IV. Conclusion

The foregoing detailed information about the Polk County Department of Court Services is not proposed as a panacean model which is inherently replicable in areas outside of Polk County. If it has demonstrated anything, the development of the Polk County program has shown that flexibility is a necessary ingredient in the process of implementing new correctional programs to meet the needs of specific communities. Thus the information contained herein is only intended as a guide and not necessarily as a sort of "magic cure-all" model for universal duplication.

SPEEDY JUSTICE

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I. INTRODUCTION

The Supreme Court of the United States in *Barker v. Wingo*[1] recently invalidated on sixth amendment grounds the demand-waiver doctrine (*i.e., automatic* waiver of defendant's speedy trial rights if same not demanded) as applied by a majority of the states, including Iowa. Our purpose in this article is to examine the apparent status of the law of speedy trial in the Iowa criminal trial process in light of *Barker v. Wingo* and other recent judicial developments.

The sixth amendment right to speedy trial[2] is one of the "fundamental" rights imposed on the states by the Due Process Clause of the fourteenth amendment,[3] thus requiring applicable state rules of criminal procedure to comport with the federal courts' interpretation of the minimal requirements of the sixth amendment. There also is a speedy trial guaranty in the Iowa Constitution,[4] which is implemented in Chapter 795 of the *Iowa Code*. Section 795.1 requires indictment within thirty days after a person is held to answer for a public offense.[5] Once an accused is indicted, section 795.2 requires the State to bring the cause to trial within sixty days unless trial has been postponed on his own application.[6] Both statutes have been construed to require a demand to enforce their respective rights of speedy indictment and speedy trial.[7] The absence of such a demand has resulted in waiver of these rights.

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

1 407 U.S. 514 (1972).

2 "In all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . ." U.S. CONST. amend. VI.

3 "We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment." Klopfer v. North Carolina, 386 U.S. 213, 223 (1967).

4 IOWA CONST. Art. 1, § 10.

5 IOWA CODE § 795.1 (1971) reads, in pertinent part: "When a person is held to answer for a public offense, if an indictment be not found against him within thirty days, the court must order the prosecution to be dismissed, unless good cause to the contrary be shown."

6 IOWA CODE § 795.2 (1971) reads, in pertinent part: "If a defendant indicted for a public offense, whose trial has not been postponed upon his application, be not brought to trial within sixty days after the indictment is found, the court must order it to be dismissed, unless good cause to the contrary be shown."

7 *See* text accompanying note 109 *infra*, as to interpretation of the demand-waiver exceptions clause in Code sections 795.1 and 795.2: "An accused not admitted to bail and unrepresented by legal counsel, shall not be deemed to have waived his privilege of

Hence, the emergence of what has come to be known as the "demand-waiver" rule. Given the applicable time lapse and the demand, the court must upon motion dismiss the prosecution unless good cause to the contrary is shown. Both statutes contain the proviso that an accused not admitted to bail and unrepresented by counsel shall not be deemed to have waived the privilege of dismissal or be held to make demand to enforce the guaranty of speedy trial. The court on its own motion shall dismiss the prosecution in such a case.

The term "speedy trial" is not precise; it defies plenary definition. This seems inescapable in light of the divergent circumstances of criminal prosecutions. However, some idea of the meaning of the term may be found in this definition: "By a speedy trial is then intended, a trial conducted according to fixed rules, regulations, and proceedings of law, free from vexatious, capricious, and oppressive delays, manufactured by the minister of justice."[8]

The purpose of Chapter 795 is "to relieve one accused of a crime of the hardship of indefinite incarceration awaiting trial, or the anxiety of suspended prosecution, if at liberty on bail, and to require the courts and peace officers to proceed with the trial of criminal charges with such reasonable promptness as proper administration of justice demands."[9] However, justice both to the accused and to the public, not speed, is the primal consideration of the statute.[10] The Iowa supreme court, discounting speed as the primal consideration of speedy trial, said in *Doerflein v. Bennet*[11] that orderly expedition is the "essential ingredient" of a speedy trial. "A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself,"[12] the Supreme Court of the United States has pointed out.

II. The Sixth Amendment Criteria

A. *Demand-Waiver Doctrine*

The majority of federal and state jurisdictions, including Iowa, have conditioned enjoyment of the benefit of the constitutional right to speedy trial upon defendant's demand for same.[13] This approach, stated negatively under the popular name of the demand-waiver doctrine, provides that "a defendant waives any consideration of his right to speedy trial for any period prior to which

dismissal or be held to make demand or request to enforce a guarantee of speedy trial, and the court on its own motion shall carry out the provisions of this section as to dismissal."

8 Pines v. District Court, 233 Iowa 1284, 1290, 10 N.W.2d 574, 578 (1943).

9 State v. Allnutt, 261 Iowa 897, 901, 156 N.W.2d 266, 268 (1968).

10 Pines v. District Court, 233 Iowa 1284, 1296, 10 N.W.2d 574, 581 (1943).

11 259 Iowa 785, 145 N.W.2d 15 (1966).

12 United States v. Ewell, 383 U.S. 116, 120 (1966).

13 "Most States have recognized what is loosely referred to as the 'demand rule,' although eight States reject it. . . . Although every federal court of appeals that has considered the question has endorsed some kind of demand rule, some have regarded the rule within the concept of waiver, whereas others have viewed it as a factor to be weighed in assessing whether there has been a deprivation of the speedy trial right." Barker v. Wingo, 407 U.S. 514, 524-25 (1972).

he has not demanded a trial. Under this rigid approach, a prior demand is a necessary condition to the consideration of the speedy trial right."[14] That is, failure to demand automatically constitutes a total waiver of defendant's speedy trial rights, irrespective of any other considerations.

The Supreme Court of the United States in *Barker v. Wingo* invalidated application of the "demand-total waiver" doctrine,[15] to wit: "We reject, therefore, the rule that a defendant who fails to demand a speedy trial forever waives his right."[16] The Court reasoned that the demand-waiver doctrine, "by presuming waiver of a fundamental right from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights."[17]

Prior to *Barker,* the demand-waiver doctrine generally had been applied in a rigid fashion to automatically preclude an accused from exercising his rights to a speedy trial (and the all-important attendant right of dismissal of prosecution for lack thereof), if he had failed to demand same. That is, no other factor was germane or even considered.[18]

B. *The Balancing Test*

The *Barker* rule does not preclude provision in a state's procedural rules for a demand requirement, but rather says that a defendant's failure to make such a demand must be considered only as *one* of many, and not *the only*, factor in determining whether he is entitled to dismissal of prosecution for lack of speedy trial. In this connection, the Court said: "This does not mean, however, that the defendant has no responsibility to assert his right. We think the better rule is that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the right."[19] The Court further pointed out that this flexible approach "allows the trial court to exercise a judicial discretion based on the circumstances, including due consideration of any applicable formal procedural rule."[20] Recognizing that "[d]elay is not an uncommon defense tactic,"[21] the Court nevertheless added that "if delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine, the demand rule aside."[22]

Rather than attempting to quantify speedy trial in rigid terms in the form of a federal constitutional requirement or doctrine, the Supreme Court left

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[14] *Id.* at 525.

[15] The term "demand-total waiver" appears to have been coined by Circuit Judge Godbold in Godbold, *Speedy Trial—Major Surgery for a National Ill,* 24 ALA. L. REV. 265, 294 (1972).

[16] 407 U.S. at 528.

[17] *Id.* at 525.

[18] *See, e.g.,* State v. Olson, 259 Iowa 756, 762, 145 N.W.2d 645, 648 (1966): "Defendant here was out on bail and was represented by legal counsel. He made no demand that the State make prompt disposition of the charge under which he was held, and the State therefore was not required to show good cause for the delay."

[19] 407 U.S. at 528.

[20] *Id.* at 528-29.

[21] *Id.* at 521.

[22] *Id.* at 529.

this setting of reasonable time periods to state procedural rules[23] and instead formulated a balancing test as the sixth amendment criteria for judging speedy trial issues on an *ad-hoc* basis. Identifying "some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right," the Court listed these four factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[24] The Court then observed that these are related factors to be considered together with other relevant circumstances and that none of the factors is to be regarded as either "a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial."[25] A brief description of each factor follows.

1. *Length of the Delay*

The length of the delay was characterized as a triggering mechanism, with the court noting that "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance."[26] No fixed standard for determining what length of time is "presumptively prejudicial" was formulated, the Court saying instead that "the length of the delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case,"[27] including the nature of the crime involved.[28] Presumably this would be governed in the first instance primarily, but not absolutely, by the time limits set in a state's "reasonable" speedy trial statutes. Thus, the Court appears to be saying that the length of the delay is a factor to be considered twice in the balancing test—first as the primary, if not sole, factor in triggering a speedy trial inquiry under the sixth amendment and secondly as one of the four independent but related primary factors to be balanced (together with other relevant circumstances) once such inquiry is triggered.

2. *Reason for the Delay*

The paramount question in considering the factor of the reason for the delay is to determine *who* caused the delay. Naturally the defendant cannot be the cause of the delay and yet avail himself of dismissal of the prosecution therefor. This was made clear in *Barker*, to wit: "We hardly need add that if delay is attributable to the defendant, then his waiver may be given effect un-

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[23] "We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise." *Id.* at 523.

[24] *Id.* at 530.

[25] *Id.* at 533.

[26] *Id.* at 530.

[27] *Id.* at 530-31.

[28] The example given was that "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Id.* at 531.

der standard waiver doctrine, the demand rule aside."[29]

Concerning state-caused delays, the Court characterized the fact of a missing witness as a valid reason which "should serve to justify appropriate delay." On the other hand, "[a] deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government." More neutral reasons such as prosecutorial negligence or over-crowded courts "should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant."[30]

3. *Assertion of Defendant's Right*

Barker by no means abolished the concept of a demand requirement (but rather only the total-waiver application automatically given it). Accordingly, the Supreme Court said that the defendant's assertion of his speedy trial right is entitled to "strong evidentiary weight" in determining whether the right is being deprived.[31] Courts are permitted to attach different weights to such non-demand situations as where defendant knowingly fails to object to delay, another defendant is not fully informed by his counsel, and a third defendant is unrepresented by counsel. The *Barker* balancing test also will allow courts "to weigh the frequency and force of the objections as opposed to attaching significant weight to a purely *pro forma* objection."[32] In the final analysis, the demand requirement retains considerable vitality as *a* balancing factor in light of the observation in *Barker* that "failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."[33]

4. *Prejudice to the Defendant*

Prejudice to the defendant, the fourth factor in the *Barker* balancing test, is to be assessed in the light of such speedy trial protective interests as: "[1] to prevent oppressive pretrial incarceration; [2] to minimize anxiety and concern of the accused; and [3] to limit the possibility that the defense will be impaired."[34] Of these, the latter was afforded greatest importance. The Court also took note of what appears to be the most obvious type of prejudice—death or disappearance of defense witnesses during a delay. The Court further noted: "There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown."[35]

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[29] *Id.* at 529.
[30] *Id.* at 531.
[31] *Id.* at 531-32.
[32] *Id.* at 529.
[33] *Id.* at 532.
[34] *Id.*
[35] *Id.; cf.* United States v. Marion, 404 U.S. 307, 321-22 (1971): "Passage of time, whether before or after arrest, may impair memories, cause evidence to be lost, deprive the defendant of witnesses, and otherwise interfere with his ability to defend him-

the Government to discover, investigate, and accuse any person within any particular period of time."[47] In other words, the Court, expressly "declin[ing] to extend the reach of the amendment to the period prior to arrest,"[48] said that "it 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."[49]

Although refusing to extend the sixth amendment speedy trial protections to delays in arrests, the Court in *Marion* nevertheless did afford some limited federal constitutional protections against pre-accusation delays. Reaffirming that "the applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges,"[50] the Court held that "the statute of limitations does not fully define [an accused's] rights with respect to the events occurring prior to indictment."[51] Rather the Court noted that the government conceded that the Due Process Clause of the fifth amendment "would require dismissal of the indictment if it were shown at trial [1] that the pre-indictment delay . . . caused substantial prejudice to appellees' rights to a fair trial and [2] that the delay was an intentional device to gain tactical advantage over the accused."[52] The Court refused to delineate the circumstances under which actual prejudice resulting from pre-accusation delays would require dismissal of prosecution, leaving the matter to an individual determination on a case-by-case basis.[53]

2. "*Held to Answer*"

Code section 795.1 becomes operative once an accused is "held to answer" for a public offense. The question thus is *when* is one "held to answer" for a public offense.

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[47] *Id.* *See also* Hoffa v. United States, 385 U.S. 293, 310 (1966):
> There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction.

[48] *Id.* at 321.

[49] *Id.* at 320.

[50] *Id.* at 322, *quoting* United States v. Ewell, 383 U.S. 116, 122 (1966).

[51] *Id.* at 324.

[52] *Id.*

[53] In the factual situation at hand, the Supreme Court reversed the district court's order dismissing the indictment which had not been returned until thirty-eight months after the last act charged in the indictment. The Court noted that defendants, instead of alleging actual prejudice, relied "solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence lost." These "speculative and premature" possibilities were not enough to demonstrate that defendants could not receive a fair trial and thus dismissal of the indictment was not justified; rather defendants were left to the trial to demonstrate any actual prejudice. *Id.* at 325-26.

In *State v. Lindloff*, the supreme court said: "[W]hen a person . . . is bound over to the district court charged with a public offense . . . he may demand a prompt disposition of the charge, in which case the State must within 30 days thereafter charge him with the crime . . . ."[54] The court thus apparently equates being "bound over to the district court charged with a public offense" with being "held to answer for a public offense." More succinctly, when one is bound over, then one is "held to answer."

In *State v. Gebhart*,[55] a preliminary information charging defendant with murder was filed in justice court on March 27, 1964. After a hearing on March 31, 1964, defendant was "held to await the action of . . . the grand jury . . . ."[56] On April 30, 1964, an informal hearing was held at which the district court called the attention of the State and defendant to section 795.1. In reference to April 30, 1964, the supreme court said: "This was the thirtieth day after the defendant had been held."[57] In counting back from April 30, it is apparent April 30 was the thirtieth day after March 31, which was the day the defendant was held to await the action of the grand jury.

No consideration thus seems to be given to the proposition that one is "held to answer" when one is arrested or charged by preliminary information.[58] Both of these events occur before preliminary hearing when the decision is made as to whether one should be bound over to await the action of the grand jury. Perhaps the failure of the court to determine that one is "held to answer" when arrested or charged by preliminary information can best be understood after an examination of the court's attitude concerning the purpose of the preliminary hearing. In *State v. Evans*,[59] defendant claimed he was "twice placed in jeopardy because he was forced to defend himself at a preliminary hearing and later at trial on the merits."[60] In holding there was no merit in this contention, the supreme court said: "The purpose of the preliminary hearing is to determine whether sufficient evidence exists to hold the accused for trial."[61] Thus, it appears the supreme court is saying that it cannot be said one is "held to answer" until it is determined whether or not sufficient evidence exists to hold one for trial.

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54 161 N.W.2d 741, 744 (Iowa 1968).
55 257 Iowa 843, 134 N.W.2d 906 (1965).
56 *Id.* at 845, 134 N.W.2d at 907.
57 *Id.* at 846, 134 N.W.2d at 907.
58 In *State v. Satterfield*, 257 Iowa 1193, 1195-96, 136 N.W.2d 257, 258 (1965), the court said that section 795.1 represents protection "for one who is charged by preliminary information, that he must be indicted promptly . . . ." This statement is *dicta* in relation to the facts of the case as defendant therein was not charged by preliminary information. *Cf.* 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 particular protections of speedy-trial provision of 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." *See also* ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial, § 2.2, at 18-19 (Approved Draft 1968) [hereinafter cited as ABA Standards].
59 169 N.W.2d 200 (Iowa 1969).
60 *Id.* at 205.
61 *Id.*

In *State v. Satterfield,*[62] defendant was returned to the penitentiary upon being found in violation of his parole. However, five months passed before defendant was charged by county attorney's information with the crime of escape.[63] Defendant urged he had not been speedily indicted pursuant to section 795.1. The court held section 795.1 had no application because upon return to the penitentiary defendant "was not then held to answer the charge of escape. . . . He had already answered the original charge of forgery; his answer had been found unsatisfactory and he had been sentenced and was serving his sentence."[64] The court also held that prosecution could be instituted anytime within the applicable statute of limitations, observing that to grant a dismissal pursuant to section 795.1 before one is held to answer would in effect shorten the statute of limitations.[65]

"Speedy trial" requirements have also been applied in the area of "serial and piecemeal prosecutions." A federal district court in Pennsylvania, applying *United States v. Marion,* has held that the right to speedy trial "must by implication attach . . . to all charges accruing to the sovereign springing from the incident giving rise to arrest. The prosecution can't hold out a 'kicker' from the effect of the Sixth Amendment by not putting it in the formal indictment once a person is an accused."[66] Thus, the import of this doctrine is to trigger "speedy trial" on all charges arising from the incident even though the accused has only been arrested and charged with one or some of the multiple charges. Thus, the wise prosecutor should file all of the applicable charges at once—since "when defendant [becomes] an accused for purposes of the right to speedy trial, he [becomes] an accused as to all charges inherent in the incident in question. . . ."[67]

Similarly, a federal court of appeals has observed: "Of course, if the crimes for which a defendant is ultimately prosecuted really only gild the charge underlying his initial arrest and the different accusatorial dates between them are not reasonably explicable, the initial arrest may well mark the speedy trial provision's applicability as to prosecution for all the unrelated offenses."[68] However, that court noted that it would be "absurd in the extreme" if an arrest on one charge triggered speedy trial protections as to prosecutions for any and all other chargeable offenses against defendant irrespective of whether or not

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[62] 257 Iowa 1193, 136 N.W.2d 257 (1965).

[63] *See* ABA Standards, *supra* note 58, at § 3.1:

> If the prosecuting attorney knows that a person charged with a criminal offense is serving a term of imprisonment in a penal institution of that or another jurisdiction, he must promptly: (i) undertake to obtain the presence of the prisoner for trial; or (ii) cause a detainer to be filed with the official having custody of the prisoner and request him to so advise the prisoner and to advise the prisoner of his right to demand trial.

[64] State v. Satterfield, 257 Iowa 1193, 1196, 136 N.W.2d 257, 259 (1965). The same conclusion is reached in *State v. Dillon,* 258 Iowa 784, 139 N.W.2d 925 (1966).

[65] 257 Iowa 1193, 1194, 136 N.W.2d 257, 257-258 (1965).

[66] United States v. Small, 345 F. Supp. 1246, 1249 (E.D. Pa. 1972).

[67] *Id.* at 1250.

[68] United States v. De Tienne, 468 F.2d 151, 155 (7th Cir. 1972).

the other charges were related to the one upon which the initial arrest was based.[69] In the case at hand, defendants were arrested pursuant to fugitive warrants issued on the basis of unrelated state charges. A couple of days later, they were identified in a lineup as bank robbers—but were not indicted for bank robbery until fourteen months later. Because defendants were not arrested on the bank robbery charges until after return of the indictments for those charges, the court of appeals held that they did not become accused until that time.

A similar position was taken recently by the Iowa supreme court in *State v. Mason*.[70] Defendant was incarcerated on an unrelated charge for several months before he was finally formally charged on the instant offense. Upholding the trial court's overruling of defendant's pretrial motion to dismiss, the supreme court determined that it was not the intent of the legislature "to grant an incarcerated defendant the benefit of a 30 day statue of limitations on offenses unconnected with the one for which he was restrained."[71] Moreover, "[a] § 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,"[72] the court concluded.

When an accused is not indicted within thirty days after being held to answer (or is not brought to trial within sixty days after being indicted), the *Iowa Code* provides that he is entitled to a dismissal of the prosecution unless he has waived his speedy trial rights or, if he has not, the State does not show good cause for the delay beyond the prescribed statutory period.[73] As a matter of procedure, the courts do not reach the good cause factor where defendant has waived his rights. Waiver can be by way of pleading guilty to the charge being prosecuted,[74] failing to demand a speedy indictment or speedy trial,[75] failing to resist inaction on the State's part,[76] or failing to file a timely motion to dismiss.[77]

III. Motion to Dismiss

A motion to dismiss is the standard procedural device for seeking the rem-

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69 *Id.*
70 No. 55537 (Iowa Dec. 20, 1972).
71 *Id.*
72 *Id.*
73 *See, e.g.*, State v. Allnutt, 261 Iowa 897, 901, 156 N.W.2d 266, 268 (1968): "Since it is undisputed defendant was not brought to trial within 60 days from the filing of the county attorney's information, he is entitled to a dismissal under section 795.2 unless [1] he has waived his right to a speedy trial or unless [2] good cause for postponing the trial beyond that time is shown."
74 "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." (*citing* Alabama, California, and Kansas cases). Foster v. Brewer, 197 N.W.2d 366, 367 (Iowa 1972).
75 *See* text accompanying notes 95-98 *infra.*
76 *See* text accompanying notes 99-103 *infra.*
77 *See* text accompanying notes 79-84 *infra.*

edy of dismissal of the prosecution for lack of speedy indictment or speedy trial.[78] Failure to so move constitutes a waiver of defendant's right to dismissal under the Iowa statutes.[79] An exception is made for an accused "not admitted to bail *and* unrepresented by legal counsel," however, with the court directed to proceed on its own motion.[80]

Defendant's motion to dismiss must be timely. Accordingly, the Iowa supreme court has held that the speedy trial issue cannot be raised for the first time on appeal without benefit of a motion to dismiss *ever* having been made,[81] nor can defendant wait until a motion for new trial to move for dismissal.[82] Indeed, a motion to dismiss made immediately prior to commencement of trial has also been held ineffectual.[83]

A "speedy trial" demand traditionally has been a condition precedent to a timely motion to dismiss. Thus, a motion to dismiss was considered premature in *State v. Lindloff*[84] in light of no demand having previously been made. Moreover, the premature motion to dismiss in *Lindloff* did not subsequently have the collateral effect of triggering the speedy trial requirements, and thus any inordinate delay after the overruling of the motion to dismiss was inconsequential—since no demand for speedy trial was thereafter made. "A

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[78] "The requirement that the defendant move for dismissal prior to trial or plea of guilty apparently is the view now taken in all states." ABA Standards, *supra* note 58 at 41.

[79] "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." Foster v. Brewer, 197 N.W.2d 366, 367 (Iowa 1972).

[80] *See* IOWA CODE §§ 795.1, .2 (1971) (emphasis added).

[81] Foster v. Brewer, 197 N.W.2d 366 (Iowa 1972). *See* note 79, *supra*.

[82] "We hold defendant waived his right to a speedy trial under section 795.2 by failing to move for a dismissal until after trial had been completed and a jury verdict returned." State v. Allnutt, 261 Iowa 897, 905, 156 N.W.2d 266, 270 (1968) (Defendant had made demand for speedy trial when being arraigned, but was not brought to trial for another five months—yet waited until making a motion for new trial before inserting the issue of dismissal). The court reasoned:

> [A] defendant may not fail to declare himself until it is too late and then take advantage of a protective statute, not to insure a speedy trial, but rather to set aside a conviction after trial has been had. . . . There is no rule, constitutional or statutory, which permits a defendant to use this cherished right simply to challenge an adverse verdict.
>
> It is a travesty to require the State to call a jury, produce witnesses, provide court personnel, present its evidence, and secure a conviction while defendant sits silently by with an ace-in-the-hole which renders this entire judicial exercise a nullity. *Id.* at 905, 156 N.W.2d at 270.

[83] "When trial has begun, or is about to take place, it is then too late to move for dismissal." State v. Allnutt, 261 Iowa 910, 913, 156 N.W.2d 274, 275 (1968), *quoting* State v. Alexander, 65 Wash. 488, 118 P. 645, 646 (1911). In *Allnutt*, demand for speedy trial was made at arraignment on January 20; trial was finally set for July 26; a motion to dismiss was filed on Saturday, July 24; the motion to dismiss was delivered to the county attorney on Monday, July 26 just thirty minutes before trial was to start). *See also* State v. Peterson, 189 N.W.2d 891, 893 (Iowa 1971).

[84] 161 N.W.2d 741 (Iowa 1968). Defendant was free on bail but made no demand for speedy indictment. He failed a motion to dismiss on the 18th day after being bound over to district court and his motion was overruled because he had never demanded speedy indictment. That he was not indicted until 27 days after the filing of his motion to dismiss was inconsequential since he failed to file a demand after the overruling of his premature motion to dismiss.

motion to dismiss is not a demand or request for a speedy trial,"[85] the supreme court declared. On the other hand, *McCandless v. District Court* held that "the motion to dismiss the indictment was proper . . . regardless of whether or not there had been an arrest under the indictment."[86]

State v. Bowers[87] dramatically illustrates that the State's tardy returning of an indictment before defendant has filed his motion to dismiss the prosecution for lack of speedy indictment does not cure a violation of defendant's right to speedy indictment and thus does not moot defendant's right to dismissal. Bowers had filed demand for speedy indictment on December 11 and when indictment was not returned against him until January 25 (*i.e.*, fourteen days beyond the statutory period) he filed a motion to dismiss on January 29. After his motion was overruled and he was subsequently tried and convicted, the supreme court reversed and remanded for dismissal of the prosecution on the basis that the State did not file a resistance to the motion and no good cause appeared in the record for the State's failure to speedily indict.[88]

The requirement of a motion to dismiss should enjoy continuing vitality under the *Barker* rule, the abrogation of the demand-waiver doctrine notwithstanding. Otherwise, there would be an undue burden on the courts, on their own motion, to make a speedy trial determination in every case. And bypassing a pretrial motion to dismiss would make no record for appeal under the standard waiver doctrine.[89] On the other hand, safeguards against uninformed waivers by unrepresented persons seem fundamental—*e.g.*, by the court carrying out the provisions as to dismissal, on its own motion.[90]

The applicable ABA Standard section provides: "Failure of the defendant or his counsel to move for discharge prior to trial or entry of a plea of guilty should constitute waiver of the right to speedy trial."[91] Simultaneously, however, another section rejects the demand requirement.[92] The ABA Advisory Committee's distinction is based upon the State, not the defendant, having the duty of bringing the charge to trial.[93] On the other hand, "[s]peedy trial is a personal right of the defendant, and thus the right is deemed waived if not properly asserted."[94]

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85 *Id.* at 744. *Accord*, State v. Kimball, No. 55291 (Iowa, Dec. 20, 1972). *Contra*, Dodge v. People, 495 P.2d 213 (Colo. 1972). *See also* note 106, *infra*.

86 245 Iowa 599, 603-04, 61 N.W.2d 674, 677 (1954).

87 162 N.W.2d 484 (Iowa 1968).

88 "It was the burden of the State to assert and prove as a matter of record good cause if so contended." *Id.* at 487.

89 "We have consistently held that ordinarily matters not raised in the trial court, *including constitutional questions*, cannot be effectively asserted the first time on appeal." State v. Beer, 193 N.W.2d 530, 532 (Iowa 1972) (emphasis added).

90 *See* IOWA CODE §§ 795.1, .2 (1971) (dismissal protections for "[a]n accused not admitted to bail and unrepresented by legal counsel.")

91 ABA Standards, *supra* note 58, at 40.

92 *Id.* at 17.

93 *Id., citing* Note, *The Right to a Speedy Criminal Trial*, 57 COLUM. L. REV. 846, 853 (1957).

94 *Id.* at 41.

IV. DEMAND

The Iowa supreme court traditionally has taken the approach that the rights under sections 795.1 and 795.2 are available only to those who positively claim their protection through a formal demand. For example, the court has said: "[T]he privilege afforded the accused for an early trial is considered waived when no demand is made to the court, and there can be no dismissal of the charge solely on the ground that 'good cause' for the continuance was not shown by the state. It is only after the demand has been made to the court that the statutory provisions become effective and place the burden on the state to show 'good cause' for a continuance."[95] Thus, until *Barker*, the Iowa supreme court has held that failure to make the necessary demand acted as an absolute bar to any privilege of dismissal for the State's failure to afford speedy indictment or speedy trial.

Although *Barker* invalidated application of such a "demand-total waiver" doctrine, as being absolutely dispositive of the matter, nevertheless the demand for speedy trial (or speedy indictment) should still play a significant role ultimately in determination of speedy trial violations in Iowa. This is because, as the Iowa supreme court recently reaffirmed in *State v. Kimball*, "a defendant represented by counsel or at bail is [still] required to demand trial in order to take advantage of the time limitation."[96] Nevertheless, defendant's assertion (or non-assertion) of his speedy trial rights is one of the four factors expressly included in the *Barker* balancing test under the sixth amendment. Thus, states were left free to require a demand as the procedural device for triggering their speedy trial statutes as long as failure to make such a demand does not operate procedurally as an automatic and total waiver of an accused's sixth amendment rights. Failure to make such a demand (by an accused not otherwise excepted from meeting this demand requirement)[97] could be weighed heavily in the *Barker* balancing test against an accused claiming violation of his sixth amendment rights. Nevertheless, the court necessarily should determine whether the failure to make a demand was done knowingly. In this connection, the Supreme Court said in *Barker* that trial courts can exercise judicial discretion "to attach a different weight to a situation in which the defendant knowingly fails to object from a situation in which his attorney acquiesces in long delay without adequately informing his client, or from a situation in which no counsel is appointed."[98]

On the other hand, the mere making of a demand without more may under the circumstances be of minimal consequence. The Supreme Court implied this in *Barker*, noting that its prescribed balancing test "would also allow a court to weigh the frequency and force of the objections as opposed to attach-

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[95] McCandless v. District Court, 245 Iowa 599, 605, 61 N.W.2d 674, 677 (1954).
[96] State v. Kimball, No. 55291 (Iowa, Dec. 20, 1972).
[97] *See* text accompanying note 109 *infra*.
[98] Barker v. Wingo, 407 U.S. 514, 528-29 (1972).

ing significant weight to a purely *pro forma* objection."[99] The import of this principle is to modify the Iowa rule regarding defendant's duty to resist delays as stated in *State v. Peterson*.[100] In *Peterson*, after filing a demand for speedy trial on November 21, 1968, defendant "did nothing to call his case on for trial thereafter."[101] From the time of his demand until he filed a motion to dismiss on August 13, 1969 (the day trial was set to begin), "defendant made no effort to obtain a ruling on his demand for speedy trial by calling the matter to the court's attention or go on record in resisting the delay."[102] Accordingly, the court held that he waived his right to speedy trial. The modified approach consistent with *Barker* would hereafter be for the trial court to not consider defendant's failure to resist the State's inaction following his demand for speedy action as a complete waiver but rather as a factor which dilutes any weight given to the fact of his making initial demand. Moreover, *Barker* indicates that the strength of a defendant's efforts in asserting his speedy trial right "will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain."[103] Courts should thus consider that the amount and severity of complaint should be directly proportionate to the degree of prejudice suffered.

a. *Requisites.* To be effective, a demand for speedy indictment (or speedy trial) must be made in the proper form. The Iowa supreme court has said: "The requirement under our statute is that one so charged, or his counsel, must appear in court or file a formal demand or request for an early trial, and such a request or demand to any other officer will not suffice."[104] Thus, defendant must go on record to *the court*[105] in demanding action—either by filing a written motion or by making an oral request in a court proceeding. A purported demand in any other form ordinarily is ineffectual (*e.g.*, by making the "demand" in the form of a letter to the county attorney).[106]

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99 *Id.* at 529.

100 189 N.W.2d 891 (Iowa 1971).

101 *Id.* at 893-94.

102 *Id.* at 892.

103 Barker v. Wingo, 407 U.S. 514, 531 (1972).

104 McCandless v. District Court, 245 Iowa 599, 608, 61 N.W.2d 674, 679 (1954).

105 "[T]he accused cannot absolve himself of his responsibility for the delay unless he appeals to the *court*, especially in cases where the matter is not yet before the court." *Id.* at 606, 61 N.W.2d at 678. "[T]he accused must go on record in the attitude of demanding a trial or resisting delay, and such record and attitude must be expressed to the *court*." *Id.* at 610, 61 N.W.2d at 681.

106 *Id.* The so-called "demand" in *McCandless v. District Court*, 245 Iowa 599, 61 N.W.2d 674 (1954) consisted merely of an exchange of a series of letters between the defense counsel and the county attorney, with defense counsel inquiring about the possibility of indictment. The supreme court also discounted defendant's "speedy trial" contention that he had relied on a promise of the county attorney to keep him advised of any grand jury action on his case, noting that any such promises or agreements "cannot be binding on the court." *Id.* at 605, 61 N.W.2d at 678; *accord* Hottle v. District Court, 233 Iowa 904, 11 N.W.2d 30 (1943) (informal plea bargaining discussions not a "demand"). *But see* Doerflein v. Bennett, 259 Iowa 785, 791, 145 N.W.2d 15, 19 (1966), in which a penitentiary inmate himself wrote the letter to the county attorney requesting a speedy trial date. The court said: "We therefore hold the requirement of a formal re-

Although the demand should be made to the trial court that will hear the case, the Iowa supreme court has held that a demand was effective although it was filed in the municipal court following a preliminary hearing at which defendant was bound over.[107] The court noted that, at the time of the demand, all documents concerning the charge were still on file in the municipal court and that defense counsel knew "all papers, including his demand, would soon be transferred and filed in the District Court."[108]

b. *Exceptions.* Iowa's present speedy trial statutes provide an exception to the demand-waiver rule for persons who are *both* unrepresented by counsel *and* not admitted to bail, with speedy trial rights thus self-operative as to them irrespective of demanding same. This statutory exception thus does not apply to a defendant who either is free on bail or is represented by counsel, or both.[109]

The Iowa supreme court has held that "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,"[110] is represented by legal counsel for the purposes of 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."[111]

In *Pines v. District Court*,[112] the county attorney and defense counsel discussed two cases pending against defendant at several conferences. The trial court found that "at the time of these conferences" this defense counsel had not been employed in the second *Pines* case. But on appeal, the supreme court said "it is significant" that defense counsel was defendant's attorney of record in the first case and, "whether employed or not, he was representing him with respect to the second indictment at these conferences, at least the case was discussed."[113] Similarly, in *State v. Kimball*,[114] the Iowa supreme court recently

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quest for a speedy trial does not apply to an accused who is confined and is not represented by counsel."

107 State v. Bowers, 162 N.W.2d 484 (Iowa 1968).

108 *Id.* at 488. *See* IOWA CODE § 761.25 (1971).

109 In *State v. Johnson*, the supreme court noted that defendant (who had counsel but who had not posted bond) "would have us change the '*and*' in the statute to interpret it to mean if a person is unrepresented by counsel *or* held in jail, failure to make a request for speedy disposition shall not constitute a waiver." The supreme court refused to do so.

110 State v. Cennon, 201 N.W.2d 715, 717 (Iowa 1972).

111 *Id.* at 717.

112 233 Iowa 1284, 10 N.W. 574 (1943).

113 State v. Cennon, 201 N.W.2d 715, 717 (Iowa 1972).

114 No. 55291 (Iowa, Dec. 20, 1972).

said: "Where the relation of attorney and client is shown to have existed in a particular case or litigation, there is a presumption of the continuation of such relation, in the absence of a showing that the relation has been terminated or discontinued."[115]

A. *"Good Cause"*

1. *Indictment*

The command of section 795.1 is that the court dismiss the prosecution if an indictment is not returned within thirty days against a defendant held to answer for a public offense and who makes a demand for speedy indictment. However, if good cause to the contrary is shown, the court shall not be required to dismiss. This proposition remains viable even after *Barker* when defendant is asserting right of dismissal under the statute strictly on the basis of expiration of the prescribed statutory time period.

The trial court has considerable discretion in determining whether good cause for delay exists.[116] However, when it becomes apparent that there is good cause, "giving the accused the full benefit of the evidence . . . no such discretion lies."[117] The burden is on the State to show good cause for delay,[118] but if on appeal a finding of good cause is supported by the record then the decision of the trial court will not be disturbed.[119]

In *Greiman v. District Court*,[120] defendant waived preliminary examination and was held to answer the charge against him. The next term of court during which defendant should have been indicted was the March 1957 term. The March term was brief because the "presiding judge had arranged to be elsewhere and, to that end, had made the trial assignment in advance of the term."[121] The record also showed the county attorney was not informed of defendant's decision to waive preliminary examination until after the grand jury had been excused for the term. The trial court denied a motion to dismiss, finding from the above facts that there was "good cause to the contrary." The Iowa supreme court affirmed on appeal.

In *State v. Evans*,[122] defendant argued he had not been speedily indicted. Finding no merit in this contention, the court on appeal noted several continuances were granted at defendant's request and that "delays were wholly due to various technical defenses raised by defendant and no demands were made as provided in section 795.1 . . . ."[123]

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115 *Id.*
116 Maher v. Brown, 225 Iowa 341, 280 N.W. 553 (1938).
117 State v. Jackson, 252 Iowa 671, 677, 108 N.W.2d 62, 66 (1961).
118 Keegan v. District Court, 237 Iowa 1186, 24 N.W.2d 791 (1946).
119 State v. Gebhart, 257 Iowa 843, 849, 134 N.W.2d 906, 909 (1965): "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."
120 249 Iowa 333, 86 N.W.2d 819 (1957).
121 *Id.* at 336, 86 N.W.2d at 820.
122 169 N.W.2d 200 (Iowa 1969).
123 *Id.* at 204.

In *State v. Cennon*,[124] the Iowa supreme court held the fact that defendant *appeared* to be represented and made no demand for speedy trial constituted good cause for failure to indict within the thirty-day period. The analysis of the issue of representation in *Cennon* concentrates on the reasonableness of the assumption by the State that defendant was represented. Defendant's "apparent attorney," during the pre-indictment period, had been in consultation with defendant and with county law enforcement officers. Defendant testified he told a deputy to contact the attorney who had visited him in jail. "The State had no way of knowing defendant had elected not to discuss pending charges with his lawyer. Under these circumstances the State would be justified in concluding it was not required to indict within 30 days unless defendant so demanded."[125]

2. *Trial*

In considering "good cause" for delay in bringing cases to trial, courts recognize that some delay is inherent in the criminal trial process. The Supreme Court of the United States has said: "The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice."[126] Good cause for delay in bringing one to trial has been defined to mean "a substantial reason—one that affords a legal excuse."[127]

In *Pines v. District Court*,[128] the county attorney was of the impression that defendant had filed a motion for continuance in regard to a pending indictment and the county attorney did nothing to prosecute the matter. Defendant filed a motion to dismiss the prosecution, which was overruled. On appeal, the court determined there was good cause for delay because: 1) there was a misunderstanding as to the motions for continuance; 2) part of the delay resulted from the defendant's voluntary conduct in violating the presumed provisions of a bond contract in not appearing to answer the indictment by arraignment and plea; 3) defendant apparently acquiesced and consented to delay;[129] and 4) defendant was at liberty on bail,[130] yet made no effort to bring his case to trial,[131] and did not protest against continuances granted prior to this

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[124] State v. Cennon, 201 N.W.2d 715 (Iowa 1972).

[125] *Id.* at 718.

[126] Beavers v. Haubert, 198 U.S. 77, 87 (1905), *quoted in* Doerflein v. Bennett, 259 Iowa 785, 793, 145 N.W.2d 15, 20-21 (1966).

[127] Pines v. District Court, 233 Iowa 1284, 1302, 10 N.W.2d 574, 583 (1943).

[128] 233 Iowa 1284, 10 N.W.2d 574 (1943).

[129] In *State v. Gebhart*, 257 Iowa 843, 134 N.W.2d 906 (1965), evidence showed defendant was happy in jail, both as to bedding and as to food, and that defendant preferred to have his trial delayed.

[130] "[T]he fact that an accused is at liberty is a matter for consideration and an important factor in the determination of good cause. It is of especial importance where, as in this case, the accused made no attempt whatsoever to bring his case to trial." Pines v. District Court, 233 Iowa 1284, 1294, 10 N.W.2d 574, 580 (1943).

[131] *See also* State v. Peterson, 189 N.W.2d 891, 892, 893, 894 (Iowa 1971); Doerflein v. Bennett, 259 Iowa 785, 791, 145 N.W.2d 15, 19 (1966).

motion to dismiss.[132]

In *State v. Jennings*,[133] the court recognized the proposition that "inordinate delay, absent good cause, in the presentment of a criminal charge and attendant prosecution cannot be approved."[134] Jennings was not brought to trial within sixty days after indictment and he filed a motion to dismiss. The State resisted, citing the following reasons as good cause for delay: 1) partial incapacitating illness of one judge in the district; 2) vacation absence of a second judge; 3) on his return the vacation leave of two other judges; 4) crowded court dockets;[135] 5) absence of any trial session of court subsequent to the filing of the information; 6) release of defendant on bond at time of arraignment; and 7) assignment for trial of the instant case for a date two weeks hence from defendant's filing of his motion to dismiss. The court recognized: "Delay resulting from congestion of a trial docket attributable to exceptional circumstances, and unavailability of prosecutor or trial judge, may constitute good cause for reasonable trial delay."[136] However, the court also said: "This does not mean, however, particularly under existing judicial districting, chronic crowded dockets, sickness of a trial judge, or unavailability of judges due to vacation schedules will alone suffice as good cause for delay."[137] In confining itself to the factual situation of the instant case, the court held the trial court did not err in overruling defendant's motion for dismissal.

An accused cannot be brought to trial until he is mentally and physically able to stand trial. To this end the court in *Maher v. Brown*[138] held that commitment of an accused as an inebriate in a state hospital was sufficiently good cause for postponement of trial until accused's release from the hospital.[139] In a similar case, the court in *State v. Jackson*[140] held that a twenty-eight month delay before indictment was for good cause where the delay was caused by accused's confinement in the department of the criminally insane at the state reformatory pursuant to an insanity judgment.

In *State v. Smith*,[141] the court held that the trial court was justified in finding that delay resulted from continuances based on representations that by reason of physical infirmity defendant was unable to appear for trial. The court held defendant was not entitled to a dismissal. In *Doerflein v. Bennett*,[142] the court found good cause in delay caused by: 1) proceedings to have counsel

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132 *Id.*
133 195 N.W.2d 351 (Iowa 1972).
134 *Id.* at 355-56.
135 *See also* Paul v. District Court, 231 Iowa 1027, 2 N.W.2d 751 (1942); Martens v. Gaffney, 230 Iowa 712, 298 N.W. 801 (1941).
136 195 N.W.2d 351, 356 (Iowa 1971).
137 *Id.*
138 225 Iowa 341, 280 N.W. 553 (1938).
139 *See In re* Imprisonment of Leary, 11 Crim. L. Rptr. 4104 (N.C. Super. Ct. 1971), cert. filed 5/26/72, where "incompetency commitment until such time as hospital authorities certify defendant is mentally able to stand trial is not a violation of the speedy trial right.
140 252 Iowa 671, 108 N.W.2d 62 (1961).
141 106 Iowa 701, 77 N.W. 499 (1898).
142 259 Iowa 785, 145 N.W.2d 15 (1966).

appointed for defendant, and 2) deprivation of trial court jurisdiction by reason of defendant's interlocutory appeal.

One in prison has the same right to speedy trial as any other person and the fact of confinement on another charge is not good cause for delay of trial.[143] However, good cause for delay does exist where a case is continued on defendant's application.[144]

The trial court in *State v. Ellington*[145] overruled defendant's motion to dismiss where defendant's counsel had been present in open court and remained silent when the trial court inquired whether any defendant at liberty on bond was insisting upon trial. Since there was no indication any criminal case was ready for trial, the court announced a jury would not be called and no criminal cases were assigned. Under such circumstances the Iowa supreme court affirmed the trial court's refusal to grant defendant's motion to dismiss.

In *State v. Nugent*,[146] the Iowa supreme court affirmed a trial court ruling denying a motion to dismiss where a stipulation was made of record to the effect that criminal proceedings should be continued pending the outcome of civil litigation arising out of the same facts as the criminal prosecuton. The State had moved for a continuance on the additional ground of ill health of the prosecuting witness.

In the case of *Keever v. Bainter*,[147] petitioner was committed to a state mental institution pursuant to judicial order. About one and one-half years later staff psychiatrists wrote letters to state officials stating petitioner was competent to stand trial. Notwithstanding these letters, the Iowa supreme court in 1971 held petitioner was properly held and her trial delayed for good cause under the original order and commitment. The United States Supreme Court vacated that judgment and remanded to the Iowa supreme court[148] for consideration in light of *United States v. Marion*.[149] On remand, the Iowa supreme court ordered the prosecution dismissed, saying: "[T]he United States Supreme Court implies the factual situation here is such that the delay shown in this case is not to be excused, has resulted in an unconstitutional deprivation of speedy trial, and has occurred through no fault of defendant but because of the dereliction or at least failure of State officials."[150]

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143 Hottle v. District Court, 233 Iowa 904, 908, 11 N.W.2d 30, 32 (1943), *citing* 22 C.J.S. § 472. However, this case was disposed of on the basis of waiver, in that defendant had not demanded speedy trial. *See also* State v. Kimball, No. 55291 (Iowa, Dec. 20, 1972): "The state must, however, accept some responsibility for the delay; the state could have sought a writ of habeas corpus prosequendum sooner," where defendant was incarcerated in Kansas.

144 State v. Peterson, 189 N.W.2d 891 (Iowa 1971), where part of the delay was the result of a continuance granted defendant because of inability to have witnesses he desired present; Parrot v. Haugh, 158 N.W.2d 766 (Iowa 1968), where trial continued on defendant's request due to illness of his attorney.

145 200 Iowa 636, 200 N.W. 494 (1924).

146 134 Iowa 237, 111 N.W. 927 (1907).

147 186 N.W.2d 133 (Iowa 1971).

148 Keever v. Bainter, 404 U.S. 1010 (1972).

149 404 U.S. 307 (1971).

150 Keever v. Bainter, 195 N.W.2d 526, 527 (Iowa 1972).

V. What Length of Delay is Presumptively Prejudicial?

The Supreme Court in *Barker v. Wingo*[151] described the speedy trial right as "slippery."[152] It noted that because of this slippery quality "two rigid approaches are urged upon us as ways of eliminating some of the uncertainty which courts experience in protecting the right."[153] These were: 1) that the Court itself fashion a universal requirement that a criminal defendant be offered a trial within a specified time period;[154] and 2) adherence to the demand-waiver rule approach.[155]

The Court declined to define a specified time period within which a criminal defendant must be offered a trial but left the states "free to prescribe a reasonable period consistent with constitutional standards . . . ."[156] The Court said it rejected the "inflexible" fixed-time period approach "because it goes further than the constitution requires."[157]

Discussing the demand-waiver approach, the Court said: "The nature of the speedy trial right does make it impossible to pinpoint a precise time in the process when the right must be asserted or waived. . . ."[158] The Court further noted:

> [U]nder the demand-waiver rule no time runs until the demand is made, the government will have whatever time is otherwise reasonable to bring the defendant to trial after a demand has been made. Thus, if the first demand is made three months after arrest in a jurisdiction which prescribes a six-month rule, the prosecution will have a total of nine months—which may be wholly unreasonable under the circumstances.[159]

The Court rejected the "inflexible" demand-waiver rule "because it is insensitive to a right which we have deemed fundamental."[160]

In adopting the balancing test and making demand only one of the factors to be considered in an inquiry into the deprivation of the speedy trial right, the Court noted this flexible approach "allows the trial court to exercise a judicial discretion based on the circumstances, including due consideration of any applicable formal procedural rule."[161] The Court added: "Nothing we have said should be interpreted as disapproving a *presumptive rule* adopted by a court in the exercise of its supervisory powers which establishes a fixed time period within which cases must *normally* be brought."[162]

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151 407 U.S. 514 (1972).
152 *Id.* at 522.
153 *Id.* at 522-23.
154 *Id.* at 523.
155 *Id.* at 523-24.
156 *Id.* at 523.
157 *Id.* at 529.
158 *Id.* at 527.
159 *Id.* at 527-28.
160 *Id.* at 529-530.
161 *Id.* at 528-29.
162 *Id.* at 530 n.29 (emphasis added).

Discussing the factors in the balancing test, the Court said: "Until there is some delay which is presumptively *prejudicial*, there is no necessity for inquiry into the other factors that go into the balance . . . . [T]he length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case."[163] In the supporting footnote, the Court said: "For example, the First Circuit thought a delay of nine months overly long, absent a good reason, in a case that depended on eyewitness testimony."[164] Significantly, the Court, while approving "presumptive *rules*,"[165] cited a case decided on *facts* which created a presumption of prejudice in delay and not involving an applicable rule stating a time within which one must be offered a trial.[166] It seems clear then that, in determining whether any given delay is presumptively prejudicial, a court may look to an applicable *rule and* to the *facts* of the case. This is consistent with the earlier quoted statement that the use of the balancing test "allows the trial court to exercise a judicial discretion based on the circumstances, including due consideration of any applicable formal procedural rule."[167] Thus, an approach automatically and absolutely precluding the examination of possible prejudice occurring before the running of any applicable procedural rule is not feasible.

There may be circumstances developed within the time confines of a given procedural rule which may render even that short lapse of time prejudicial. An approach precluding the examination of such circumstances would be subject to the same criticism made in *Barker v. Wingo* against the demand-waiver rule—*i.e.*, that a refusal to examine such facts is "insensitive."[168]

If one is prone to maintain there shall be no examination of possible prejudice until the running of an applicable procedural rule, consider also the possibility of a "nine month rule" and the statement by the Court in *Barker* that nine months "may be wholly unreasonable under the *circumstances*."[169]

The conclusion that the approach to be used in determining presumptively prejudicial delay must include examination of attendant facts as well as an applicable procedural rule finds support in the recent Iowa supreme court decision of *State v. Cennon*.[170] In that case, defendant alleged violation of his statutory right to speedy trial. The supreme court noted there was "no evidence defendant was prejudiced . . . nor does he claim any prejudice . . . ."[171] The court also noted that defendant "allege[d] no separate violation of his right to speedy trial apart from the statutory implementation of that right."[172] It ap-

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163 *Id.* at 530-31 (emphasis added).
164 *Id.* at 531 n.31, *citing* United States v. Butler, 426 F.2d 1275, 1277 (1st Cir. 1970).
165 *Id.* at 530 n.29 (emphasis added).
166 United States v. Butler, 426 F.2d 1275, 1277 (1st Cir. 1970).
167 Barker v. Wingo, 407 U.S. 514, 528-29 (1972).
168 *Id.* at 529-30.
169 *Id.* at 528 (emphasis added).
170 201 N.W.2d 715 (Iowa 1972).
171 *Id.* at 718.
172 *Id.*

pears the supreme court presumes that examination of a speedy trial question involves an examination of the "statutory implementation of that right" (*i.e.*, the applicable procedural rule) and other facts which may or may not demonstrate prejudice under the sixth amendment criteria set forth in *Barker*.

Given a reasonable applicable procedural rule (a "presumptive" rule), there are two distinctive burdens of going forward with the evidence. If defendant alleges a speedy trial denial *within* the statutory limits (such as the sixty-day Iowa rule), there is no dismissal under the statute and the state need not show good cause; the burden is on defendant to go forward with the evidence and demonstrate actual prejudice under *Barker*. If defendant alleges a statutory speedy trial denial from a delay exceeding statutory limits, the burden is on the state to show good cause for delay. Under *Barker*, with an unreasonably long delay or intentional dilatory prosecution, the courts may presume prejudice or require the state to prove absence of prejudice.[173]

At least one criterion that helps in determining whether delay is reasonable is the type of crime which is the basis of the prosecution. "[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge,"[174] the Supreme Court noted in *Barker*.

Given a sixty-day speedy trial rule as in Iowa, the following examples illustrate possible speedy trial violations occurring within the confines of the sixty-day period:

Example No. 1. On January 1, defendant is charged with a crime involving relatively little preparation for prosecution, to wit: indecent exposure.[175] On January 1, defendant is for some reason wrongfully denied bail. On January 2, defendant demands a speedy trial. On January 6, the state completes its investigation and other preparation for trial. No reason appears as to why defendant should not be brought to trial as soon as possible. Defendant is not brought to trial until March 1. In this example defendant has been wrongfully incarcerated for 59 days. The question of prejudice certainly is worthy of examination.

Example No. 2. Same facts as Example No. 1 except that on January 7 the state is notified that defendant's one and only witness is moving across country, taking an extended vacation, or expected to die of a terminal illness, all within thirty days of such notification to the State. The question of prejudice would at least be again open to consideration, if such circumstance did happen before expiration of the statutory period.

Example No. 3. Upon demand, ten whites have been granted trials well before the running of the statute. Ten blacks have been denied trials until just be-

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[173] Godbold, *Speedy Trial—Major Surgery for a National Ill*, 24 ALA. L. REV. 265, 284 (1972).

[174] 407 U.S. 514, 531 (1972).

[175] There would be very little, if any, documentary evidence for the prosecution to gather and the prosecution's case would probably involve a minimal number of witnesses, the substance of whose testimony could be determined with no great amount of delay.

fore the running of the statute. The instant black defendant makes *pro forma* demand for speedy trial upon being held to answer. No reason appears as to why the prosecution cannot proceed. The star witness for the instant black defendant dies on the 58th day. The question of prejudice due primarily to unreasonable, arbitrary and capricious action is open to question.

It is apparent that the circumstances which will give rise to a finding of prejudicial delay even before the running of a reasonable applicable rule must indeed be *extraordinary* circumstances. Only a very diligent defendant, making a detailed record concerning these circumstances, will be able to effectively assert denial of the speedy trial right; courts will probably require the clearest and best of records to establish presumptive prejudicial delay before the expiration of time provided for in a reasonable applicable rule.

Chief Justice Warren Burger has suggested that "courts be given the manpower and the tools to try criminal cases within 60 days after indictment."[176] If this is to be interpreted as an ideal national goal, then it is highly unlikely that any delay within the confines of Iowa's sixty-day rule would be held presumptively prejudicial.

VI. Dismissal with Prejudice?

Once a defendant obtains a dismissal pursuant to section 795.1 or 795.2, or pursuant to a sixth amendment criteria analysis, the question arises as to whether defendant can be re-indicted. The question of dismissal with prejudice,[177] in regard to section 795.2 or the sixth amendment has never been resolved by any decision of the Iowa supreme court.

The following language from *Barker v. Wingo* is helpful in a consideration of this question:

> 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 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.[178]

One writer feels that this language "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."[179]

The American Bar Association's *Standards Relating to Speedy Trial* also urges dismissal with prejudice as the appropriate consequence of denial of speedy trial. Specifically, section 4.1 provides:

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176 Godbold, *supra* note 173, at 291.
177 *See generally* Annot., 50 A.L.R.2d 943 (1956).
178 407 U.S. 514, 522 (1972) (emphasis added).
179 Godbold, *supra* note 173, at 294. *See also* Note, *Speedy Trial Schemes and Criminal Justice Delay*, 57 Cornell L. Rev. 794, 811-12 (1972).

> 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.[180]

The commentary to the above section says the right to speedy trial is "largely meaningless" if absolute discharge does not result from a violation thereof.[181]

In advocating absolute dismissal for denial of speedy trial it is clear the ABA Standards do not contemplate absolute dismissal for denial of speedy indictment. This conclusion is reached in view of the fact the Standards say time for trial should commence running without demand by defendant from the date the charge is filed. Since charges are in the form of true informations or indictments it would seem the Standards do not expect dismissal with prejudice should result from state delay before that time. The application of the ABA Standards in Iowa would then seem to result in a dismissal with prejudice for a violation of section 795.2 (speedy trial) but not for a violation of section 795.1 (speedy indictment).[182]

The Standards also advocate that if the defendant is held in custody or on bail or recognizance from a time before the filing of charges, then time for trial should commence running from the time defendant was so held.

Code section 795.5 provides that a dismissal of a prosecution on motion of the court or the county attorney, in the interest of justice, will not be a bar to further prosecution if the offense charged is a felony.[183] Such a provision does not appear in sections 795.1 or 795.2. Express mention of the possibility of reprosecution in 795.5 may imply exclusion of the possibility under 795.1 and 795.2, as it is not mentioned therein.[184]

In *State v. Bowers*,[185] the Iowa supreme court found defendant had not been indicted within thirty days after demand for speedy trial and reversed the conviction, remanding to the district court for dismissal of the prosecution. The court said: "It therefore is our duty to give full force and effect to the directive of section 795.1 even though it results here in the release of one found guilty of a serious offense by a jury."[186] The supreme court does not seem to

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[180] ABA Standards, *supra* note 58, § 4.1.

[181] Mann v. United States, 304 F.2d 394, 398 (D.C. Cir. 1962) says the dismissal pursuant to federal rule 48(b) on constitutional grounds should be a bar to subsequent prosecution.

[182] This is the result anticipated in § 27(1) of the recommendations of the Iowa Criminal Code Review Study Committee. *See* Iowa R. Crim. P. 27(1) (Final draft, Iowa Criminal Code Review Study Committee 1972) (unpublished copy on file with the Iowa Legislative Service Bureau).

[183] A defendant is subject to reprosecution at any time within the applicable statute of limitations subsequent to a section 795.5 dismissal. *See* State v. Sefcheck, 261 Iowa 1159, 157 N.W.2d 128 (1968).

[184] The rule of statutory construction *expressio unius est exclusio alterius* (express mention of one thing implies exclusion of others) is cited in *State v. Binkley*, No. 55296 (Iowa, Nov. 15, 1972).

[185] 162 N.W.2d 484 (Iowa 1968).

[186] *Id.* at 487.

anticipate reprosecution although a bar is not explicitly stated. If the supreme court did not anticipate reprosecution in the instant case it may well have been because of a double jeopardy problem and not based at all on a violation of the right to speedy trial. This would be consistent with this statement in *State v. Gebhart*: "The defendant had not been placed in jeopardy by the mere returning of the indictment."[187] The court took the position that upon dismissal of one indictment another one could be returned against defendant. However, prohibiting further prosecution subsequent to a dismissal secured after jeopardy has attached is a reasonable remedy.

VII. Retrial After Order of Procedendo or New Trial

In *Ferguson v. Bechly*,[188] the court held that the speedy trial provisions of the *Code of Iowa* have nothing "to do with when a defendant shall be entitled to trial . . . after the procedendo has been forwarded to the trial court . . . . The section provides that trial must be had at the *next* term *after* the indictment is found, or the charge filed as in the instant case."[189]

This seems to be an odd result but it is dictated by the terms of the statute. Section 795.2 does not provide a time by which trial must be had after an order of procedendo or new trial. However, no logical reason appears as to why either contingency should not stand in the place of an indictment.

In *State v. Kimball*,[190] defendant urged a violation of section 795.2 after reversal and remand of his case. In response to defendant's allegation he was denied speedy trial, the court cited *Ferguson v. Bechly* and even accepting *arguendo* defendant's allegation that section 795.2 applies on remand of an appealed case, the court said the result would not be changed. The court found no speedy trial violation, after applying the sixth amendment *Barker* criteria.

VIII. Summary

The first and best speedy trial protection afforded a defendant is pursuant to a fixed-time dismissal statute with criteria of dismissal being demand, lapse of the fixed-time, motion to dismiss, and no showing of good cause for delay by the state. Broader protection is offered by the sixth amendment under the *Barker* balancing test. Upon a finding of non-applicability of a fixed-time statute and upon assertion of denial of the sixth amendment speedy trial right, courts must determine whether defendant has been denied said right. This determination must be pursuant to sixth amendment criteria which includes prejudice to the defendant; whereas prejudice is not part of the "dismissal criteria" of a fixed-time statute.

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187 257 Iowa 843, 851, 134 N.W.2d 906, 910 (1965), *quoting*, State v. Bige, 195 Iowa 1342, 1344, 193 N.W. 17, 19 (1923).

188 224 Iowa 1049, 277 N.W. 755 (1938).

189 *Id.* at 1053, 277 N.W. at 757. Procedendo is the order issued by the supreme court to carry its decision into effect. *See* § 686.4, Iowa R. Civ. P. 351.

190 No. 55291 (Iowa, Dec. 20, 1972).

A. *Pre-Accusation*

1) The sixth amendment does not apply during the pre-accusation stage.

2) The State statutes of limitations are the primary protection against the bringing of stale charges.

3) The Due Process Clause of the fifth amendment can be applicable to delays in the pre-arrest stage if defendant is substantially prejudiced and State intentionally delayed to gain tactical advantage over the accused.

B. *Attachment of "Speedy Trial" Rights*

1) Speedy indictment is included in the statutory implementation of the right to speedy trial in the sixth amendment and the Iowa Constitution.

2) These broad "speedy trial" rights attach at the time defendant is held to answer for a criminal offense.

C. *Motion to Dismiss*

1) A motion to dismiss is a necessary procedural step in asserting the right of dismissal under either a fixed-time statute or the sixth amendment balancing test under *Barker*.

2) A motion to dismiss must be timely (*i.e.*, filed after a demand under the statutes and before the day trial is set to begin).

3) State generally should file resistance to motion to dismiss; however, good cause for delay may appear in the record itself.

D. *Demand—Assertion of Rights*

1) Demand is necessary to trigger the dismissal provisions of the statutes.

2) Demand must be formal and must be made to the *court*.

3) Waiver of automatic dismissal under chapter 795 does not apply to one unrepresented by counsel *and* not admitted to bail.

4) Demand is one of four factors to be weighed in the balancing test.

5) Strong evidentiary weight will be given in the balancing test to the fact defendant did not demand his "speedy trial" rights.

6) The frequency and force of defendant's continued assertion of his "speedy trial" rights will be afforded additional weight in the balancing test.

E. *Good Cause—Reason for Delay*

1) Good cause for delay must be shown by the State upon the expiration of the time of a fixed-time dismissal statute.

2) Good cause for delay (reason for delay) is one of four factors to be weighed in the balancing test.

F. *Length of Delay*

1) Statutes do not become operative until expiration of fixed-time statutory periods.

2) Balancing test *normally* does not become operative until this same time but nevertheless it *can* come into play earlier in the most extraordinary circumstances.

3) The length of the delay past the fixed-time statutory periods is immaterial under the statutory approach.

4) Because length of delay is one of four factors in the balancing test, the amount of delay generally will have to be unreasonable in order for length of delay to be afforded significant weight in the balancing test.

G. *Prejudice to Defendant*

1) Defendant need not show prejudice to obtain a dismissal under a fixed-time dismissal statute.

2) Prejudice is one of four factors to be taken into account in the balancing test, but is not absolutely essential to a dismissal.

3) It will be difficult for a defendant to obtain a dismissal for a speedy trial violation in the absence of a showing of some prejudice.

4) Prejudice may be presumed from unreasonably long delay.

5) Burden may shift to state to prove absence of prejudice when State has intentionally delayed prosecution.

SURVEY OF IOWA LAW

IMPLEMENTATION OF CONSTITUTIONAL HOME RULE IN IOWA

Sam F. Scheidler†

In the 1972 session of the Iowa General Assembly, a bill was passed which will have a significant effect on the workings of municipal government in Iowa. The bill, commonly known as the "home rule bill," is an attempt to implement the concept of home rule which was added to the Iowa constitution by amendment in 1968.[1] This survey will examine the concept of home rule and the bill which seeks to implement it. But first it is desirable to note the historical development of city-state relationships in order to point out the problems that the home rule amendment and bill were designed to deal with. Only when these problems are fully understood can the beneficial effect of home rule as implemented be judged.

I. HISTORICAL BACKGROUND

A. The Development of the City-State Relationship

The roots of American city-state relationships are found in England. The Magna Carta of 1215 contained a grant to London and "all other cities and boroughs" of all their "liberties and free customs."[2] This was essentially an affirmation of an ancient concept that local governments could exercise exclusive control over affairs peculiar to the locale governed.[3] In the next four centuries, however, the Crown was successful in eroding these liberties. As the concept of nationalism grew, there was a concomitant decline in the autonomy of local governments.[4] This decline was due principally to the policy of the

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[1] IOWA CONST. art. III, § 40 (1968).

[2] ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONAL AND STATUTORY RESTRICTIONS UPON THE STRUCTURAL, FUNCTIONAL, AND PERSONNEL POWERS OF LOCAL GOVERNMENT 3 (1962) [Hereinafter cited as ACIR Report].

[3] *Id. See also* 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 3, at 4 (5th ed. 1911) (Judge Dillon quoted the following description of the city-state relationship in Rome: "'hence . . . arose the common conception of a municipal town; that is, a community of which the citizens are members of the whole nation, all possessing the same rights, and subject to the same burdens, but retaining the administration of law and government in all local matters which concern not the nation at large. . . .'" As will be seen later in the article this description is very nearly what many people today would call home rule.

[4] COMMITTEE ON GOVERNMENT OPERATIONS, UNSHACKLING LOCAL GOVERNMENT,