.* at 2802 n.6.

245. 93 S. Ct. 2628 (1973).

246. *Id.* at 2634.

247. *Id.* at 2632.

g. *Miscellany.*

Several other federal and state developments concerning obscenity prosecutions warrant summary mention.

i. *Pre-arrest adversary proceeding.* The Iowa supreme court held in *State v. Lavin*<sup>248</sup> that defendant has no right to a pre-arrest adversary proceeding similar to that afforded in a case of seizure of obscene material. Here, officers purchased a copy of a book in an "adult" bookstore, examined it, and thereupon arrested the managers of the bookstore.

ii. *Forfeiture proceedings.* The United States Supreme Court held in *Alexander v. Virginia*<sup>249</sup> that there is no sixth amendment right to trial by jury in state civil obscenity forfeiture proceedings.

iii. *Importation and interstate transportation.* In the two remaining cases of its recent octology, the United States Supreme Court upheld broad Congressional powers under the interstate commerce clause to prevent importation of,<sup>250</sup> as well as interstate transportation of,<sup>251</sup> obscene material. In *United States v. 12 200-Ft. Reels of Super 8mm. Film*,<sup>252</sup> the Court held that Congress "may constitutionally prohibit importation of obscene material which the importer claims is for private, personal use and possession only."<sup>253</sup> Similarly, the Court opined in *United States v. Orito*:<sup>254</sup> "[W]e cannot say that the Constitution forbids comprehensive federal regulation of interstate transportation of obscene material merely because such transport may be by private carriage, or because [the] material is intended for the private use of the transporter."<sup>255</sup>

iv. *Scienter.* An obscenity conviction was reversed by the Iowa supreme court in *State v. Lavin*<sup>256</sup> because scienter was not alleged in the county attorney's information and the trial court thus erred in overruling defendant's demurrer thereto. Holding that "[k]nowledge of the obscene material is an essential element in obscenity prosecutions," the court nevertheless added that indictments or informations "need not charge the offense in the language of the *Memoirs*' definition, they may charge the ultimate fact of obscenity."<sup>257</sup>

21. *Operating a Motor Vehicle While Under the Influence*

A proliferation of operating a motor vehicle while under the influence cases (O.M.V.U.I.) continued to command attention of the Iowa supreme court.

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248. 204 N.W.2d 844 (Iowa 1973).

249. 93 S. Ct. 2803 (1973).

250. 19 U.S.C. § 1305(a) (1970).

251. 18 U.S.C. § 1462 (1970).

252. 93 S. Ct. 2665 (1973).

253. *Id.* at 2667.

254. 93 S. Ct. 2674 (1973).

255. *Id.* at 2678.

256. 204 N.W.2d 844 (Iowa 1973).

257. *Id.* at 848-49.



a. *Definition of the Offense.* The statutory definition of the crime<sup>258</sup> was attacked unsuccessfully in two cases. In *State v. Tiernan*,<sup>259</sup> the court held that the proscription on driving while under the influence of an alcoholic beverage is not unconstitutionally overbroad, vague or indefinite so as to require persons of common intelligence to guess its meaning. Likewise, the court held in *State v. Davis*<sup>260</sup> that (after the legislative change of the crime from O.M.V.I. to O.M.V.U.I.)<sup>261</sup> manslaughter can be predicated upon a vehicular death caused by a driver who, under the new verbiage, was under the influence of an alcoholic beverage, just as before when the latter offense was characterized as driving while intoxicated. Accordingly, the court held that the definition in the Bar Association's uniform jury instruction number 520.3<sup>262</sup> "applies equally to both expressions—driving in an intoxicated condition and driving while under the influence of intoxicants—and the two expressions mean essentially the same thing."<sup>263</sup>

b. *Time of Intoxication.* *State v. Creighton*<sup>264</sup> dramatically illustrates that the State must prove that defendant was under the influence *at the time he was driving*. Here, the only evidence of defendant's intoxicated condition was adduced in the arresting officer's testimony as to defendant's condition at the time that the officer arrived at the scene of defendant's one-car accident. There was no evidence as to the time of the accident, the length of the interval before arrival of the officer, or "what transpired between the time of the accident and the time of arrest."<sup>265</sup> Because of the lack of this evidence, the court rejected the State's circumstantial evidence argument, noting contrariwise: "[T]hat rule becomes applicable only upon a *showing of the circumstances* from which it is said the ultimate fact may be found to exist."<sup>266</sup> The court pointed out that none of the persons at the scene before the officer's arrival was called to testify and that "[n]o search was made of the car nor of the surrounding area to disclose evidence—or the lack of it—to refute a claim defendant may have become intoxicated *after* the accident."<sup>267</sup> Consequently, the court refused to hold that "one who is under the influence of an alcoholic beverage at an established time was necessarily in that condition at some earlier unspecified moment without any evidence concerning the length of the interval between the two or of the events occurring during it."<sup>268</sup>

c. *Blood Test Evidentiary Foundation.* Three cases involved the foun-

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258. See IOWA CODE § 321.281 (1973).

259. 206 N.W.2d 898 (Iowa 1973).

260. 196 N.W.2d 885 (Iowa 1972).

261. Cf. IOWA CODE § 321.281 (1966) (O.M.V.I.) with IOWA CODE § 321.281 (1973) (O.M.V.U.I.).

262. II Iowa Uniform Jury Instructions, No. 520.3 (1970).

263. *State v. Davis*, 196 N.W.2d 885, 890 (Iowa 1972).

264. 201 N.W.2d 471 (Iowa 1972); accord *State v. Miller*, 204 N.W.2d 834 (Iowa 1973) (O.M.V.U.I. conviction reversed because the only evidence of defendant's *driving* while under the influence was inadmissible hearsay).

265. *State v. Creighton*, 201 N.W.2d 471, 473 (Iowa 1972).

266. *Id.*

267. *Id.*

268. *Id.*



dational requirements for the taking of a blood sample.<sup>269</sup> One issue involved the qualifications for a medical technologist. In *State v. Snyder*,<sup>270</sup> the supreme court concluded that "the legislature did not intend that an individual have the educational background required by the American Society of Clinical Pathologists in order to qualify as a medical technologist under section 321B.4,"<sup>271</sup> and thus being licensed in Iowa as a registered medical technologist is sufficient. Two cases posed questions of the sufficiency of the authorization to the registered nurse by the licensed physician. Telephonic authorization by the licensed physician who was on call at the hospital was upheld in *State v. Binkley*,<sup>272</sup> as was a general authorization as a standing order to all registered nurses in that hospital in *State v. Sloan*.<sup>273</sup> On the other hand, it was further held in *Binkley* that defendant's failure to object until moving for a new trial waived the error in admitting blood test results notwithstanding the lack of a written request by the peace officer for the taking of a blood test.<sup>274</sup>

Sanitation requirements concerning the vial in which the blood sample is placed were established in *Binkley* also. The supreme court rejected defendant's contention that the statutory requirement that syringes and needles used for drawing blood be kept "under strictly sanitary and sterile conditions"<sup>275</sup> applied also to the vial. Nevertheless, the State must prove that the vial was "uncontaminated by alcohol or other substances which might affect the test."<sup>276</sup>

d. *Breath Test Evidentiary Foundation.* Five cases dealt with the admissibility into evidence of the results of breath tests administered under Code § 321B.1. Two convictions<sup>277</sup> were summarily reversed under the *Rodriguez v. Fulton*<sup>278</sup> precedent that it is reversible error in an O.M.V.U.I. prosecution to admit breath test results where no blood test had previously been offered and refused before the officer requested a breath specimen. Even though evidence of the offer and refusal of the blood test is admissible "under the plain terms of section 321B.11,"<sup>279</sup> one trial court actually granted a pretrial motion in limine ordering the State to make no such introduction at trial. Appealing his conviction, defendant claimed prejudicial error in the State's violation of

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269. See IOWA CODE § 321B.4 (1973).

270. 203 N.W.2d 280 (Iowa 1972).

271. *Id.* at 285.

272. Telephonic authorization "minimally satisfies § 321B.4 as a designation of the nurse by a licensed physician." 201 N.W.2d 917, 919 (Iowa 1972).

273. 203 N.W.2d 225 (Iowa 1972).

274. The supreme court noted: "It is equally clear under § 321B.4, The Code, as interpreted in *State v. Wallin*, 195 N.W.2d 95 (Iowa 1972) and *State v. Boner*, 186 N.W.2d 161 (Iowa 1971), proof of such written request was foundationally essential for admission of the test results." *State v. Binkley*, 201 N.W.2d 917, 918 (Iowa 1972).

275. See IOWA CODE § 321B.4 (1973).

276. *State v. Binkley*, 201 N.W.2d 917, 920 (Iowa 1972), citing *Lessenhop v. Norton*, 261 Iowa 44, 52-53, 153 N.W.2d 107, 112 (1967) (enumeration of "the foundational evidence which must be introduced prior to admission of blood test results").

277. *State v. Rowland*, 202 N.W.2d 98 (Iowa 1972) and *State v. Williams*, 201 N.W.2d 710 (Iowa 1972).

278. 190 N.W.2d 417 (Iowa 1971).

279. *State v. Tiernan*, 206 N.W.2d 898, 899 (Iowa 1973).

the order in limine. Affirming the conviction, the supreme court pointed out in *State v. Tiernan*<sup>280</sup> that the error here, inuring to defendant's benefit, was in the trial court's sustaining of defendant's motion in limine. Indeed, "[e]vidence of the refusal was not only admissible, it was required as a foundation for any evidence of the breath test."<sup>281</sup>

The *Rodriquez v. Fulton* doctrine was extended in *State v. Hall*<sup>282</sup> to include admission into evidence the defendant's refusal to take a breath test when the results of the breath test, if taken, would have been inadmissible for noncompliance with the *Rodriquez* procedure. Reversing the conviction, the supreme court thought a rule (like the *Rodriquez* rule) "would be anomalous indeed which would permit introduction of evidence of refusal to take a test when the test itself cannot be shown."<sup>283</sup> The court added: "Defendant had a right to take manual tests and still refuse a breath test which could not legally be required of him without the prior offer of a blood test."<sup>284</sup>

*State v. Hansen*<sup>285</sup> set forth the remaining foundation requirements for admissibility of the results of a breath test, following the offer and refusal of a blood test. Such results "should be admitted only upon a showing (1) of the devices and methods approved by the Commissioner of Public Safety for the taking of such tests . . . and (2) proof that the test was given by use of the approved devices and methods."<sup>286</sup> The arresting officer's "bare conclusion" that he followed the prescribed procedures "is insufficient," the court concluded.<sup>287</sup> If this two-part foundational requirement is met, the supreme court has held in *State v. Tiernan*<sup>288</sup> that stringent standards of mechanical precision of the breathalyzer equipment are not required. Specifically, the court held therein that a showing of periodic testing of the equipment is unnecessary.

e. *Statutory Presumption of Intoxication.* Four cases dealt with the statutory presumption of intoxication provision of *Code* section 321.218, which provides: "[E]vidence that there was, at the time, more than ten hundredths of one percentum by weight of alcohol in his blood shall be admitted as presumptive evidence that the defendant was under the influence of an alcoholic beverage."

i. *Additional testimony.* While noting that the purpose of this statutory presumption is "to permit a case to go to the jury on this issue on nothing more than a showing of the required blood alcohol content," *State v. Boner*<sup>289</sup>

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280. 206 N.W.2d 898 (Iowa 1973).

281. *Id.* at 899.

282. 203 N.W.2d 375 (Iowa 1973).

283. *Id.* at 376.

284. *Id.*

285. 203 N.W.2d 216 (Iowa 1972).

286. *Id.* at 223. See *Iowa Departmental Rules* p. 123 (Supp. July 1972), designating "an indium encapsulation breath crimper" as the device and prescribing collection procedures.

287. *State v. Hansen*, 203 N.W.2d 216, 223 (Iowa 1972).

288. 206 N.W.2d 898 (Iowa 1973).

289. 203 N.W.2d 198 (Iowa 1972).

makes it clear that the State "may prove a stronger case by additional testimony."<sup>290</sup> The supreme court approved of the State's calling of an expert witness "to express his opinion that defendant was under the influence of an alcoholic beverage and to describe the effect of alcohol on human behavior."<sup>291</sup> Thus, while defendant may, of course, introduce evidence to rebut this statutory presumption, "there is nothing to suggest that otherwise competent evidence cannot similarly be used to fortify it."<sup>292</sup>

ii. *Jury instructions.* The Bar Association's Uniform Jury Instruction 520.8<sup>293</sup> was declared by a 5-4 vote in *State v. Hansen*<sup>294</sup> to be an unconstitutional application of this statutory presumption, which itself was considered constitutional. However, the supreme court limited the statute's operation to raising "an inference (sometimes called a 'presumption of fact') . . . ."<sup>295</sup> The constitutional flaw thus was not in the first paragraph of the instruction stating that a stipulated percentage of alcohol in defendant's blood is "presumptive evidence" of being under the influence nor in the second paragraph permitting the jury to "infer" defendant's being under the influence if his blood-alcohol content exceeded the stipulated proportion. However, the last sentence of the third paragraph ("[Such inference] may be overcome or rebutted by evidence to the contrary") was considered by the supreme court as "erroneously convert[ing] this into a *conclusive* presumption if evidence is not produced to rebut it."<sup>296</sup> Agreeing with defendant's contention that this instruction "compels" an accused to forego his fifth amendment right to not testify, the supreme court characterized the latter part of the above-mentioned instruction as "convey[ing] to the jury the notion that the un rebutted 'presumptive evidence' required, rather than permitted, a finding defendant was under the influence of an alcoholic beverage."<sup>297</sup> Reiterating that a proper instruction concerning the *Code* section 321.281 statutory presumption "should not place significance on the failure to produce rebutting evidence," the court added that such an instruction "should set out the fact that the test is presumptive evidence and charge the jury to determine under all the facts and circumstances in the case whether defendant was under the influence of an intoxicating beverage."<sup>298</sup> The same instruction was given verbatim in *State v. Sloan*,<sup>299</sup> and the supreme court reversed the conviction (by a 5-4 vote) despite the State's contention that giving this improper instruction was harmless error.

The supreme court added in *State v. Hutton*<sup>300</sup> that the constitutional

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290. *Id.* at 199-200.

291. *Id.* at 199.

292. *Id.*

293. II Iowa Uniform Jury Instructions, No. 520.8 (1973).

294. 203 N.W.2d 216 (Iowa 1972).

295. *Id.* at 219.

296. *Id.* at 220.

297. *Id.* at 222.

298. *Id.*

299. 203 N.W.2d 225 (Iowa 1972).

300. 207 N.W.2d 581 (Iowa 1973).

defect in this uniform instruction was not cured or rendered harmless by the addition of this fourth paragraph:

You are instructed that despite the permissible inference from the blood test, the burden remains at all times upon the State to establish each and every element of the crime and the crime itself beyond a reasonable doubt and the burden remains at all times upon the State to go forward with the proof of all matters in issue in the case. There is no burden upon the Defendant in a criminal case.<sup>301</sup>

Reversing the conviction by a 6-3 vote, the supreme court refused to speculate "whether the jury followed the erroneous part of [the] instruction" (paragraph three of the uniform instruction) "or the curative part" (the aforementioned additional fourth paragraph).<sup>302</sup>

## 22. *Operating an Overweight Vehicle on a Public Highway*

In *State v. McDonald*,<sup>303</sup> an employee of a construction company primarily engaged in road building, was prosecuted for operating an overweight vehicle on a public highway<sup>304</sup> because he drove a caterpillar on a public highway to a new work site. On a State's appeal following a directed verdict, the supreme court refused to accept the State's proffered definition of road machinery within the *Code* section 321.453 exemption as meaning "special equipment designed for road work, either construction or maintenance, while being so used at that time for those purposes at or in close proximity to the site of the road work."<sup>305</sup> The court pointed out that there is little or no equipment designed *exclusively* for road work. Moreover, the court also rejected the State's restrictive reading of the *Code* section 321.453 exemption for temporary moving of overweight vehicles to mean that any such moving must be done "in close proximity to the site of the road work."<sup>306</sup>

## 23. *Possession of Burglar's Tools*

A detailed exposition of the rules governing opinion testimony as to the nature of burglar's tools<sup>307</sup> was made in *State v. Knudtson*.<sup>308</sup> First, the supreme court concluded that it is proper to permit opinion testimony of properly-qualified witnesses as to whether certain tools which may also have le-

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301. *Id.* at 582.

302. *Id.* at 583.

303. 197 N.W.2d 573 (Iowa 1972).

304. See IOWA CODE § 321.463 (1973).

305. 197 N.W.2d at 574.

306. *Id.*

307. See IOWA CODE § 708.7 (1973) (possession of burglar's tools).

308. 195 N.W.2d 698 (Iowa 1972). Actually, in the instant case, defendant was convicted of attempted breaking and entering. See IOWA CODE § 708.10 (1973). Following the proprietor's hearing of pounding at the unused door at the rear of his building at 3:00 a.m., police apprehended defendant attempting to hide behind a nearby truck and in possession of, or in close proximity to, burglar's tools. This case is included in this subsection because of the attention being focused therein upon foundational requirements as to testimony identifying burglar's tools.

gitimate uses are of the type that could be used as burglar's tools.<sup>309</sup> Next, it upheld the foundation laid in the instant case for the police officers' testimony. The court, noting that the officers "qualified themselves by showing they had been involved in investigations of other breakings and enterings or burglaries," determined that it was unnecessary for these witnesses to show that their other investigations had been "judicially determined to be breakings and enterings or burglaries."<sup>310</sup> On the subject of these officers being qualified as expert witnesses, the court agreed with defendant that "a mere showing they were in fact police officers does not in and of itself qualify them as [experts]."<sup>311</sup> However, the court pointed out that these officers were shown to have been veteran officers experienced in investigating burglary scenes and in finding burglar's tools thereat similar to those in the instant case. Moreover, all but one of the testifying officers had attended special institutes with training in crime scene investigations. Finally, the court confirmed that qualified experts, such as these officers, can state that these *are* burglar's tools instead of being limited to testifying that the tools *could* be burglar's tools.<sup>312</sup>

#### 24. Rape

Two survey cases dealt with sufficiency of the other evidence required by Code section 782.4 to corroborate a rape<sup>313</sup> prosecutrix's testimony. In *State v. Smith*,<sup>314</sup> defendant supplied it himself! He accomplished this by testifying as a witness in his own behalf that he did have sexual intercourse with prosecutrix on the date in question, albeit claiming it was *voluntary* intercourse. There being sufficient corroboration, it was a matter for the jury to decide whose version of the nature of the intercourse to believe—defendant's voluntary version or prosecutrix's involuntary version. Defendant was less cooperative in *State v. Polson*,<sup>315</sup> in which the other corroborating evidence was garnered from "the entire combination of circumstances."<sup>316</sup> These included defendant's "suspicious conduct" as well as his "presence very near the site of the assault both before and after its commission."<sup>317</sup>

Questions involving the introduction of other lascivious acts arose in two rape convictions which were reversed. The general rule was noted in *State v. Wright*<sup>318</sup> that "on a charge of statutory rape evidence of lascivious conduct with girls other than prosecutrix is inadmissible unless essential to complete

309. "Tools used to accomplish breakings and enterings are commonly called burglar tools, and consist of tools which may also have a perfectly legitimate use, such as hammers, screwdrivers, punches, pliers, and prybars." 195 N.W.2d at 700.

310. *Id.* at 701.

311. *Id.*

312. *Id.*, citing *Grismore v. Consolidated Products Co.*, 232 Iowa 328, 348, 5 N.W.2d 646, 657 (1942).

313. See IOWA CODE § 698.1 (1973).

314. 195 N.W.2d 673 (Iowa 1972).

315. 205 N.W.2d 740 (Iowa 1973).

316. *Id.* at 742.

317. *Id.* at 741.

318. 203 N.W.2d 247 (Iowa 1972).



the story of the crime on trial by proving its immediate context of happenings near in time and place."<sup>319</sup> Here, the State erroneously introduced evidence concerning defendant's fondling of his own daughter (who was prosecutrix's step-sister) for approximately a two-year period during which time he had sexual intercourse a number of times with his step-daughter. The supreme court concluded that the State "utterly failed to prove" the relationship of this evidence of other criminal conduct as an integral transaction (which is applicable "only where the separate offenses are so related to each other that proof of one tends to establish the other").<sup>320</sup> Thus, this proof of separate offenses was inadmissible. On the other hand, exclusion of evidence of prosecutrix's promiscuous behavior was held error under the particular circumstances in *State v. McDaniel*,<sup>321</sup> in which defendant's proffered evidence of the statutory rape being committed by his companion was excluded. Repeating that prior unchastity of prosecutrix is no defense to a charge of rape, the supreme court added that such evidence is admissible "not on the issue of consent or justification for the act, but in answer to any inferences which might arise by reason of the State's offer of evidence on the laboratory tests and physical condition of the prosecutrix. Defendant had a right to attempt to show another person . . . was the one responsible for any violation of the prosecutrix."<sup>322</sup>

## 25. Reckless Driving

*State v. Baker*<sup>323</sup> held that the offense of reckless driving<sup>324</sup> "is not an intentional wrong in the sense that resulting harm is intended."<sup>325</sup> Thus, Code section 321.283 is violated by "conscious and intentional driving which the driver knows, or should know, creates an unreasonable risk of harm to others,"<sup>326</sup> irrespective of the lack of intended harm to anyone. Additionally, "[m]omentary nonuse of the traveled way by others certainly could not, as a matter of law, excuse defendant's violations."<sup>327</sup>

## 26. Simulated Intoxication

In its first interpretation of the crime of simulated intoxication,<sup>328</sup> the supreme court believed in *State v. McGuire*<sup>329</sup> that "it is clear the legislature, when using the word 'simulate' in section 123.42, intended to make it illegal to pretend or to feign intoxication."<sup>330</sup> Accordingly, the State "must establish

319. *Id.* at 251.

320. *Id.*

321. 204 N.W.2d 627 (Iowa 1973).

322. *Id.* at 630.

323. 203 N.W.2d 795 (Iowa 1973).

324. See IOWA CODE § 321.283 (1973).

325. 203 N.W.2d at 796.

326. *Id.*

327. *Id.*

328. See IOWA CODE § 123.46 (1973) (formerly § 123.42).

329. 200 N.W.2d 832 (Iowa 1972).

330. *Id.* at 833.



the intentional or voluntary nature of the acts relied on as one of the elements of the offense."<sup>331</sup> Defendant's conviction had been based solely on the arresting officer's testimony as to defendant's slow and deliberate movements, slurred speech, contracted pupils, and fixed-focus eyes. Because of the officer's testimony that he did not know whether those physical characteristics were normal or abnormal as relating to defendant, there was no evidence that defendant was intentionally acting intoxicated. Reversing the conviction, the supreme court was "unwilling to say one who looks and acts as the witness described defendant—without more—is guilty of violating the statute in question"<sup>332</sup> since the unusual movements *could* have been the unintentional result of illness, physical peculiarity, or other natural cause. Because the conviction was reversed for failure of proof, the supreme court did not reach the unconstitutionality-for-vagueness challenge.

## 27. Sodomy

The supreme court noted in *State v. Schurman*:<sup>333</sup> "In a prosecution for sodomy<sup>334</sup> the State must prove penetration, but it may be proved by circumstantial as well as by direct evidence."<sup>335</sup> In this stepfather-stepson involuntary act of buggery, it was unnecessary for the stepson, a six-year-old, to testify.

### C. Defenses

#### 1. Entrapment

The United States Supreme Court characterized entrapment as "a relatively limited defense" in *United States v. Russell*,<sup>336</sup> saying: "It is only when the government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play."<sup>337</sup> The thrust of this defense focuses on "the intent or predisposition of the defendant to commit the crime."<sup>338</sup> The *Russell* opinion turned on the fact that defendant instantly conceded that "he may have harbored a predisposition to commit the charged offenses."<sup>339</sup> Accordingly, the fact that government officers "merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution."<sup>340</sup> Here, the undercover agent had supplied an essential ingredient for the illicit manufacture of a controlled substance. Nevertheless, the Court pointed out that defendant had obtained this ingredient elsewhere for previous activities and that he *could* have done so again. Had the undercover agent been the only possible supplier for this ingredient, it is

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331. *Id.* at 834.

332. *Id.*

333. 205 N.W.2d 732 (Iowa 1973).

334. See IOWA CODE § 705.1 (1973).

335. 205 N.W.2d 732, 735 (Iowa 1973).

336. 93 S. Ct. 1637 (1973).

337. *Id.* at 1645.

338. *Id.* at 1641.

339. *Id.* at 1643.

340. *Id.* at 1644; accord *State v. McGranahan*, 206 N.W.2d 88 (Iowa 1973).

possible that the Court may have found entrapment. (This possibility would be increased in situations, unlike here, where the ingredient itself was contraband.). This premise is based upon the Court's following observation: "While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . . the instant case is distinctly not of that breed."<sup>341</sup>

The Iowa supreme court held in *State v. Bruno*<sup>342</sup> that the defense of entrapment is not available when defendant denies the very acts upon which the prosecution is predicated. In the instant prosecution for unlawful sale of hallucinogenic drugs, defendant testified that the tablets in question really were aspirin. Affirming the trial court's refusal to instruct on entrapment, the supreme court said:

Although the doctrine of entrapment may be asserted even though defendant pleads not guilty, ordinarily the defense is not available where defendant denies commission of the very acts upon which the prosecution is predicated. Such a denial is inconsistent with the defense, which assumes the offense charged was committed but permits accused to seek relief from guilt on the ground the criminal intent or design was not his, but rather that of employees or agents of the government who planted the idea in his otherwise innocent mind by suggestion or solicitation.<sup>343</sup>

## 2. Intoxication

In *State v. Buchanan*,<sup>344</sup> the constitutionality of placing on defendant the burden of proving his intoxication as a *partial* defense (i.e., to render him "incapable of forming the requisite criminal intent")<sup>345</sup> was raised. However, the alleged error in the giving of the Iowa Bar Association's uniform instruction<sup>346</sup> was not preserved by defendant and thus the supreme court did not decide the issue. Four justices nevertheless indicated their views that this instruction is unconstitutional. Because the other five justices remained silent, it is open to conjecture what the supreme court will rule when the issue is squarely before them.

Justice McCormick (concurring specially),<sup>347</sup> arguing that the defense of voluntary intoxication "is not generically different from the defense of alibi,"<sup>348</sup> pointed out that the former Iowa rule of requiring defendant to prove his alibi was held in *Stump v. Bennett*<sup>349</sup> to violate federal due process. He added:

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341. *Id.* at 1643.

342. 204 N.W.2d 879 (Iowa 1973).

343. *Id.* at 882.

344. 207 N.W.2d 784 (Iowa 1973) (en banc).

345. II Uniform Jury Instruction 501.18 (1970).

346. *Id.*

347. Justices Mason and Reynoldson joined in McCormick's opinion. See 207 N.W.2d at 788. Justice Rawlings, on the other hand, agreed with McCormick's rationale but, because of CODE § 793.18, would reverse the conviction. See 207 N.W.2d at 792.

348. *Id.* at 791.

349. 398 F.2d 111 (8th Cir. 1968), cert. denied 393 U.S. 1001 (1968).

"I believe, as did the court in *Stump* of our former alibi rule, . . . there is no doubt our rule as to the affirmative defense of intoxication shifts the burden of persuasion to a defendant to disprove an essential element of a crime, in this case specific intent."<sup>350</sup>

In *State v. Sill*,<sup>351</sup> the trial court committed reversible error by instructing the jury that intoxication cannot preclude acquittal on a charge with specific intent as an essential element. "The jury should have been told voluntary intoxication to a degree preventing defendant from having such intent would entitle him to acquittal,"<sup>352</sup> the supreme court said.

### 3. Self Defense

That defendant must interpose the defense of self defense<sup>353</sup> in order to require the State to disprove it was made clear in *State v. Vick*.<sup>354</sup> In this prosecution for assault (with a rifle) defendant testified he shot the rifle "but never intimated that in doing so he acted in self defense," nor was there "the slightest hint defendant was ever threatened or felt intimidated."<sup>355</sup> Indeed, he testified he was merely taking some target practice. However, the shots struck the ground a few feet behind an inspector for the state highway commission, with whom defendant was feuding over a proposed fencing project.<sup>356</sup>

### 4. Statutory Challenges<sup>357</sup>

a. *Constitutionality*. In *State v. Vick*,<sup>358</sup> the Iowa supreme court upheld the constitutionality of Code section 694.1 proscribing, but not defining, assaults—against defendant's contention that it is "so vague and standardless that it leaves an individual uncertain as to the particular conduct it prohibits . . . ."<sup>359</sup> Conceding that "a penal statute must define the crime in a manner that permits a reasonable man of common intelligence to comprehend the type of activity proscribed by the statute,"<sup>360</sup> the supreme court relied on the

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350. 207 N.W.2d at 790.

351. 199 N.W.2d 47 (Iowa 1972) (prosecution for assault with *intent* to inflict great bodily injury).

352. *Id.* at 49.

353. See Iowa CODE §§ 691.1-.2 (1973).

354. 205 N.W.2d 727 (Iowa 1973).

355. *Id.* at 731.

356. See also *State v. Fields*, 199 N.W.2d 144, 147 (Iowa 1972) (where there is conflicting testimony as to self defense "differing inferences might reasonably be drawn" thus creating a jury issue and accordingly the trial court should not grant defendant's motion for a directed verdict).

357. In other cases involving novel statutory challenges, see *State v. McGranahan*, 206 N.W.2d 88 (Iowa 1973) [the passage of Iowa's new Uniform Controlled Substances Act, and its express repealer of Iowa's former Uniform Narcotics Act therein, does not preclude conviction under the former Act of a defendant who had been arrested but not yet indicted under the latter Act at the time (July 1, 1971) the new Act became effective] and *State v. Allison*, 206 N.W.2d 893, 894 (Iowa 1973) ("[O]therwise valid statutes are not invalid because the legislature which enacted them was malapportioned.").

358. 205 N.W.2d 727 (Iowa 1973).

359. *Id.* at 729.

360. *Id.* at 730.

rule that "a statute may punish an offense by giving it a name known to the common law, without further defining it, and the common-law definition will be applied."<sup>361</sup>

b. *Exemptions.* In *State v. Lynch*,<sup>362</sup> the supreme court upheld the requirement in Iowa's former Uniform Narcotics Act that defendant prove he came within one of the lawful exceptions enumerated in the statute rather than requiring the State to disprove the converse. The supreme court formulated the following general rule:

If an exception is material in arriving at the definition of the crime, it is generally held the State has the burden of showing the exception does not apply because it is then one of the essential elements of the offense. However, where the exception merely furnishes an excuse for what would otherwise be criminal conduct, the duty devolves upon the defendant to bring himself within the exculpatory provision.<sup>363</sup>

### III. PROCEDURAL LAW

#### A. Pretrial

##### 1. Counsel for Indigents

a. *Appointment of Counsel.* The major development in this area<sup>364</sup> during the survey period was the United States Supreme Court's refusal, in *Argersinger v. Hamlin*,<sup>365</sup> to extend the sixth amendment right of counsel to State misdemeanor prosecutions. Instead, the Court limited its holdings to precluding the imprisonment of a convicted indigent who stood trial without counsel and without effectively waiving same<sup>366</sup>—rather than rendering a

361. *Id.* at 731, quoting *State v. Flory*, 203 Iowa 918, 924, 210 N.W. 961, 964 (1926). A comprehensive statement concerning constitutional challenges was made in *Vick*, to wit:

Ordinarily, statutes, with notable exceptions, regularly enacted by legislatures will be accorded a strong presumption of constitutionality. Where the constitutionality of a statute is merely doubtful or fairly debatable the courts will not interfere. The burden of proving a legislative enactment to be violative of the constitution rests upon those so asserting to the degree of negating every reasonable basis of support therefor. A constitutional challenge must specify constitutional provisions invoked and state with precision the details of a claimed defect . . . .

*Id.* at 729; accord *Henrichs v. Hildreth*, 207 N.W.2d 805, 806-07 (Iowa 1973) (void for vagueness challenge).

362. 197 N.W.2d 186 (Iowa 1972).

363. *Id.* at 190. For a further discussion of this case, see text accompanying notes 95-98 *supra*.

364. See *State v. Kephart*, 202 N.W.2d 62, 67 (Iowa 1972): "[*Coleman v. Alabama*, 399 U.S. 1 (1970)] held that a preliminary hearing was a critical stage of the State's criminal process at which an accused was entitled to aid of counsel." See also *Adams v. Illinois*, 405 U.S. 278 (1972) (*Coleman v. Alabama* does not apply retroactively to State preliminary hearings conducted prior to June 22, 1970). For a discussion of the role of judicial discretion in the appointment of counsel process, see Dunahoo, *Judicial Discretion in the Iowa Criminal Trial Process*, 58 Iowa L. Rev. 1023, 1025-29 (1973) [hereinafter cited as Dunahoo].

365. 407 U.S. 25 (1972).

366. See also text accompanying notes 813-20 *infra*. (sentencing)

counselless misdemeanor conviction void.<sup>367</sup> However, the Court left the door slightly ajar on the question of an unqualified *right* to counsel on misdemeanor charges, to wit: "We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here petitioner was in fact sentenced to jail."<sup>368</sup>

b. *Effectiveness of Counsel.* *State v. Williams*<sup>369</sup> held that a court-appointed counsel's application under *Code* section 775.5 for public funds for an investigator must be specific. Indeed, this statute was further interpreted as "requir[ing] the trial judge to satisfy himself that such services are necessary and to articulate the reasons therefor."<sup>370</sup> It accordingly is within the trial court's discretion to ascertain if defense counsel's claim is "necessary in the interest of justice" or is "frivolous and unwarranted."<sup>371</sup> The instant application, which was turned down, read: "That there are certain witnesses whose names are known to the defense counsel, but defense counsel is unable to locate them, and that their testimony is necessary for the defense of defendant."<sup>372</sup> There is an implication that a *Code* section 775.5 application does not require the defense attorney to inform the court and prosecutor of the names and addresses of the persons he wanted to investigate, but that a trial court can insist upon specific information concerning "the number of investigators to be employed, the area to be investigated and probable cost or rate of pay."<sup>373</sup> For a guide in determining these applications, trial courts should familiarize themselves with the comparable federal provision,<sup>374</sup> the supreme court added.<sup>375</sup>

367. See *Gideon v. Wainwright*, 372 U.S. 335 (1963). (State felony conviction void if tried without counsel and counsel not waived.)

368. 407 U.S. 25, 37 (1972).

369. 207 N.W.2d 98 (Iowa 1973).

370. *Id.* at 106.

371. *Id.*

372. *Id.* at 103.

373. *Id.* at 105.

374. *Id.* at 106, citing 18 U.S.C.A. § 3006(A)(e) (1969), as amended (Supp. 1973), which sets forth the following federal procedure: Counsel for a person "financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them" in an *ex parte* proceeding from the court or U.S. Magistrate. Appointed counsel may, subject to later review, obtain such services for an adequate defense without prior authorization but the cost cannot exceed \$150 plus reimbursement of expenses reasonably incurred. The maximum compensation paid to a person for services rendered hereunder shall not exceed \$300 exclusive of reimbursement of expenses reasonably incurred, unless certified by the court.

375. In the related matter of effective assistance rendered by counsel, the supreme court consistently upheld the adequacy of the representation:

(a) *Access*: Effective assistance is not denied merely because of defendant's confinement in a different city during the trial where he "was not otherwise denied access to his attorneys" and consulted with them both before opening and after closing of the trial days. *State v. Kimball*, 203 N.W.2d 296, 299 (Iowa 1972).

(b) *Degree of Guilt*: Counsel is not inadequate because he waived a possible defense and relied unsuccessfully on a somewhat-supportable theory for reduction of degree of guilt—here to second-degree murder on a felony-murder charge. *State v. Kelley*, 195 N.W.2d 702 (Iowa 1972).

(c) *Mistake*: "Counsel are often in error as to an item of fact. When such an error is a factor in advice to plead guilty it cannot be said later to void the guilty plea." *State v. Jackson*, 199 N.W.2d 102, 103 (Iowa 1972).

(d) *Multiple Defendants*: Multiple representation of several co-defendants does not



## 2. Speedy Indictment

Several issues concerning the Code section 795.1 requirement that a defendant be indicted within thirty days of being held to answer for a public offense were decided during the survey period.<sup>376</sup>

a. *Demand-Waiver Doctrine.* Following the United States Supreme Court's lead in *Barker v. Wingo*<sup>377</sup> (viz., the sixth amendment right to a speedy trial is violated by a State procedural rule forever barring dismissals for lack thereof unless defendant demands a speedy trial),<sup>378</sup> the Iowa supreme court has dropped its long-standing policy of applying a demand-waiver requirement in the speedy indictment procedure. In *State v. Morningstar*,<sup>379</sup> the court, referring to its decision to drop the demand-waiver requirement under the Code section 795.2 speedy trial provision,<sup>380</sup> said: "[W]e have recently eliminated demand as a prerequisite to operation of the section."<sup>381</sup> This means that the thirty-day statutory period for indicting a defendant<sup>382</sup> begins to run automatically upon his being "held to answer,"<sup>383</sup> irrespective of whether or not he files a demand for speedy indictment. If the indictment is not returned during this requisite period, the prosecution must be dismissed unless "good cause" for the delay is shown.<sup>384</sup> Conversely, the State need not show good cause for any alleged "delay" when the indictment is returned *within* the statutory period.<sup>385</sup>

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*ipso facto* render counsel ineffective where there is "nothing in the record to establish any conflict of interest resulting in prejudice to the defendant;" defendant has the burden of showing such a conflict "to his resultant prejudice." *State v. Donohue*, 207 N.W.2d 750, 751 (Iowa 1973).

(e) *Preparation:* "If a review of the [entire] record shows counsel alertly and capable defended his client's rights throughout the trial, an assertion by counsel before trial that he needed more information [and time] to prepare his case is not conclusive in establishing inadequate representation." *State v. Massey*, 207 N.W.2d 777, 780 (Iowa 1973); accord *State v. Kelley*, 195 N.W.2d 702 (Iowa 1972).

376. See generally Dunahoo and Sullins, *Speedy Justice*, 22 DRAKE L. REV. 266 (1973), which was written before the Iowa supreme court adopted its policy change regarding the demand-waiver doctrine under Iowa's speedy indictment and speedy trial statutes, as discussed below.

See also *One Certain Person Named in Indictment v. Grand Jury*, 207 N.W.2d 33 (Iowa 1973) (legal existence of a grand jury may not be extended into the calendar year following its selections even though pursuant to a district court order).

377. 407 U.S. 514 (1972).

378. See also text accompanying notes 515-27 *infra*. (Speedy trial).

379. 207 N.W.2d 772 (Iowa 1973).

380. See *State v. Gorham*, 206 N.W.2d 908 (Iowa 1973).

381. 207 N.W.2d 772, 775 (Iowa 1973).

382. Thirty days is "a reasonable pre-indictment period" which does not violate federal constitutional standards of due process or of speedy trial. *State v. Bledsoe*, 200 N.W.2d 529, 530 (Iowa 1972).

383. See IOWA CODE § 795.1 (1973).

384. Cf. *State v. Gebhart*, 257 Iowa 843, 849, 134 N.W.2d 906, 909 (1965) (a § 795.1 speedy indictment case): "The defendant urges that the court made no finding of good cause. This was not necessary; it is sufficient if this element is *shown by the record*." (emphasis added) with *State v. Gorham*, 206 N.W.2d 908, 914 (Iowa 1973) (a § 795.2 speedy trial case): "[A]n accused . . . is entitled to a dismissal if not brought to trial within 60 days after being indicted unless 'good cause' to the contrary be *Prosecutorially shown* . . ." (emphasis added).

385. See *State v. Bledsoe*, 200 N.W.2d 529 (Iowa 1972) ("speedy indictment" not violated where defendant not formally charged with escape until 23 days after his capture and return to Iowa).



b. "*Held to answer.*" The crucial point in time in the criminal trial process concerning speedy indictment (and speedy trial subsequently)<sup>386</sup> is the time when an accused is "held to answer" for the offense charged. This is because, by express terms of *Code* section 795.1, "speedy indictment" does not attach until the "held to answer" stage. This stage was defined in *State v. Mays*<sup>387</sup> as follows: "§ 795.1 comes into operation by its own language and as a part of the regular procedure when an accused is held to answer after *preliminary examination* or *waiver* of same."<sup>388</sup> Thus, the speedy indictment provision is not triggered by either an arrest<sup>389</sup> or the filing of a preliminary information, or even by taking defendant before a magistrate for preliminary arraignment.<sup>390</sup> Defendant's remedy to cause a "speedy" preliminary hearing lies in habeas corpus, the supreme court pointed out in *Mays*.<sup>391</sup>

c. *Incarceration on Unrelated Charges.* In *State v. Mason*,<sup>392</sup> the supreme court held that the thirty-day speedy indictment period under *Code* section 795.1 is not applicable when defendant is already incarcerated on an unrelated charge. The court determined that it was not the legislative intent "to grant an incarcerated defendant the benefit of a 30 day statute of limitations on offenses unconnected with the one for which he was restrained."<sup>393</sup> Consequently, a section 795.1 dismissal "is not mandated where the public offense for which a defendant is held to answer is unrelated to the one on which the allegedly late indictment or information is subsequently filed."<sup>394</sup>

d. *Motion to dismiss.* That a defendant who has been denied his right to speedy indictment waives his right to dismissal therefor unless he not only files a pretrial motion to dismiss but also insists upon a ruling thereon was made dramatically clear in *State v. Schiernbeck*.<sup>395</sup> Here, defendant "proceeded to trial knowing there had been no ruling on either of his motions to dismiss and without having called the omission to the attention of the

386. CODE § 795.2 (speedy trial), by its express terms, is triggered only by an indictment (or county attorney's information).

387. 204 N.W.2d 862 (Iowa 1973).

388. *Id.* at 866 (emphasis changed). *Accord State v. Morningstar*, 207 N.W.2d 772 (Iowa 1973).

389. *But see United States v. Marion*, 404 U.S. 307, 320-21 (1971): "[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage . . . the Sixth Amendment. Invocation of the speedy-trial provision thus need not await indictment, information, or other formal charge. But we decline to extend the reach of the amendment to the period prior to arrest."

390. *See State v. Morningstar*, 207 N.W.2d 772 (Iowa 1973) (defendant taken before magistrate for preliminary arraignment and posted bail, but no preliminary examination was held or waived, and so defendant was not "held to answer"). *See also Parsons v. Brewer*, 202 N.W.2d 49, 53 (Iowa 1972) (The CODE § 795.7 requirement that defendant, when arrested, be taken before a magistrate without unnecessary delay does not apply to a penitentiary inmate who committed another crime while imprisoned—where he was confined in a special cell "pending further investigation" and was not arrested "for the instant offense until taken before a magistrate.").

391. 204 N.W.2d 862, 865-66 (Iowa 1973).

392. 203 N.W.2d 292 (Iowa 1972).

393. *Id.* at 294.

394. *Id.*

395. 203 N.W.2d 546 (Iowa 1973).

court."<sup>396</sup> The supreme court pointed out: "A motion not ruled on in the trial court, where there has been no request or demand for ruling, preserves no error."<sup>397</sup>

e. *Representation of counsel.* Code section 795.1, as well as section 795.2, contains a provision exempting a defendant who is neither represented by counsel nor free on bail from the historical requirement of making a demand for a speedy indictment (or a speedy trial). That is, "the court on its own motion shall carry out the provisions of this section as to dismissal," notwithstanding defendant's failure to make a demand on a motion to dismiss.<sup>398</sup> The supreme court's recent elimination of the demand-waiver requirement as to both the speedy indictment<sup>399</sup> and the speedy trial<sup>400</sup> statutes has rendered this provision of minimal importance. Nevertheless, the supreme court said in *State v. Gorham*:<sup>401</sup> "[W]hen an accused is neither at liberty on bail nor represented by an attorney, then absence of demand for or assertion of right to a speedy trial shall under no circumstances be considered ["in an *ad hoc* delicate balancing process in evaluating any good cause so shown"]<sup>402</sup> in connection with trial time delay."<sup>403</sup>

In *State v. Cannon*,<sup>404</sup> the Iowa supreme court held that whether a defendant is "represented" by counsel for purposes of Code section 795.1 depends upon whether he has consulted with an attorney and not upon the time of formal appointment (or retainer) of counsel. Thus, "a defendant who, prior to indictment, has the opportunity and actually does consult freely with an attorney of his choice, but voluntarily elects not to discuss the charge (known to him) upon which an indictment is subsequently found,"<sup>405</sup> is represented by legal counsel for the purposes of Code section 795.1. The record showed that a few days after defendant waived preliminary hearing and was bound over to the district court on the instant charge, he had a conference with his court-appointed attorney on another matter (*i.e.*, a hold order from California authorities). The same attorney was formally appointed at his arraignment on the instant charge. The supreme court "recognize[d] the frequent practice of assigning an attorney for a defendant, followed by a formal appointment at arraignment in district court" and "doubt[ed] such an arrangement would result in a holding that defendant was 'unrepresented' during the pre-indictment period."<sup>406</sup>

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396. *Id.* at 547.

397. *Id.*

398. See IOWA CODE §§ 795.1, .2 (1973).

399. *State v. Morningstar*, 207 N.W.2d 772 (Iowa 1973).

400. *State v. Gorham*, 206 N.W.2d 908 (Iowa 1973).

401. *Id.*

402. *Id.* at 914.

403. *Id.*

404. 201 N.W.2d 715 (Iowa 1972). This decision was prior to *State v. Morningstar*, 207 N.W.2d 772 (Iowa 1973), but is illustrative as to what constitutes representation by counsel (although itself turning on defendant's failure to demand a speedy indictment under the old demand-waiver rule).

405. *Id.* at 717.

406. *Id.*

### 3. Double Jeopardy

In *State v. White*,<sup>407</sup> the Iowa supreme court finally considered the question of the attachment of double jeopardy upon retrials following a hung jury. In the instant case, defendant was retried and convicted following mistrials in each of two prior trials because the respective juries were unable to agree.

The supreme court concluded that the United States Supreme Court "has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served."<sup>408</sup> Accordingly, the Iowa court distilled the "flexible rule" that, in ruling on a demurrer alleging double jeopardy, the trial court "must consider all surrounding facts and circumstances and in fairness determine when the accused's right to be finally tried by a particular tribunal outweighs the public interest in justice."<sup>409</sup> Thus, the supreme court rejected any rigid, mechanical rule that defendant "may not be retried, regardless of the 'manifest necessity' or considerations of 'the ends of public justice' for aborting two trials . . ."<sup>410</sup> In *White*, there was presented "only the stark fact of two mistrials for jury disagreement" and thus there was "no evidence upon which to review trial court's discretion in declaring the mistrials. . . ."<sup>411</sup> Consequently, the supreme court found no double jeopardy violation<sup>412</sup> and defendant's conviction was therefore affirmed.<sup>413</sup>

### 4. Discovery<sup>414</sup>

a. *Alibi rebuttal witnesses.* The leading development in the area of discovery was the United States Supreme Court decision in *Wardius v. Oregon*,<sup>415</sup> in which the Court held that federal due process requires reciprocal discovery concerning a state's statutory notice-of-alibi rule.<sup>416</sup> Specifically, the Court held that "the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal

407. 209 N.W.2d 15 (Iowa 1973).

408. *Id.* at 17, citing *Illinois v. Somerville*, 93 S. Ct. 1066 (1973).

409. *Id.*

410. *Id.*

411. *Id.*

412. In a related development, the supreme court refused to overrule *State v. Sefcheck*, 261 Iowa 1159, 157 N.W.2d 128 (1968) (reprosecution after supreme court's voiding of first conviction—here, for lack of trial counsel—is not barred by reason of double jeopardy).

413. See also *Robinson v. Neil*, 93 S. Ct. 876 (1973) (*Waller v. Florida*, 397 U.S. 387 (1970), which bars on the fifth amendment ground of double jeopardy state and municipal prosecutions based on the same criminal activity, is fully retroactive).

414. For a discussion of the role of judicial discretion in the discovery process, see *Dunahoo*, *supra* note 364 at 1031-34.

415. 93 S. Ct. 2208 (1973).

416. Concerning other types of State's discovery, see *Cupp v. Murphy*, 93 S. Ct. 2000 (1973) (fingernail scrapings), as discussed in note 472(d) *infra*; *United States v. Mara*, 93 S. Ct. 774 (1973) (handwriting exemplars), as discussed in text accompanying notes 496-98 *infra* and note 472(c) *infra*; and *United States v. Dionisio*, 93 S. Ct. 764 (1973) (voice exemplars), as discussed in text accompanying notes 496-98 *infra* and note 472(f) *infra*.

defendants."<sup>417</sup> At issue was Oregon's statute requiring a defendant to give the State notice of the particulars of an intended alibi defense but remaining silent as to any subsequent reciprocation by the State as to pretrial notice of intended alibi rebuttal witnesses.<sup>418</sup> Holding that such a statutory scheme was "facially invalid,"<sup>419</sup> the Supreme Court dictated that "in the absence of fair notice that he would have opportunity to discover the State's rebuttal witnesses, petitioner cannot be compelled to reveal his alibi defense."<sup>420</sup> Thus, the Court did not retreat from its position in *Williams v. Florida*<sup>421</sup> that a State's notice-of-alibi statute is not unconstitutional as an infringement of the fifth amendment privilege against self incrimination. Nor did the Court hold that the State must provide notice-of-alibi rebuttal witnesses. Indeed, the State apparently may, consistent with *Wardius*, either abandon its notice-of-alibi rule or add a notice-of-alibi rebuttal witness requirement.

b. *Expert witness' reference materials.* Copies of an expert witness' reference materials were deemed non-discoverable in *State v. Allison*.<sup>422</sup> Defendant therein had requested a disclosure order requiring production to him of the medical texts, treatises, journals, and articles upon which the State's physician was expected to base his opinion that a blood test of 249 shows intoxication. "Had the State's physician rendered a report with respect to this particular case and defendant requested the State to produce it, a different question would be presented,"<sup>423</sup> the supreme court cautioned.

c. *Informer's identity.* Two survey cases dealt with the general principle that the identity of confidential informants can be withheld from the defense subject to disclosure on a case-by-case basis where the requisite showing of necessity for disclosure is made.<sup>424</sup> That is, such disclosure "is required where it would be relevant and helpful to the defense, i.e. when the informer was a participant in, or a witness to, the crime charged."<sup>425</sup> Defendant carries the burden of showing such need and "[m]ere speculation an informer may be helpful is not enough to carry the burden,"<sup>426</sup> the supreme court determined in *State v. Battle*.<sup>427</sup> Defendant's burden in *Battle* was not met merely by requesting the informer's name during cross examination of a police officer. In *State v. Crawford*,<sup>428</sup> the non-disclosure rule was held to extend to reputation testimony such that a police officer testifying as to defendant's bad reputation was not required to divulge the identity of informers who were his sources re-

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417. 93 S. Ct. 2208, 2211.

418. Cf. IOWA CODE § 777.18 (1973). See also *State v. Kappos*, 189 N.W.2d 563 (Iowa 1971) (the name of a rebuttal witness need not be endorsed on the county attorney's information).

419. 93 S. Ct. 2208, 2211 n.4.

420. *Id.* at 2214.

421. 399 U.S. 78 (1970).

422. 206 N.W.2d 893 (Iowa 1973).

423. *Id.* at 894.

424. See *State v. Battle*, 199 N.W.2d 70, 71 (Iowa 1972).

425. *Id.*

426. *Id.* at 72.

427. 199 N.W.2d 70 (Iowa 1972).

428. 202 N.W.2d 99 (Iowa 1972).

garding defendant's reputation. Notwithstanding the general rule requiring (on cross-examination) identification of the source of reputation statements, the supreme court held that "public policy favoring the non divulgence privilege [outweighs] . . . the rule for testing collateral testimony by cross-examination."<sup>429</sup> The court added that even if the informants were identified, defendant, "under the present state of our case law, could not have called them to impeach statements of the witness in this collateral area."<sup>430</sup> Thus, the trial court "did not abuse its discretion in refusing to require the witness to name the informants."<sup>431</sup>

d. *Statements of witnesses.* In *State v. Aossey*,<sup>432</sup> the supreme court attempted to strike a balance between *State v. Eads*<sup>433</sup> (abuse of court's discretion to order production of statements of all of State's witnesses expected to testify at trial) and *Brady v. Maryland*<sup>434</sup> (State must turn over requested statements which are materially exculpatory). Affirming the trial court's refusal to order the State to produce a written statement of Aossey's accomplice, the supreme court characterized the statement as "highly inculpatory."<sup>435</sup> So viewing it, as non-exculpatory, the supreme court held that the State was not required to produce it—unless it was "necessary to his proper defense,"<sup>436</sup> which it was not (since defendant's theory of mistake as to his accomplice's lack of authority to remove goods from his employer "taxe[d] credulity to the limit").<sup>437</sup> And, even if parts of it were exculpatory, the issue of non-production was mooted since other state's witnesses acknowledged these particular allegedly exculpatory matters at trial.<sup>438</sup> Moreover, since defendant's accomplice himself did not testify, there was no Jencks problem, the supreme court concluded.

In *State v. Houston*,<sup>439</sup> the Iowa supreme court upheld the trial court's refusal to order in-trial turnover of a police officer's summary of a statement of a state's witness. After the state's witness testified on direct examination as to the description of defendant he gave to the investigating officer at the scene of the crime, defendant requested turnover to him of the witness' statement before cross examination. The trial court examined the police report *in camera* and, finding no inconsistency in the summary of the witness' statement and his testimony, refused to order turnover of the statement. Affirming, the supreme court noted that defendant "does not claim access to the police

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429. *Id.* at 102.

430. *Id.*

431. *Id.*

432. 201 N.W.2d 731 (Iowa 1972).

433. 166 N.W.2d 766 (Iowa 1969). However, the supreme court in *Eads* did "not foreclose the possibility that a defendant may be entitled to a particular statement upon showing it is necessary to his proper defense." *Id.* at 774.

434. 373 U.S. 83 (1963).

435. 201 N.W.2d 731, 734.

436. *Id.*

437. *Id.* at 733.

438. *Id.*

439. 209 N.W.2d 42 (Iowa 1973).



report because it is exculpatory or a verbatim, signed or adopted statement of the witness."<sup>440</sup> Noting that there is a distinction between "a statement made by a witness and an imprecise summary of what another understood him to say," the supreme court cited a number of cases in which it had "approved the federal Jencks Act procedure for determining defendant's right to see statements of witnesses."<sup>441</sup> The test, in making this distinction, is "whether the statement is the witness' own, rather than the product of the investigator's selections, interpretations and interpolations."<sup>442</sup> Moreover, "[i]t must be shown, unless there is direct evidence the witness prepared, signed or adopted the statement, that it minimally is a continuous, narrative statement made by the witness and recorded verbatim, or nearly so."<sup>443</sup> The instant statement did not meet this test and thus "[t]here was no error in depriving the defense access thereto."<sup>444</sup> Indeed, the court recalled that it had rejected "a dragnet demand for all statements, reports or summaries of those persons the State intended to call as witnesses"<sup>445</sup> in *State v. Cunha*.<sup>446</sup>

## 5. Motions to Suppress

Rulings by the trial courts on pretrial motions to suppress<sup>447</sup> provided the central issue in many of the survey cases, as defendants asserted that incriminatory evidence had been obtained against them in an unconstitutional or illegal fashion.<sup>448</sup>

### a. Identification Procedures.

i. *Individualized Confrontations.* The leading development in the area of identification procedures<sup>449</sup> was *Kirby v. Illinois*,<sup>450</sup> in which the United States Supreme Court sharply limited *United States v. Wade*.<sup>451</sup> The latter had set forth a sixth amendment standard of *per se* exclusion of identification testimony based upon a post-indictment lineup when defendant was not afforded right to assistance of counsel. *Kirby* held that the *Wade* doctrine does not extend to identification testimony based upon "a police station showup that took place *before* the defendant had been indicted or otherwise formally

440. *Id.* at 46, *distinguishing* *State v. Mayhew*, 170 N.W.2d 608 (Iowa 1969), *on appeal after remand*, 183 N.W.2d 723 (Iowa 1971).

441. *Id.*

442. *Id.* Cf. *State v. Hodge*, 252 Iowa 449, 105 N.W.2d 613 (1960), *cert. denied*, 368 U.S. 402 (1962) (State witness' "work product" not discoverable).

443. *Id.*

444. *Id.*

445. *Id.*

446. 193 N.W.2d 106 (Iowa 1971).

447. For a discussion of the scope of judicial discussion in rulings on motions to suppress, see Dunahoo, *supra* note 364 at 1041-42.

448. For a discussion of challenges to blood-test and breath-test evidence in O.M.V.U.I. cases during the survey period, see text accompanying notes 269-88 *supra*.

449. In the related areas of compelled handwriting and voice exemplars, see text accompanying notes 496-98 *infra*.

450. 406 U.S. 682 (1972).

451. 388 U.S. 218 (1967).



charged with any criminal offense."<sup>452</sup> Thus, while there is no federal constitutional requirement of counsel at a lineup or in an individualized confrontation until a criminal suspect has been formally charged, the states were left free to apply a broader right of counsel.

Iowa is one of the states<sup>453</sup> that has stuck with the *Kirby* minimal standards. In *State v. Jackson*,<sup>454</sup> the Iowa supreme court observed that *Kirby* "held admissible evidence of preindictment identification at a police station where accused was without counsel."<sup>455</sup> In *Jackson*, the robbery victim was asked to come to the police station because the police had detained suspects fitting the description of his assailants, and as he entered the station he recognized defendant coming down the stairs. Noting the similarity with the factual situation in *Kirby*, the Iowa supreme court said: "The identification was spontaneous and was received without prompting from any law enforcement officer."<sup>456</sup>

Similarly, a counsellless one-man showup was upheld in *Williamson v. State*.<sup>457</sup> The robbery victim obtained defendant's name from a third party and reported to police that he had been robbed by defendant. Two or three hours later, defendant was arrested and the victim was called to the police station. Upon entering, the victim spotted defendant and immediately confronted him about the stolen billfold. Applying *Kirby*, the Iowa supreme court held that this procedure was not "unnecessarily suggestive and conducive to irreparable mistaken identification,"<sup>458</sup> even though defendant was the only black defendant in the station at the time. The court noted, *inter alia*, that the counsellless confrontation "occurred soon after the offense while the victim's memory was fresh" and that the identification was "spontaneous."<sup>459</sup> Moreover, an in-court identification was made.<sup>460</sup>

ii. *Photographic displays*. In a related matter, the United States Supreme Court held in *United States v. Ash*<sup>461</sup> that "the Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification

452. 406 U.S. 682, 684 (1972).

453. See *State v. Saint Andre*, 263 La. 48, 267 So. 2d 190 (1972); *State v. Carey*, 486 S.W.2d 443 (Mo. 1972) (counsel applies only to post-indictment lineups); *People v. Faulkner*, 28 Cal. App. 3d 384, 104 Cal. Rptr. 625 (1972); *contra*, *Arnold v. State*, 484 S.W.2d 248 (Mo. 1972).

454. 199 N.W.2d 102 (Iowa 1972).

455. *Id.* at 103 (emphasis added).

456. *Id.* at 102.

457. 201 N.W.2d 490 (Iowa 1972).

458. *Id.* at 491.

459. *Id.*

460. On the related matter of an independent origin for in-court testimony, the supreme court said in *State v. Houston*, 209 N.W.2d 42 (Iowa 1973): "Assuming there was an illegal identification procedure used prior to trial, the in-court identification testimony is admissible if the State proves by clear and convincing evidence the in-court identification had an independent origin." Here, the above test was met by witness' identification having "untainted origin" in his observations of defendant (from 3-4 feet away in a well-lighted area) at the scene of the crime. Thus, he could identify defendant in court notwithstanding an arguably illegal police station lineup (the evidence of which was partially "suppressed" by an order in limine).

461. 93 S. Ct. 2568 (1973).

of the offender."<sup>462</sup> This holding covers both pre-indictment and post-indictment photographic displays,<sup>463</sup> both of which were used in *Ash*. Only the post-indictment display was argued to the Supreme Court in *Ash*, since defendant recognized that *Kirby*, in the Court's words, "forecloses application of the Sixth Amendment to events before the initiation of adversary criminal proceedings."<sup>464</sup> The Court's rationale was based on its formulation of the following test for determining when a pretrial event constitutes a "critical stage" thus necessitating the right to assistance of counsel, viz., "whether the accused require[s] aid in coping with legal problems or assistance in meeting his adversary."<sup>465</sup> Concluding that requiring counsel in the instant case would require a "substantial departure" from the abovementioned historical test, the Court reasoned: "Since the accused himself is not present at the time of the photographic display, and asserts no right to be present, . . . no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary. Similarly, the counsel guarantee would not be used to produce equality in a trial-like adversary confrontation."<sup>466</sup>

b. *Search and seizure evidence.*

i. *Standing to challenge.* A comprehensive standard for determining a person's standing to challenge the legality of a search, and the admissibility of evidence derived therefrom, was expressed in *State v. Osborn*.<sup>467</sup> Specifically, the court held that standing proceeds from any of the following: "Invasion of privacy may be claimed by that person [1] who is charged with an offense of possession; or [2] who has a proprietary or possessory interest in the property seized; or [3] who is legitimately on the premises when the search occurs."<sup>468</sup> But the court then proceeded to qualify all three bases for standing, which are discussed below in the context of the instant factual situation. Here, the supreme court held that a guest in another's automobile has standing to challenge the legality of the search of that automobile when the fruits of the search are being used against the guest on a burglary charge provided that he alleges that the search invaded his expectation of privacy.

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462. *Id.* at 2579.

463. See also *State v. Houston*, 206 N.W.2d 687 (Iowa 1973) (no showing that counselless photographic identification "was so impermissibly induced or suggestive as to create a very substantial likelihood of irreparable misidentification;" counsel issue not raised).

464. 93 S. Ct. 2568, 2570 n.3 (1973).

465. *Id.* at 2575.

466. *Id.* at 2577.

467. 200 N.W.2d 798 (Iowa 1972).

468. *Id.* at 804, accord *Brown v. United States*, 93 S. Ct. 1565, 1569 (1973):

[T]here is no standing to contest a search and seizure where, as here, the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) had no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

While the court pointed out that standing is automatic for anyone charged with an offense of possession, it nevertheless noted that possession of the seized evidence must itself be an essential element of the crime charged in order for the automatic standing rule to apply. Thus, there is no automatic standing on a charge of burglary (as opposed, *e.g.*, to a charge of unlawful possession of marijuana). Next, the court qualified the automatic-standing rule where the accused has a proprietary or possessory interest in either the premises searched or the property seized by saying that it is unlikely that the accused has standing by virtue of an interest in *stolen goods* seized as evidence. In other words, it appears that a thief (such as the accused here in a burglary case) lacks standing generally. Finally, the court held that an automobile-guest normally would have standing—since standing normally evolves when the accused is legitimately on the premises in an area in which there was “a reasonable expectation of freedom from governmental intrusion”<sup>469</sup> (such as in a friend’s automobile). However, the court ruled that it is proper to require that an otherwise ‘aggrieved person’ “allege, and if the allegation be disputed, that he establish, that he himself was the victim of an invasion of privacy.”<sup>470</sup> In other words “it is an invasion of his personal right of privacy of person or premises due to an unreasonable search and seizure that Osborn must verify to obtain standing to question the legality of the search of Nott’s automobile.”<sup>471</sup> Because defendant did not so allege, he lacked standing, the supreme court concluded.

ii. *Warrantless searches with consent.* The United States Supreme Court provided the major development concerning warrantless searches,<sup>472</sup> by

469. *Id.* at 805, quoting *Mancusi v. DeForte*, 392 U.S. 364, 368 (1968).

470. *Id.* at 806, quoting *Jones v. United States*, 362 U.S. 257, 261 (1960).

471. *Id.* at 804.

472. In other warrantless search and seizure cases, the United States Supreme Court held:

(a) *Business records.* No fourth amendment claim arises when petitioner’s records, which have been turned over to her accountant, are subpoenaed from the accountant by the government for criminal investigative purposes. “[T]here can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return.” *Couch v. United States*, 93 S. Ct. 611, 619 (1973).

(b) *Exigent circumstances—Impounded Vehicles.* The fourth amendment is not violated by a warrantless search of an impounded automobile (including its locked trunk) pursuant to a standard police procedure of carrying out “community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.” Here, the impounded automobile was stored in a rural area seven miles from the police station and a revolver was suspected to be in it since the car belonged to a police officer who was unconscious following an accident. The search was for the purpose of removing the gun as a matter of public safety and not for discovery of evidence of criminal activity (here, a murder). *Cady v. Dombrowski*, 93 S. Ct. 2523 (1973).

(c) *Handwriting exemplars:* “We have held today in *Dionisio*, [*United States v. Dionisio*, 93 S. Ct. 764 (1973)] that a grand jury subpoena is not a ‘seizure’ within the meaning of the Fourth Amendment, and further, that that Amendment is not violated by a grand jury directive compelling production of ‘physical characteristics’ which are ‘constantly exposed to the public’. . . . Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person’s script than there is the tone of his voice.” *United States v. Mara*, 93 S. Ct. 774, 775-56 (1973).

holding in *Schneckloth v. Bustamonte*<sup>473</sup> that Miranda-type<sup>474</sup> warnings are not a prerequisite to a valid consent search. That is, an accused's knowledge of a right to refuse is not an indispensable element of a valid consent. Nevertheless, this knowledge is a consideration:

We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.<sup>475</sup>

iii. *Warrantless searches based on exigent circumstances.* In *State v. Simmons*,<sup>476</sup> the Iowa supreme court reaffirmed the principle that "a police officer may make a valid search of a vehicle on a public highway without a warrant or consent or prior to arrest where exigent circumstances and probable cause exist."<sup>477</sup> Here, police officers stopped a car containing four blacks while investigating a reported robbery by four black juveniles. One of the occupants fit the reported description of one of the robbers. After the stopping, one occupant (Smith) was observed bending over and apparently shoving something under the front seat. Meanwhile, the driver (Colton) alighted and started walking back to the police car. Based upon their experience that "such conduct was often an attempt to keep them from observing the contents and occupants of the vehicle,"<sup>478</sup> the officers returned Colton to the car. One of the officers then shined his flashlight through the open car door and saw a brown paper bag protruding from under the front seat. Upon questioning, Colton

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(d) *Incident to arrest.* The *Chimel v. California* [395 U.S. 752 (1969)] doctrine of a warrantless search incident to a lawful arrest applies to a limited station house seizure of highly evanescent evidence (here, fingernail scrapings) from a person who was not under arrest at the time but was voluntarily being generally questioned. This limited intrusion was constitutionally permissible in light of defendant's attempted destruction of this evidence; however, the Court added that it did "not hold that a full *Chimel* search would have been justified in this case without a formal arrest and without a warrant." *Cupp v. Murphy*, 93 S. Ct. 2000, 2004 (1973).

(e) *Stop and Frisk.* Reasonable cause for a stop-and-frisk "search" need not be based upon the officer's personal observation and thus can rest upon an informant's tip provided that the tip has some indicia of reliability. *Adams v. Williams*, 407 U.S. 143 (1972).

(f) *Voice exemplars.* "It is clear that a subpoena to appear before a grand jury is not a 'seizure' in the Fourth Amendment sense . . . . The required disclosure of a person's voice is thus immeasurably further removed from the Fourth Amendment protection than was the intrusion into the body effected by the blood extraction in *Schmerber* [*Schmerber v. California*, 384 U.S. 757 (1966)]." *United States v. Dionisio*, 93 S. Ct. 764, 769, 772 (1973).

473. 93 S. Ct. 2041 (1973).

474. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

475. 93 S. Ct. 2041, 2059 (1972).

476. 195 N.W.2d 723 (Iowa 1972).

477. *Id.* at 724-25. See also *Almeida-Sanchez v. United States*, 93 S. Ct. 2535, 2537-38 (1973): "[T]he *Carroll* doctrine [*Carroll v. United States*, 267 U.S. 132 (1925)] does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search."

478. *Id.* at 724.



repeatedly said nothing was in the bag and kept inching it out when directed to remove the bag. The officer thereupon reached in and pulled out the bag which contained blasting caps. Affirming the conviction of the defendant (another occupant of the car) for unlawful possession of explosive devices, the supreme court concluded: "Exigent circumstances and probable cause existed for the warrantless seizure of the caps. In so holding we find the actions of Smith and Colton added some weight to the probable cause issue."<sup>479</sup>

iv. *Searches with warrant.* The only significant new general development concerning search warrants during the survey period<sup>480</sup> was the holding in *State v. Dodson*<sup>481</sup> that Miranda warnings<sup>482</sup> are not necessary before execution of a search warrant provided that there are "no tainted elicitation of incriminatory statements. . . ."<sup>483</sup> Thus, any of defendant's attendant statements or admissions were admissible.

In other cases, the supreme court reaffirmed a number of standard principles—e.g., that a warrant "may issue upon [reliable] hearsay supplied by an unidentified informant"<sup>484</sup> and that probable cause for a warrant cannot rest upon the unsupported conclusions of the affiant-officer.<sup>485</sup> *State v. Lynch*<sup>486</sup> is the only case in which the Iowa supreme court discussed probable cause for a warrant in detail.<sup>487</sup> In *Lynch*, the content of the police officers' affidavit was summarized as follows:

That they had made a complete investigation into defendant's activities and knew all of the facts in the police file; that they were aware of defendant's suspicious actions during the previous two weeks; that they had reliable information from a reliable informant who is a credible resident of the state of Iowa that defendant has been selling narcotic drugs and marijuana, and that defendant left several days previous to the date of the application for California to pick up a load of drugs; that during a flight into Cedar Rapids defendant had offered to obtain drugs for the airline stewardess; that defendant was arrested on or about June 5, 1968, in California on a narcotics charge; that an official from United Air Lines informed affiants that defendant had offered to obtain narcotics for the stewardess on his flight on December 19, 1968.<sup>488</sup>

479. *Id.* at 725.

480. On the specific topic of necessity for a search warrant for seizure of allegedly obscene materials, see text accompanying notes 238-44 *supra*.

481. 195 N.W.2d 684 (Iowa 1972).

482. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

483. 195 N.W.2d 684, 686 (Iowa 1972).

484. *State v. Dodson*, 195 N.W.2d 684, 685 (Iowa 1972).

485. "[I]t is not the arresting officer's determination which counts; it is that of the magistrate, who must reach his conclusion solely upon information supplied to him at the time the warrant is requested." *The Draper v. United States*, 358 U.S. 307 (1959) probable cause standard for an officer making a warrantless arrest (and search incident thereto) does not apply to an officer's stating probable cause in his affidavit for a search warrant. *State v. Johnson*, 203 N.W.2d 126, 128 (Iowa 1972).

486. 197 N.W.2d 186 (Iowa 1972).

487. For other cases, in which the supreme court summarily upheld the affidavits for search warrants, see *State v. Dodson*, 195 N.W.2d 684 (Iowa 1972) and *State v. Simmons*, 195 N.W.2d 723 (Iowa 1972).

488. 197 N.W.2d 186, 191 (Iowa 1972).



The supreme court said that "except for the recitation that defendant had offered to supply narcotics to the stewardess on the flight into Cedar Rapids, we have no hesitancy in saying that probable cause for issuance of the warrant could not be found."<sup>489</sup> The court continued:

Nothing else appears except the conclusions of the police officers, who asserted they had the defendant under surveillance for several weeks and that his actions were "suspicious." This conclusion was entirely unsupported by facts. They also stated they knew everything that was in the police files; but the writ cannot issue on what *they* secretly know. It can issue only on information communicated to the issuing officer who then makes his own determination of probable cause.<sup>490</sup>

The supreme court held "it is reasonable to conclude that one traveling on an airliner who offers narcotics to the stewardess may have such narcotics on his person or among his effects." This reported offer "[s]upported by the statements of an official of the airlines . . . was sufficient to furnish probable cause," the supreme court concluded.<sup>491</sup>

b. *Privilege against self incrimination.* During the survey period, the United States Supreme Court handed down three major opinions concerning the fifth amendment privilege against self incrimination. These cases are all discussed in this section on evidentiary standards, although not all of them involved motions to suppress.

i. *Production of records in another's possession.* In *Couch v. United States*,<sup>492</sup> the Court, stating that this is "a personal privilege,"<sup>493</sup> held that a taxpayer-defendant may not invoke the fifth amendment to prevent the subpoena-coerced production of her business records in the possession of her accountant (albeit title remained in the taxpayer). Noting that the accountant was "the only one compelled to do anything"<sup>494</sup> by the subpoena, the court recalled Justice Holmes' observation: "A party is privileged from producing the evidence but not from its production."<sup>495</sup>

ii. *Non-testimonial evidence.* That this fifth amendment privilege protects only against compelled disclosure of incriminatory testimonial evidence sought for its communicative content was once more made clear. In *United States v. Mara*<sup>496</sup> and *United States v. Dionisio*,<sup>497</sup> respectively, the Supreme Court held that this privilege does not preclude grand jury subpoenas ordering certain named witnesses to appear and produce handwriting and voice exemplars. It has long been held that "the compelled display of identifiable physical characteristics infringes no interest protected by the privilege against

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489. *Id.* at 192.

490. *Id.*

491. *Id.*

492. 93 S. Ct. 611 (1973).

493. *Id.* at 616.

494. *Id.*

495. *Id.*, quoting *Johnson v. United States*, 228 U.S. 457, 458 (1913).

496. 93 S. Ct. 774 (1973).

497. 93 S. Ct. 764 (1973).

compulsory self-incrimination,"<sup>498</sup> the Court pointed out. Thus, defendants' contempt convictions for refusal to abide by the subpoenas were affirmed in both cases.

iii. *Confessions.* The standard for determining the voluntariness of defendant's confession<sup>499</sup> was set forth in *State v. Fetters*,<sup>500</sup> to wit: "[W]hen a confession of a criminal defendant is challenged at a pretrial suppression hearing as involuntary, the burden is on the state to prove by a preponderance of the evidence that the confession was voluntary as a prerequisite to its admissibility into evidence at his trial."<sup>501</sup> The Iowa supreme court thus adopted the less-stringent standard after the United States Supreme Court<sup>502</sup> had "left States free, pursuant to their own law, to adopt the higher standard."<sup>503</sup>

## 6. Change of Venue

A new dimension in deciding applications for change of venue<sup>504</sup> was added in *Pollard v. District Court*.<sup>505</sup> The supreme court held therein that the application must be considered in the context of the publicity attending the entire matter and not merely the isolated publicity concerning an individual wrongdoer. Accordingly, it was reversible error to deny defendant's application for change of venue based upon considerable media coverage of a city council meeting in which there was considerable bickering between the State Auditor and the city councilmen but only casual reference to defendant being named in the state audit as the only city employee who had possibly violated any law. Rejecting the traditional approach of requiring defendant to "demonstrate conclusively she cannot receive a fair trial,"<sup>506</sup> the court said: "When

498. *Id.* at 767.

499. See *Schneekloth v. Bustamonte*, 93 S. Ct. 2041, 2046 (1973), a consent search case, as to the nature of voluntariness. See also *State v. Ware*, 205 N.W.2d 700 (Iowa 1973) (confession is inadmissible when induced by officer's promissory leniency), as discussed in text accompanying notes 663-67 *infra*. (Trial-mistrial).

500. 202 N.W.2d 84, 89 (Iowa 1972) (defendant's subnormal intelligence by itself does not render a confession involuntary if he can "understand the meaning and effect of the confession," but this is a factor to be considered in the court's determination).

501. *Id.* at 88. However, the admissibility of confessions made before *Miranda* [*Miranda v. Arizona*, 384 U.S. 436 (1966)] must be determined "by application of concomitant case law explicating the due process standard of voluntariness." On a postconviction relief petition, the burden thus is upon defendant to establish by a preponderance of the evidence that his confession, viewed reasonably in light of the totality of circumstances, was involuntarily given. See *Parsons v. Brewer*, 202 N.W.2d 49, 52 (Iowa 1972).

502. *Lego v. Twomey*, 404 U.S. 477 (1972).

503. 202 N.W.2d 84, 88 (Iowa 1972).

504. For a discussion of the scope of judicial discretion in ruling on applications for change of venue, see *Dunahoo*, *supra* note 364, at 1047-52.

505. 200 N.W.2d 519 (Iowa 1972).

506. *Id.* at 521. On the other hand, the court upheld denials of defendant's applications for changes of venue in three other cases involving allegedly prejudicial publicity concerning defendants alone. [In these cases, defendants failed to show actual excitement and the material was not "so potentially prejudicial that prejudice must be presumed."] *Pollard v. District Court*, 200 N.W.2d 519, 520 (Iowa 1972).]. See *State v. Davis*, 196 N.W.2d 885 (Iowa 1972) (not prejudicial that one newspaper account was subject to misinterpretation in two respects since it was in "substantial accord with the facts"); *State v. Elmore*, 201 N.W.2d 443 (Iowa 1972) (insufficient showing of local excitement and prejudice to require a change of venue although a minor reference was

the spotlight's glare comes to rest on a certain individual in a matter of large public interest involving widespread and intensive publicity of a prejudicial nature, the test is whether a 'reasonable likelihood' exists that the voir dire jury examination or a continuance will not be sufficient to allow a fair trial."<sup>507</sup>

The supreme court also made a policy change regarding the scope of its review of rulings on change of venue applications. In *State v. Elmore*,<sup>508</sup> it said: "We are required to make 'an independent evaluation of the circumstances' on change of venue issues in criminal cases involving the right to an impartial jury, i.e., our review is de novo whether the questions comes to us on certiorari in advance of trial, or on direct appeal following judgment. . . . To this extent only our pronouncement in *Harnack v. District Court* . . . is no longer controlling."<sup>509</sup>

In other cases involving procedural aspects, the court held: that mere conclusions or generalities in a supporting affidavit (unlike in the motion itself) will not support a change of venue and thus the grounds therefor must be stated with definiteness and certainty;<sup>510</sup> that the State's failure to file affidavits in resistance to defendant's motion does not convert defendant's motion and affidavit from a prima facie to a conclusive showing;<sup>511</sup> and that sustaining of defendant's motion for continuance renders moot his motion for change of venue when alternative relief was sought in the two concurrently-filed motions.<sup>512</sup> The court also suggested: "[W]hen motions to change venue are overruled, counsel on both sides would be well advised to have voir dire examination of the jury reported."<sup>513</sup>

## 7. Speedy Trial<sup>514</sup>

The survey period evidenced a major change in the area of speedy trial, which was occasioned by a monumental ruling of the United States Supreme Court.

a. *Demand-waiver doctrine.* Prompted by the United States Supreme Court's June 22, 1972 holding in *Barker v. Wingo*<sup>515</sup> that rejected a State's demand-waiver rule that "a defendant who fails to demand a speedy trial forever waives his right,"<sup>516</sup> the Iowa supreme court belatedly did an aboutface<sup>517</sup>

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made in one newspaper account during the trial to a parole violation being the reason defendant was not free on bond); and *State v. Williams*, 207 N.W.2d 98 (Iowa 1973) (insufficient showing of local excitement and prejudice to preclude retrial in same county only two weeks after a mistrial).

507. 200 N.W.2d 519, 521 (Iowa 1972).

508. 201 N.W.2d 443 (Iowa 1972).

509. *Id.* at 445, referring to *Harnack v. District Court*, 179 N.W.2d 356, 359 (Iowa 1970).

510. *State v. Dague*, 206 N.W.2d 93 (Iowa 1973).

511. *Id.*

512. *State v. Weiland*, 202 N.W.2d 67 (Iowa 1972).

513. *State v. Davis*, 196 N.W.2d 885, 889 (Iowa 1972).

514. See generally Dunahoo and Sullins, *Speedy Justice*, 22 DRAKE L. REV. 266 (1973). See also note 517 *infra*.

515. 407 U.S. 514 (1972).

516. *Id.* at 528.

517. Prior to its dropping of the demand-waiver rule under CODE §§ 795.1 and 795.2

in *State v. Gorham*:<sup>518</sup> "In light of contemporary standards we now reject the rule that absent a demand an accused, per se, waives his right to a Code § 795.2 speedy trial."<sup>519</sup> This means that "an accused, on bail and represented by counsel, whose trial has not been postponed upon his application is entitled to a dismissal if not brought to trial within 60 days after being indicted unless 'good cause' to the contrary be prosecutorially shown, and (2) courts must engage in an *ad hoc* delicate balancing process in evaluating any 'good cause' so shown."<sup>520</sup>

This new procedural rule represents a policy change on the part of the Iowa supreme court, which "[s]ince 1943 . . . has repeatedly held . . . an accused, unless not admitted to bail and unrepresented by counsel, waives right to dismissal for failure to demand a speedy trial."<sup>521</sup> Thus, once a case is not brought to trial within sixty days of indictment,<sup>522</sup> defendant *must* file

in *State v. Gorham*, 206 N.W.2d 908 (Iowa 1973) on April 25, 1973, the Iowa supreme court had expressly maintained same in *State v. Kimball*, 203 N.W.2d 296 (Iowa 1972) on December 20, 1972 (and thus differentiated "speedy trial" under the CODE and the sixth amendment). In *Kimball*, the supreme court held that "a defendant represented by counsel or at bail is required to demand trial in order to take advantage of the time limitation" (of CODE § 795.2) and accordingly "[s]ince a demand for trial was not filed, the trial court properly refused to dismiss the case under the statute." *Id.* at 300 (emphasis added). The court then noted that "[t]he federal constitutional right to speedy trial was recently expounded by the United States Supreme Court in *Barker v. Wingo*," and upon applying the four-part *Barker* balancing test, concluded: "We hold, under the *Barker* decision, that defendant's federal constitutional right to speedy trial was not violated." *Id.* at 300, 301 (emphasis added). Then, in *Gorham*, the supreme court observed: "Now, for the first time since issuance of the opinion in *Barker v. Wingo* . . . we are called upon to determine the propriety of our aforesaid demand-waiver rule." *Id.* at 910 (emphasis added). The court, without mentioning *Kimball*, thereupon held that "to the extent *Pines v. District Court* [233 Iowa 1284, 10 N.W.2d 574 (1943)] and its successors conflict herewith they are no longer controlling." *Id.* at 913. The apparent explanation for this *Kimball-Gorham* discrepancy is that in *Gorham*, presumably unlike in *Kimball*, defendant "argue[d] the so-called demand waiver rule, specifically and by judicial construction inherent in § 795.2, is constitutionally proscribed." *Id.* at 909.

518. 206 N.W.2d 908 (Iowa 1973).

519. *Id.* at 913.

520. *Id.* at 914.

521. *Id.* at 909 [new text added].

522. This sixty-day period is subject to computational rules recognizing certain excluded periods. In *State v. Gorham*, *supra*, the court constructed the following chronology: indictment on April 26, defendant's committal (upon defendant's request) to a State medical facility for mental evaluation on May 17, defendant's return to local jail on July 14 and September 3 order setting trial for October 11, and defendant's request for replacement counsel on September 13. The supreme court observed: "Stated briefly, absent any defense initiated cause for delay, (1) 61 full days elapsed from the time *Gorham* was incarcerated in the Linn County Jail on return from the medical facility and his request for replacement counsel; . . . (3) the initial trial date fixed by court order was 89 days after defendant's aforesaid return to jail." 206 N.W.2d at 914-15 (emphasis added). Thus, the court placed considerable emphasis upon the time that defendant returned from the medical evaluation, however, the fact remains that the State failed to try him within 60 days after his return from commitment. It, of course, remains to be seen what it will do with this type of scenario (medical commitment on 50th day after indictment, trial begun on 50th day after defendant's return from commitment, motion to dismiss on the basis that any period of the State's unexcusable delay in getting defendant committed should be tacked on to the time period following release from commitment).

As to recommended excluded periods, see ABA, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL, § 2.3, at 25-26 (Approved Draft 1968):

The following periods should be excluded in computing the time for trial:

a motion to dismiss<sup>523</sup> which must be granted unless the State can show good cause for the delay, irrespective of defendant's making or not making demand for speedy trial. What constitutes good cause remains a matter of the trial court's determination within its sound judicial discretion.<sup>524</sup> The language in *Gorham* (i.e., "courts must engage in an *ad hoc* delicate balancing process in evaluating any 'good cause' so shown")<sup>525</sup> suggests that the courts, in determining good cause, should consider, *inter alia*, the four factors of the *Barker* balancing test, to wit: (1) the length of the delay, (2) the reason for the delay, (3) the existence of absence of resultant prejudice to defendant, and (4) defendant's demand or lack thereof.<sup>526</sup> This premise is further sup-

(a) The period of delay resulting from other proceedings concerning the defendant, including but not limited to an examination and hearing on competency and the period during which he is incompetent to stand trial, hearings on pretrial motions, interlocutory appeals, and trial of other charges.

(b) The period of delay resulting from congestion of the trial docket when the congestion is attributable to exceptional circumstances.

(c) The period of delay resulting from a continuance granted at the request or with the consent of the defendant or his counsel. A defendant without counsel should not be deemed to have consented to a continuance unless he has been advised by the court of his right to a speedy trial and the effect of his consent.

(d) The period of delay resulting from a continuance granted at the request of the prosecuting attorney, if:

(i) the continuance is granted because of the unavailability of evidence material to the state's case, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at the later date; or

(ii) the continuance is granted to allow the prosecuting attorney additional time to prepare the state's case and additional time is justified because of the exceptional circumstances of the case.

(e) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever his whereabouts are unknown and in addition he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. A defendant should be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained or he resists being returned to the state for trial.

(f) If the charge was dismissed upon motion of the prosecuting attorney and thereafter a charge is filed against the defendant for the same offense or an offense required to be joined with that offense, the period of delay from the date the charge was dismissed to the date the time limitations would commence running as to the subsequent charge had there been no previous charge.

(g) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to him.

(h) Other periods of delay for good cause.

523. See *Foster v. Brewer*, 197 N.W.2d 366, 367 (Iowa 1972): "Our ruling [in *State v. Allnutt*, 261 Iowa 897, 156 N.W.2d 266 (1968)] that defendant waived his right to speedy trial by failing to move to dismiss until after trial surely applies to this petitioner, who never made such motion."

Of course, the motion to dismiss requirement does not apply to a defendant who is both incarcerated and unrepresented. See IOWA CODE § 795.2 (1973).

524. See, e.g., *Maher v. Brown*, 225 Iowa 341, 280 N.W. 553 (1938). However, when it becomes apparent that there is good cause, "giving the accused the full benefit of the evidence . . . no such discretion lies." *State v. Jackson*, 252 Iowa 671, 677, 108 N.W.2d 62, 66 (1961).

525. 206 N.W.2d 908, 914 (Iowa 1973).

526. See *Barker v. Wingo*, 407 U.S. 514, 530 (1972).



ported by the following statement in *Gorham*: "[W]hen an accused is neither at liberty on bail nor represented by an attorney, then absence of demand for or assertion of right to a speedy trial *shall under no circumstances be considered in connection with trial time delay.*"<sup>527</sup>

In *Gorham*, the State made no attempt to show good cause for the delay,<sup>528</sup> relying instead entirely on the then-operative demand-waiver rule. It appears that the reason for the delay is the paramount factor in the four-part *Barker* balancing test as it seemingly was applied to Iowa law in *Gorham*, and that the State must carry its burden as to the factor irrespective of the presence or absence of the other factors (e.g., lengthy delay, prejudice, and demand) in order to show good cause to the contrary why the prosecution should not be dismissed. Even so, a sufficient showing as to the reason for the delay might possibly still be offset by other factors,<sup>529</sup> in application of "the *ad hoc* delicate balancing process." That is, an extraordinarily lengthy delay coupled with actual prejudice to defendant and/or defendant's demand for speedy trial, could possibly "tip the balance" against the State's showing of a legitimate or plausible reason for the delay, thus requiring a dismissal for lack of speedy trial. Because the State made no attempt to show good cause in *Gorham*, it remains to be seen exactly how the Iowa supreme court will oversee "the *ad hoc* delicate balancing process" it voiced, but did not definitively describe, in *Gorham*.<sup>530</sup>

b. *Remedy*. There being no good cause shown for the delay in *Gorham*, the supreme court concluded: "This case must be reversed and remanded for dismissal."<sup>531</sup> Thus, whether this dismissal for lack of speedy trial is *with prejudice* was not expressly made clear.<sup>532</sup> However, it appears that this is the case in light of the court's notation of the *ABA Standards Relating to Speedy Trial*, to wit: "If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, the consequence should be absolute discharge. Such discharge should forever bar prosecution for the offense charged and for any other offense required to be joined with that offense."<sup>533</sup> That this remedy is dictated is strongly implied, if not made absolutely clear, in *Barker*:

The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will

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527. 206 N.W.2d 908, 914 (emphasis added).

528. See note 384 *supra*.

529. 206 N.W.2d 908, 914 (Iowa 1973).

530. But see *State v. Kimball*, 204 N.W.2d 296 (Iowa 1972) in light of the discussion in note 517 *supra*.

531. 206 N.W.2d 908, 915 (Iowa 1973).

532. Cf. *Keever v. Bainter*, 195 N.W.2d 526, 527 (Iowa 1972) (denial of speedy trial because of delay in bringing committed-for-incompetency defendant back for another competency-to-stand-trial): "[R]espondent [trial court] is ordered and directed to dismiss the above case *with prejudice* forthwith." (emphasis added).

533. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SPEEDY TRIAL, § 4.1 (Approved Draft 1968).

go free, *without having been tried*. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial, but it is the only possible remedy.<sup>534</sup>

That dismissal of the indictment remains "the *only* remedy"<sup>535</sup> for speedy trial violations was recently made clear by the United States Supreme Court in *Strunk v. United States*.<sup>536</sup> It reversed an order by the Court of Appeals for the Seventh Circuit which had fashioned a new substitute remedy of reducing defendant's sentence to the extent of the unnecessary delay. That the Supreme Court does not contemplate reindictment and retrial is apparent in its observation that speedy trial is "unlike some of the other guarantees of the Sixth Amendment. For example, failure to afford a public trial, an impartial jury, notice of charges, or compulsory service can ordinarily be *cured* by providing those guaranteed rights in a *new trial*."<sup>537</sup>

It remains to be seen what the Iowa supreme court will do regarding whether the State can reindict defendant following the trial court's granting of his motion to dismiss for lack of speedy indictment. Thus, unlike the situation in *State v. Bowers*,<sup>538</sup> in which defendant's motion to dismiss for lack of speedy indictment was improperly overruled and he then stood trial, such a hypothetical defendant would not have been placed in jeopardy.<sup>539</sup>

## 8. Guilty Pleas

a. *Scope of the interrogation colloquy*. With the exception of one aberration, trial courts experienced little difficulty with the *Sisco* colloquy standards<sup>540</sup> in accepting guilty pleas.<sup>541</sup> In *State v. Clary*,<sup>542</sup> the entire colloquy actually consisted merely of the judge asking defendant if he wished to withdraw his plea of not guilty and to enter a guilty plea. Otherwise, the supreme court took the general position that the trial court's interrogation "need not follow a ritualistic or rigid formula"<sup>543</sup> so long as there is substantial compliance with the *Sisco* guidelines. Accordingly, a guilty plea was upheld in *State v. Slawson*<sup>544</sup> even though the name of the offense charged was not mentioned during the taking of the plea since during the sentencing interrogation defendant "admitted acts constituting the offense to which he pleaded guilty."<sup>545</sup>

534. 407 U.S. 514, 522 (1972) (emphasis added). "[Barker] lays to rest any existing doubt that the appropriate remedy—in fact the 'only possible remedy'—for a deprivation of the constitutional guaranty is dismissal operating as a bar to subsequent trial." Godbold, *Speedy Trial—Major Surgery for a National Ill*, 24 ALA. L. REV. 265, 294 (1972).

535. *Strunk v. United States*, 93 S. Ct. 2260, 2263 (1973) (emphasis added), quoting *Barker v. Wingo*, 407 U.S. 514, 522 (1972).

536. 93 S. Ct. 2260 (1973).

537. *Id.* at 2263 (emphasis added).

538. 162 N.W.2d 484 (Iowa 1968).

539. See generally *State v. Gebhart*, 257 Iowa 843, 134 N.W.2d 906 (1965).

540. See *State v. Sisco*, 169 N.W.2d 542 (Iowa 1969).

541. For a discussion of the scope of judicial discretion in the taking of guilty pleas, see Dunahoo, *supra* note 364, at 1036-40.

542. 203 N.W.2d 382 (Iowa 1973).

543. *State v. Bledsoe*, 200 N.W.2d 529, 531 (Iowa 1972).

544. 201 N.W.2d 460 (Iowa 1972).

545. *Id.* at 461-62.

Moreover defendant's equivocation in admitting his guilt was held in *State v. Quinn*<sup>546</sup> to not vitiate the plea.

All attempts to expand the scope of the interrogation were unsuccessful, with the supreme court variously holding that the trial court is not required to interrogate defendant regarding each essential element of the crime charged<sup>547</sup> nor as to any plea arrangement.<sup>548</sup> Neither is the trial court required to warn defendant as to "the effect of [this] conviction on any future conviction."<sup>549</sup>

b. *Competency to stand trial.* A new twist was put on a trial court's jurisdiction to accept a guilty plea from a person whose mental competency has been put in issue.<sup>550</sup> In *State v. Thomas*,<sup>551</sup> the supreme court held that the *Sisco* guidelines "require the trial court to personally make a determination of the validity of the plea"<sup>552</sup> notwithstanding a prior jury's adjudication that defendant is competent to stand trial. "[S]uch a determination is a factor to be considered, but is not controlling," the supreme court declared.<sup>553</sup> The trial court's task is to determine whether there are "circumstances present" that demand "further demonstration of defendant's competency before accepting the proffered plea."<sup>554</sup> Then on appellate review, the supreme court "examine[s] all the circumstances before the trial court to determine if there then existed reasonable doubt as to defendant's competency to plead guilty . . ."<sup>555</sup>

c. *Waiver of defenses.* That a guilty plea waives defendant's right to reversal of his conviction because of lack of speedy indictment or speedy trial was suggested, but not determined, in *Foster v. Brewer*.<sup>556</sup> The supreme court volunteered: "It is also unnecessary for us to decide whether petitioner's plea of guilty was a waiver of his right to speedy trial, although this issue has been decided against defendants in several jurisdictions."<sup>557</sup>

### B. Trial

The Iowa supreme court dealt with a variety of significant trial matters during the survey period. These included the topical areas of methods of jury selection, the scope of examination of witnesses, the admissibility of evidence, the propriety of motions for mistrial, and the content of instructions to the jury—all of which are discussed in detail below. In related matters not discussed in this section, the supreme court: extended the right to jury trial in contempt

546. 197 N.W.2d 624, 625 (Iowa 1972), quoting *North Carolina v. Alford*, 400 U.S. 25, 37 (1969): "... An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."

547. *State v. Hackett*, 201 N.W.2d 487 (Iowa 1972).

548. *State v. Christensen*, 201 N.W.2d 457 (Iowa 1972).

549. *Id.* at 459.

550. See IOWA CODE § 783.1 (1973).

551. 205 N.W.2d 717 (Iowa 1973).

552. *Id.* at 719 (emphasis added).

553. *Id.* at 720.

554. *Id.* at 719.

555. *Id.* at 721.

556. 197 N.W.2d 366 (Iowa 1972).

557. *Id.* at 367.

cases involving multiple counts;<sup>558</sup> reiterated that the "right" to a jury trial on a simple misdemeanor charge is waived if not demanded before the taking of any evidence;<sup>559</sup> held that a jury conviction is not invalidated because of failure to record defendant's plea of not guilty;<sup>560</sup> and continued to uphold a liberal policy of permitting the State to amend the charge after the trial has begun so long as a new offense is not charged thereby.<sup>561</sup>

### 1. Jury Selection

Questions involving various aspects of jury selection<sup>562</sup> arose in three Iowa supreme court cases. Additionally, a United States Supreme Court decision in this area of the law could have some impact on Iowa criminal procedure.

#### a. Scope of Voir Dire

While the Iowa supreme court accords broad discretion to trial courts in ruling on questions regarding the scope of voir dire of prospective jurors,<sup>563</sup> the United States Supreme Court recently held in *Ham v. South Carolina*<sup>564</sup> that such discretion is curtailed whenever issues with federal constitutional overtones are involved. Ham, a black civil-rights activist, claimed that he was being framed by the police. Accordingly, he requested trial court to interrogate the prospective jurors specifically as to racial prejudice.<sup>565</sup> "[T]he essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record the petitioner be permitted to have the [prospective] jurors interrogated on the issue of racial bias," the Supreme Court concluded.<sup>566</sup> It was not sufficient for the interrogation to consist of the three statutorily-prescribed *general* questions (concerning bias, prejudice, or partiality).<sup>567</sup> Nevertheless, the trial court "was

558. See *Sarich v. Havercamp*, 203 N.W.2d 260 (Iowa 1972), as discussed in text accompanying notes 72-82 *supra*.

559. *State v. Baker*, 203 N.W.2d 795 (Iowa 1973).

560. "Defendant was not prejudiced by the inadvertent omission of recording a formal not guilty plea. He stood trial without objection and his position was precisely the same as if such a plea had been entered. The jury, in fact, was told that the defendant had entered a not guilty plea." *State v. Lynch*, 197 N.W.2d 186, 188 (Iowa 1972).

561. See *State v. Bruno*, 204 N.W.2d 879 (Iowa 1973) (OK for amendment to eliminate surplusage which had merely defined the alleged crime more specifically by citing the definitional section) and *State v. Osborn*, 200 N.W.2d 798 (Iowa 1972) (OK for amendment to substitute the name of the correct owner of the property burglarized).

562. For a discussion of the scope of judicial discretion in the jury selection process, see Dunahoo, note 364 at 1060-67.

563. See *Elkin v. Johnson*, 260 Iowa 46, 148 N.W.2d 442 (1967).

564. 93 S. Ct. 848 (1973).

565. The two questions about specific racial prejudice defendant sought to be asked were the following:

1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?

You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term "black"?

93 S. Ct. 848, 849 n.2 (1973).

566. *Id.* at 850.

567. These included:

1. Have you formed or expressed any opinion as to the guilt or innocence

not required to put the [specific racial prejudice] question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner."<sup>568</sup>

On the other hand, *Ham* held further that the trial court's refusal to inquire "as to particular bias against beards, after his inquiries as to bias in general, does not reach the level of a constitutional violation."<sup>569</sup> The Supreme Court stated: "Given the traditionally broad discretion accorded to the trial judge in conducting voir dire, . . . and our inability to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices, we do not believe the petitioner's constitutional rights were violated when the trial judge refused to put this question (*i.e.*, "Would you disregard the fact that this defendant wears a beard in deciding this case?")."<sup>570</sup>

#### b. Segregated Voir Dire

That segregated voir dire of prospective jurors is not required upon a party's request was reaffirmed in *State v. Elmore*.<sup>571</sup> Discounting defendant's claim of excitement and prejudice engendered against him by a "constant barrage"<sup>572</sup> of media coverage of his arrest, the trial court nevertheless required that counsel not ask prospective jurors to repeat what they had read or heard about the case. Rather, they were merely asked if, as a result of any of this pretrial publicity, they had formed an opinion as to defendant's guilt or innocence. After all, "the real issue was whether any of the prospective jurors has formed or expressed an opinion . . . which would prevent them from being fair and impartial jurors," the court opined.<sup>573</sup> On the other hand, this approach strictly leaves it to the individual veniremen to determine if he has been prejudiced by the publicity rather than forcing a disclosure on the record as to what he heard or read for purposes of challenges for cause by the parties.<sup>574</sup>

#### c. Challenges for Cause

The trial courts' "broad discretionary power" in ruling on challenges for cause to prospective jurors was upheld in *State v. Houston*<sup>575</sup> even though the contested venireman initially indicated some difficulty in being able to return

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of the defendant, Gene Ham?

2. Are you conscious of any bias or prejudice for or against him?

3. Can you give the State and the defendant a fair and impartial trial?

93 S. Ct. at 850 n.3.

568. *Id.* at 850.

569. *Id.* at 851.

570. *Id.* at 850 n.3.

571. 201 N.W.2d 443 (Iowa 1972).

572. *Id.* at 444.

573. *Id.* at 446.

574. *Cf. Commonwealth v. Johnson*, 440 Pa. 342, 351-52, 269 A.2d 752, 757 (1970): "When there is present in a case inflammatory pretrial publicity which creates the possibility that a trial could be prejudiced, there are exactly those circumstances present which require each juror to be questioned out of the hearing of the other jurors."

575. 206 N.W.2d 687, 689 (Iowa 1973).



a verdict of not guilty. In response to questioning by defense counsel, the venireman not only expressed doubt about defendant's innocence if, as hypothesized, defendant's picture was on file with the police but also said it was doubtful he could disregard an accomplice's testimony even though not corroborated. Nevertheless, upon further questioning, he "clearly demonstrated he could base his decision on the evidence presented and would follow instructions given by the court."<sup>576</sup>

d. *Tainted Panel*

*State v. Lunsford*<sup>577</sup> held that it is *ipso facto* reversible error for defendant to be tried before the same jury panel which was previously dismissed and told that defendant, who was named, had pled guilty. Here, defendant subsequently changed his mind and his guilty plea was allowed to be withdrawn, and he was tried two weeks after his abortive guilty plea. Noting the general rule that "admission into evidence of a withdrawn plea of guilty deprives a defendant of a fair trial," the court reasoned that "[t]he prejudicial impact would seem to be nearly as great from such a communication before trial as during trial."<sup>578</sup> Conceding that the jurors, like other members of the public, could have learned of the guilty plea anyway since it was reported routinely in the local newspaper, the supreme court opined: "Unlike the situation with an ordinary news report, there is little doubt the panel received the message, associated it with defendant, and remembered it two weeks later."<sup>579</sup> Holding that the burden was not on defendant to demonstrate prejudice, the court reasoned: "The unfortunate sequence of events compels an inference of prejudice."<sup>580</sup>

2. *Examination of Witnesses*

The principal issues concerning the scope of examination of witnesses discussed in this section include: proper serving of notice of State's additional witnesses not listed on the indictment, proper limiting of cross examination to avoid attacks on the credibility of witnesses through collateral matters, and improper controlling of equivocation and unresponsiveness of witnesses' testimony on direct examination. In other cases, the Iowa supreme court: reaffirmed that a defendant (consistent with the federal Constitution) can be impeached with his prior felony convictions;<sup>581</sup> noted that correcting one's own witness'

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576. *Id.*

577. 204 N.W.2d 613 (Iowa 1973).

578. *Id.* at 619.

579. *Id.*

580. *Id.*

581. Requiring a defendant testifying in his own behalf to state whether he had ever before been convicted of a felony "is not prohibited by any provision of the United States Constitution." *State v. Hackett*, 200 N.W.2d 493, 494 (Iowa 1972) (majority opinion confined "to the constitutional issue here posed"). Cf. Justice McCormick's special concurring opinion (joined by Justice Mason), in which he suggests there is nothing in CODE § 622.17 conferring upon a cross-examiner "an absolute right in all circumstances

facts to be as he testified,"<sup>597</sup> and the supreme court said that such equivocation merely affects the testimony's probative force rather than its admissibility.

d. *Unresponsiveness*. In *Smiley*, the supreme court also held it error for the trial court to sustain the prosecutor's objections that witnesses being examined by the defense counsel were not responding to the questions asked. The supreme court said: "Only the attorney conducting the examination at the time may object to the lack of responsiveness on the part of a witness. Such objection is never available to opposing counsel."<sup>598</sup>

### 3. Evidence

The Iowa supreme court dealt with a wide variety of issues concerning admissibility of evidence<sup>599</sup> during the survey period. The major categories of issues, which are discussed in detail below, included: hearsay, opinion evidence, relevancy of evidence, and reputation evidence. In other cases, the supreme court: reversed two convictions based solely upon circumstantial evidence and raising nothing more than *suspicion* of defendant's guilt;<sup>600</sup> confirmed an unbroken chain of custody of evidence in several cases notwithstanding the fact that not everyone with access to the seized exhibit testified at trial, where, however, there was unlikelihood of tampering;<sup>601</sup> discussed the

597. *Id.* at 731.

598. *Id.*

599. As to evidentiary rules concerning the trial on habitual criminal charges, see text accompanying notes 807-12 *infra*.

600. See *State v. Jellema*, 206 N.W.2d 679 (Iowa 1973) (breaking and entering) and *State v. Streit*, 205 N.W.2d 742 (Iowa 1973) (arson). See generally *State v. Johnson*, 196 N.W.2d 563, 566 (Iowa 1972): Where circumstantial evidence is relied upon, it must be "so convincing as to exclude a reasonable doubt that defendant was guilty of the offense charged."

See also *State v. Tokatlian*, 203 N.W.2d 116, 119 (Iowa 1972): "Unless defendant's motion for directed verdict is renewed at the close of all evidence, it is deemed waived," notwithstanding the motion being made (and overruled) at the close of the State's case.

601. See *State v. Battle*, 199 N.W.2d 70 (Iowa 1972) (only the chemist testified out of the three persons with access to laboratory where drug analysis was made; a second police officer with a key to the evidence-being-held-for-trial locker testified); *State v. Burton*, 201 N.W.2d 492 (Iowa 1972) (prosecutor, to whom exhibit was delivered a few days before trial, did not testify); *State v. Grady*, 201 N.W.2d 493 (Iowa 1972) (front seat passenger in informer's car in which drug-buy exhibit is stashed on floor of back seat did not testify); and *State v. Lunsford*, 204 N.W.2d 613 (Iowa 1973) (no testimony by informant who arranged the purchase by an undercover agent and subsequent to seller's arrest drove by himself, with marijuana exhibit in the car, briefly to police station to get more officers). But see *State v. Bruno*, 204 N.W.2d 879 (Iowa 1973) (chain of custody of evidence defect waived by defendant's failure to object until after the witness' testimony).

As to the requisite foundation for a chain of custody of substances such as marijuana, which are neither hard objects nor readily identifiable articles, see *State v. Lunsford*, 204 N.W.2d 613, 616-17 (Iowa 1973):

Marijuana is susceptible to tampering or substitution. . . . A more elaborate foundation to establish identification is therefore required than as to readily identifiable articles. . . .

Determination of the sufficiency of identification is made by the trial judge. "Factors to be considered in making this determination include the nature of the article, the circumstances surrounding the [nature] and custody of it, and the likelihood of intermeddlers tampering with it. . . ."

It is not essential for admissibility that the State negate the possibility of tampering or substitution absolutely. It is sufficient to establish that is reason-

nature of the other evidence necessary to corroborate an out-of-court confession;<sup>602</sup> held that a witness' failure to identify defendant in a lineup does not render inadmissible in-court identification;<sup>603</sup> and upheld the introduction of portions of defendant's first-trial testimony at his retrial despite a contention that defendant's original testimony was impelled by the state's use of illegally-seized evidence.<sup>604</sup> On procedural matters, the supreme court: approved of the taking of judicial notice of the alcoholic content of beer sold in Iowa;<sup>605</sup> of departmental rules of state agencies;<sup>606</sup> and of federal legislation and regulations;<sup>607</sup> upheld reopening of the record after the State had rested its case without admitting the contraband exhibit into evidence;<sup>608</sup> reaffirmed that a party whose pretrial motion in limine was overruled must make his record at

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ably probable tampering or substitution did not occur. . . . Contrary speculation affects the weight of the evidence but not its admissibility. . . .

602. The "other evidence" or other proof besides defendant's confession (unless made in open court) required under CODE § 782.7 to warrant a conviction "need not *per se*, and independent of a confession, be sufficient to prove commission of the crime charged beyond a reasonable doubt. It will suffice if, when considered with the confession, it establishes beyond a reasonable doubt the offense was committed by someone." (Here, the "other proof" in prosecution for arson of personal property (a car) consisted of the car being "unexpectedly found in a remote wooded area where it would not normally be, burned almost beyond identification, with the two front wheels missing."). *State v. Dunn*, 199 N.W.2d 104, 108-09 (Iowa 1972).

603. "The question of line-up procedures was brought up only on cross-examination as defendant sought to show the witnesses had previously been unable to identify defendant. This, of course, was entirely proper and might well have destroyed the in-court identification, but it went only to the weight of the testimony." *State v. Masters* 196 N.W.2d 548, 551 (Iowa 1972), *accord* *State v. Hinsey*, 200 N.W.2d 810 (Iowa 1972).

604. The State may introduce portions of defendant's first-trial testimony at a retrial notwithstanding defendant's original conviction being reversed because of introduction of illegally-seized evidence—where defendant's first-trial testimony was designed to prove another point (*i.e.*, that someone else was driving the car) and the illegally-seized evidence went to proof of another point in this O.M.V.U.I. case (*i.e.*, that defendant was intoxicated). Thus, the impellation rule of *Harrison v. United States*, 392 U.S. 219 (1968) was deemed inapplicable. *State v. Boner*, 203 N.W.2d 198 (Iowa 1972).

605. "[I]t was permissible to take judicial notice of the fact that by law . . . beer sold in this state has an alcoholic content of four percent by weight." *State v. Boner*, 203 N.W.2d 198, 200 (Iowa 1972).

606. "Courts may . . . take judicial notice of . . . departmental rules and regulations adopted pursuant to statutory authority . . ." *State v. Armstrong*, 203 N.W.2d 269, 272 (Iowa 1972).

607. "The court properly took judicial notice of the Federal Drug Act and regulations promulgated pursuant to the act to further define the term 'hallucinogenic drug.'" *State v. Bruno*, 204 N.W.2d 879, 888 (Iowa 1973).

608. "Trial courts have discretion to permit a party to reopen the record and introduce evidence which was previously omitted." (In this prosecution for sale of hashish, the State introduced evidence of the facts of the case but not the hashish itself. After the State rested, defendant moved for a directed verdict. Over defendant's objection, the record was then reopened for introduction of the hashish into evidence. Affirming, the Supreme Court noted the remarkable similarity to that in *United States v. Keine*, 424 F.2d 39 (10th Cir. 1970), where there was expert testimony identifying the drug, an unbroken chain of custody of evidence, testimony concerning the drug, and jury viewing of the drug—but failure to admit drug via mere inadvertence. The supreme court added: "[W]e do not intimate that the State had to introduce the hashish in order to make a *prima facie* case." *State v. Moreland*, 201 N.W.2d 713, 714 (Iowa 1972); *accord* *State v. Mason*, 203 N.W.2d 293, 296 (Iowa 1972): "The testimony introduced in this case after reopening was supplemental to and clarified previous evidence. It could arguably be deemed directed to an oversight, if not a mistake." Here, the State was allowed to reopen to introduce further evidence on the issue of the car title, in this prosecution for false drawing and uttering. *State v. Mason*, 203 N.W.2d 292, 296 (Iowa 1972).

trial on that evidentiary point;<sup>609</sup> discussed the effect of admitting by stipulation a State criminalistics laboratory report;<sup>610</sup> and dealt with a host of sufficiency of,<sup>611</sup> as well as timeliness of,<sup>612</sup> objections to,<sup>613</sup> and curative measures for,<sup>614</sup> asserted errors in admitting or excluding evidence.<sup>615</sup>

a. *Hearsay*.<sup>616</sup> An O.M.V.U.I. conviction was reversed in *State v.*

609. "The overruling of the motion in limine, even though wrong, is not reversible error. Relief must be predicated on a record made during trial when the objectionable evidence is sought to be introduced." No objection was made at trial and thus there was no record for appeal. (The rule is different where the motion is granted, thus not requiring a subsequent record by opponent.). *State v. Hinsey*, 200 N.W.2d 810, 817 (Iowa 1972) (emphasis added). See also *State v. Tiernan*, 206 N.W.2d 898, 899 (Iowa 1973) (State's witness' violation of pretrial order in limine is not prejudicial to defendant where the trial court had erred in granting the order, i.e., that the controverted evidence was admissible).

610. Defendant's stipulation "to introduction of the State criminalistics laboratory report which identified the substance as marijuana . . . eliminated any need to resort to statutory definition" on the question of identification of the substance. *State v. Boose*, 202 N.W.2d 368, 369 (Iowa 1972).

611. See, e.g., *State v. Armstrong*, 203 N.W.2d 269, 271 (Iowa 1972) (Objection to witness' proffered testimony on the basis of a "no proper foundation, irrelevant and immaterial objection" is insufficient and "actually presents nothing for review") and *State v. Binkley*, 201 N.W.2d 917, 919 (Iowa 1972) (Objection phrased "Yes, I would have some objection to it" was "so unspecific trial court did not err in overturning it"); accord *State v. Williams*, 207 N.W.2d 98, 109 (Iowa 1973) ("One attempting to exclude evidence, whether the attempted exclusion is by objection or motion, has a duty to indicate the specific grounds to the court so as to alert him to the question raised and enable opposing counsel to take proper corrective measures to remedy the defect, if possible").

612. "The record does not preserve the claim since the objection was not made until after answer, no reason for delay appears and no motion to strike was made." *State v. Taylor*, 201 N.W.2d 724, 727 (Iowa 1972).

613. See, e.g., *State v. Williams*, 207 N.W.2d 98, 109-10 (Iowa 1973) ("A failure to assert promptly and specifically an objection to an offer of evidence at the time the offer is made is a waiver upon appeal of any ground of complaint against its admission"); *State v. Schurman*, 205 N.W.2d 732, 735 (Iowa 1973) ("Relevant evidence admitted without proper objection, and not excluded upon a motion to strike, has the same effect as though it were admissible, even though it might have been excluded under the rules of evidence"); and *State v. Boose*, 202 N.W.2d 368, 369 (Iowa 1972) ("The right to suppress was waived in this case because the evidence was received without objection and the motion was made long after its ground became apparent").

However, *State v. Miller*, 204 N.W.2d 834 (Iowa 1973) makes it clear that a prior objection in chambers obviates the necessity for objection (in the jury's presence) when the objectionable evidence or testimony is introduced. Here, defendant already had made clear his position (by way of sufficient objection in chambers) that any testimony by third persons as to alleged statements made by his companion would be inadmissible hearsay and "[t]he trial court by overruling defendant's objection made it abundantly clear that any similar objections to like evidence would be overruled." Thus, "[o]nce a proper objection has been urged and overruled, counsel is not required to make further objections to preserve his right on appeal when a question is asked raising the same issue subsequently in the course of trial." *Id.* at 841.

614. "[A] motion to strike or withdraw evidence is not timely where it comes without prior objection and the grounds of such motion should have been apparent before it was made." *State v. Houston*, 206 N.W.2d 687, 691 (Iowa 1973); accord *State v. Boose*, 202 N.W.2d 368, 369 (Iowa 1972).

615. On the specific subject of waiver in the Iowa criminal trial process, see Sullins, *Preservation of Error: Providing a Basis for Appellate Review*, 22 *DRAKE L. REV.* 435 (1973). See generally *State v. Tokatlian*, 203 N.W.2d 116, 120 (Iowa 1972): "Ordinarily, matters not raised in the trial court, including constitutional questions, cannot be effectively asserted the first time on appeal. Even more appurtenant, the constitutionality of a statute may not be considered on appeal where the question was not raised in the lower court." Accord *State v. Armstrong*, 203 N.W.2d 269 (Iowa 1972).

616. The latest definition of hearsay used by the Iowa supreme court is that in rule 801, Proposed Rules of Evidence for United States Courts and Magistrates, viz. "Hear-



*Miller*<sup>617</sup> because of the improper admissibility of hearsay evidence.<sup>618</sup> Defendant and his companion Fallstone had both been heavily drinking together before their one-car accident which was witnessed by no one. The central issue on appeal was sufficiency of *competent* evidence as to defendant being the driver. At the scene of the accident, neither defendant nor Fallstone admitted being the driver. A city police officer testified that he was present during a highway patrolman's subsequent interrogation of Fallstone at the hospital, stating: "I was in the room when Patrolman North talked to him, and asked him if Cal [defendant] was driving the vehicle, and he said, 'Yes.'"<sup>619</sup> Fallstone did not testify, however, thus making the statement hearsay. Applying *Gibbs v. Wilmeth*<sup>620</sup> for "the controlling standards in testing admissibility of *res gestae* statements," the supreme court "conclude[d] Fallstone's statement at the hospital does not qualify as *res gestae*."<sup>621</sup> Therefore, this testimony was admitted improperly.

Another error concerning hearsay was committed in *Miller* when the highway patrolman was permitted to testify he knew defendant was driving at the time of the accident. The supreme court, noting that the patrolman had also testified that he had not witnessed the accident himself and that neither defendant nor Miller confessed at the accident scene, concluded: "It is obvious the witness did not have personal knowledge of the matter about which he was questioned. The answer must of necessity have depended on what some third party [*i.e.*, Fallstone] had told the witness."<sup>622</sup>

A third asserted instance of hearsay evidence was denied by the supreme court in *Miller*, however. The issue arose when the highway patrolman was permitted on direct examination to testify as to the following regarding a conversation he allegedly had with defendant: "As night went on, I asked him—that his partner had said that he had been driving, . . . and he said, 'Yeah, what about it,' or something to this effect."<sup>623</sup> Recognizing a distinction "between hearsay and nonhearsay utterances of a declarant not offered as a witness for cross-examination when such assertions are offered by a testifying witness," the supreme court said the test was whether the instant testimony "was being offered . . . for the purpose of showing the truth of that statement or was it being offered merely as reporting a fact that an utterance had been made

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say' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." See *State v. Miller*, 204 N.W.2d 834, 840 (Iowa 1972) and *State v. Kelsey*, 201 N.W.2d 921, 924 (Iowa 1972). Cf. *State v. Kelsey*, *supra*: "In substance, the hearsay rule does not prevent a witness from testifying only as to what has been heard, being rather a restriction on the proof of fact through extrajudicial statements." *Id.*

617. 204 N.W.2d 834 (Iowa 1972).

618. Cf. *State v. Schurman*, 205 N.W.2d 732, 735 (Iowa 1973) (hearsay evidence which was not objected to at time of its admission remains in the record "and alone or in part may support a verdict or finding").

619. 204 N.W.2d 834, 839 (Iowa 1972).

620. See *Gibbs v. Wilmeth*, 261 Iowa 1015, 1024-25, 157 N.W.2d 93, 98-99 (1968).

621. 204 N.W.2d 834, 840 (Iowa 1972).

622. *Id.* at 842.

623. *Id.*



to [the highway patrolman], a matter of which he had personal knowledge."<sup>624</sup> The supreme court characterized it as being within the latter classification and concluded therefore that the statement "his partner said he had been drinking" was not hearsay. In a related fourth hearsay aspect of this case, the supreme court agreed that the highway patrolman's recounting of defendant's response ("Yeah, what about it") was not hearsay. "[D]efendant's statements offered against him are not hearsay on the theory their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule,"<sup>625</sup> the supreme court pointed out.

i. *Res Gestae Exception*. As noted above, the supreme court held in *State v. Miller*<sup>626</sup> that the statements of the defendant's accomplice made while he was being questioned by a highway patrolman "sometime later at the hospital"<sup>627</sup> did not come within the *res gestae* exception. By way of contrast, the supreme court, noting that "[t]he trend is to extend, rather than to narrow, the *res gestae* doctrine," upheld the application of the *res gestae* exception in *State v. Crawford*.<sup>628</sup> In the latter case, the statements were made by the 13-year old rape prosecutrix upon being driven by her attacker back to near her home and complaining of the attack upon entering her house. Her statements, testified to by her sister, met the *res gestae* admissibility standards, viz. "(1) spontaneity, and (2) such closeness of connection with the transaction as to exclude any presumption of fabrication."<sup>629</sup>

ii. *Tacit Admissions*. In *State v. Kelsey*,<sup>630</sup> the supreme court held that "evidential use of 'tacit admissions' by an accused offends the proscription included in the Fifth Amendment of the United States Constitution against self-incrimination and is therefore no longer permissible in criminal trials within this jurisdiction."<sup>631</sup> The instant admission-through-silence arose in testimony by a State's witness as to a conversation in which one of defendant's accomplices told a third person, in defendant's immediate presence and without him protesting, that they had robbed and shot a man. The supreme court concluded that this testimony "was for the purpose of proving the facts, i.e., commission of the robbery attendant murder of a man by Kelsey and his three accomplices. Surely it was not testimonially offered merely to prove the utterance was made in [the State's witness'] presence."<sup>632</sup> Nevertheless, applying the harmless error rule, the conviction was upheld since "[a] review of the

624. *Id.* at 843.

625. *Id.* at 842.

626. 204 N.W.2d 834 (Iowa 1972).

627. *Id.* at 840.

628. 202 N.W.2d 99, 101 (Iowa 1972).

629. *Id.*

630. 201 N.W.2d 921 (Iowa 1972).

631. *Id.* at 927. See also *State v. Williams*, 207 N.W.2d 98, 107 (Iowa 1973) (Corroboration of an accomplice's testimony "may come from defendant himself in the way of his admissions, declarations, conduct, writings or other documentary evidence. Of course, tacit admissions by an accused may not be relied on in this connection").

632. *Id.* at 924.

record fairly shrieks the guilt of this defendant,"<sup>633</sup> the supreme court concluded.

b. *Opinion Evidence.* On the subject of opinion evidence, the supreme court noted in *State v. Armstrong*<sup>634</sup> that the best evidence rule does not prevent a witness from expressing his opinion as to whether an unlicensed person could effect a valid sale of insurance under existing law since "this witness was not called upon to prove existence or content of any statute or regulation."<sup>635</sup> Similarly, in *State v. Taylor*<sup>636</sup> the court, upholding admissibility of a fingerprint identification expert's testimony regarding comparison of the fingerprint found at the crime scene and defendant's prints, reiterated: "Where, as here, inquiry is directed to a proper subject of expert testimony, an objection that it invades the province of the jury is invalid."<sup>637</sup>

An element of mutuality regarding admissibility of nonexpert state of mind evidence was added in *State v. Milliken*,<sup>638</sup> in which sustaining of the State's objections to defendant's proffered evidence after the State had admitted an officer's opinion evidence on this point was determined to be an abuse of discretion. The officer had expressed his opinion in this O.M.V.U.I. case that there was danger of collision of defendant's car with an oncoming truck. Testifying in his own behalf, defendant attempted to counter the officer's opinion testimony by giving his own opinion on the same question, but the trial court sustained the State's "calling for opinion and conclusion" objection. Noting that the admission of opinion evidence, including that relating to nonexpert state of mind, rests largely in the trial court's discretion which nevertheless must be exercised fairly and impartially, the supreme court implied that a lay witness like defendant was entitled to give such an opinion and added that "since officer Sunken's opinion evidence was initially admitted it fairly follows defendant's attempt to counter same should have been allowed."<sup>639</sup>

c. *Relevancy.* As already discussed, two cases were reversed because of improper exclusion of defendant's proffered evidence on the grounds of relevancy;<sup>640</sup> viz. evidence of a statutory rape prosecutrix's other promiscuous acts in an attempt to show someone else was her attacker<sup>641</sup> and evidence of restitution made in a prosecution for false drawing and uttering of a check in

633. *Id.* at 927.

634. 203 N.W.2d 269 (Iowa 1972).

635. *Id.* at 272.

636. 201 N.W.2d 724 (Iowa 1972).

637. *Id.* at 727.

638. 204 N.W.2d 594 (Iowa 1973).

639. *Id.* at 598.

640. "Relevancy means the logical relation between the proposed evidence and a fact to be established. Evidence must generally have probative value to be relevant. . . . We have often held the question of relevancy and materiality of evidence rests within the sound discretion of the trial court." *State v. Battle*, 199 N.W.2d 70, 72 (Iowa 1972) (officer's testimony "had some probative value on the question of a separation of identities as between defendant and [one] Chin").

641. *State v. McDaniel*, 204 N.W.2d 627 (Iowa 1973), as discussed in text accompanying notes 321-22 *supra*.

order to show lack of intent to defraud.<sup>642</sup> Likewise, in *State v. Smiley*,<sup>643</sup> the trial court abused its discretion in excluding for remoteness certain evidence proffered by defendant. Defense counsel (for the tavern proprietors being prosecuted for assault and battery) had sought to explore the drinking earlier that evening by gang members who started the original altercation with another patron. Conceding that it is within a trial court's sound judicial discretion "to exclude relevant evidence too remote to be material or have any probative value," the supreme court mused that "it scarcely qualifies as sound discretion to exclude evidence of the immediate drinking experience of the participants of a brawl giving rise to a criminal charge."<sup>644</sup>

On the other hand, the supreme court upheld the admissibility of the State's evidence, over the respective defendant's objections, in five other cases. Two of these involved introduction of certain photographs,<sup>645</sup> and another the results of experimental evidence.<sup>646</sup> Moreover, in *State v. Lynch*,<sup>647</sup> the objectionable testimony "was based on the agent's experience in narcotics investigations and described in some detail the manner in which marijuana is measured out and packaged for resale purposes," which the supreme court believed was a relevant description from which "the jury could properly find the marijuana in defendant's possession was intended for sale."<sup>648</sup> Similarly, it was left within the trial court's discretion in *State v. Kimball*<sup>649</sup> to admit into evidence bank records of defendant's other accounts besides the account on which the instant bad check was written in this prosecution for falsely uttering a check. Because the State had to prove defendant's fraudulent intent, including lack of arrangement with said bank, its proof that "defendant did not have funds in either of the accounts to pay the check negated any contention that the check was mistakenly drawn on the wrong account and established that defendant did not have 'funds with such bank' sufficient to pay the check,"<sup>650</sup> the supreme court reasoned.

642. *State v. Johnson*, 196 N.W.2d 563 (Iowa 1972), as discussed in text accompanying notes 135-39 *supra*. But see *State v. Graham*, 203 N.W.2d 600 (Iowa 1973) (within trial court's discretion to exclude defense-proffered testimony concerning out-of-court statements allegedly made by defendant's acquaintance that she intended to comply with a child custody decree, in this prosecution for interference with administration of justice arising out of defendant's thwarting of execution of that decree), as discussed in text accompanying notes 165-71 *supra*.

643. 201 N.W.2d 730 (Iowa 1972).

644. *Id.* at 731.

645. See *State v. Youngbear*, 202 N.W.2d 70 (Iowa 1972) (The trial court did not abuse its discretion in permitting admission of numerous photographs which may have been merely cumulative) and *State v. Williams*, 207 N.W.2d 98 (Iowa 1973) (The trial court did not abuse its discretion in permitting admission into evidence of photographs of decedent's fatal head wound).

646. "Admissibility of experimental evidence rests within the sound discretion of the trial court." *State v. Lunsford*, 204 N.W.2d 613, 615 (Iowa 1973) (discretion not abused in permitting experimental evidence as to driving time from scene of arrest to police station in order to minimize speculation of tampering with contraband exhibit seized from defendant).

647. 197 N.W.2d 186 (Iowa 1972).

648. *Id.* at 190.

649. 203 N.W.2d 296 (Iowa 1972).

650. *Id.* at 299.

By way of contrast, the supreme court noted in *State v. Hinsey*<sup>651</sup> that it is improper for the trial court to allow the State to introduce into evidence defendant's statements of hatred toward police which were made at the time of his arrest. Noting that the State attempted to justify such evidence as "show[ing] defendant's state of mind," the supreme court granted as much for what the comments showed but added that this was "on a matter totally irrelevant to the charge for which he was being tried."<sup>652</sup> "Defendant's general hatred of policemen, standing alone, could hardly be relevant evidence in his trial for robbing and shooting a storekeeper,"<sup>653</sup> the supreme court concluded. Nevertheless, the conviction was upheld notwithstanding this error because of defendant's failure to object to this testimony when it was offered at trial, thus leaving no record to be reviewed.<sup>654</sup>

d. *Reputation evidence.* Reversible error was committed in *State v. Sill*<sup>655</sup> by the admission of "truth and veracity reputation testimony over proper objection when the foundation requirements of *Hobbs*<sup>656</sup> were not met."<sup>657</sup> Here, three State rebuttal witnesses testified defendant had a bad reputation for truth and veracity, notwithstanding the fact that they "did not say whether there were in fact comments about his reputation for truth and veracity, nor how many, their type, place, time, duration or representative nature."<sup>658</sup> Thus, the foundation requirements cannot be weaker where, as here, evidence goes to credibility than where, as in *Hobbs*, the evidence went to probability or non-probability of guilt.<sup>659</sup>

#### 4. *Mistrial*

The principal cases concerning motions for mistrial involved constitutionally-proscribed evidence, evidence of other crimes, the bounds of jury arguments, and in-trial interrogation of jurors concerning media publicity, all of which are discussed in detail below. In other cases, the supreme court af-

651. 200 N.W.2d 810 (Iowa 1972).

652. *Id.* at 817.

653. *Id.*

654. For a discussion of the related area of relevancy of evidence as it concerns admissibility of evidence of other crimes, see text accompanying notes 668-80 *infra*.

655. 199 N.W.2d 47 (Iowa 1972).

656. See *State v. Hobbs*, 172 N.W.2d 268, 272 (Iowa 1972):

When introducing reputation evidence as a means of proving defendant's character strict foundation requirements must be met. Several evidentiary facts must be established before a witness may testify as to what he has heard concerning defendant's reputation. These include: (1) The background, occupation, residence, etc., of the character witness, (2) His familiarity and ability to identify the party whose general reputation was the subject of comment, (3) Whether there have in fact been comments concerning the party's reputation for a given trait, (4) The exact place of these comments, (5) The generality of these comments, many or few in number, (6) Whether from a limited group or class as opposed to a general cross-section of the community, (7) When and how long a period of time the comments have been made.

657. 199 N.W.2d at 49.

658. *Id.*

659. See also *State v. Crawford*, 202 N.W.2d 99 (Iowa 1972), as discussed in text accompanying notes 428-31 *supra*.

firmed the trial courts' refusals to declare mistrials in the following situations: a prosecutor's bringing of several boxes with FBI markings into the courtroom temporarily and intermingling these with other exhibits which were admitted into evidence;<sup>660</sup> coaching of a witness (the ten-year old prosecutrix in a sodomy prosecution) by a spectator;<sup>661</sup> and bringing defendant's alleged accomplice attired in non-distinctive prison garb into the courtroom for identification purposes.<sup>662</sup>

a. *Constitutionally-Proscribed Evidence.* The general rule as to whether interjection into the trial of prejudicial, inadmissible evidence requires a mistrial or whether the problem can be cured through the standard strike-and-admonition approach is as follows: "If evidence is improperly admitted but is later withdrawn with a cautionary statement to the jury to disregard it, there is no error except in extreme instances where the prejudicial effect would probably remain to influence the verdict despite its exclusion."<sup>663</sup> However, in *State v. Ware*,<sup>664</sup> the supreme court interpreted *Chapman v. California*<sup>665</sup> as "clearly indicat[ing] certain types of constitutional error require an automatic reversal"—including "involuntary confession, right to counsel and an impartial presiding judge."<sup>666</sup> Accordingly, it held that "the constitutionally proscribed evidential use of . . . defendant's confession or admission was [not] dispelled by giving to the jury an oral in-course-of-trial ejaculatory instruction."<sup>667</sup> The instant mistrial situation arose when a violation of defendant's Miranda rights first came to light upon cross examination of a police officer following prior introduction of defendant's tainted confession into evidence.<sup>668</sup>

b. *Evidence of Other Crimes.* During the survey period, two of the three cases involving introduction of other crimes into evidence<sup>669</sup> were re-

660. *State v. Peterson*, 196 N.W.2d 436 (Iowa 1972).

661. *State v. Hackett*, 197 N.W.2d 569, 573 (Iowa 1972): Even if it could be argued that the trial court had a duty to take some sort of curative action after it had observed or had its attention called to the fact that a spectator was coaching a witness, much must, of necessity, be left to the sound discretion of the trial court since it had the opportunity to see and hear everything that transpired. Such discretion will not be disturbed unless it clearly appears it has been abused.

662. The prisoner was not attired in "any readily discernible prison garb. Neither does the record disclose presence of improper official escort or custodial restraint of Kelsey in the courtroom." *State v. Gilroy*, 199 N.W.2d 63, 65 (Iowa 1972).

663. See *State v. Coffee*, 182 N.W.2d 390, 392 (Iowa 1970); accord *State v. Osborn*, 200 N.W.2d 798, 807-08 (Iowa 1972) (Striking-and-admonition was sufficient where sheriff was asked on cross-examination how he could be so sure of his identification and he answered "I have had him in custody on prior occasions," because this "did not imply that [defendant] had ever been tried, convicted or even charged with any crime or in any way intimate defendant was of bad character or guilty of prior criminal conduct.").

664. 205 N.W.2d 700 (Iowa 1973).

665. 386 U.S. 18 (1967).

666. 205 N.W.2d 700, 704 (Iowa 1973).

667. *Id.*

668. Ware's confession was prompted by the arresting officers following up their giving of the Miranda rights [*Miranda v. Arizona*, 384 U.S. 436 (1966)] with the statement that it would go easier on him if he wanted to tell them anything. This "not so subtle" promissory leniency expressed by [the officers] induced the then frightened defendant to incriminate himself," the supreme court opined. *Id.* at 703.

669. See also *State v. Osborn*, 200 N.W.2d 798, 807-08 (Iowa 1972) (Sheriff's testi-



versed because the purpose for introducing such evidence did not come within any of the recognized exceptions to the general rule barring such evidence.<sup>670</sup>

In *State v. Wright*,<sup>671</sup> the State persistently interjected allusions to defendant's incestuous behavior with his own daughter into the instant prosecution for statutory rape of his step-daughter, notwithstanding the trial court's repeated sustaining of defendant's objections. Reversing the conviction because of the introduction of evidence of these other crimes without their coming within any of the recognized exceptions, the supreme court rejected defendant's twin contentions that this evidence was being offered as corroboration as well as being part of an integral transaction. That evidence of a crime other than the one being prosecuted is offered as "corroboration" of that crime "is not a recognized exception permitting its use."<sup>672</sup> Such evidence "would be corroboration only in the sense of proving defendant's alleged criminal character and thus that he was more likely to have committed the crime. This is exactly why it may not be introduced. . . . A defendant must be convicted only if it is proved he committed the offense charged and not because he is a bad man," the supreme court reiterated.<sup>673</sup> The court added that the integral transaction exception to the general rule barring proof of other crimes in the instant prosecution "is applicable only where the separate offenses are so related to each other that proof of one tends to establish the other."<sup>674</sup> Generally, on a charge of statutory rape, as in the instant case, "evidence of lascivious conduct with girls other than prosecutrix is inadmissible unless essential to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." Because the State had "failed utterly to prove that relationship here," the conviction was reversed.<sup>675</sup> In what appears to be somewhat of a new stance, the court added, however, that "even if the evidence could have been brought within some recognized exception, [the] trial court had discretion to exclude it."<sup>676</sup>

mony that he had had defendant "in custody on prior occasions" did not require a mistrial since the statement "did not tend to put defendant's character in issue since it did not imply that [defendant] had ever been tried, convicted or even charged" (and it was stricken); however, this type of testimony is not approved of).

See generally *State v. Hinsey*, 200 N.W.2d 810, 817 (Iowa 1972) (error for State to introduce into evidence defendant's statements of hatred toward police since "[d]efendant's general hatred of policemen, standing alone, could hardly be relevant evidence in his trial for robbing and shooting a storekeeper;" however, error not preserved here by timely and sufficient objection at trial).

670. "We have long held, subject to well-circumscribed exceptions, that the State cannot prove against a defendant any crime for which he is not being tried, either as a foundation for separate punishment or as aiding the proof in the case being tried." *State v. Wright*, 203 N.W.2d 247, 250 (Iowa 1972). See also *State v. Wright*, 191 N.W.2d 638, 639 (Iowa 1971) listing the five exceptions as permitting proof of: (1) motive, (2) intent, (3) absence of mistake or intent, (4) a common scheme with two or more crimes so related in an integral transaction that proof of one tends to prove the other, and (5) identity of the accused.

671. 203 N.W.2d 247 (Iowa 1972).

672. *Id.* at 250.

673. *Id.*

674. *Id.* at 251.

675. *Id.*

676. *Id.* This leeway of discretion empowers the judge to exclude the other-crimes

In *State v. Davis*,<sup>677</sup> a conviction for manslaughter arising out of a traffic death was reversed because the State's case brought out at trial that defendant did not have a valid driver's license at the time of the accident. Because the subject was not pursued further, it did not appear whether his license "had expired or was invalid for other reasons."<sup>678</sup> This evidence was inadmissible for lack of relevancy "in the absence of a showing of a causal relationship between the invalid license and the collision,"<sup>679</sup> the supreme court opined. It concluded a new trial was required in light of this evidence revealing a separate offense without the above showing of relevancy or connection to the crime being instantly prosecuted.

On the other hand, *State v. Fetters*<sup>680</sup> held that evidence of other breakings and enterings involving thefts in which defendant participated both before and after the one being instantly prosecuted was admissible for the State to establish the specific felonious intent of breaking and entering with intent to commit larceny. Moreover, the State could elect to introduce this evidence even though defendant attempted to remove his intent as an issue through his admission as a witness.<sup>681</sup>

c. *Jury Arguments.* Although it generally affords trial courts wide latitude in ruling on motions for a mistrial because of prosecutorial misconduct in the making of improper remarks<sup>682</sup> during jury arguments, the supreme court nevertheless determined in *State v. Vickroy*<sup>683</sup> that the court erred in refusing to order a mistrial for prejudicial remarks during both the opening and closing arguments. In his opening argument, the prosecutor told the jury he knew defendant was guilty. He thus "improperly commissioned himself an expert witness, then exceeded his prerogative as such by expressing an impermissible opinion as to defendant's guilt."<sup>684</sup> Then, on closing argument, he called upon the jurors "to place themselves and members of their families in a hypothetical position of peril created by a drunken, car operating defendant."<sup>685</sup> He thus undertook "to inflame the fears, passion and prejudice of the jury as against defendant,"<sup>686</sup> the supreme court determined. Observing that "[p]rejudice flowing therefrom is self-evident,"<sup>687</sup> the supreme court appears to have dictated that such arguments as the above necessitate a mistrial rather

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evidence, even when it has substantial independent relevancy, if in his judgment its probative value for this purpose is outweighed by the danger that it will stir such passion in the jury as to sweep them beyond a rational consideration of guilt or innocence of the crime on trial. *Id.*, quoting C. McCORMICK, EVIDENCE § 190, at 453-54 (2d ed. 1972).

677. 196 N.W.2d 885 (Iowa 1972).

678. *Id.* at 894.

679. *Id.*

680. 202 N.W.2d 84 (Iowa 1972).

681. *Id.* at 91.

682. On the somewhat related matter of the propriety of remarks made by the judge during trial and in the jury's presence, see *State v. Taylor*, 201 N.W.2d 724 (Iowa 1972).

683. 205 N.W.2d 748 (Iowa 1973).

684. *Id.* at 751.

685. *Id.*

686. *Id.*

687. *Id.*

than a mere strike-and-admonition "remedy" (which was not even done here).<sup>688</sup>

On the other hand, the prosecutor's impropriety by being argumentative in his opening argument in *State v. Schiernbeck*<sup>689</sup> was effectively cured by the trial court's admonition for the jury to disregard the argumentative portion. Here, the prosecutor "argued" that since defendant was the only one in the motel that night then the person who entered the motel and was robbed had to have been robbed by defendant. The supreme court believed that the trial court acted "within its permissible range of discretion in finding the county attorney's statements did not deprive defendant of a fair trial."<sup>690</sup>

d. *Publicity and Jury Interrogation.* A new policy for dealing with the prejudicial effect of during-trial publicity was established in *State v. Bigley*.<sup>691</sup> Until *Bigley*, the trial court could decide, in its discretion, whether or not to interrogate jurors concerning their knowledge of inflammatory media accounts of the trial. In *Bigley*, the trial court refused to do so, relying instead on its earlier giving of the standard admonition that jurors are not to read (or listen to) news accounts of the trial. Determining that defendant had failed to demonstrate prejudice, the supreme court affirmed the conviction and thus gave only prospective application to the following new procedural rule. In all trials started after November 15, 1972, the procedure when an issue arises during trial about possible jury exposure to potentially prejudicial material going beyond the record has been as follows: "[T]he court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material."<sup>692</sup> This examination "shall take place in the presence of counsel, and an accurate record of the examination shall be kept."<sup>693</sup> The *A.B.A. Standards Relating to Fair Trial and Free Press*<sup>694</sup> shall serve as guidelines for excusing a juror challenged for exposure to prejudicial publicity.

## 5. Instructions

The Iowa supreme court dealt with a wide range of issues concerning jury instructions during the survey period. These are discussed below under the general headings of preservation of the record for appellate review, substan-

688. See also *State v. Moreland*, 201 N.W.2d 713 (Iowa 1972) (Improper in closing argument for the prosecutor, in rebuttal, to say one of the reasons that the informant had not testified was that if an informant testifies then his life might be imperilled—where there was no evidence introduced as to danger to this particular informant's life and so the court was right in promptly directing the jury to disregard that part of the argument thus obviating a mistrial; moreover, this argument was in rebuttal and "[d]efense counsel should certainly have anticipated a strong response from the prosecutor.").

689. 203 N.W.2d 546 (Iowa 1973).

690. *Id.* at 548.

691. 202 N.W.2d 56 (Iowa 1972).

692. *Id.* at 58.

693. *Id.*

694. A.B.A. Project on Standards for Criminal Justice, *Standards Relating to Fair Trial and Free Press* § 3.4(b).

tive content of the instructions given, propriety of giving certain instructions, and propriety of failing to give certain instructions.

a. *Preservation of the Record for Appellate Review.* Defense counsel frequently failed to make a proper record for appellate review of jury instructions.<sup>695</sup>

Requisites for the sufficiency of objections timely made were discussed in two cases. In *State v. Youngbear*,<sup>696</sup> the supreme court pointed out that Iowa Rule of Civil Procedure 196 "requiring that objections to instructions set out the grounds for complaint governs in criminal cases as well as civil. . . . Except that the time for making such objections is enlarged by section 787.3, this condition applies whether instructions are challenged by motion for new trial or by objections made during trial."<sup>697</sup> The instant objection asserted that the instruction "did not embody the law applicable to this case and clearly misled the jury and prejudiced this defendant."<sup>698</sup> "Such a blanket objection without specifying the nature of the claimed defects present[ed] no issue" for the supreme court to consider.<sup>699</sup> The court added that while the Code<sup>700</sup> permits a defendant to postpone making his objections until filing a motion for a new trial, "he is not thereby relieved of the duty to state what he complains of."<sup>701</sup> Similarly, the defense counsel stated in his objection in *State v. Buchanan*<sup>702</sup> that he "believe[d] that is no longer the law."<sup>703</sup> "This is tantamount to saying that the instruction does not state the law, which is insufficiently specific to constitute a basis for error," the supreme court concluded.<sup>704</sup> The supreme court also made it clear in *Buchanan* that an objection made at trial cannot be amplified subsequently in the motion for new trial. "This ground of the motion must stand or fall on the exception taken at trial, for if a defendant undertakes to except the instructions at trial he must rest on those exceptions [and he thus] cannot in a post-verdict motion amplify them or add new ones," the supreme court ruled.<sup>705</sup>

Timeliness in making objections was at issue in several cases that dealt with exceptions to the rule that "[i]n a criminal case it is permissible to postpone objections to instructions until after trial and to make them a basis for a new trial."<sup>706</sup> The exceptions are: "A party may waive the right . . . or if the instruction was correct as given but not as explicit as a party may have desired, he must request an additional instruction before the jury is

695. See generally, Sullins, *Preservation of Error: Providing a Basis for Appellate Review*, 22 DRAKE L. REV. 435, 469-73 (1973).

696. 202 N.W.2d 70 (Iowa 1972).

697. *Id.* at 72.

698. *Id.*

699. *Id.*

700. See IOWA CODE §§ 787.3(5), (7) (1973).

701. 202 N.W.2d 70, 72 (Iowa 1972).

702. 207 N.W.2d 784 (Iowa 1973).

703. *Id.* at 787.

704. *Id.*

705. *Id.*

706. See, e.g., *State v. Cox*, 196 N.W.2d 430, 432 (Iowa 1972).

charged."<sup>707</sup> Defendant waived his right to raise objections in his motion for new trial in *State v. Cox*<sup>708</sup> and *State v. Dagne*<sup>709</sup> by making express disclaimers of objections at the time of submission of the instructions to the jury. Likewise, the supreme court upheld a waiver in *State v. Youngbear*<sup>710</sup> in which defense counsel at trial not only indicated he had not requested instructions and made no objections to the instructions given but also "did not indicate an intention of reserving the right to take later exceptions."<sup>711</sup> That defendant should specifically reserve the right at trial to take exceptions later (in a motion for new trial) is suggested by the statement in *State v. Cox*<sup>712</sup> (as well as the above-mentioned reference in *Youngbear*): "Defendant did not indicate an intention of reserving the right to take later exceptions. He cannot be permitted thus to change his position after the verdict."<sup>713</sup> The "record" made at trial in *Cox* consisted of defendant objecting to other instructions not involved in this appeal and thereafter advising the court: "Defendant has no other objections and makes no further exceptions to the instructions. . . ."<sup>714</sup> Lastly, *State v. Hackett*<sup>715</sup> reaffirmed that the issue of improper jury instructions cannot be raised for the first time on appeal.

b. *Substantive Content of the Instructions Given.* As already discussed in detail above, the United States Supreme Court not only changed one part of the tripartite test for determining obscenity from whether the entire work "is utterly without redeeming social value" to whether the entire work "lacks serious literary, artistic, political, or scientific value"<sup>716</sup> but also eliminated the hypothetical *national* community for determining contemporary community standards.<sup>717</sup> Moreover, as already discussed above, the Iowa supreme court held that "it was error to instruct on an exception to the [hunting by artificial light] statute which is plainly not present in its language."<sup>718</sup> Likewise, the latter court held that it is improper to instruct that intoxication cannot preclude acquittal on a charge with specific intent as an essential element.<sup>719</sup> Finally, it determined that the Iowa Bar Association's Uniform Jury Instruction

707. *Id.* But see *State v. Youngbear*, 203 N.W.2d 274, 277 (Iowa 1972) (§ 787.3 (5) waiver rule does not apply "when the court has misdirected the jury in a material matter of law . . . or has refused properly to instruct the jury. . . .").

708. 196 N.W.2d 430, 432 (Iowa 1972): "Defendant has no other objections and makes no further exceptions to the instructions. . . ."

709. 206 N.W.2d 93, 95 (Iowa 1973): ("We don't have any objections to the instructions, your honor.")

710. 203 N.W.2d 274 (Iowa 1972).

711. *Id.* at 277.

712. 196 N.W.2d 430 (Iowa 1972).

713. *Id.* at 432.

714. *Id.*

715. 197 N.W.2d 569 (Iowa 1972).

716. See *Miller v. California*, 93 S. Ct. 2607 (1973), as discussed in text accompanying notes 202-05 *supra*.

717. See *Miller v. California*, 93 S. Ct. 2607 (1973), as discussed in text accompanying notes 219-22 *supra*.

718. See *State v. Hocker*, 201 N.W.2d 74, 75 (Iowa 1972), as discussed in text accompanying notes 160-64 *supra*.

719. See *State v. Sill*, 199 N.W.2d 47 (Iowa 1972), as discussed in text accompanying notes 351-52 *supra*.



520.8 is an unconstitutional application of the Code section 321.281 "presumption" of intoxication arising from the presence of a specified percentage of alcohol in the accused's blood.<sup>720</sup>

i. *Accomplice's testimony.* The United States Supreme Court held in *Cool v. United States*<sup>721</sup> that it is reversible error to instruct the jury that an accomplice's testimony must be believed beyond a reasonable doubt in order for the jury to give it the same effect as any other witness' testimony, i.e., the jury was to ignore this defense testimony unless jury believed it true beyond a reasonable doubt. The supreme court explained:

No constitutional problem is posed when the judge instructs a jury to receive the prosecution's accomplice testimony 'with care and caution'. . . . But there is an essential difference between instructing a jury on the care with which it should scrutinize certain evidence in determining how much weight to accord it and instructing a jury, as the judge did here, that as a predicate to the consideration of certain evidence, it must find it true beyond a reasonable doubt.<sup>722</sup>

In *State v. Houston*,<sup>723</sup> the Iowa supreme court held that it is improper for an instruction to place the burden on the State to prove (beyond a reasonable doubt) that certain State witnesses were not defendant's accomplices where defendant had raised the issue that they had aided and abetted him in the commission of the crime. Rather, the burden should have been placed on the defendant to prove (by a preponderance of the evidence) that they were his accomplices (and, if so, then their testimony needed to be corroborated<sup>724</sup>). Thus, this error inured to defendant's benefit and defendant's conviction was upheld.

ii. *Emphasis on adverse evidence.* It was determined in *State v. Milliken*<sup>725</sup> that reversible error is committed when jury instructions place undue emphasis upon evidence adverse to one party, here, the defendant. "[I]nstructions reciting facts militating against one party, without a recitation of facts favorable to his contention, are improper and erroneous,"<sup>726</sup> the supreme court pointed out. One of the instant instructions noted that if the jury found there was the odor of alcohol on defendant's breath at the time of his arrest for O.M.V.U.I. then it could "consider that fact with all the other pertinent facts and evidence in arriving at whether or not the Defendant was under the influence of an alcoholic beverage."<sup>727</sup> In another instruction,<sup>728</sup> the

720. See *State v. Hutton*, 207 N.W.2d 581 (Iowa 1973); *State v. Hansen*, 203 N.W.2d 216 (Iowa 1972), and *State v. Sloan*, 203 N.W.2d 225 (Iowa 1972), as discussed in text accompanying notes 293-302 *supra*.

721. 93 S. Ct. 354 (1972).

722. *Id.* at 357.

723. 206 N.W.2d 687 (Iowa 1973). See also the text accompanying notes 35-36 *supra*.

724. See IOWA CODE § 782.5 (1973).

725. 204 N.W.2d 594 (Iowa 1973).

726. *Id.* at 596, quoting *State v. Proost*, 225 Iowa 628, 635-36, 281 N.W. 167, 170 (1938).

727. *Id.* at 595.

728. Cf. 11 Uniform Jury Instructions 520.6.

jury was told that "it is not necessary for the State to prove or show how many drinks the defendant had or what quantity or kind of alcoholic beverage the Defendant consumed, or when or where he consumed it, and it is often difficult, if not impossible to do so,"<sup>729</sup> but rather that the State merely need show that he was under the influence of an alcoholic beverage. Disapproving, the supreme court admonished: "The evil attendant upon [these] instructions . . . is that they tend to lead a jury to dissociate the evidence thus emphasized from all other evidence they are duty bound to consider."<sup>730</sup> A proper instruction, the supreme court intimated, would be a general instruction "applicable to all witnesses alike,"<sup>731</sup> which would list altogether all of the facts which the jury should consider in reaching its decision.

iii. *Reasonable doubt.* The general requisites of a valid jury instruction defining reasonable doubt were spelled out in *State v. McGranahan*.<sup>732</sup> Here, the instruction merely rearranged the words by defining reasonable doubt as "a doubt which is based upon reason."<sup>733</sup> This instruction was considered by the supreme court to be fatally defective because it contained no definition of reasonable doubt and thus made no reference to any standard to aid the jury in determining the reasonableness of any doubt they might entertain. The court pointed out in passing that the Iowa Bar Association's uniform jury instruction on reasonable doubt<sup>734</sup> contains at least three acceptable standards, but that it also is defective in another respect. A proper instruction on reasonable doubt "should limit its reference to the lack or failure of evidence of such a lack or failure o[f] evidence produced by the state,"<sup>735</sup> the supreme court declared.

c. *Propriety of Giving Certain Instructions.* In several survey cases involving jury instruction matters, the central issue was the propriety of giving the instruction (i.e., any instruction on this point).<sup>736</sup>

i. *Aiding and abetting.* This problem was best illustrated in *State v. Mays*,<sup>737</sup> in which it was held reversible error to submit an issue completely "unsubstantiated by evidence."<sup>738</sup> Specifically, the trial court erred in giving an instruction on aiding and abetting when "no evidence at all was introduced

729. 204 N.W.2d 594, 595 (Iowa 1973).

730. *Id.* at 596.

731. *Id.* at 596-97.

732. 206 N.W.2d 88 (Iowa 1973).

733. *Id.* at 91.

734. Uniform Jury Instruction No. 501.11.

735. 206 N.W.2d 88, 92 (Iowa 1973).

736. See generally *State v. Sill*, 199 N.W.2d 47, 49 (Iowa 1972): "Since the case will be remanded for new trial [because of an erroneous instruction on voluntary intoxication] we also note there was no evidence of involuntary intoxication and no reason to instruct on it."

See also *State v. Cartee*, 202 N.W.2d 93, 97 (Iowa 1972) (reaffirmation of prospective application only of *State v. Kimball*, 176 N.W.2d 864 (Iowa 1970) doctrine that it is reversible error to instruct the jury, absent defendant's request or objection, that it should draw no inference from defendant's failure to testify).

737. 204 N.W.2d 862 (Iowa 1973).

738. *Id.* at 865.

that anyone beside[s] defendant was involved."<sup>739</sup> That is, there was "want of proof that anyone else had anything to do with the crime."<sup>740</sup> Rejecting the State's claim on appeal that the instruction was not prejudicial since "under the evidence, defendant was the only one who could possibly be convicted of committing the crime," the supreme court admonished: "But that is the very reason the instruction should not have been given. It opened up to speculation participation by others, without any proof of such participation."<sup>741</sup>

ii. *Circumstantial evidence.* Defendant's objection in *State v. Peterson*<sup>742</sup> went to the trial court's giving of the Iowa Bar Association's uniform jury instruction defining both direct and circumstantial evidence,<sup>743</sup> with defendant contending that "the State's case was based entirely on circumstantial evidence."<sup>744</sup> In this prosecution for possession of burglar's tools, however, the supreme court determined that each of the following constituted direct evidence: establishment of the character of the tools by testimony of police officers-witnesses, identification of defendant as a passenger in the car in flight from which these tools were thrown during a police chase, and introduction into evidence of burglar's tools found in the same car.

iii. *Collateral issues.* It was deemed reversible error in *State v. Dunn*<sup>745</sup> to give a jury instruction on a collateral issue. Here, defendant was charged with arson for the burning of one Rogers' automobile, although the facts smacked of collusion between defendant and Rogers to defraud Rogers' insurance company. Over various objections, Rogers' insurance company's agent (Thompson) was allowed to testify concerning statements allegedly made to him by Rogers on the theory that if a conspiracy between defendant and Rogers were established "then any hearsay statements made to Thompson by Rogers would be admissible."<sup>746</sup> The jury subsequently was instructed that if they believed beyond a reasonable doubt that such a conspiracy existed then they could consider Thompson's testimony concerning Rogers' alleged statements. Reversing the conviction, the supreme court, pointing out that defendant was charged with arson and not with conspiracy, concluded:

We are satisfied the questioned instruction was erroneously given in that it compounded the confusion resulting from extended introduction of prosecutorial evidence regarding collateral issues and separate offenses, possibly stemming in part from absence, at times, of sufficiently specific testimonial objections; it improperly allowed the jury to inceptionally determine whether or not there was sufficient evidence of a conspiracy, apart from statements by Rogers to Thompson, to justify a consideration of those statements in determining whether defendant was guilty of the offense charged; in effect the

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739. *Id.* at 864.

740. *Id.*

741. *Id.* at 865.

742. 196 N.W.2d 436 (Iowa 1972).

743. Uniform Jury Instruction 501.13.

744. 196 N.W.2d at 438.

745. 199 N.W.2d 104 (Iowa 1972).

746. *Id.* at 108.

jury was thereby wrongfully allowed to pass under admissibility of evidence after the court had permitted its introduction.<sup>747</sup>

iv. *Verdict-urging instructions.* Two survey cases concerned the trial court's propriety in giving a verdict-urging instruction similar to the Iowa Bar Association's Uniform Jury Instruction 501.1. The gist of this instruction is to encourage the jury to reach a verdict, thus prompting each juror, in case of deadlock, to re-examine his views and to change his opinion if such can be done without violating his conscience.

In *State v. Hackett*<sup>748</sup> the original instructions included the admonitions that "[a]n inconclusive trial is always highly undesirable" and that jurors in the course of their upcoming deliberations should "not hesitate to reexamine [their] own views and change [their] opinions if convinced it is [sic] erroneous," if not done so "for the mere purpose of reaching a verdict."<sup>749</sup> Noting this instruction was part of the original charge to the jury, the supreme court was satisfied this type of instruction "is not subject to the abuses said to attend the giving of an 'Allen' [or dynamite] charge."<sup>750</sup>

The uncertainty left in *Hackett* as to the supreme court's view toward the giving of a so-called "Allen" or "dynamite" charge<sup>751</sup> during the jury's deliberation to prompt the breaking of a deadlock and thus encourage a verdict was subsequently dispelled in *State v. Quitt*.<sup>752</sup> Refusing to hold that the giving of an "Allen charge" to a deadlocked jury *per se* deprives defendant of a fair trial, the supreme court instead left it to the trial courts' "considerable discretion in determining whether it should be given."<sup>753</sup> With each case to be decided, "on its own circumstances," the test for determining whether the giving of a verdict-urging instruction forced or helped to force an agreement, or merely started a new train of real deliberation which ended the disagreement."<sup>754</sup> This unsatisfactory test thus means that a trial court can exercise his "considerable discretion" only at the peril of reversible error subsequently arising through a quick verdict thereafter, with jurors attempting to impeach the verdict with affidavits as to the coercive impact of an "Allen charge" on the subsequent deliberations. In *Quitt*, however, there was a total elapsed deliberation time of four hours between the giving of the "Allen charge" and the return of the verdict of guilty. The supreme court, affirming the conviction, determined: "The record here does not suggest coercion. In fact, it rather demonstratively negatives it."<sup>755</sup>

d. *Propriety of Failing to Give Certain Instructions.* One last category of jury instruction matters concerns the propriety of the trial court's failure to

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747. *Id.* at 110.

748. 200 N.W.2d 493 (Iowa 1972).

749. *Id.* at 496.

750. *Id.*

751. See *Allen v. United States*, 164 U.S. 492 (1896).

752. 204 N.W.2d 913 (Iowa 1973).

753. *Id.* at 914.

754. *Id.*

755. *Id.*

give certain instructions desirable to defendant. As the discussion below indicates,<sup>756</sup> this facet can involve either the court's rejection of defendant's request for instructions or the court's affirmative duty to instruct *sua sponte*.

i. *Entrapment*. Defendant's request for an instruction on the affirmative defense of entrapment was properly refused in *State v. McGranahan*.<sup>757</sup> The only evidence offered at trial relating to defendant's contention that he had been induced by Officer Keenley to make the illegal sale of marijuana was the following testimony by Officer Keenley: "Well, Mr. McGranahan was the first to speak. He said, 'What is it that you need?' And I said, 'Well, what have you got?' And he answered with the word, 'Marijuana'."<sup>758</sup> The supreme court pointed out that "there is no entrapment when narcotics agents merely afford an accused the opportunity to commit the offense."<sup>759</sup> Here, the agent "merely afforded the opportunity for the defendant to commit the crime. He did not induce the defendant to commit it."<sup>760</sup>

ii. *Evidential basis*. The cardinal principle that there must be evidence in the record to support an instruction was unsuccessfully challenged in *State v. Armstrong*.<sup>761</sup> First, the trial court correctly sustained the State's objection to a qualified hypothetical question for which there was no evidential support. Then it correctly refused defendant's requested instruction concerning that hypothesis. "This request, interlaced with multiple qualifying 'ifs,' stems from the same faulty premise heretofore considered regarding the hypothetical question put by defense counsel to the witness Lewis,"<sup>762</sup> the supreme court observed. The impropriety of defendant's request stems from the principle that the trial court's duty to instruct "is confined to 'Material questions of law in the case' . . . [but] only where relevant evidence was produced which would make apparent the materiality of the law claimed applicable thereto."<sup>763</sup>

iii. *Impeachment with prior felony convictions*. A new procedural rule concerning impeachment of a previously-convicted defendant testifying in his own behalf was established in *State v. Mays*.<sup>764</sup> In trials commencing after February 21, 1973, the trial court must instruct *sua sponte* that "consid-

756. Although the survey cases raising issues of self defense did not specifically arise on refusal of requests for instructions, see text accompanying notes 353-56 *supra*.

See also *State v. Davis*, 196 N.W.2d 885, 891 (Iowa 1972) (defendant in vehicular homicide case is not entitled to instruction on recklessness that "even if he was aware of a dangerous situation, recklessness would be shown only if he did not exercise the slightest care to avoid injury to others"), as discussed in text accompanying notes 198-99 *supra*.

757. 206 N.W.2d 88 (Iowa 1973). See also text accompanying notes 336-43 *supra* for a discussion of two cases in which entrapment instructions were given contrary to defendant's contentions that entrapment had been shown as a matter of law (thus requiring dismissal of the charges).

758. 206 N.W.2d at 90.

759. *Id.*

760. *Id.*

761. 203 N.W.2d 269 (Iowa 1972).

762. *Id.* at 274.

763. *Id.*, quoting *State v. Perry*, 246 Iowa 861, 866, 69 N.W.2d 412, 415 (1955).

764. 204 N.W.2d 862 (Iowa 1973).



eration of defendant's previous convictions must be limited to defendant's credibility as a witness."<sup>765</sup>

iv. *Lesser included offenses.* As already discussed above, the Iowa supreme court has reversed *State v. Everett*,<sup>766</sup> and now applies this test in determining whether instructions on certain lesser included offenses should be submitted to the jury: "[T]he evidence of the case must be considered in determining whether one offense is includable within another."<sup>767</sup> In *State v. Hawkins*,<sup>768</sup> the supreme court said:

Under the facts presented in this case it would have been impossible for defendant to commit the offense charged without a showing of each element necessary to convict him of the lesser offense. Under the rule announced by the majority in *State v. Everett*, supra, this would not make the lesser offense includable because situations, though not involved or presented in the case, can be imagined in which the major offense might be committed by means other than those which would constitute a commission of the lesser offense. . . . We now believe and hold the dissenting opinion [in *Everett*] expresses the sounder view.<sup>769</sup>

The court nevertheless reiterated in *Hawkins* that "the evidence must justify the submission of the included offense" and thus "if there is no evidence from which the jury could find the defendant guilty of the included offense, then such included offense need not be submitted."<sup>770</sup> Similarly, in *State v. Osborn*<sup>771</sup> the trial court did not err in this prosecution for burglary by failing to give defendant's requested instruction regarding the lesser included offense of breaking and entering. "There is not a scintilla of evidence that the breaking and entering at the Rock home occurred other than in the nighttime as that term is ordinarily defined,"<sup>772</sup> the supreme court determined, thus apparently combining principles of evidence of the case and matters of law.

*Hawkins* merely changed the rule as to whether lesser included offenses are submitted in a particular case, but did not change the definition of a lesser included offense, to wit:

Every crime charged consists of certain specific elements, and if from the elements of the crime charged certain elements thereof may be taken, thereby leaving the necessary elements of another crime, the latter would be an included offense; or, to state it in another way, if certain elements are necessary to a criminal charge, and these elements, plus certain other elements, make the necessary elements of a higher crime, then the lower crime is included in the higher one.<sup>773</sup>

765. *Id.* at 867.

766. 157 N.W.2d 144 (Iowa 1968).

767. *State v. Hawkins*, 203 N.W.2d 555, 557 (Iowa 1973).

768. *Id.* For a discussion of the factual situation in *Hawkins*, see text accompanying notes 178-84 *supra*.

769. *Id.* at 557.

770. *Id.*, quoting *State v. Marshall*, 206 Iowa 373, 375, 220 N.W. 106 (1928).

771. 200 N.W.2d 798 (Iowa 1972).

772. *Id.* at 807. For a further discussion of this point, see text accompanying notes 68-71 *supra*.

773. *State v. Hawkins*, 203 N.W.2d 555, 557 (Iowa 1973), quoting *State v. Marshall*, 206 Iowa 373, 375, 220 N.W. 106 (1928).

note to the presiding judge inquiring as to the nature and date of the undesignated previous felony conviction which had been introduced at trial for impeachment purposes. The judge then recalled the jury and re-instructed them that defendant's previous felony conviction was not to be considered (other than presumably for impeachment purposes). Defendant made no other showing of any resultant events and jurors' affidavits indicated that no further mention of the extra-legal information was made. The fact that "fully five hours of deliberation ensued"<sup>791</sup> thereafter was prominently mentioned in the opinion.

## 2. Outsiders' Contact With Jurors

*State v. Bruno*<sup>792</sup> illustrates that a new trial is not required *ipso facto* by every outsider's contact with the jurors during their deliberations. Here, the alleged misconduct was based solely upon the fact that the sheriff appeared to have spoken once to one of the jurors while unlocking the door to the jury room. The supreme court opined: "While the sheriff's conduct was objectionable and avoidable, his slight encounter with the jurors [which was not repeated] does not appear to constitute the requisite conduct that gives rise, or appears to give rise, to the kind of 'doubt or disrespect' indicating prejudice."<sup>793</sup>

## D. Sentencing

The sentencing process<sup>794</sup> continues to present major problem areas for Iowa trial judges.<sup>795</sup>

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791. *Id.* at 690.

792. 204 N.W.2d 879 (Iowa 1973).

793. *Id.* at 885.

794. For a discussion of the scope of judicial discretion in the sentencing process, see generally Dunahoo, *supra* note 364, at 1101-16.

795. Summarily, the other sentencing process issues not discussed elsewhere in this survey include:

(a) ALLOCATION: The CODE § 789.6 right of allocation is meant only to afford defendant an opportunity to make a statement and does not require verbalization in the precise words of the statute. *State v. Christensen*, 201 N.W.2d 457 (Iowa 1972).

(b) AT ARRAIGNMENT: "We cannot conclude here the trial court acted improperly, although arraigning the defendant, accepting his plea, and imposing sentence all at one hearing and on the same day is not a procedure that should be followed. The burden is on the defendant here to establish the fact the disposition of his case with such dispatch is a circumstance entitling him to prevail in this proceeding." *State v. Kephart*, 202 N.W.2d 62, 67 (Iowa 1972).

(c) EXCESSIVENESS—Juveniles: The trial court does not abuse its discretion in selecting the most severe of the possible sentencing alternatives although CODE § 237.72 authorizes the court to give "special consideration" when sentencing a juvenile under the criminal code. *State v. Davis*, 195 N.W.2d 677 (Iowa 1972).

(d) EXCESSIVENESS—Multiplicity: Concurrent sentences of life imprisonment for "open-charge" murder and "felony" murder convictions, based upon the same homicide, are excessive; one must be set aside. *State v. Gilroy*, 199 N.W.2d 63 (Iowa 1972).

(e) EXCESSIVENESS—Severity: "Although the sentence seems quite severe in view of the amount of the [\$7 bad] check, we cannot say there was an abuse of discretion." *State v. Johnson*, 196 N.W.2d 563, 571 (Iowa 1972).

### 1. *Deferred Sentencing*

The reportedly widespread practice of deferred sentencing<sup>796</sup> was declared invalid in *State v. Wright*.<sup>797</sup> As succinctly described in Justice McCormick's special concurrence in which he defended deferred sentencing,<sup>798</sup> under this technique "[s]entence in appropriate cases, after plea of guilty, is deferred for a specified period, usually upon condition defendant submit to probation. If defendant conforms to the terms of probation he is permitted to withdraw his guilty plea at its expiration and ask that the case be dismissed in the interests of justice."<sup>799</sup> Accordingly, a probation-conforming defendant ultimately will have no conviction. The supreme court's majority held: "The right to defer imposition of a sentence in a criminal case is not inherent but is regulated by statute and can only be exercised in accordance with the terms of the statute."<sup>800</sup> The only applicable statutes<sup>801</sup> were construed as limiting, for a reasonable time, the deferral of imposition of sentence only for determining motions for a new trial or in arrest of judgment or for the making of a pre-sentence investigation. Moreover, the probation provision<sup>802</sup> is applicable only after the entry of judgment of conviction and the imposition of sentence. State differently, *Code* section 247.20 "refers only to a suspended sentence and has no application to a deferred sentence."<sup>803</sup> Therefore, *Wright* mandated that trial courts move forward with entry of judgment and sentencing following a conviction. This meant that, save for convictions for simple possession under Iowa's Uniform Controlled Substances Act,<sup>804</sup> anyone pleading guilty or being convicted by a jury would have a conviction of record, the probation provision notwithstanding.

The Iowa General Assembly subsequently granted statutory authority for deferred sentencing, with numerous enumerated exceptions and procedural limitations.<sup>805</sup> The new law became effective on August 15, 1973, and expressly validated all previous deferred sentences except as to "any case in which an appeal was pending on June 1, 1973."<sup>806</sup>

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796. See *Contemporary Studies Project: Perspectives on the Administration of Criminal Justice in Iowa*, 57 IOWA L. REV. 598, 612 (1972).

797. 202 N.W.2d 72 (Iowa 1972) (en banc).

798. Justice McCormick, joined by Justices Harris and Reynoldson, concurred only in the result in *Wright*, in which defendant unsuccessfully contested the trial court's revocation of his probation granted as part of a deferred sentence and his subsequent sentencing. The six-man majority said there was no authority to grant the deferred sentence in the first instance, while Justices McCormick, Harris and Reynoldson took the position that the trial court had statutory authority (under *CODE* § 789.2) as well as inherent power, to grant the deferred sentence, but that the trial court was justified in subsequently revoking the probation, entering the judgment of conviction, and sentencing.

799. 202 N.W.2d 72, 79 (Iowa 1973).

800. *Id.* at 76.

801. See IOWA *CODE* § 789.2 (1973), as construed at 202 N.W.2d 72, 78 (Iowa 1973).

802. *Id.* § 247.20.

803. 202 N.W.2d 72, 77 (Iowa 1973).

804. See IOWA *CODE* § 204.409 (1973).

805. See Ch. 295 [1973] Iowa Acts.

806. *Id.* § 14.

## 2. Habitual Criminal

Two survey cases dealt with various aspects of the aggravated sentencing process for a defendant shown to be a habitual criminal.<sup>807</sup>

In *State v. Houston*,<sup>808</sup> the supreme court held, *inter alia*, that the State need only show as to previous convictions that defendant was *sentenced* to a term of at least three years' imprisonment thus rendering irrelevant the time *actually served*. Moreover, the court held that a jury question concerning a prior commitment is generated "if the State can show a mittimus was issued ordering the sheriff to deliver defendant to prison"<sup>809</sup> and thus it is unnecessary for the State to show defendant was actually incarcerated in prison. Finally, the court held that "[t]he duly authenticated copy of the mittimus makes a prima facie case,"<sup>810</sup> and accordingly the State need not show that defendant's prior convictions were not appealed.

In *State v. Mason*,<sup>811</sup> the supreme court held that the State can carry the issue of a habitual-criminal defendant's identification to the jury through in-court identification by witnesses "who had known him and connected him with those [prior] proceedings."<sup>812</sup> Accordingly, "an in-court comparison of defendant's photographs and fingerprints with those taken on the other convictions,"<sup>813</sup> while being the best evidence, is not necessary.

## 3. Indigent Defendants

The application of recently-revised federal constitutional guidelines for the sentencing of indigent defendants to imprisonment was one of the major areas of concern during the survey period.

a. *Counsel*. In *Argersinger v. Hamlin*,<sup>814</sup> the United States Supreme Court held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial."<sup>815</sup> As a practical matter of procedure, the Court noted that "every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the

807. See IOWA CODE § 747.1, .2 & .5 (1973). See also *Davis v. Bennett*, 400 F.2d 279, 281 (8th Cir. 1968):

The Iowa Supreme Court has repeatedly held that the habitual offender statute does not create a separate and distinct crime, but is merely relevant in determining the penalty to be imposed should a conviction be obtained on the 'primary' charge. \* \* \* There is nothing in the [fourteenth amendment] due process clause which prevents the state of Iowa from making this construction.

808. 209 N.W.2d 42 (Iowa 1973).

809. *Id.* at 47.

810. *Id.*

811. 203 N.W.2d 292 (Iowa 1972).

812. *Id.* at 296.

813. *Id.*

814. 407 U.S. 25 (1972).

815. *Id.* at 37.

accused before the trial starts."<sup>816</sup> Thus, the Supreme Court refused to take this opportunity to afford a sixth amendment *right* to counsel on non-felony offenses,<sup>817</sup> unlike its rule in *Gideon v. Wainwright*<sup>818</sup> as to felonies. Rather, it merely precluded a trial court from exercising any statutory authority to sentence a convicted indigent to imprisonment unless he had been effectively offered counsel—thus leaving an indigent defendant facing only a fine with no *right* to counsel.

*Argersinger* signalled a change in Iowa's general practice of not affording appointive counsel for indigents charged with *simple* misdemeanors,<sup>819</sup> although the Iowa supreme court had expressly reserved judgment on the question.<sup>820</sup> In *Henricks v. Hildreth*,<sup>821</sup> the Iowa supreme court held that *Argersinger* is to be applied prospectively only (*i.e.*, to trials started after June 12, 1972).

b. *Default Imprisonment.* In *Tate v. Short*,<sup>822</sup> the United States Supreme Court held that automatic imprisonment of an indigent defendant merely for his *non-wilful* failure to pay *in toto* a fine violates the Equal Protection Clause of the fourteenth amendment. Rather, the State is to resort to alternative methods of collecting the fine (*e.g.*, installment payments) or exacting some economic equivalent (*e.g.*, civil process against defendant's non-exempt property). The Supreme Court emphasized, however, that *Tate* was *not* to be understood "as precluding imprisonment as an enforcement method when alternative means are unsuccessful despite the defendant's reasonable efforts to satisfy the fines by those means; the determination of the constitutionality of imprisonment in that circumstance must await the presentation of a concrete case."<sup>823</sup>

In *State v. Snyder*,<sup>824</sup> the Iowa supreme court held that the *Tate* rules were violated by the entry of a judgment that defendant was to be jailed if he failed to pay the imposed fine. Thus, default imprisonment was made the only alternative to immediate, albeit non-wilful, *in toto* payment of the fine instead of alternative methods being offered. (One such alternative expressly mentioned by the Iowa supreme court was installment payments). Vacating the sentence and remanding the cause for resentencing, the supreme court rejected the possible argument that the default imprisonment imposed on defendant was not governed by *Tate* since the trial court "had authority to levy a fine or imprisonment on a defendant convicted of violating section

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816. *Id.* at 40.

817. "We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here, petitioner was in fact sentenced to jail." *Id.* at 37.

818. 372 U.S. 335 (1963).

819. *But see* *Wright v. Denato*, 178 N.W.2d 339 (Iowa 1970) (statutory right to appointive counsel for indigents charged with both felonies and indictable misdemeanors).

820. *Id.* at 342-43.

821. 207 N.W.2d 805 (Iowa 1973).

822. 401 U.S. 395 (1971).

823. *Id.* at 401.

824. 203 N.W.2d 280 (Iowa 1972).



321.281.”<sup>825</sup> In other words, it makes no difference that defendant *could* originally have been sentenced to imprisonment and any subsequent default imprisonment would unconstitutionally arise merely because of his indigency.

In an offshoot to *Snyder*, the Iowa supreme court strongly disapproved of a sentencing colloquy involving an indigent defendant in *State v. Milliken*.<sup>826</sup> Sentencing defendant for first-offense O.M.V.U.I. (which is punishable by a term of imprisonment in the penitentiary or a fine or both) the judge noted on the record that there was no *jail* sentence possible “except possibly to coerce payment of a fine.”<sup>827</sup> Noting further that defendant-pauper probably could not pay a reasonable fine, the judge indicated he was convinced defendant “ought to spend some time in prison or in jail”<sup>828</sup> and accordingly sentenced him to a penitentiary term. Reversing the instant conviction because of a faulty instruction, the supreme court declared that no such references are to be made in any phase of the sentencing process to a defendant’s pauperism.

#### 4. *Pacts*

The Iowa supreme court made it clear in *State v. Jackson*<sup>829</sup> that sentencing is to be done on an individualized basis and accordingly trial courts cannot bind themselves to a group agreement that prescribes uniform minimum sentences when the applicable criminal statute sets no such limits. Here, the judges in one judicial district had agreed to impose a minimum penalty of twenty days’ imprisonment in the county jail for every first-offense O.M.V.U.I. conviction, subject to individualized consideration to granting of probation— notwithstanding the fact that the applicable statute<sup>830</sup> neither sets a minimum period of imprisonment nor even mandates *any* imprisonment. Sentencing “under a predetermined fixed policy cannot satisfy a statutory requirement for the exercise of discretion,”<sup>831</sup> the supreme court admonished, adding that the sentencing judge must *exercise* his discretion by considering the peculiar facts and circumstances of each individual case in order to make “a sound, fair and just determination” of the proper sentence.<sup>832</sup>

#### 5. *Resentencing*

Three survey cases dealt with various issues related to resentencing procedures.

a. *Increased punishment.* The Iowa supreme court held in *City of*

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825. *Id.* at 290.

826. 204 N.W.2d 594 (Iowa 1973).

827. *Id.* at 598.

828. *Id.*

829. 204 N.W.2d 915 (Iowa 1973).

830. See IOWA CODE § 321.281 (1973).

831. 204 N.W.2d 915, 916 (Iowa 1973).

832. *Id.*

*Cedar Rapids v. Klees*<sup>833</sup> that the federal constitutional bar on harsher punishment after a retrial on remand to the same trial court (except when based on defendant's record of conduct in the interim between the original sentence and the resentencing)<sup>834</sup> is not applicable to trials de novo on appeal.<sup>835</sup> Here, defendant had been fined \$25 in municipal court but given five days in jail after a trial de novo after conviction on appeal to district court.

b. *Multiple sentences.* In *Cleesen v. Brewer*,<sup>836</sup> an exception was carved out of the rule in *Code* section 745.1 automatically making a sentence for escape to run consecutive to the original sentence. The instant defendant had been sentenced to an indeterminate term of ten years' imprisonment for breaking and entering and was subsequently sentenced to a three-year term for escape, with the sentence for escape made to run consecutively to the earlier sentence (as required by *Code* section 745.1). Following vacating of the sentence for breaking and entering in a postconviction proceeding, defendant was re-sentenced to a term not exceeding ten years, but the court did not specify whether this term was as to run concurrently with or consecutively to the three-year term for escape. Claiming the warden was illegally holding him for a total of thirteen years, defendant commenced another postconviction proceeding claiming that this turn of events brought into play *Code* section 789.12 which makes multiple sentences run concurrently unless specified to the contrary by the court in pronouncing the second sentence. Agreeing, the supreme court noted that after vacating of defendant's sentence for breaking and entering, "the only sentence in effect was the one for escape,"<sup>837</sup> and the second sentence for breaking and entering was to be treated merely as the second of multiple sentences, thus making *Code* section 789.12 govern.

c. *Replacement Statute.* In a bizarre turn of events, the punishment in *State v. Wiese*<sup>838</sup> was, in effect, ordered increased by the Iowa supreme court. Defendants successfully challenged in a postconviction relief proceeding their original sentences under Iowa's former Uniform Narcotics Act and they were re-sentenced to a \$2000 fine and a term of imprisonment "not to exceed two years." By that time, a new penalty provision was applicable under Iowa's Controlled Substances Act<sup>839</sup> which expressly makes the new schedule of penalties, "if they are less than those under prior law," applicable to offenses still being prosecuted on July 1, 1971 (the effective date of the new act). Defendants sought only to reduce their fines from \$2000 to \$1000 but not to change their terms of imprisonment.

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833. 201 N.W.2d 920 (Iowa 1972).

834. *North Carolina v. Pearce*, 395 U.S. 711 (1969); accord *State v. Pilcher*, 171 N.W.2d 251 (Iowa 1969).

835. 201 N.W.2d 920, 921 (Iowa 1972), citing *Colten v. Kentucky*, 407 U.S. 104 (1972).

836. 201 N.W.2d 474 (Iowa 1972).

837. *Id.* at 477.

838. 201 N.W.2d 734 (Iowa 1972). This case was consolidated on appeal with *State v. Hatch*.

839. See Ch. 148, § 601 [1971] Iowa Acts (S.F. 148). This transitional provision was not codified in the 1973 Iowa Code. See IOWA CODE ch. 204 (1973).

The supreme court upheld defendant's contention that the new penalty provision was applicable, noting that "[a] case which has not reached valid final judgment is 'being prosecuted.'"<sup>840</sup> However, the supreme court then pointed out that defendants' offenses would constitute possession with intent to deliver under the new statute and defendants must be resentenced accordingly even though the applicable penalty (imprisonment not to exceed five years) is greater. Pointing out that the trial court "has no authority to fix a lesser prison term,"<sup>841</sup> the supreme court reversed and remanded for new sentences.

### E. Posttrial Developments

#### 1. Postconviction Relief

Two survey cases involved construction of the provision in Iowa's Uniform Postconviction Procedure Act<sup>842</sup> that bars relitigation of any ground "finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived" in the proceeding that resulted in the conviction or sentence as well as any other proceeding taken to secure relief. That is, with the exception of the abovementioned qualifications, a postconviction proceeding cannot be taken to relitigate an issue previously raised on appeal, certiorari, habeas corpus, or an earlier postconviction petition.<sup>843</sup>

*Horn v. Haugh*<sup>844</sup> held that "[t]he failure to raise a defense in the original trial, unless excused as provided by the section, waives the issue in any future postconviction proceeding."<sup>845</sup> That is, the supreme court rejected defendant's contention that the conditional exception "or not raised" in the non-relitigation clause "relates only to prior postconviction proceedings and does not preclude assertion of matters waived in the original trial."<sup>846</sup> Accordingly, the court refused to permit the use of postconviction relief as a substitute for the simple statutory remedy of lodging objections at trial.

*State v. Masters*<sup>847</sup> held that this non-relitigation rule does not apply when defendant had taken his original appeal *pro se* and the issues were not adequately raised on that appeal. The supreme court's general conclusion on the earlier appeal that defendant had a fair trial "is not tantamount to a ruling on the merits of the errors now asserted"<sup>848</sup> on appeal from denial of postconviction relief, the supreme court determined. (The supreme court thereupon ruled adversely to defendant on the merits of his "relitigated" issues).

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840. 201 N.W.2d 734, 737 (Iowa 1972).

841. *Id.* at 738.

842. See IOWA CODE § 663A.8 (1973).

843. See also *Murch v. Mottram*, 93 S. Ct. 71 (1972) (federal habeas corpus does not lie for challenge of issue intentionally waived in State post-conviction procedure).

844. 209 N.W.2d 119 (Iowa 1973).

845. *Id.* at 121.

846. *Id.*

847. 199 N.W.2d 102 (Iowa 1972).

848. *Id.* at 103.

## 2. Parole Revocation

a. *Hearings.* In *Morrissey v. Brewer*,<sup>849</sup> the United States Supreme Court declared that Iowa's no-hearing parole revocation process<sup>850</sup> violates procedural due process rights of the fourteenth amendment. In fact, the Court held that a parolee facing revocation is entitled to two separate hearings—a preliminary hearing and the revocation hearing. The purpose of the preliminary hearing, to be held before an impartial hearing officer who need not be a judicial officer, is to determine if there are "reasonable ground[s] to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions" and thus "probable cause to hold the parolee for the final decision of the parole board on revocation."<sup>851</sup> For this hearing, the parolee is entitled to notice of the hearing, its purpose, and the alleged parole violations. At the hearing, he is entitled to appear and present evidence as well as to cross-examine his accusers (subject to security considerations concerning identity of confidential informants). The purpose of the more formal revocation hearing, to be held before a body such as the state parole board, is for making "a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation."<sup>852</sup>

Declaring that "the full panoply of rights due a defendant in [a criminal prosecution] does not apply to parole revocations," the Court nevertheless formulated "minimum requirements of due process" in the final parole revocation hearing, to wit:

(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.<sup>853</sup>

These new rules were accorded prospective application only.<sup>854</sup>

b. *Counsel.* In *Morrissey*, the Supreme Court expressly did not decide the question "whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent."<sup>855</sup> However, the Court subsequently accorded a qualified right to counsel in both probation revoca-

849. 408 U.S. 471 (1972).

850. "The Code [§ 247.11] in prescribing procedure for recommitment does not require hearing or notice, but simply provides a parole violator may be arrested upon the written order of the board of parole." *Gardels v. Brewer*, 190 N.W.2d 803, 807 (Iowa 1971).

851. 408 U.S. at 485-87.

852. *Id.* at 488.

853. *Id.* at 489.

854. *Id.* at 490.

855. *Id.* at 489.

tion proceedings and parole revocation proceedings in *Gagnon v. Scarpelli*,<sup>856</sup> as discussed in detail below.<sup>857</sup>

### 3. Probation Revocation

a. *Hearing.* The *Morrissey v. Brewer* rules for parole revocation proceedings were extended by the United States Supreme Court to the probation revocation process in *Gagnon v. Scarpelli*.<sup>858</sup> Specifically, the Court held that "a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in *Morrissey v. Brewer* . . ."<sup>859</sup> Being pegged on fourteenth amendment due process grounds, *Gagnon* overrules, by implication, *Cole v. Holliday*<sup>860</sup> in which the Iowa supreme court held that no hearing is required as long as probation is not revoked "arbitrarily, capriciously, or without any information."<sup>861</sup>

Prior to *Gagnon*, the Iowa supreme court prescribed procedural rules for a revocation hearing which was held, basing them upon the *Morrissey* guidelines without ever specifically stating that Iowa probation revocation hearings must comport with the *Morrissey* rules concerning parole revocation proceedings. (That they must was made clear subsequently in *Gagnon*). Specifically, the Iowa supreme court held in *State v. Hughes*:<sup>862</sup> (1) that the trial court "was not required to render an opinion or conclusions of law;" (2) that the findings of a court revoking probation must show "the factual basis for the revocation;" (3) that the revocation can be based upon an arrest for a subsequent offense (although there has been no prosecution); (4) that "the strict rules of evidence in criminal trials do not apply in revocation hearings;" (5) that revocation "may not rest on rumor or surmise;" (6) that hearsay is admissible "if the fact of the violation is established by evidence which is competent;" (7) that "the requisite degree of proof is a preponderance of the evidence" and thus grounds for revocation "need not be established beyond a reasonable doubt."<sup>863</sup> The supreme court determined that it did not need to decide whether the parole officer's report was admissible at the hearing when the maker of the report was not present (to be confronted for cross examination)—reasoning that this report was utilized here as a charge rather than as proof and that revocation rested on the policeman's testimony.

b. *Counsel.* In *Gagnon*, the Supreme Court, finally answering the question expressly left open in *Morrissey*, held that there is no absolute right to appointive counsel in parole or probation revocation hearings. "We think rather, that the decision as to the need for counsel must be made on a case-by-case

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856. 93 S. Ct. 1756 (1973).

857. See text accompanying notes 863-65 *infra*.

858. 93 S. Ct. 1756 (1973).

859. *Id.* at 1760.

860. 171 N.W.2d 603 (Iowa 1969).

861. *Id.* at 606.

862. 200 N.W.2d 559 (Iowa 1972).

863. *Id.* at 562-63.



basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system."<sup>864</sup> The test is:

Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself.<sup>865</sup>

As a procedural matter, the grounds for refusal of a request for counsel at either the preliminary or final hearing "should be stated succinctly in the record."<sup>866</sup>

#### IV. SUMMARY OF MAJOR DEVELOPMENTS

##### A. *Specific Crimes*

1) State statutes proscribing abortions during all stages of pregnancy except when necessary to save the life of the mother are unconstitutional. (U.S. Sup. Ct.).

2) Iowa's anti-abortion law is unenforceable. (3-judge fed. dist. ct.).

3) The third part of the first amendment tripartite standard on obscenity is changed from "utterly without social redeeming value" to "lacking in serious literary . . . value." (U.S. Sup. Ct.).

4) The first amendment test for judging obscenity under contemporary community standards no longer requires a "national" community. (U.S. Sup. Ct.).

5) There is a right to a jury trial on multiple contempt of court charges. (Iowa Sup. Ct.).

6) Placing the burden on defendant in an accommodation hearing under the Uniform Controlled Substances Act is not unconstitutional. (Iowa Sup. Ct.).

7) Simple possession is not a lesser included offense of the crime of delivery under the Uniform Controlled Substances Act. (Iowa Sup. Ct.).

8) Symbolic political protest is no defense to physical acts of flag desecration. (Iowa Sup. Ct.).

9) An anti-loitering ordinance is constitutional if it is directed with specificity to persons obstructing free use of public walkways. (Iowa Sup. Ct.).

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864. 93 S. Ct. 1756, 1763 (1973).

865. *Id.* at 1764.

866. *Id.*

10) The crime of simulated intoxication requires proof of pretending or feigning intoxication, *i.e.*, an intentional act. (Iowa Sup. Ct.).

### B. Defenses

1) The defense of entrapment is not available when defendant denies the very acts upon which the prosecution is predicated. (Iowa Sup. Ct.).

2) It is constitutional to require a defendant to bring himself within an exculpatory provision of a statute furnishing an excuse for what would otherwise be criminal conduct. (Iowa Sup. Ct.).

### C. Pretrial

1) An application under *Code* section 775.5 for public funds for a private investigator or experts must "point out with specificity the reasons such services are necessary." (Iowa Sup. Ct.).

2) The demand-waiver doctrine under the speedy indictment statute has been abolished. (Iowa Sup. Ct.).

3) Retrial following two mistrials because of hung juries does not *per se* constitute double jeopardy. (Iowa Sup. Ct.).

4) A State procedural rule requiring defendant to give pretrial notice of an alibi defense while not requiring reciprocation by the State as to alibi rebuttal witnesses violates federal due process. (U.S. Sup. Ct.).

5) Miranda-type warnings are not absolutely required in order to make a (warrantless) consent search valid. (U.S. Sup. Ct.).

6) The *United States v. Wade* rule of *per se* exclusion of evidence of a counsellless post-indictment identification procedure does not extend to pre-indictment identification procedures. (U.S. Sup. Ct.).

7) The sixth amendment right to counsel does not extend to either pre-indictment or post-indictment identification-of-photographs procedures. (U.S. Sup. Ct.).

8) An application for a change of venue must be considered in the context of the entire affair and not merely the publicity centering on defendant. (Iowa Sup. Ct.).

9) A demand for a speedy trial is no longer required under *Code* section 795.2. (Iowa Sup. Ct.).

10) Dismissal of the prosecution is the only remedy for violation of defendant's speedy trial rights. (U.S. Sup. Ct.).

11) A trial court is required to make a personal determination of the validity of a proffered guilty plea, notwithstanding a prior jury's adjudication that defendant is competent to stand trial. (Iowa Sup. Ct.).

### D. Trial

1) It is *ipso facto* reversible error for defendant to be tried before the

same jury panel which was previously dismissed and told that defendant, who was named, had pled guilty. (Iowa Sup. Ct.).

2) The Iowa rule shall continue to be that trial courts have broad discretion in "defin[ing] the ambit of permissible cross examination in an attack on the credibility of a witness by questions concerning collateral acts of alleged misconduct"—rather than imposing no limitations upon, or entirely prohibiting, such examination. (Iowa Sup. Ct.).

3) It is error for the trial court to sustain the State's objections to equivocation and unresponsiveness of a defense witness on direct examination. (Iowa Sup. Ct.).

4) "The trend is to extend, rather than to narrow, the *res gestae* doctrine." (Iowa Sup. Ct.).

5) "[E]vidential use of 'tacit admissions' by an accused . . . is no longer permissible in criminal trials within this jurisdiction." (Iowa Sup. Ct.).

6) Whenever the State has been allowed to introduce nonexpert state of mind evidence, defendant must be permitted to do the same. (Iowa Sup. Ct.).

7) The foundation requirements for reputation testimony are the same as to evidence going to credibility as they are for evidence going to probability or non-probability of guilt. (Iowa Sup. Ct.).

8) Admissibility of certain types of constitutionally-proscribed evidence (*e.g.*, defendant's involuntary confession) requires a mistrial, rather than mere striking of the evidence and admonishing of the jury to disregard. (Iowa Sup. Ct.).

9) It is prejudicial for the prosecutor to say in opening argument that he knows defendant is guilty.

10) It is prejudicial in jury argument for the prosecutor to inflame the jury's fears, passion, and prejudice against defendant by asking the jurors to place themselves and their families "in a hypothetical position of peril created by a drunken, car operating defendant." (Iowa Sup. Ct.).

11) A trial court now *must* on motion of either party "question each juror, out of the presence of the others, about his exposure to [during-trial publicity]." (Iowa Sup. Ct.).

#### E. Instructions

1) The evidence of the case must be considered in determining whether to submit a lesser included offense, thus overruling *State v. Everett*. (Iowa Sup. Ct.).

2) Uniform Jury Instruction No. 501.11 (defining reasonable doubt) is defective in one respect, *i.e.*, it "should limit its reference to the lack or failure of evidence of such a lack or failure o[f] evidence *produced by the state*." (Iowa Sup. Ct.).

3) The last paragraph of Uniform Jury Instruction No. 520.8 (relating to O.M.V.U.I.) is an unconstitutional application of the *Code* section 321.281 so-called "presumption" of intoxication arising from the presence of a specified percentage of alcohol in the accused's blood. (Iowa Sup. Ct.).

4) The "Allen" or "dynamite" verdict-urging charge to a deadlocked jury does not *per se* deny a fair trial. (Iowa Sup. Ct.).

5) Trial courts must instruct *sua sponte* that "consideration of defendant's previous felony convictions must be limited to defendant's credibility as a witness." (Iowa Sup. Ct.).

#### F. Sentencing

1) "[A]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial." (U.S. Sup. Ct.).

2) The abovementioned rule is to be applied *prospectively* only by Iowa trial courts. (Iowa Sup. Ct.).

3) Default imprisonment as the only alternative to immediate, albeit non-wilful, *in toto* payment of a fine denies equal protection to an indigent. (Iowa Sup. Ct.).

4) Express legislative authority for deferred sentencing is granted effective August 15, 1973, following Iowa supreme court ruling that there was no such prior legislative authority, nor inherent power to do so. (Iowa Sup. Ct.).

5) Sentencing must be done on an individualized basis rather than pursuant to sentencing pacts. (Iowa Sup. Ct.).

6) The general bar on harsher punishment after a retrial on remand to the same trial court is not applicable to trials *de novo* on appeal to a higher trial court. (Iowa Sup. Ct.).

#### G. Posttrial Matters

1) The conditional exception "or not raised" in the non-relitigation clause in *Code* section 663A.8 does not permit the use of postconviction relief as a substitute for the requirement of lodging objections at trial. (Iowa Sup. Ct.).

2) Iowa's no-hearing parole revocation procedure violates due process. (U.S. Sup. Ct.).

3) States also must provide a two-stage hearing in their probation revocation proceedings. (U.S. Sup. Ct.).

4) There is no *absolute* sixth amendment right to counsel in either parole revocation hearings or in probation revocation hearings; instead the need for counsel must be determined on a case-by-case basis. (U.S. Sup. Ct.).

5) The requisite degree of the State's proof for revocation of probation (and presumably parole) is "a preponderance of the evidence." (Iowa Sup. Ct.).

## Notes

### IOWA RULE 215.1—MANDATORY DISMISSAL FOR WANT OF PROSECUTION—THE FLEXIBLE TRAP

The number and diversity of local mandatory dismissal rules designed to expedite litigation and clear dockets of stale cases<sup>1</sup> led to the adoption of Rule 215.1 in 1961.<sup>2</sup> The rule is intended to discourage dilatory tactics and require reasonable diligence to see that actions are brought to trial promptly<sup>3</sup> in a manner that is uniform throughout the state.<sup>4</sup>

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1. *Fischer v. Hauber*, 257 Iowa 793, 134 N.W.2d 918 (1965); *Seela v. Haye*, 256 Iowa 606, 128 N.W.2d 279 (1964); *Windus v. Great Plains Gas*, 255 Iowa 587, 122 N.W.2d 901 (1963).

2. Iowa R. Civ. P. 215.1 provides:

It is the declared policy that in the exercise of reasonable diligence every civil and special action, except under unusual circumstances, shall be brought to issue and tried within one year from the date it is filed and docketed and in most instances within a shorter time.

All cases at law or in equity where the petition has been filed more than one year prior to July 15 of any year shall be for trial at any time prior to January 1 of the next succeeding year. The clerk shall prior to August 15 of each year give notice to counsel of record as provided in Rule 82 of:

- (a) the docket number,
- (b) the names of parties,
- (c) counsel appearing,
- (d) date of filing petition,

and the notice shall state that such case will be for trial and subject to dismissal if not tried prior to January 1 of the next succeeding year pursuant to this rule. All such cases shall be assigned and tried or dismissed without prejudice at plaintiff's costs unless satisfactory reasons for want of prosecution or grounds for continuance be shown by application and ruling thereon after notice and not ex parte. This rule shall not apply to cases (a) pending on appeal from a court of record to a higher court or under order of submission to the court; (b) in which proceedings subsequent to judgment are pending; (c) which have been stayed pursuant to the Soldiers and Sailors Civil Relief Act; (d) which have been filed but in which plaintiff has been unable by due diligence to obtain service of original notice; (e) where a party is paying a claim pursuant to written stipulation on file or court order; and (f) awaiting the action of a referee, master or other court appointed officer; provided, however, that a finding as to "a" through "f" is made and entered of record.

No continuance under this rule shall be by stipulation of parties alone but must be by order of court. Where appropriate the order of continuance shall be to a date certain.

The trial court may, in its discretion, and shall upon a showing that such dismissal was the result of oversight, mistake or other reasonable cause, reinstate the action or actions so dismissed. Application for such reinstatement, setting forth the grounds therefor, shall be filed within six months from the date of dismissal.

3. *Baty v. City of West Des Moines*, 259 Iowa 1017, 147 N.W.2d 204 (1966); *Kutrulles v. Suchomel*, 258 Iowa 1206, 141 N.W.2d 593 (1966); *McKinney v. Hirstine*, 257 Iowa 395, 131 N.W.2d 823 (1964). See also Annot., 5 A.L.R. FED. 897 (1970) (treatment of the federal rule).

4. Rule 215.1 now constitutes "the sole method for dismissing a case for want of prosecution, thus eliminating any and all prior local court rules upon this proposition." *Seela v. Haye*, 256 Iowa 606, 128 N.W.2d 279, 280 (1964).