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THE SCOPE OF JUDICIAL DISCRETION IN THE IOWA CRIMINAL TRIAL PROCESS

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Trial judges must constantly make decisions with no fixed rules to guide them. This absence of structure is unavoidable—it would be a Herculean task, and a pyrrhic victory at best, to attempt to establish formal rules of procedure to cover every possible situation that can occur in the many stages of the criminal trial process. As one commentator has observed:

Situations inevitably arise wherein two possible lines of action offer themselves to the judge; decision is to be made between two principles of law; or some of the few conditions present themselves wherein there is no governing rule. Under such circumstances, since the court is bound to act, he must use his judgment as to what is best under the particular conditions for arriving at justice, and therein he exercises the power of decision termed "judicial discretion."¹

The purpose of this Article is to explore in depth what is meant by judicial discretion and to pinpoint some of its parameters. This is explored in a detailed analysis of how the concept of judicial discretion has been used, and sometimes abused, in the Iowa criminal trial process.

I. THE NATURE OF JUDICIAL DISCRETION

As suggested, the exercise of discretion by the trial court is an essential foundation stone of the criminal trial process. Even though it is a crucial element of this process, it is clear that the power to act in a discretionary manner does not give the trial court the license to take

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

¹ R. BOWERS, THE JUDICIAL DISCRETION OF TRIAL COURTS § 6, at 11-12 (1931).

arbitrary, off-handed actions in the name of orderly administration of justice. Rather, the power to exercise discretion

must be utilized fairly and impartially, not arbitrarily, by application of relevant, legal and equitable principles to all known or readily available facts of a given issue or cause to the end that justice may more nearly be effectuated.²

Thus, judicial discretion can never mean "the arbitrary will of the judge. . . . It is a legal discretion, founded upon conditions which call for judicial action, as distinguished from mere individual or personal view or desire."³ Accordingly, discretion "imports the exercise of judgment, wisdom, and skill, as contradistinguished from unthinking folly, heady violence, and rash injustice."⁴

Once this discretion has been exercised, it is subject to appellate review, but only to the limited extent of determining whether it has been abused. However, the decisions of the trial court are cloaked with "a strong presumption in [their] favor,"⁵ and "[u]ntil the contrary appears, the presumption is that the discretion of the district court was rightfully exercised."⁶ Indeed,

[a]ll reasonable presumptions are in favor of regularity, and against error; and if there is any reasonable hypothesis upon which the ruling can be upheld, it must be adopted.⁷

Moreover, to overcome this presumption of regularity requires an affirmative showing of abuse and the burden of so showing rests upon the party complaining.⁸

This burden is heavy, indeed, for it can only be sustained by showing abuse *and* prejudice. In the words of a leading treatise on discretion:

to warrant an appellate court in setting aside a ruling of the trial court made in the exercise of a conceded discretion. . . . The action complained of must have been unreasonable in the light of attendant circumstances—the discretion must have been exercised for *reasons clearly untenable* or to an extent clearly *unreasonable* [and] the action must have resulted *prejudicially* to the rights of the party complaining. Without a union of these conditions, the ruling will stand; and, they concurring, it is seldom that a reversal is refused.⁹

² State v. Vickroy, 205 N.W.2d 748, 751 (Iowa 1973).

³ Arthaud v. Griffin, 205 Iowa 141, 144, 217 N.W. 809, 811 (1928), citing *In re Superintendent of Banks*, 207 N.Y. 11, 100 N.E. 428 (1912); accord, State v. District Court, 213 Iowa 822, 830, 238 N.W. 290, 294 (1931).

⁴ See generally Commonwealth v. Evans, 190 Pa. Super. 179, 225, 154 A.2d 57, 82 (1959).

⁵ Murray v. Buell, 74 Wis. 14, 18, 41 N.W. 1010, 1011 (1889).

⁶ R. BOWERS, THE JUDICIAL DISCRETION OF TRIAL COURTS § 18, at 34 (1931); accord, State v. Bastedo, 253 Iowa 103, 110 111 N.W.2d 255, 259 (1961). "We presume the regularity of actions of officials or courts unless the contrary is made to appear." *Id.*

⁷ Breed v. Ketchum, 51 Wis. 164, 169, 7 N.W. 550, 552-52 (1880).

⁸ R. BOWERS, THE JUDICIAL DISCRETION OF TRIAL COURTS § 18, at 33 (1931).

The heavy burden borne by a party seeking review of the exercise of discretion is further weighted by the fact that appellate courts tend to apply the stringent "reasonable man" standard of review. Discretion accordingly has been abused.

only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.¹⁰

This means that, in the absence of injustice, an appellate court will not substitute its discretion for that of the trial court. Within this analytical framework, the following sections of the Article will examine the actual exercise of discretion in the criminal trial process, beginning with the pretrial stage, the first stage of the process in which the trial judge has an opportunity to exercise discretion in any substantial manner.

II. JUDICIAL DISCRETION IN THE PRETRIAL PROCESS

There are numerous situations which call for the exercise of judicial discretion prior to the actual commencement of trial. During the pretrial process the court may be called upon to rule on questions of such disparate nature as whether to appoint counsel for an allegedly indigent defendant, whether to sever the trials of jointly indicted defendants, or whether to accept or reject a proffered plea of guilty. In this section, we will discuss the most significant matters that may be raised by the parties or by the court on its own motion. Obviously, all of these questions will not arise in every trial, nor will they necessarily occur in the order in which they are discussed.

A. Legal Assistance for Indigents

One problem with which the trial court must be prepared to deal before trial is that of determining whether to appoint counsel for a defendant who claims to be unable to afford legal assistance. In making the determination of whether an individual case is a proper one for the appointment of publicly paid counsel, the trial court must resolve three issues: (1) whether the specific crime charged is of the type requiring appointment of counsel; (2) whether an indigent defendant *knowingly and intelligently* waived his right to appointive counsel; and (3) whether the defendant in fact qualifies as an indigent.

The Iowa Code affords the right of appointive counsel to indigents charged with felonies¹¹ or indictable misdemeanors.¹² However, it is

⁹ *Id.* § 13, at 25.

¹⁰ *Delno v. Market St. Ry. Co.*, 124 F.2d 965, 967 (9th Cir. 1942).

¹¹ See IOWA CODE §§ 775.4-.5 (1973).

¹² See *Wright v. Denato*, 178 N.W.2d 339, 341-42 (Iowa 1970), *interpreting* IOWA CODE §§ 775.1, .2, .4, .8 (1973).

silent about simple misdemeanors, and, in *Wright v. Denato*,¹³ the Iowa Supreme Court expressly refused to comment on whether indigents so charged are entitled to appointive counsel.¹⁴

In light of *Argersinger v. Hamlin*,¹⁵ however, it appears unlikely that the Iowa Supreme Court will extend the right to counsel to simple misdemeanor charges. In *Argersinger*, the United States Supreme Court, rather than extending the sixth amendment right to counsel to all state offenses,¹⁶ held that a trial court's refusal to appoint counsel for an indigent defendant merely precludes subsequent sentencing of that person to imprisonment. The Court said:

We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.¹⁷

The Court continued:

Under the rule we announce today, 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 accused before the trial starts.¹⁸

The import of *Argersinger* is that the trial court is not required to appoint counsel on simple misdemeanors, but the court's refusal to do so, albeit a refusal properly within its discretion, has the effect of sharply curtailing the court's normally broad sentencing discretion. In other words, even though practically all simple misdemeanors are punishable by either a fine or imprisonment, a judge who chooses not to appoint counsel may only impose a fine if the defendant is subsequently convicted.

If the crime charged requires the court to appoint counsel, or if the court so chooses, the court must determine whether the defendant has waived his right to counsel. Simple waiver, however, is not all that must be established, for it would appear to be an abuse of discretion for the trial court to fail to appoint counsel even though the indigent

¹³ 178 N.W.2d 339 (Iowa 1970).

¹⁴ *Id.* at 342.

¹⁵ 407 U.S. 25 (1972).

¹⁶ Cf. *Gideon v. Wainwright*, 372 U.S. 335, 342-45 (1963) (sixth amendment right to counsel on felony charges extended to states).

In [*Gideon*], the Court unanimously announced a clear and simple constitutional rule: In the absence of waiver, a felony conviction is invalid if it was obtained in a court that denied the defendant the help of a lawyer. *Loper v. Beto*, 405 U.S. 473, 481 (1972).

¹⁷ *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

¹⁸ *Id.* at 40.

defendant waived his right, if the record indicated that the defendant did not do so knowingly and intelligently.¹⁹

Assuming that counsel is required and that there has been no knowing and intelligent waiver, it remains for the court to determine whether the defendant is indigent.²⁰ However, except for the vague directive to appoint counsel for a defendant who "is unable to employ any,"²¹ the Code provides neither a specific definition of indigency nor general criteria for the trial court to consider in reaching its own determination. The supreme court has not set forth any definitive guidelines in this regard. Instead, it has confined its opinion to enumeration of some of the factors that should be considered in making the determination, as well as some that should not.

Thus, in *Bolds v. Bennett*,²² for example, the supreme court listed some of the factors that a trial court can properly consider in making its determination of indigency. These include:

- (1) real or personal property owned; (2) employment benefits; (3) pensions, annuities, social security and unemployment compensation; (4) inheritances; (5) number of dependants; (6) outstanding debts; (7) seriousness of the charge; and (8) any other valuable resources not previously mentioned.²³

On the other hand, the supreme court has ruled that the availability of the resources of the defendant's relatives is an improper consideration,²⁴ as is the fact that the defendant has posted bail.²⁵

Once counsel has been appointed for an indigent, a related matter must sometimes be considered. The Code provides that a court-appointed attorney "shall be entitled to a reasonable compensation . . . including such sum or sums as the court may determine are necessary for investigation in the interests of justice. . . ."²⁶ The supreme court has interpreted this section as lodging

¹⁹ For further discussion of the indigent defendant, see text accompanying notes 718-19 *infra*.

²⁰ There is a legislative standard for determining eligibility of a defendant to make use of the public defender system: inability to employ private counsel "without prejudicing his financial ability to provide economic necessities for himself or his family." See IOWA CODE § 336A.4 (1973).

Although this standard is mentioned in the Iowa Code only with respect to public defenders, one may reasonably argue that it was the intent of the legislature to have this standard applied in the case of appointed counsel as well. *Contemporary Studies Project: Perspectives on the Administration of Criminal Justice in Iowa*, 57 IOWA L. REV. 598, 681 (1972).

²¹ IOWA CODE § 775.4 (1973).

²² 159 N.W.2d 425 (Iowa 1968).

²³ *Id.* at 428.

²⁴ *State v. Wright*, 111 Iowa 621, 624, 82 N.W. 1013, 1013-14 (1900).

²⁵ *State v. Van Gorder*, 192 Iowa 353, 354-55, 184 N.W. 638, 639 (1921).

²⁶ IOWA CODE § 775.5 (1973). A common sense interpretation of this statute

limited discretionary power in the trial court to disburse reasonable compensation to an attorney defending an indigent for the purpose of conducting an investigation in the interests of justice.²⁷

This discretion should be exercised in such a way that the court-appointed attorney is not required to incur personal expenses "in preparing and conducting a meaningful and conscientious defense for the accused," while also protecting against frivolous, unwarranted claims "by restricting payment to those investigations which in the court's judgment are necessary in the interests of justice."²⁸

*State v. Hancock*²⁹ is a case where the trial court abused its discretion in this regard. In this forgery case, the court denied the defendant's application for public funds to obtain an independent analysis of her handwriting for comparison purposes, after the state had given notice that it intended to use expert witness testimony concerning the defendant's handwriting exemplar.³⁰ Reversing the subsequent conviction, the supreme court was

convinced the refusal to provide funds for an independent analysis of defendant's handwriting was not in the best interests of Justice, particularly in view of the fact the State had given notice it intended to call an expert. . . .³¹

This seems to indicate that mutuality of opportunity for expert witness' services is a definite factor in deciding whether the defendant should be entitled to such funds. However, these public funds do not appear to be limited to services used in offsetting the state's theory of the case and instead might be available, as a matter of right under certain circumstances, to enable the defendant to effectively develop any affirmative defense.³² This broader approach was given at least some impetus by the fact that, in *Hancock*, the court premised its decision upon "the interests of justice" rather than on mutuality per se, and the court stated:

In denying her request the court effectively prevented defendant from

would, of course, render these public services available also to an indigent defendant who is permitted to proceed *pro se*.

²⁷ *State v. Hancock*, 164 N.W.2d 330, 332 (Iowa 1969).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 333.

³² For a listing of a number of cases in which various appellate courts have upheld, as a matter resting in the trial court's discretion, the appointment of investigators or experts to aid in the preparation of an indigent's defense notwithstanding the absence of specific statutory authority see *Anot.*, 34 A.L.R. 3d 1256, 1269-72 (1970). *But see Hardt v. State*, 490 P.2d 752, 756 (Okla. Crim. App. 1971) (trial court cannot appoint investigator and expert in the absence of specific legislative authority to do so).

even the possibility of obtaining evidence which may have been highly relevant and material to a meaningful defense.³³

B. Pretrial Release

Another problem which trial courts must face in nearly every case is that of initially determining whether to allow a particular defendant to be released prior to trial, and, if so, under what terms and conditions. Bail is ordinarily set twice during the pretrial process, first at preliminary arraignment³⁴ upon the informal charge and again at the arraignment³⁵ after the defendant has been formally charged. Considerable judicial discretion is involved in determining whether and in what amount a surety bond will be required or whether the defendant will be released on his own recognizance or on unsecured bail, but the courts apparently have no discretion to refuse to set bail on bailable offenses.³⁶ This is because both the Iowa constitution³⁷ and the Iowa Code³⁸ render all defendants "bailable," except when charged with certain crimes. It is arguable that *all* defendants are bailable, however, because the Iowa constitution affords a right to bail on all noncapital offenses and there no longer are any capital offenses in Iowa. Therefore, the statutory prohibition of bail in cases of first-degree murder and kidnapping for ransom is arguably unconstitutional. Although the Iowa Supreme Court has never faced this question, the majority of other appellate courts that have ruled under similar circumstances have held that bail is a matter of right on all charges.³⁹

³³ 164 N.W.2d at 333, *see also* State v. Williams, 207 N.W.2d 98 (Iowa 1973).

³⁴ Iowa Code § 761.5 (1973).

³⁵ *Id.* §§ 763 *et seq.*

³⁶ *But see* Commonwealth v. Truesdale, 449 Pa. 325, —, 296 A.2d 829, 835 (1972):

We do not intend by this opinion that pretrial bail may not be denied regardless of the circumstances. As noted before, the right to release before trial is conditioned upon the accused giving adequate assurance he or she will appear for trial. If upon proof shown, the court reasonably concludes the accused will not appear for trial regardless of the character or the amount of the bail, then in such an instance bail may properly be denied, regardless of the nature of the charges. The burden of proof is upon the Commonwealth. This decision must be reached by the application of certain criteria, such as: (1) general reputation in the community; (2) past conduct while on bail; (3) ties to the community in the form of a job, family, or wealth However, the trial court must also consider that modern police methods, such as exchange of photographs and fingerprints, act as deterrent to flight. *Id.*

³⁷ IOWA CONST. art. 1, § 12.

³⁸ IOWA CODE § 763.1 (1973).

³⁹ *See, e.g.,* Commonwealth v. Truesdale, 449 Pa. 325, —, 296 A.2d 829, 832 (1972); State v. Johnson, 61 N.J. 351, 358-59, 294 A.2d 245, 249 (1972); Taglianetti v. Fontaine, 105 R.I. 596, 600, 253 A.2d 609, 611 (1969); State v. Pett, 253 Minn. 429, 435, 92 N.W.2d 205, 209 (1958); *In re* Ball, 106 Kan. 536, 537-38, 188 P. 424, 425 (1920); *contra*, People v. Anderson, 6 Cal. 3d 628, 657 n.45, 100 Cal. Rptr.

In setting the terms of pretrial release of "bailable" defendants, the Code mandates either release on personal recognizance or upon unsecured appearance bond "unless the magistrate determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the defendant as required."⁴⁰ Once the magistrate has made such a determination, he "shall" then impose the least severe of the statutorily enumerated conditions of release "which will reasonably assure the appearance of the person for trial"⁴¹

Because the decision to allow pretrial release demands first that the court determine whether to require the defendant to post a bond, and, if so that the court set the amount thereof, many appeals present assignments of error in the alternative, asserting that there was an abuse of discretion in not affording pretrial release merely on personal recognizance or, alternatively, that the amount of the cash or surety bail bond was set excessively high under the circumstances. The supreme court takes the position that "[d]etermination of the conditions for the release of one charged with a public offense is directed to the magistrate's discretion," and accordingly "[i]f such order is supported by the record we must affirm."⁴² Because the sole statutory criterion in setting the specific terms of pretrial release is to impose the least severe condition which will "reasonably assure the appearance of the person for trial . . . ,"⁴³ the question of the defendant's credibility can be a crucial factor. Accordingly, noting that the statute clearly implies that the district court has discretion in allowing release on personal recognizance, the supreme court has pointed out that at least the

152, 171 n.45, 493 P.2d 880, 899 n.45 (1972); *People ex rel. Dunbar v. District Court*, — Colo. —, 502 P.2d 420, 421-22 (1972).

⁴⁰ IOWA CODE § 763.17(1) (1973).

⁴¹ *Id.* The conditions of release are:

- a. Place the defendant in the custody of a designated person or organization agreeing to supervise him;
- b. Place restrictions on the travel, association or place of abode of the defendant during the period of release;
- c. Require the execution of an appearance bond in a specified amount and the deposit with the clerk of the court in cash or other qualified security of a sum not to exceed ten percent of the amount of the bond, such deposit to be returned to the defendant upon the performance of the appearances as required in section 766.1;
- d. Require the execution of a bail bond with sufficient surety, or the deposit of cash in lieu thereof, provided that, except as provided in section 763.2, bail initially given shall remain valid until final disposition of the offense. If the amount of bail is deemed insufficient by the court before whom the offense is pending, the court may order an increase thereof and the defendant must provide the additional undertaking, written or cash, to secure his release.
- e. Impose any other condition deemed reasonably necessary to assure appearances as required, including a condition requiring that the defendant return to custody after specified hours. *Id.*

⁴² *State v. Fenton*, 170 N.W.2d 678, 680 (Iowa 1969).

⁴³ IOWA CODE § 763.17(1) (1973).

trial court has "the benefit . . . of seeing and hearing this defendant which we do not have."⁴⁴

Considerable discretion is generally recognized in setting the amount of bail on a particular charge, especially when the defendant has a previous record or other charges pending against him. Typical of the supreme court's attitude is the case of *State v. Mussman*,⁴⁵ where the court said:

Admittedly the amount of the bail which was ordered is large, but in view of the defendant's past misconduct and the pendency of two rape charges against him now, we conclude the order appealed from is supported by the proceedings in the district court.⁴⁶

Nevertheless, the supreme court has held that excessive bail cannot be used as a means of keeping a "dangerous" defendant incarcerated before trial.⁴⁷ Thus, in *State v. Cummings*,⁴⁸ the court noted that "the [trial] court's reluctance to allow defendant his liberty pending trial is readily understandable but illegal."⁴⁹ In that case the supreme court further acknowledged that it did "not have before it the psychiatric reports available to the trial court" but felt that if incarceration were required on psychiatric grounds, "the legal provisions for such incarceration must be followed."⁵⁰ Accordingly, the supreme court felt constrained to order that "[o]n the record before us any bail requirement in excess of \$50,000 would be excessive, and thus ordered reduction of the \$200,000 bail."⁵¹

C. Discovery

One of the primary reasons for allowing a defendant to be released on bail is to enable him to more effectively prepare his defense.⁵²

⁴⁴ *State v. Arbuckle*, 162 N.W.2d 279, 281 (Iowa 1968).

⁴⁵ 178 N.W.2d 319 (Iowa 1970).

⁴⁶ *Id.* at 320.

⁴⁷ *State v. Cummings*, No. 55294 (Iowa, Jan. 3, 1972); *accord*, *Commonwealth v. Truesdale*, 449 Pa. 325, 296 A.2d 829, 836-37 (1972):

The Commonwealth also urges us to rule that bail may be denied to protect the community from further criminal activity on the part of the accused, or in order to safeguard the well-being of witnesses in the case The traditional decision to deny bail was not a means of keeping an accused confined to protect the public, it was a means of assuring he would appear at trial. . . . Thus, anticipated criminal activity alone cannot stand as a grounds for the denial of bail. This, however, is not to say it cannot be considered in setting the amount of bail in conjunction with the aforementioned elements in determining if the accused will flee. Moreover, it may be considered by the trial judge in setting the terms of bail, but as the sole ground for the absolute denial of bail it is invalid. *Id.*

⁴⁸ *State v. Cummings*, No. 55294 (Iowa, Jan. 3, 1972).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PRETRIAL RELEASE 3 (Approved Draft 1968).

Even the most liberal pretrial release provisions may not ensure that an adequate defense is afforded without at least a rudimentary opportunity to make discovery. Except for a few scattered provisions requiring disclosure of specified basic items,⁵³ however, Iowa has no statute either requiring, permitting, or prohibiting general discovery by defendants in criminal cases. This means that there is no such thing as a discovery deposition in Iowa criminal law.⁵⁴ However, the Iowa Supreme Court, like most state appellate courts,⁵⁵ has recognized that the trial courts have the inherent power—indeed, in some instances, the duty—to order that *certain* evidence in the state's possession be disclosed before trial in order to assure the defendant a fair trial.⁵⁶ The court emphasized in *State v. Eads* that the trial courts are to exercise sound judicial discretion in compelling disclosure of evidence "when necessary in the interests of justice."⁵⁷ Upon appellate review alleging an abuse of the court's discretion, "the ultimate test against which our decision must be measured is that of a fair trial. Defendant is entitled to *no more*, and he must have no less."⁵⁸ Accordingly, the trial court can abuse its discretion by ordering too much disclosure since "it is not only the defendant who is entitled to a fair trial. Society, too, represented by the prosecution, has an equal right to one."⁵⁹

With these double-edged guidelines in mind, the supreme court has, on a case-by-case basis, determined what *must* be disclosed, what *cannot* be disclosed, and what *may*, in the trial court's discretion, be ordered to be disclosed. The procedural vehicle triggering a disclosure inquiry is the defendant's motion for a bill of particulars.⁶⁰ This statutory motion may be made when the indictment, together with the attached minutes of evidence, "fails to inform the defendant of the particulars of the offense sufficiently to enable him to prepare his defense, or to give him such information as he is entitled to under the Constitution of this state . . ."⁶¹ However, the trial court *may* order the disclosure on its own motion, but the supreme court has held that failure to do so may not constitute an abuse of discretion.⁶²

⁵³ IOWA CODE §§ 769.13, 772.4 (1973). (minutes of testimony the state expects to rely upon at trial); IOWA CODE § 749A.4 (1973) (report of state criminalistics laboratory); IOWA CODE § 775.8 (1973) (copy of indictment or information).

⁵⁴ *State v. District Court*, 253 Iowa 903, 910-12, 114 N.W.2d 317, 321-22 (1962).

⁵⁵ See Annot., 7 A.L.R.3d 8, 36-43 (1966).

⁵⁶ *State v. Eads*, 166 N.W.2d 766, 769 (Iowa 1969).

⁵⁷ *Id.*

⁵⁸ *Id.* at 771 (emphasis added).

⁵⁹ *Id.*

⁶⁰ See IOWA CODE §§ 773.6, .7 (1973).

⁶¹ *Id.* § 773.6.

⁶² *State v. Berenger*, 161 N.W.2d 798, 801 (Iowa 1968).

The following have expressly been held by the Iowa Supreme Court to be discoverable by the defendant as a matter of right, thus leaving no discretion in the trial court to refuse to order their disclosure: (1) an autopsy report,⁶³ (2) contents of documents the state intends to use against the defendant,⁶⁴ (3) any physical evidence the state intends to use against the defendant,⁶⁵ and (4) exculpatory evidence.⁶⁶ The following, while possibly not discoverable as a matter of right, can properly be ordered, in the trial court's sound discretion, to be disclosed: FBI laboratory reports,⁶⁷ photographs,⁶⁸ copies of statements of the state's witnesses,⁶⁹ and the names of any informants relied upon by the state.⁷⁰ On the other hand, the trial court cannot order *pretrial* disclosure of police investigation reports,⁷¹ the names of investigating officers,⁷² or any notes, memoranda, or correspondence constituting

⁶³ State v. Eads, 166 N.W.2d 766, 772 (Iowa 1969):

Fundamental fairness requires the State to produce the report so that defendant may prepare to meet its findings in an orderly and effectual fashion.

⁶⁴ The defendant "is also entitled to know the contents of documents the state intends to use against him." State v. White, 260 Iowa 1000, 1005, 151 N.W.2d 552, 555 (1967).

⁶⁵ "[N]o reasonable rule justifies denial of an opportunity for defendant to examine the physical evidence the State expects to use against him." State v. Eads, 166 N.W.2d 766, 771 (Iowa 1969).

⁶⁶ Cf. State v. Niccum, 190 N.W.2d 815, 826 (Iowa 1971). However, the defendant's request therefore was "too broad and general to be sustained." *Id.*

⁶⁷ State v. Eads, 166 N.W.2d 766, 773 (Iowa 1969): "We hold the trial court's order to produce these reports was a proper exercise of its discretion to assure defendant a fair trial." *Id.*

⁶⁸ See, e.g., State v. Niccum, 190 N.W.2d 815, 820 (Iowa 1971); State v. Galloway, 167 N.W.2d 89, 90 (Iowa 1969); State v. Eads, 166 N.W.2d 766, 774 (Iowa 1969).

⁶⁹ State v. Eads, 166 N.W.2d 766, 774 (Iowa 1969):

We hold the trial court abused its discretion in ordering the State to deliver copies of the statements of all witnesses expected to testify at defendant's trial.

We do not foreclose the possibility that a defendant may be entitled to a particular statement upon showing it is necessary to his proper defense.

⁷⁰ State v. Battle, 199 N.W.2d 70, 71-72 (Iowa 1972); State v. Denato, 173 N.W.2d 576, 578-79 (Iowa 1970) (disclosure was not ordered in these cases, however).

⁷¹ State v. Eads, 166 N.W.2d 766, 774 (Iowa 1969):

We hold the [trial court's] order requiring the State to produce copies of police reports was an abuse of discretion . . . thereby depriving the State of a fair trial.

But see State v. Mayhew, 170 N.W.2d 608, 613-14 (Iowa 1969) (in camera inspection by the judge after the officer testifies on direct with possible limited turnover to the defendant for purposes of cross examination).

⁷² "[P]retrial discovery may be had in Iowa only for the production of specific documents which are shown to be in existence." State v. Redding, 169 N.W.2d

the prosecutor's "work product."⁷³

D. Competency to Stand Trial

Regardless of anything else that occurs during pretrial proceedings the trial court must be sensitive to the possibility that the defendant may not be competent to stand trial. The Code provides that whenever a defendant appears in any stage of a criminal trial and "a reasonable doubt arises as to his sanity," the proceedings must be suspended and a jury trial had upon the question of his competency to stand trial.⁷⁴ Quite unsurprisingly, although a defendant's failure to raise the question of his own competency may be a factor to be considered on review of a trial court's failure to consider the competency of that defendant,⁷⁵ the statute has been construed as imposing a mandatory duty on the court "to act on its own motion if a doubt of defendant's present insanity arises."⁷⁶ To aid the trial courts in determining com-

788, 790 (Iowa 1969), citing *State v. Kelly*, 249 Iowa 1219, 1220-22, 91 N.W.2d 562, 563-64 (1958).

⁷³ See *State v. Eads*, 166 N.W.2d 766 (Iowa 1969) where the court, in reference to defendant's demands for pretrial discovery of statements made to police by persons expected to be called as state witnesses at trial, stated:

. . . whether condemned as "mere fishing expeditions," "attempts to rifle the prosecutor's file," or "requests for the State's work product," the overwhelming weight of authority is against such disclosure. *Id.* at 774.

To the same effect is *People v. Powell*, 49 Misc. 2d 624, 626, 268 N.Y.S.2d 380, 383 (Sup. Ct. 1965):

With respect to the Police or District Attorney's notes, stenographic or otherwise, of all such statements . . . the Court is of the belief that such subject matter would not be a proper subject for discovery and inspection . . . *Id.*

This rule is more explicitly stated by the ABA project committee on criminal justice standards:

Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of his legal staff. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 2.6(a) (approved Draft 1970).

See also *State v. Allison*, 206 N.W.2d 893 (Iowa 1973) (expert witness' books not discoverable).

⁷⁴ IOWA CODE § 783.1 (1973).

⁷⁵ *State v. Stoddard*, 180 N.W.2d 448, 450 (Iowa 1970).

⁷⁶ *Id.* at 449; see *Hickey v. District Court*, 174 N.W.2d 406, 408-09 (Iowa 1970).

⁷⁷ The supreme court gives great weight to the trial court's decision in this regard, noting in *Stoddard* that the facts

should clearly suggest a question of defendant's mental capacity before we reverse the trial court for failing to determine whether a reasonable doubt exists on his own motion. 180 N.W.2d at 452.

This is generally because the trial court has the advantage of observing the

petency,⁷⁷ the supreme court has formulated this three-part standard: "defendant's mental capacity to appreciate the charge against him, understand the proceedings, and conduct his defense."⁷⁸

Once a defendant's competency is questioned, the court abuses its discretion in proceeding without first ordering a jury's determination of whether there is a reasonable doubt about the defendant's competency to stand trial. Indeed, before accepting a guilty plea, the court must be possessed of "sufficient and satisfactory evidence" of the accused's mental capacity.⁷⁹ For example, the trial court in *Hickey v. District Court*⁸⁰ abused its discretion in accepting the defendant's guilty plea without first ordering further inquiry into his sanity, even though the defendant raised the issue for the first time on appeal. The court-ordered presentence investigation report detailed Hickey's past commitment to a mental hospital but did not indicate a discharge therefrom. The supreme court held that there should have been a direct evaluation of defendant's present state of mental health "before the court could resolve the question of reasonable doubt as to defendant's mental capacity to enter a plea of guilty."⁸¹

When the trial court improperly proceeds with the trial rather than commencing a separate proceeding to determine whether there is a reasonable doubt about the defendant's competency, it is, in effect, acting without jurisdiction over the defendant.⁸² However, if the defendant seeks to appeal the trial court's action, he must contend with a presumption that the court retains jurisdiction, which presumption will only be rebutted if the defendant can show by a clear preponderance of the evidence that the court abused its discretion by acting illegally in proceeding further with the case.⁸³ The consequences of a defendant's inability to sustain this burden are illustrated in *State v. Milford*.⁸⁴ In that case, after the state rested, the defense

defendant first hand. See *State v. McCollom*, 260 Iowa 977, 987, 151 N.W.2d 519, 525 (1967).

⁷⁸ *State v. McCollom*, 260 Iowa 977, 987, 151 N.W.2d 519, 524 (1967). This test, of course, relates only to a defendant's sanity at time of trial and not his sanity at the time of the crime. *State v. Hamilton*, 247 Iowa 768, 774, 76 N.W.2d 184, 187 (1956).

A reading of the court's ruling on the motion gives the impression that in so ruling, it was passing upon the ultimate fact of insanity rather than upon the existence of facts insufficient to raise a reasonable doubt thereof. *Id.*

⁷⁹ *Hickey v. District Court*, 174 N.W.2d 406, 412 (Iowa 1970).

⁸⁰ *Id.* See also *State v. Thomas*, 205 N.W.2d 717 (Iowa 1973).

⁸¹ *Id.* at 410; see *State v. Bordorsky*, 183 N.W.2d 170 (Iowa 1971).

⁸² See *Hickey v. District Court*, 174 N.W.2d 406, 409 (Iowa 1970).

⁸³ See *id.*

⁸⁴ 186 N.W.2d 590 (Iowa 1971).

counsel moved for mental examination of defendant. That motion was denied, and on appeal, the supreme court noted that no evidence was submitted to support the contention of defendant's alleged paranoia, uncooperativeness with his counsel, or of his hostility toward the court and his attorney. Quite the contrary, the defendant thereafter effectively testified in his own defense, apparently with "no difficulty in doing so."⁸⁵ As a result, the actions of the trial court in continuing the proceedings were ruled to be proper and not an abuse of discretion.

Just as it is an abuse of discretion for the trial court to improperly continue the proceedings against a defendant whose competency has been questioned, however, so too may it be an abuse for the court simply to refuse to set a case for trial in such a situation. That is, the law prescribes but one course of action—suspension of the proceedings only for a trial on the issue of competency. Thus, in *State v. Gaffney*,⁸⁶ the trial court's refusal to set aside its order continuing the case until defendant became sane, while refusing to fix a time for immediate trial either on the merits or on the competency issue, was reversed.

E. Guilty Pleas

When a defendant decides to plead guilty rather than stand trial and there is no reason to suspect his competency, the trial court is faced with the immediate question of whether to accept the proffered plea or refuse it and order the defendant to stand trial. In this regard, there appears to be at most a limited power in the trial courts to accept a plea of guilty to a lesser offense over the prosecutor's objection. In what is apparently the only case directly on point, the Iowa Supreme Court noted:

Where, as here, the court has no knowledge other than the age of the defendant and accepts a plea over the objection of the county attorney we are compelled to hold such action is an abuse of discretion.⁸⁷

Exactly what type of factual situation, if any, *could* justify an Iowa trial court in accepting such a plea is not clear.

On the other hand, although there are no Iowa cases on point, at least one federal court of appeals has held that the trial court did not abuse its discretion in refusing to accept a defendant's plea of guilty to a lesser offense.⁸⁸ That court noted that the United States Supreme Court has specifically held that a trial judge is not required to accept every knowing and intelligent guilty plea and conversely

⁸⁵ *Id.* at 592.

⁸⁶ 237 Iowa 1394, 1402-03, 25 N.W. 352, 354 (1946).

⁸⁷ *State v. Koepfel*, 250 Iowa 1052, 1054, 97 N.W.2d 926, 927 (1959).

⁸⁸ *United States v. Melendrez-Salas*, 466 F.2d 861 (9th Cir. 1972).

that "[a] criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court."⁸⁹

The courts' discretion in the method in which they receive guilty pleas recently has been strictly confined through the federal constitutional doctrine promulgated by the United States Supreme Court in *Boykin v. Alabama*⁹⁰ and resultantly adopted by the Iowa Supreme Court in *State v. Sisco*.⁹¹ The *Sisco* guidelines require that whenever an accused pleads guilty to a felony or an indictable misdemeanor, the record must show that the *trial court* ascertained from the defendant that he was entering such plea voluntarily, with an understanding of the charge, and with knowledge of the consequences of his plea.⁹² Moreover, the record must show a factual basis for the charge and for the defendant's guilt. Nevertheless, a trial court's interrogation of a defendant "need not follow a ritualistic or rigid formula," as long as there is substantial compliance with the *Sisco* guidelines.⁹³

Once the trial court has accepted a plea, it may subsequently be faced with the problem of deciding whether to allow the defendant to withdraw it. Iowa trial courts are statutorily accorded almost absolute discretion in determining whether to permit withdrawal of guilty pleas, since the statute provides: "At any time before judgment, the court *may* permit the plea of guilty to be withdrawn . . ."⁹⁴ As the Iowa Supreme Court has pointed out, this provision

does not state that the *defendant* may withdraw [his] plea of guilty. The word *may* refers to the authority of the court to permit such withdrawal [D]iscretion is lodged in the court and does not give a defendant an absolute right to withdraw such plea.⁹⁵

⁸⁹ *Id.* at 862, quoting *North Carolina v. Alford*, 400 U.S. 25, 38 n.11 (1970).

⁹⁰ 395 U.S. 238, 242-44 (1969).

⁹¹ 169 N.W.2d 542, 550-51 (Iowa 1969).

⁹² *Id.* Prior to *Sisco*, the same standard for accepting a guilty plea was followed, but without the requirement that the determination be made by the court itself and that it be made as part of the record. See, e.g., *State v. Kellison*, 232 Iowa 9, 14, 4 N.W.2d 239, 242 (1942), see also *State v. Thomas*, 205 N.W.2d 717 (Iowa 1973).

⁹³ *State v. Bledsoe*, 200 N.W.2d 529, 531 (Iowa 1972); accord, *State v. Slawson*, 201 N.W.2d 460 (Iowa 1972) (*Sisco* colloquy completed during the sentencing colloquy is valid). But see *State v. Clary*, 203 N.W.2d 382, 383 (Iowa 1973) (woefully inadequate colloquy consisting solely of the judge stating for the record that the defendant wishes to withdraw his plea of not guilty and enter guilty plea, with defendant so confirming).

⁹⁴ IOWA CODE § 777.15 (1973).

⁹⁵ *State v. Krana*, 159 N.W.2d 413, 415 (Iowa 1968) (emphasis added); accord, *State v. Weckman*, 180 N.W.2d 434, 440 (Iowa 1970); *State v. Hellickson*, 162 N.W.2d 390, 395 (Iowa 1968). But see *State v. Machovec*, 236 Iowa 377, 381, 17 N.W.2d 843, 845 (1945):

We have heretofore held this statute and identical provisions of former statutes give to a defendant an absolute right to withdraw a plea of guilty at any time before judgment is entered in the record book. *Id.*

Accordingly, the supreme court has held that "the [trial] court may without abusing its discretion refuse to permit its withdrawal" when a valid guilty plea has been entered.⁹⁶ This doctrine has even been extended to a situation in which the defendant's motion for withdrawal was asserted to be based upon "substantial defense to the charge."⁹⁷

The United States Supreme Court's decision in *Santobello v. New York*⁹⁸ could sharply curtail the courts' discretion in disallowing withdrawals of guilty pleas that were the product of broken plea bargains.⁹⁹ Although Santobello's guilty plea to a lesser offense was pursuant to an agreement that the state would make no recommendation as to sentence, an assistant prosecutor other than the one who had negotiated the plea recommended the maximum sentence (which was imposed). Discounting the fact that "the breach of the agreement was inadvertent,"¹⁰⁰ the Supreme Court said that when

⁹⁶ *State v. Krana*, 159 N.W.2d 413, 415 (Iowa 1968). A less mechanistic approach is taken, for example, in Virginia where

the rule is that the withdrawal of a guilty plea by a defendant is within the discretion of the trial court, but that it should be granted whenever there is the least evidence that the ends of justice would best be served by a plea of not guilty. *Eggleston v. Slayton*, 343 F. Supp. 221, 226 (W.D. Va. 1972).

⁹⁷ *State v. Krana*, 159 N.W.2d 413, 415-16 (Iowa 1968). On the other hand, the Pennsylvania Supreme Court has held that a lower court in fact abused its discretion in refusing to allow the withdrawal of a guilty plea motivated by defense counsel's threat to withdraw from the case if defendant did not plead guilty. *Commonwealth v. Forbes*, — Pa. —, 299 A.2d 268, 270-71 (1973). The court said:

These circumstances rendered involuntary appellant's decision to abandon his withdrawal request and continue with his original plea. What plea to enter is a decision which must be made voluntarily and intelligently by the accused A guilty plea . . . "induced by promises or threats which deprive it of the character of a voluntary act, is void." *Id.*

In seeking to withdraw a guilty plea, timeliness is of the essence. Consequently, a motion to withdraw a guilty plea after judgment and sentencing is not timely. *State v. Whitehead*, 163 N.W.2d 899, 901 (Iowa 1969). Moreover, the Iowa Supreme Court has held that "a guilty plea should [not] be set aside as involuntary in the absence of an allegation that defendant is in fact innocent." *Id.* at 903. This view accords with the Pennsylvania court's, at least in theory: timely assertions of innocence offer a "fair and just" reason for withdrawal. *Commonwealth v. Forbes*, *supra*, — Pa. at —, 299 A.2d at 272.

⁹⁸ 404 U.S. 257 (1971).

⁹⁹ Plea bargaining has been approved by the Iowa Supreme Court. *State v. Whitehead*, 163 N.W.2d 899, 902 (Iowa 1969):

There is nothing wrong with the universal practice of using plea bargaining as a device for disposing of criminal cases. It is entirely proper to grant concessions to a defendant who enters a plea of guilty when the public interest is served thereby. *Id.*

¹⁰⁰ 404 U.S. at 262.

a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."¹⁰¹

The case was remanded to the state court, with the ultimate relief left

to the discretion of the state court which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be resentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, i.e., the opportunity to withdraw his plea of guilty.¹⁰²

Santobello has already been interpreted by one federal court of appeals as requiring that a defendant be able to withdraw his guilty plea if the plea was the product of plea bargaining followed by the court's refusal to accept the prosecutor's agreed-upon sentence recommendation.¹⁰³ Conceding that it is still within the court's sound discretion "to determine whether the interests of justice will be served by accepting the prosecutor's recommendation,"¹⁰⁴ the court of appeals ruled that when the sentencing judge decides not to accept the government's sentence recommendation made pursuant to a plea bargain, then "the defendant should be permitted to withdraw his guilty plea, particularly where, as here, there is no Government claim of prejudice or harm."¹⁰⁵

Nevertheless, subsequent to *Santobello*, the Iowa Supreme Court has held that during a guilty plea colloquy the trial court is not required "to question counsel regarding a plea arrangement."¹⁰⁶ This approach appears undesirable in light of the possibilities it engenders for post-conviction attack on the plea if the bargained-for promises are not kept.¹⁰⁷ A more realistic approach has been proposed by the Iowa Criminal Code Review Study Committee, which has recom-

¹⁰¹ *Id.*

¹⁰² *Id.* at 263.

¹⁰³ *United States ex rel. Culbreath v. Rundle*, 466 F.2d 730 (3d Cir. 1972).

¹⁰⁴ *Id.* at 734.

¹⁰⁵ *Id.* at 735; *accord*, *People v. Barajas*, 26 Cal. App. 3d 932, 103 Cal. Rptr. 405 (1972):

Where the prosecution repudiates its part of the plea bargain, the defendant's remedy is to move to withdraw his plea of guilty in the trial court. Unless he makes such a motion in the trial court, he is precluded from obtaining relief on appeal. *Id.* at 937, 103 Cal. Rptr. at 408.

¹⁰⁶ *State v. Christensen*, 201 N.W.2d 457, 459 (Iowa 1972).

¹⁰⁷ The task force for the courts of the National Advisory Commission on Criminal Justice Standards and Goals recently recommended abolition of plea bargaining. NATIONAL ADVISORY COMM. ON CRIMINAL JUSTICE STANDARDS AND GOALS, WORKING PAPER FOR THE NATIONAL CONFERENCE ON CRIMINAL JUSTICE Standard 3.1, at Ct. — 42 to 45 (1973). The Commission also recommended interim measures to structure the transition period. *Id.* Standards 3.2-.8, at Ct.-46 to 64.

mended that "the court shall require the disclosure of the [plea bargaining] agreement in open court at the time the plea is offered."¹⁰⁸ Then, if the court rejects the plea agreement, the *defendant* is afforded the absolute right to withdraw his guilty plea,¹⁰⁹ and no reference to this withdrawn plea, nor to any of the plea discussions, can be made at trial.¹¹⁰

F. Dismissals

Iowa is one of several jurisdictions with statutory authority¹¹¹ for a trial court's dismissal of a pending prosecution on its own motion and without the consent of the prosecutor.¹¹² This power is to be exercised only when the court finds such dismissal to be in the furtherance of justice,¹¹³ however, and under Iowa's particular statute, which also authorizes the court to dismiss cases upon the application of the county attorney,¹¹⁴ no pending prosecution "shall be discontinued or abandoned in any other manner."¹¹⁵

A dismissal under this statute is "a bar to another prosecution for the same offense if it is a misdemeanor"¹¹⁶ but not such a bar "if the offense charged be a felony."¹¹⁷ Nevertheless, "such power and discre-

¹⁰⁸ Iowa Crim. Code Rev. Study Comm., Proposed Iowa Criminal Code, Iowa R. Crim. P. 9(2) (1973).

¹⁰⁹ *Id.* Rule 9(4).

¹¹⁰ *Id.* Rule 9(5). The committee struck from a subcommittee proposal a ban on the court participating in any of the plea discussions. See generally ABA PROJECT ON MINIMUM STANDARDS OF CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 4.1(a) (Approved Draft 1972); Note, *Judicial Participation in Guilty Pleas—A Search for Standards*, 33 U. PITT. L. REV. 151 (1971) (analyzing cases generally disapproving of pre-plea judicial ratification of plea bargaining).

¹¹¹ IOWA CODE § 795.5 (1973).

¹¹² See F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 334 (1970).

¹¹³ *Id.* See also IOWA CODE § 795.5 (1973), requiring that the court state its reasons therefor in the order of dismissal and thus that they be entered of record.

¹¹⁴ IOWA CODE § 795.5 (1973). Iowa's procedure contrasts with that in some jurisdictions in which the prosecutor "may dismiss the proceeding on his own initiative." See MILLER, *supra* note 112, at 14. Nevertheless, the requirement of the trial court's consent for the dismissal appears to be little more than a formality in many jurisdictions. In fact,

[t]he majority of American courts have interpreted the common law to mean that the prosecutor's wish to dismiss the charge prevails regardless of the wishes of the judge." *Id.* at 308 n.50.

¹¹⁵ IOWA CODE § 795.5 (1973).

¹¹⁶ *Id.*; cf. *State v. Reinhard*, 202 Iowa 168, 209 N.W. 419 (1926).

¹¹⁷ *Id.*; see *State v. Gebhart*, 257 Iowa 843, 849, 850, 134 N.W.2d 906, 909 (1965) ("the dismissal of the prior charge did not prevent the state from filing a second, within the limits of the statute on limitations," where the first charge had not

tion may not be exercised to harass a defendant nor to subject him to repeated and unwarranted prosecution."¹¹⁸ This type of dismissal statute has been liberally construed as "confer[ring] on the trial judiciary the same kind of discretion to prevent prosecution even on sufficient evidence [as that] normally held and exercised by prosecutors."¹¹⁹ Nevertheless, the courts cannot exercise this power arbitrarily. For example, the Iowa Supreme Court¹²⁰ has sharply denounced two municipal court judges' policy of dismissing all overloaded vehicle summonses *sua sponte* because they questioned the wisdom of such a law being enforced in their court. The supreme court admonished:

[J]ustice is not "furthered" by wholesale dismissals of cases with no opportunity for each side to be heard and for no better reason than that the presiding judge thinks the offended statutes are unfair in their application.¹²¹

Declaring that arbitrary dismissals are not in "the interest of proper administration of the courts," the supreme court dictated that in subsequent dismissals "a fair opportunity for each side to present its case must be afforded."¹²²

G. *Pretrial Evidentiary Motions*

Although most questions of evidence are matters which are not dealt with until the trial itself, the trial court can be called upon to rule on some evidentiary matters before trial. Two of the major pretrial evidentiary motions are the motion to suppress and the motion in limine,¹²³ both of which are discussed below.

1. *Motion to Suppress*

A trial court's ruling on a motion to suppress evidence is subject to close scrutiny upon appellate review.¹²⁴ This is because constitutional issues are generally the guiding principles of law. The trial court

yet been timely brought to trial). Dismissal of a felony charge after swearing of the jury, however, bars reprosecution, since the defendant has been put in jeopardy. *State v. V.F.W.* Post 1856, 223 Iowa 1146, 1149, 274 N.W. 916, 917 (1937).

¹¹⁸ *State v. Sefcheck*, 261 Iowa 1159, 1168, 157 N.W.2d 128, 133 (1968).

¹¹⁹ *MILLER*, *supra* note 112, at 335.

¹²⁰ *In re Judges of Cedar Rapids Mun. Court*, 256 Iowa 1135, 130 N.W.2d 553 (1964).

¹²¹ *Id.* at 1137, 130 N.W.2d at 555.

¹²² *Id.*, 130 N.W.2d at 555.

¹²³ While both of these ordinarily are pretrial motions, yet they both can be made, under certain circumstances, during trial. See *State v. Evans*, 193 N.W.2d 515, 518 (Iowa 1972) (motion to suppress); *State v. Hollins*, 184 N.W.2d 676 (Iowa 1971) (motion in limine).

¹²⁴ While the appellate review ordinarily is by appeal after final judgment, certiorari can be taken before trial when the disputed matter involves law questions only and the supreme court thus would not be reviewing fact questions. In

nevertheless is granted considerable leeway in deciding disputed fact questions. This means, for example, that the supreme court ordinarily will accept the trial court's finding of fact that consent was given for a warrantless search but will interpose its own view as to whether, as a matter of law, consent could be given under such circumstances. For example, the supreme court said in *State v. Shephard*:¹²⁵

The question of whether consent was in fact given is a factual matter to be determined by the trial court and where the evidence is conflicting this court will accept the finding of the trial court unless it is clearly unreasonable.

The supreme court also stated:

It is for the trier of fact to determine whether the consent was voluntary or coerced. The evidence in this instance must be viewed in the light most favorable to the state. We are to determine if the evidence so considered is sufficient to support the trial court's finding that [defendant] gave his consent freely and voluntarily.¹²⁶

Appellate review thus is not concerned with evaluation of "contradictory factual questions."¹²⁷ The supreme court deems it "essential," however, that it make "an independent examination of the facts, findings, and record in order to determine whether relevant constitutional standards have here been fully respected."¹²⁸

2. Motion in Limine

An order granting a motion in limine, while not specifically authorized under Iowa's rules of criminal procedure, is considered to be within the trial court's inherent power to reasonably control the trial process so as "to insure a fair and just trial to each litigant."¹²⁹ The general purpose of such an order is to "prohibit disclosure of questionable evidence until the court during trial in the jury's absence has been presented an offer and objection."¹³⁰ Thus, it could be used during the voir dire of prospective jurors to prohibit the disclosure of "prejudicial matters which may compel declaring a mistrial."¹³¹ How-

State v. Holliday, the supreme court, noting that the instant petition by the state presented only questions of law, disagreed with the defendant's contention that

the ruling of the trial court [sustaining the defendant's motion to suppress] was within his judicial discretion, and was not in fact an illegal ruling, such as to allow review by means of certiorari. 169 N.W.2d 768, 770 (Iowa 1969).

¹²⁵ 255 Iowa 1218, 1223, 124 N.W.2d 712, 715 (1963), quoting *People v. Speice*, 23 Ill. 2d 40, 45, 177 N.E.2d 233, 235 (1961).

¹²⁶ *Id.* at 1222, 124 N.W.2d at 715.

¹²⁷ *State v. Spier*, 173 N.W.2d 854, 857 (Iowa 1970).

¹²⁸ *Id.*

¹²⁹ *State v. Johnson*, 183 N.W.2d 194, 197 (Iowa 1971).

¹³⁰ *Id.*

¹³¹ *Id.*

ever, it "should not, except upon a clear showing, be used to reject evidence."¹³²

This is one of the few areas of the law in which the trial court need not exercise its discretionary powers. Thus, the court can properly refuse to even rule on the motion and such inaction merely "constitutes a denial of the motion."¹³³ Moreover, "a denial of a motion in limine (or failure to rule on the motion) cannot, in and of itself, constitute reversible error,"¹³⁴ even though the supreme court subsequently determines the ruling was incorrect.¹³⁵ This is because "[t]he objectionable material has not yet reached the jury's ears. It may never reach the jury."¹³⁶ Then if this evidence is offered at trial, the other party must object to its admission and thus "a proper record may be made for review on appeal."¹³⁷ In other words, "[r]elief must be predicated on a record made during trial when the objectionable evidence is sought to be introduced."¹³⁸ Even though the trial court's denial of a motion in limine or its refusal to rule thereon may not be subject to appellate scrutiny, however, the trial court's *granting* of such a motion can result in reversible error even if no record is made at trial.¹³⁹ The court's rationale in one such case was:

[S]ince nothing occurred on the trial changing the admissibility or inadmissibility [of the objectionable evidence], plaintiffs were not required to make a further offer of proof on trial to preserve the claimed error in ruling on the motion in limine.¹⁴⁰

The lesson from all of this appears to be that the trial court should use its motion in limine powers cautiously, and especially so when the resultant order would have the effect of excluding the evidence altogether.

H. Jury Trial

The Iowa criminal code contains several rather explicit provisions governing the right of defendants to be tried by a jury rather than by the court. Thus, once the decision has been made to go to trial, the

¹³² *Id.* See also *State v. Tiernan*, 206 N.W.2d 898 (Iowa 1973).

¹³³ *State v. Garrett*, 183 N.W.2d 652, 655 (Iowa 1971).

¹³⁴ *Id.*

¹³⁵ "The overruling of the motion in limine, even though wrong, is not reversible error." *State v. Hinsey*, 200 N.W.2d 810, 817 (Iowa 1972).

¹³⁶ *State v. Garrett*, 183 N.W.2d 652, 655 (Iowa 1971).

¹³⁷ *State v. Johnson*, 183 N.W.2d 194, 197 (Iowa 1971).

¹³⁸ *State v. Hinsey*, 200 N.W.2d 810, 817 (Iowa 1972).

¹³⁹ *State v. Garrett*, 183 N.W.2d 652, 655 (Iowa 1971).

¹⁴⁰ *Gustafson v. Iowa Power & Light Co.*, 183 N.W.2d 212, 214 (Iowa 1971). Although *Gustafson* was a civil case, the rule therein has been expressly made applicable to criminal cases. See *State v. Hinsey*, 200 N.W.2d 810, 818 (Iowa 1972).

court is faced with the problem of proper application of the trial-by-jury provisions of the Code to the instant defendant. In the case of felony prosecutions, this presents relatively little opportunity for the exercise of discretion since all felony charges which are not disposed of by a guilty plea *must* be tried before a jury¹⁴¹ notwithstanding a defendant's request to be tried before the court only.¹⁴² Although there is no absolute *requirement* of a jury trial on misdemeanor charges, the defendant has a *right* to a jury trial on an indictable misdemeanor.

Prior to 1971, the Code did not have even this flexibility, and all trials on indictable misdemeanors had to be by jury.¹⁴³ This statutory requirement was enforced in *State v. Fagan*¹⁴⁴ in spite of the fact that the defendant, with the prosecutor's concurrence, had attempted to waive what he felt was his right.¹⁴⁵ The supreme court affirmed the trial court's refusal to try the case without a jury, noting that the non-waiver rule is founded "upon the authority of the legislature, under the constitution, to mandate the manner in which prosecutions shall be tried."¹⁴⁶ The issue, in the supreme court's view, was "whether an absolute provision of the law may be set aside, and a power which the statute has withheld be conferred by agreement."¹⁴⁷ Concluding that "it cannot be done,"¹⁴⁸ the supreme court essentially took the position that a trial court cannot derive legislatively proscribed discretionary powers through mutual agreement of the parties to waive the statutory requirement.

In 1971 the legislature removed the requirement that trials for indictable misdemeanors be by jury and instead made the matter of a jury trial a *right* of the defendant.¹⁴⁹ This may be waived in writing by the defendant, but he does not have an absolute right of waiver, since before allowing the defendant to sign the waiver, the presiding judge must determine that he is "fully aware of the fact that he is waiving his right to a jury trial. . . ."¹⁵⁰ Once the judge has made this

¹⁴¹ See IOWA CODE § 777.16 (1973): "Issues of fact must be tried by a jury, unless right to jury trial is waived by defendant pursuant to section 780.23." The latter section is limited to waivers in indictable misdemeanor charges. *Id.* § 780.23.

¹⁴² "Defendant's waiver of trial by jury and request for trial by the court was properly overruled." *State v. Pilcher*, 171 N.W.2d 251, 253 (Iowa 1969).

¹⁴³ See IOWA CODE § 777.16 (1971): "Issues of fact must be tried by a jury."

¹⁴⁴ 190 N.W.2d 800 (Iowa 1971).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 801.

¹⁴⁷ *Id.*, quoting *State v. Douglass*, 96 Iowa 308, 309-10, 65 N.W. 151 (1895).

¹⁴⁸ *Id.*

¹⁴⁹ See IOWA CODE § 780.23 (1973).

¹⁵⁰ *Id.*

determination, the defendant then "shall be allowed to sign the waiver. . . ."¹⁵¹

There is no absolute right to a jury trial on nonindictable misdemeanors, but the statute allows either party to the prosecution to make a written demand therefor.¹⁵² In light of interpretations of the statute before its latest amendment,¹⁵³ it appears that failure of either party to demand a jury trial will operate as a waiver of the right to do so.

One peculiar area of the law in which the courts heretofore have been allowed to proceed without benefit of a jury trial has been that of punishment for contempt.¹⁵⁴ Notwithstanding the fact that this crime is an indictable misdemeanor,¹⁵⁵ the Iowa Supreme Court has pointed out:

The power to proceed summarily, without a formal indictment and without the intervention of a jury, to hear charges of contempt of court, and to assess punishment upon those found guilty, has been an attribute to all courts of record in every stage of the development of our system of procedure.¹⁵⁶

The Iowa Supreme Court recently limited by implication the application of this rule to cases in which the maximum *authorized* punishment does not exceed imprisonment for six months.¹⁵⁷ The court said

¹⁵¹ *Id.*

¹⁵² *Id.* § 762.15 (1973).

¹⁵³ *State v. Baker*, 203 N.W.2d 795, 797 (Iowa 1973):

We . . . elect to point out a jury trial may be waived Code section 762.15 . . . required defendant to demand a jury trial before any evidence was taken. He made no such demand. He thereby waived any right to a jury trial.

¹⁵⁴ IOWA CODE § 665.1 (1973).

¹⁵⁵ See text accompanying notes 11-14 *supra*.

¹⁵⁶ *Newby v. District Court*, 259 Iowa 1330, 1342, 147 N.W.2d 886, 893 (1967), quoting *Jones v. Mould*, 151 Iowa 599, 605, 132 N.W. 45, 48 (1911).

¹⁵⁷ The Iowa Supreme Court noted in *Sarich v. Haverkamp*, 203 N.W.2d 260, 263 (Iowa 1972), that *Duncan v. Louisiana*, 391 U.S. 145, 161 (1968), and *Baldwin v. New York*, 399 U.S. 66, 68 (1970), direct state courts "to look to the penalty authorized for a particular offense in the determining whether it is serious or not" 203 N.W.2d at 268. *Duncan*, applying the sixth amendment right to jury trial to the states, held that "[c]rimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses" 391 U.S. at 159. Moreover, *Bloom v. Illinois*, 391 U.S. 194 (1969) held that the "Constitution guarantees the right to jury trial in state court prosecutions for contempt just as it does for other crimes." *Id.* at 199-200. See also *Cheff v. Schnackenberg*, 384 U.S. 373 (1966):

[W]e rule further that sentences exceeding six months for criminal contempt may not be imposed by federal courts absent a jury trial or waiver thereof. *Id.* at 380 (emphasis added).

The Iowa Supreme Court also took note, 203 N.W.2d at 268, of the recommendation in the ABA STANDARDS FOR TRIAL BY JURY that the possibility of 6-months'

in *Sarich v. Havercamp*¹⁵⁸ (a case involving 23 separate charges of contempt):

We adopt the view the penalty involved, that is, the statutorily authorized maximum penalty shall be the relevant criterion as to 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.¹⁵⁹

In Iowa the maximum authorized penalty specified in section 665.4 for *one act* of contempt is six months' imprisonment.¹⁶⁰ Thus, there is no right to a jury trial when the defendant is charged with only one allegedly contemptuous act. The right attaches upon a multiple-count indictment charging two or more separate acts. However, the defendant in the latter circumstance must still demand a jury trial in a timely manner or he may waive his right thereto.

I. Severance

Because Iowa law permits joint indictments of two or more defendants,¹⁶¹ the trial court may be faced with a demand by a jointly indicted defendant for a separate trial. Except for offenses under the Uniform Controlled Substances Act,¹⁶² the Code gives such a defendant an absolute right to severance of a felony charge if he so requests.¹⁶³ Thus, in a felony case, at least, nothing is left to the court's

imprisonment "should be the upper limit upon the definition of 'petty offenses'" when determining the right to a jury trial. See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY § 1.1(a), Comment, at 20-23 (Approved Draft 1968).

¹⁵⁸ 203 N.W.2d 260 (Iowa 1972).

¹⁵⁹ *Id.* at 268.

¹⁶⁰ IOWA CODE § 665.4 (1973).

¹⁶¹ IOWA CODE § 780.1 (1973).

¹⁶² *Id.* §§ 204.1 *et seq.*

¹⁶³ See *id.* §§ 204.408, 780.1. There is no right to a separate trial for any offense under Iowa's Uniform Controlled Substances Act. Indictments under this act may

join one or more persons as defendants who it is alleged violated the same provisions in the same transaction or series of transactions and which involve common questions of law and fact. *Id.* § 204.408.

However, the Act provides:

The court may grant a severance and separate trial to any accused person jointly charged or indicted if it appears that substantial injustice would result to such accused person unless a separate trial was granted. *Id.* (emphasis added).

The Iowa Criminal Code Review Study Committee proposed no changes in either the general severance statute or in the exception included in the controlled substances provision. See Iowa Criminal Code Rev. Study Comm., Proposed Iowa Criminal Code, Iowa R. Crim. P. 6(4)(b) (1973). See also ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 3.9 (Approved Draft 1972):

discretion. In other cases, however, defendants jointly indicted "may be tried separately or jointly, in the discretion of the court."¹⁶⁴ Because the severance statute expressly leaves the question of severance in nonfelony cases to judicial discretion,¹⁶⁵ the supreme court has turned a deaf ear to appellants' contentions that a trial court has erred in overruling their motions for separate trials.¹⁶⁶

It should also be noted that the right to request severance in nonfelony cases does not rest exclusively in the defendant. On the contrary, the supreme court has interpreted the severance statute as permitting the state as well as the defendant to make an application for a separate trial on a nonfelony charge. This is illustrated in *State v. Marvin*,¹⁶⁷ where, following the joint indictment of A and B, the state's key witness married A. Holding that the trial court had not abused its discretion in granting the state's motion for separate trials, the supreme court pointed out that the new husband "could not be a witness against his wife, and if a separate trial could not have been granted, the State would thus be deprived of its witness."¹⁶⁸

J. Changing Venue

The Iowa Code lodges broad discretion in the trial courts when ruling on applications for change of venue.¹⁶⁹ It provides:

The court, in the exercise of a sound discretion, must, when fully advised, decide the matter of the petition according to the very right of it.¹⁷⁰

Nevertheless, the supreme court has pointed out that this is "a judicial, not a personal discretion, and if improperly exercised it may be re-

The trial judge should order severance of offenses or defendants before trial on his own motion whenever it appears reasonably required to insure the fairness of the trial or its orderly progress, if a severance could be obtained on motion of a defendant or the prosecutor. *Id.*

¹⁶⁴ IOWA CODE § 780.1 (1973).

¹⁶⁵ *Id.* "[T]he statute (Rev. § 4789) is express that the defendants 'may be tried separately or jointly in the discretion of the Court.'" *State v. Gigher*, 23 Iowa 318 (1867). The statute there in question is identical, save for punctuation, with the current version. Compare IOWA CODE § 4789 (Rev. of 1860) with IOWA CODE § 780.1 (1973).

¹⁶⁶ "In this there was no error, for the reason that the offense of which he was charged was not a felony, and it was within the discretion of the district court to refuse a separate trial." *State v. Kirkpatrick*, 74 Iowa 505, 506, 38 N.W. 380, 381 (1888).

¹⁶⁷ 12 Iowa 499 (1861).

¹⁶⁸ *Id.* at 502.

¹⁶⁹ Actually, change of venue is a misnomer since it is the place of trial that is being changed. See IOWA CODE § 778.1 (1973). Venue as an element in proving the offense charged remains in the original county where the crime occurred.

¹⁷⁰ IOWA CODE § 778.9 (1973).

viewed"¹⁷¹ Moreover, the Code prescribes only two grounds for changing venue: prejudice of the judge and excitement and prejudice in the county.¹⁷² The state can petition for a change only in felony cases.¹⁷³

The general rule is that an application proper on its face "makes a prima facie case, which if uncontroverted entitles the applicant to the change."¹⁷⁴ Nevertheless, failure of the other party to resist such application

does not rob the trial court of its discretion to determine, under the record made, the necessity or advisability of a change of place for trial.¹⁷⁵

Indeed, although the statute is worded so as to impose an apparent mandatory duty on the courts, it is not reversible error for the court to fail to rule on an application, where the applicant goes to trial without insisting on a ruling.¹⁷⁶

On appeal or certiorari,¹⁷⁷ the movant "has the burden of showing the trial court abused its sound discretion in overruling the motion for change of venue."¹⁷⁸ In determining when this burden is met, the supreme court makes "an independent evaluation of the circumstances,"¹⁷⁹ including examining any relevant media publicity "with care."¹⁸⁰ In making its own evaluation, the supreme court uses this standard:

If the reasons given by the court for its action are clearly untenable or unreasonable, if its action clearly amounts to a denial of justice, if clearly against justice or conscience, reason, and evidence it has abused its discretion.¹⁸¹

Generally, the trial court's decision to deny a requested change of

¹⁷¹ *State v. Niccum*, 190 N.W.2d 815, 824 (Iowa 1971).

¹⁷² IOWA CODE § 778.2 (1973). The state may only apply for change of venue on the latter ground. *Id.* § 778.4.

¹⁷³ *Id.* § 778.1.

¹⁷⁴ *State v. Hephner*, 161 N.W.2d 714, 716 (Iowa 1968).

¹⁷⁵ *State v. Loney*, 163 N.W.2d 378, 383 (Iowa 1968).

¹⁷⁶ *State v. Hephner*, 161 N.W.2d 714, 717 (Iowa 1968).

¹⁷⁷ A trial court's order denying or granting a change of venue is reviewable either on certiorari, with the proceedings stayed, as in *Harnack v. District Court*, 179 N.W.2d 356, 359 (Iowa 1970), and *Pollard v. District Court*, 200 N.W.2d 519, 520-21 (Iowa 1972); or an appeal as an assignment of error requiring reversal, as in *State v. Meyer*, 181 Iowa 440, 448, 164 N.W. 794, 797 (1917). The supreme court's review is de novo whether the question is raised "on certiorari in advance of trial, or on direct appeal following judgment." *State v. Elmore*, 201 N.W.2d 443, 445 (Iowa 1972), *overruling Harnack v. District Court, supra*, as to this point.

¹⁷⁸ *State v. Albers*, 174 N.W.2d 649, 651 (Iowa 1970).

¹⁷⁹ *State v. Niccum*, 190 N.W.2d 815, 824 (Iowa 1971).

¹⁸⁰ *State v. Loney*, 163 N.W.2d 378, 382 (Iowa 1968).

¹⁸¹ *State v. Niccum*, 190 N.W.2d 815, 824-25 (Iowa 1971), *quoting State ex rel. Fletcher v. District Court*, 213 Iowa 822, 831, 238 N.W. 290, 294 (1931).

venue will be upheld if the supreme court determines that there was an inadequate showing of *actual* excitement or prejudice¹⁸² or that the allegedly prejudicial published material was not "so potentially prejudicial that prejudice must be presumed."¹⁸³ In order to avoid trying the defendant "in the press"¹⁸⁴ as in the celebrated Sam Sheppard case,¹⁸⁵ the general standard to be applied in determining whether publicity surrounding a trial has been sufficiently prejudicial to warrant granting a change of venue is whether it has been factual, non-inflammatory,¹⁸⁶ ordinary reporting of the incidents as they develop,¹⁸⁷ without continued reiteration,¹⁸⁸ and especially not just before trial.¹⁸⁹ Such reports need not be absolutely correct; substantial accord with the facts is sufficient.¹⁹⁰ Moreover, a court can properly refuse to order a changing of venue even when there is publication of potentially prejudicial material if the court determines that no "reasonable likelihood" existed that defendant could not get a fair trial because of this publicity.¹⁹¹

¹⁸² *State v. Davis*, 196 N.W.2d 885, 889 (Iowa 1972).

¹⁸³ *Pollard v. District Court*, 200 N.W.2d 519, 520 (Iowa 1972), *incorporating by reference* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 3.2(c) (Tentative Draft 1968), which reads:

A motion for change of venue or continuance shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. This determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. A showing of actual prejudice shall not be required. *Id.*

¹⁸⁴ "The situation did not approach the continued and inflammatory publicity in Sheppard or in *Estes* The articles were not inflammatory in tone" *State v. Davis*, 196 N.W.2d 885, 889 (Iowa 1972).

¹⁸⁵ *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

¹⁸⁶ *State v. Davis*, 196 N.W.2d 885, 889 (Iowa 1972).

¹⁸⁷ "The publicity here was nothing more than ordinary reporting which always accompanies any event such as this." *State v. Albers*, 174 N.W.2d 649, 652 (Iowa 1970).

¹⁸⁸ "The articles were not inflammatory in tone, and the subject was not pursued in subsequent issues of the papers." *State v. Davis*, 196 N.W.2d 885, 889 (Iowa 1972).

¹⁸⁹ "No adverse publicity from June 2 to the date of the trial [August 21], more than eleven weeks later, is shown." *State v. Loney*, 163 N.W.2d 378, 382 (Iowa 1968). The media accounts "appeared about 8 months before trial." *State v. Albers*, 174 N.W.2d 649, 651 (Iowa 1970).

¹⁹⁰ See *State v. Davis*, 196 N.W.2d 885, 888 (Iowa 1972).

¹⁹¹ *State v. Elmore*, 201 N.W.2d 443 (Iowa 1972). Here,

one small portion of the news article made reference to a parole violation as the reason defendant was not at liberty on bond. The court found that in all other respects the articles appeared to be simply statements

Continuing media publicity of an inflammatory nature, coupled with developments in another case, was the basis for the only Iowa Supreme Court reversal of a *conviction* because of a trial court's denial of defendant's application for change of venue. In *State v. Meyer*,¹⁹² the defendant had been jointly indicted with her son for murder of her son's wife. The newspaper stories, which gave blow-by-blow accounts of developments from the time of the murder until the defendant's trial, were numerous and often inflammatory. The son was tried first and was convicted of second-degree murder. There was broad detailed reporting of the son's trial, with notations that the state would have basically the same case against the mother when she was tried.¹⁹³ Reversing the conviction for failure to change venue, the supreme court admonished:

Though it might be possible to select twelve men who had no feeling or bias against the defendant on entering the jury box, yet the trial was to be had in the same community in which the other jurors found her son guilty, under practically the same showing that the State intended to urge against her.¹⁹⁴

Another case further illustrates that pretrial publicity must be evaluated in the context of related events rather than merely as to accounts focusing on the defendant. *Pollard v. District Court*¹⁹⁵ involved a flood of publicity about a state audit of a city's accounts, with considerable media attention centered upon political bickering between the state auditor and disgruntled city councilmen. Nevertheless, the audit ultimately pointed to the defendant as the only wrongdoer among the city employees.¹⁹⁶ Sustaining defendant's writ of certiorari following the trial court's refusal to change the venue, the supreme court pointed out that it could not "realistically isolate Mrs. Pollard and her publicity from the audit and its publicity."¹⁹⁷ The court continued:

When the spotlight's glare comes to a 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.¹⁹⁸

That the state is also entitled to a change of venue in order to re-

of fact, and conclude after an examination of the newspaper accounts and hearing the testimony offered, that there was an insufficient showing of excitement and prejudice in the community against the defendant so as to prevent his receiving a fair trial. *Id.* at 445.

¹⁹² 181 Iowa 440, 164 N.W. 794 (1917).

¹⁹³ *Id.* at 442-46, 164 N.W. at 795-96.

¹⁹⁴ *Id.* at 448, 164 N.W. at 797.

¹⁹⁵ 200 N.W.2d 519 (Iowa 1972).

¹⁹⁶ *Id.* at 520.

¹⁹⁷ *Id.* at 521.

¹⁹⁸ *Id.*

ceive a fair and impartial trial was made clear in *State ex rel. Fletcher v. District Court*.¹⁹⁹ This was a 1931 case in which the supreme court sustained the state's pretrial writ of certiorari following the trial court's refusal to order change of venue. Informations charging conspiracy and false pretenses arising out of the same series of transactions had been filed against 26 defendants. Following acquittal of the first defendant in a highly publicized trial, the state alleged local excitement and prejudice against the prosecution and moved for change of venue for the remaining cases. Noting the journalistic notoriety accorded the highly attended cases, the supreme court said that the state is entitled to a fair trial beginning with the calling of the jury from a community absent excitement and prejudice against the prosecution.²⁰⁰ Otherwise, the state would be "handicapped from the start"²⁰¹ by unfair obstacles.

The pinnacle of judicial discretion in this context was reached in *Harnack v. District Court*,²⁰² in which the Iowa Supreme Court upheld the trial court's order changing venue to a county *outside* the judicial district in spite of the clear statutory mandate that such a change "must" be made to a county in the *same* district.²⁰³ Noting that the judicial districting scheme in the Iowa Code needed revision,²⁰⁴ the supreme court said that one- or two-county judicial districts rendered literal application of the statute impossible. Rather, it felt constrained to give a liberal construction to the statute so as to give effect to the legislative intent and thus "protect an accused's right to a fair and impartial trial."²⁰⁵ Despite these sentiments, however, the court based its decision on

the rule that when procedural legislation governing change of venue conflicts with basic constitutional rights to speedy trial by an impartial jury, to the extent the legislative enactment deprives accused of due process of law, such legislation must yield.²⁰⁶

On the other hand, the supreme court affirmed another trial court's order *denying* a change of venue to a county outside the judicial district, in *State v. Cunha*.²⁰⁷ Conceding that the court could have exercised its inherent powers to transfer the case outside the district "in order to insure a speedy, impartial trial,"²⁰⁸ the supreme court held

¹⁹⁹ 213 Iowa 822, 829, 238 N.W. 290, 293 (1931).

²⁰⁰ *Id.* at 823, 833-35, 238 N.W. at 291, 295-96.

²⁰¹ *Id.* at 835, 238 N.W. at 296.

²⁰² 179 N.W.2d 356 (Iowa 1970).

²⁰³ *Id.* at 360-61; IOWA CODE § 778.10 (1973).

²⁰⁴ 179 N.W.2d at 361. Cf. IOWA CODE § 602.18 (1973).

²⁰⁵ *Id.*, citing *Turner v. State*, 87 Fla. 155, 162-63, 99 So. 334, 336 (1924).

²⁰⁶ *Id.* at 361.

²⁰⁷ 193 N.W.2d 106, 110 (Iowa 1972).

²⁰⁸ *Id.*

that failure to do so did not constitute reversible error *on the record before it*. The court noted that, other than the defendant's affidavit, the record was devoid of evidence of excitement or prejudice in the adjoining county to which venue was transferred as opposed to the county where the crime was committed.²⁰⁹

Once it has been determined that venue will be changed, the decision as to the new situs lies in the trial court's sound discretion.²¹⁰ As the supreme court pointed out in *Harnack*: "A defendant on motion for change of venue does not have a right to select a particular county for his trial."²¹¹ All the defendant or the state is apparently entitled to is a change of venue to a county in which he or it can get a fair trial, that is, one where the objectionable excitement or prejudice is lacking.

K. Continuance

Several statutory provisions establish guidelines for the courts to follow in granting or denying continuances before trial.²¹² One such provision is inextricably bound up in the defendant's right to a speedy trial.²¹³ Although the Code provides that:

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. . .²¹⁴

the defendant's right to a dismissal is not absolute, for the court has the authority, for "good cause . . . shown" to refuse to dismiss the case²¹⁵ and may, in its discretion, order the case continued for a maximum of 90 days.²¹⁶

Two other provisions relate to possible continuances to allow the defendant to readjust his defense following notification of alterations

²⁰⁹ *Id.* at 109.

²¹⁰ *Harnack v. District Court*, 179 N.W.2d 356, 360 (Iowa 1970).

²¹¹ *Id.*

²¹² Among these are the relevant rules of civil procedure. The provisions of the Code of civil procedure relative to the continuances of the trial of civil causes shall apply to the continuance of criminal actions IOWA CODE § 780.2 (1973).

²¹³ For a more detailed discussion of the right to "speedy justice" and the impact of the sixth amendment on Iowa criminal law see *State v. Gorham*, no. 59/55433 (April 25, 1973) and *State v. Morningstar*, 207 N.W.2d 772 (Iowa 1973); Dunahoo & Sullins, *Speedy Justice*, 22 DRAKE L. REV. 266 (1973).

²¹⁴ IOWA CODE § 795.2 (1973). A somewhat similar provision exists as to failure to indict in a speedy manner. *Id.* § 795.2.

²¹⁵ *Id.* § 795.2.

²¹⁶ *Id.* § 795.3. See also ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 1.4 (Approved Draft 1972): "The trial judge has the obligation to avoid delays, continuances and extended recesses, except for good cause."

in the state's case. The right to a continuance because of an amendment of the charge is qualified, however, by the statutory mandate that: "[N]o continuance . . . shall be granted because of such amendment unless it is made to appear that defendant should have additional time to prepare for trial because of such amendment."²¹⁷ On the other hand, the defendant appears to have an absolute right to a continuance, upon request, when the state files additional minutes of testimony and the defendant has not been given timely notice of this proposed additional testimony.²¹⁸ By the same token, the state is entitled to a continuance of up to 4 days when the defendant files notice of an alibi or insanity defense less than 4 days before the case is set for trial.²¹⁹

Another ground for continuance relates to a specific disclosure duty of the state. If any report of the state criminalistics laboratory is not given to the defendant at least 4 days before trial, "such fact shall be grounds for a continuance."²²⁰ This rule applies "whether or not such findings are to be used in evidence against him."²²¹

The defendant is entitled under the Code to at least 3 days in which to prepare for trial after entry of his plea.²²² Beyond this 3-day minimal period, however, the question of either party obtaining any additional time after the scheduled trial date rests in the sound discretion of the trial court.²²³

The trial court's discretion in granting or denying continuances is "very broad,"²²⁴ and this decision "rests largely in the sound discretion of the trial court."²²⁵ The breadth of this discretion is apparent from the statement, in *State v. Elliston*,²²⁶ that the trial court's ruling on a motion for continuance "will not be interfered with on appeal unless it

²¹⁷ IOWA CODE § 773.47 (1973).

²¹⁸ See *Id.* § 780.10-.12. For a discussion of whether, in the trial court's discretion, addition testimony can be given at trial by state's witnesses whose names were not endorsed on the indictment and for whom the four-day notice before trial requirement was not given see text accompanying notes 392-404 *infra*.

²¹⁹ IOWA CODE § 777.18 (1973).

²²⁰ *Id.* § 749A.4.

²²¹ *Id.*

²²² *Id.* § 780.3.

²²³ This, of course, is subject generally to constitutional and statutory guarantees of speedy indictment and speedy trial. For an example of an abuse of discretion in requiring a defendant to go to trial within 14 days of her indictment, without adequate opportunity to locate known but unavailable witnesses for her defense, see *People v. Bain*, 4 Ill. App. 3d 442, 443-44, 280 N.E.2d 776, 777 (1972).

²²⁴ *State v. McNeal*, 261 Iowa 1387, 1393, 158 N.W.2d 129, 133 (1968).

²²⁵ *Id.* at 1392, 158 N.W.2d at 133; accord, H. UNDERHILL, TREATISE ON THE LAW OF CRIMINAL EVIDENCE § 456, at 433-34 (4th ed. 1935) (the granting or denying of a continuance is a matter of judicial discretion, with relief on review only if "there has been a palpable abuse of that discretion to his disadvantage").

²²⁶ 159 N.W.2d 503 (Iowa 1968).

clearly appear that the trial court has abused his discretion, *and an injustice has resulted therefrom*."²²⁷ In *Elliston*, the trial date was set for 9 calendar days after the defendant's plea, but the defendant did not employ counsel until the day before trial. Immediately before trial was to commence, the defendant moved for a continuance.²²⁸ In upholding the trial court's refusal to grant the continuance, the supreme court implied that orderly administration of the court's business is a factor to be considered:

Here trial had been set for more than a week, at least 15 night working police officers were present to testify and other defendants involving the same incident were present and ready for trial.²²⁹

Another consideration noted by the court was that the defendant had not acted in a timely manner, since the defense counsel could have made the motion for a continuance on the day he was employed instead of waiting until the day of trial.

The supreme court has also countenanced the trial court's denial of a continuance where the defendant has failed to comply with the statutory requisites therefor. In *State v. McNeal*,²³⁰ the defendant had been granted a continuance on his assertion that his three alibi witnesses were unavailable.²³¹ Upon granting a second continuance, the trial court asked for "supporting medical testimony, affidavits or documents,"²³² as required by the Iowa Rules of Civil Procedure,²³³ to substantiate the defendant's claim that his key witness was still too ill to appear in court to testify in his behalf. A requested third continuance was denied "because nothing in support thereof had been produced."²³⁴

²²⁷ *Id.* at 509, quoting *State v. Maupin*, 196 Iowa 904, 908, 192 N.W. 828, 830 (1923) (emphasis added). Standards for determining when a defendant has suffered an injustice are suggested in H. UNDERHILL, *supra* note 225, § 456, at 935-36:

A refusal to grant a continuance, which results in [1] depriving the accused of his right to a fair and impartial jury trial, or [2] his right to procure and compel the attendance of witnesses, or [3] the opportunity to be represented by counsel, or [4] to have a reasonably full opportunity to consult with counsel, or [5] to have a reasonable time to prepare for his defense, may constitute reversible error. *Id.*

²²⁸ Whether the time allowed counsel for a defendant for preparation for trial is sufficient will depend upon the nature of the charge, the issues presented, counsel's familiarity with the applicable law and the pertinent facts, and the availability of material witnesses. *Stamps v. United States*, 387 F.2d 993, 995 (8th Cir. 1967), quoting *Ray v. United States*, 197 F.2d 268, 271 (8th Cir. 1952).

²²⁹ 159 N.W.2d at 509.

²³⁰ 261 Iowa 1387, 158 N.W.2d 129 (1968).

²³¹ *Id.* at 1389, 158 N.W.2d at 130.

²³² *Id.* at 1391, 158 N.W.2d at 132.

²³³ IOWA R. CIV. P. 183(b).

²³⁴ 261 Iowa at 1392, 158 N.W.2d at 132.

Affirming, the supreme court noted that the record "fails to show compliance with the rules for a continuance" and further that "such discretion as to continuance on the part of the trial court is very broad."²³⁵

On the other hand, the supreme court in *State v. Conley*²³⁶ upheld the trial court's ordering of a continuance requested by the state on the day trial was set to commence.²³⁷ In support of its application, the state filed an affidavit alleging that its chief witness, being out of state, had not appeared, thus rendering the state unable to proceed to trial. This was considered a valid reason for granting the continuance. Moreover, the application was not rendered ineffective because the state failed to follow the statutory requirement therein that the substance of the expected testimony of the absent witness be set out in the affidavit.²³⁸ Requiring this of the state, which must attach the proposed testimony of its witnesses to the information,²³⁹ "would have necessitated a repetitious account of her testimony with respect to which the defendant had already been apprised."²⁴⁰ In the final analysis, the supreme court could find "no prejudice to the defendant in the court's order sustaining the State's motion for continuance."²⁴¹

Conversely, the supreme court has held that the state also has the right to have its interests protected from undue prejudice. In an early case,²⁴² the defendant had requested immediate trial following entry of his plea. The trial court overruled the state's motion for a continuance until the next day, which motion was supported by an affidavit, stating that the state was unable to have its key witness ready to testify, and accordingly dismissed the case when the state was unable to proceed.²⁴³ Reversing the judgment, the supreme court noted that "[a] higher degree of diligence could scarcely have been exercised" by the state in preparing its case and securing attendance of its witnesses.²⁴⁴ Accordingly, since "the State, as well as the defendant, was entitled to a reasonable opportunity to procure its witnesses and be prepared for trial,"²⁴⁵ the denial of the continuance was an abuse of discretion and the supreme court had no choice but to overrule it.²⁴⁶

²³⁵ *Id.* at 1393, 158 N.W.2d at 133.

²³⁶ 176 N.W.2d 213 (Iowa 1970).

²³⁷ *Id.* at 214-15.

²³⁸ See IOWA R. CIV. P. 183(b).

²³⁹ IOWA CODE § 769.4 (1973).

²⁴⁰ 176 N.W.2d at 215.

²⁴¹ *Id.*

²⁴² *State v. Painter*, 40 Iowa 298 (1875).

²⁴³ *Id.* at 298-300.

²⁴⁴ *Id.* at 300.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

L. Amendment of Charge

Unlike the original charging process, in which the court plays only a minimal role,²⁴⁷ the process of amending the formal charge, whether an indictment or information,²⁴⁸ requires a court order. Because the statutory authority for ordering an amendment is stated in permissive rather than mandatory terms,²⁴⁹ this decision lies in the sound discretion of the trial court.²⁵⁰ There are statutory guidelines as to the general classifications of permissible and nonpermissible amendments, however. Amendments "may" be ordered "to correct errors or omissions in matters of form or substance,"²⁵¹ thus leaving it to the court's discretion to refuse to order an authorized amendment. On the other hand, an amendment "shall not" be ordered when it will have "the effect of charging the accused with an offense which is different than the offense which was intended to be charged in the indictment [or information]"²⁵²

Although an amendment may have been permissible at the time it was ordered, the fact that it was granted opens the door to subsequent developments which may result in reversible error. For example, an amendment may have been orderly and timely when allowed, but error may result if the court fails to grant a continuance where "it is made to appear that defendant should have additional time to prepare for trial because of such amendment."²⁵³ Moreover, as a condition precedent to the granting of an otherwise permissible amendment, the defendant or his attorney "shall be served [with a copy thereof] . . . and an opportunity given the defendant to resist the same,"²⁵⁴ and it may be reversible error to subsequently refuse to strike the amendment if service is not perfected.²⁵⁵

III. CONDUCT OF THE TRIAL

The next step in the trial process, indeed the focus of almost every

²⁴⁷ See *Contemporary Studies Project: Perspectives on the Administration of Criminal Justice in Iowa*, 57 IOWA L. REV. 598, 605-09 (1972).

²⁴⁸ The same amendment rule applies to both indictments and informations. IOWA CODE § 769.12 (1973).

²⁴⁹ "The court may . . . order the indictment [information] so amended" *Id.* § 773.43.

²⁵⁰ *State v. Crutcher*, 174 N.W.2d 449, 452 (Iowa 1970) (amendment during trial of case).

²⁵¹ IOWA CODE § 773.43 (1973); see *State v. Miller*, 259 Iowa 188, 190, 142 N.W.2d 394, 396 (1966) (typographical error can be corrected by amendment).

²⁵² IOWA CODE § 773.46.

²⁵³ *Id.* § 773.47.

²⁵⁴ *Id.* § 773.44.

²⁵⁵ See *State v. Hyduck*, 210 Iowa 736, 736-37, 231 N.W. 451 (1930) (reversible error to refuse to strike an amendment when application to amend is made before trial and the defendant is neither served with a copy thereof nor given an opportunity to resist it).

facet of the pretrial maneuverings discussed above, is the trial itself. However, it is beyond the scope of this Article to discuss every opportunity the judge has to exercise his discretion during trial. One area, especially, that of making evidentiary rulings and controlling the examination of witnesses, has commanded innumerable multi-volume treatises, and will not be discussed herein.²⁵⁶ Rather, this section will be more selective than comprehensive, and will focus on selected problem areas that are illustrative of difficulties faced by the litigants and the court itself in setting the parameters within which the trial court may exercise its discretion.

A. Order in the Courtroom

Perhaps the logical place to begin the discussion of the trial process is with an examination of the trial court's inherent power to maintain decorum in the courtroom, a power essential to ensure that the trial proceeds in an orderly manner. Generally, courts have an almost unlimited power to protect their orderly procedures. As succinctly stated by the United States Supreme Court:

It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated.²⁵⁷

As a general rule, therefore, a trial judge's courtroom rules, and his reasonable actions in defense thereof, appear to be beyond reproach when they "bear a reasonable relationship to contemporary conditions and ought to be imposed only after there is a reasonable foundation for the need of any rule."²⁵⁸

The ABA *Standards on the Function of the Trial Judge* state this general principle as a positive duty of the court: "The trial judge has the obligation to use his judicial power to prevent distractions from and disruptions of the trial."²⁵⁹ Nevertheless, these *Standards* exhort tempered actions:

If the judge determines to impose sanctions for misconduct affecting the trial, he should ordinarily impose the least severe sanction appropriate to correct the abuse and to deter repetition. In weighing the severity of a possible sanction for disruptive courtroom conduct to be applied during the trial, the judge should consider the risk of further disruption, delay

²⁵⁶ For a more detailed and exhaustive discussion of the rules of evidence in a criminal trial see, e.g., B. GEORGE, *CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES* 119-32, 321-32 (1973); H. ROTHBLATT, *HANDBOOK OF EVIDENCE FOR CRIMINAL TRIALS* (1965); 3 F. WHARTON, *WHARTON'S CRIMINAL EVIDENCE* §§ 835-900 (R. Anderson ed. 1955).

²⁵⁷ *Illinois v. Allen*, 397 U.S. 337, 343 (1970).

²⁵⁸ *Peck v. Stone*, 34 App. Div. 506, 507, 304 N.Y.S.2d 881, 884 (1969).

²⁵⁹ ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE* § 6.3 (Approved Draft 1972).

or prejudice that might result from the character of the sanction or the time of its imposition.²⁶⁰

The courts' inherent powers to preserve order in the courtroom may, under certain limited circumstances, even transcend constitutional rights, such as the defendant's right to a public trial.²⁶¹ However, this rather sweeping authority must only be exercised in the face of individual circumstances necessitating strong corrective measures. It is clearly improper for the court to act arbitrarily in the guise of preserving order in the courtroom. *o*

The balancing of interests between the court's need to act to protect the orderly process of the trial, on the one hand, and the right of the defendant to a public trial, on the other, was exhaustively discussed by the Iowa Supreme Court in *State v. Lawrence*,²⁶² a case in which the public was excluded from the courtroom during the reading of the instructions to the jury. The starting point in the court's analysis of whether the public can properly be excluded from a trial was its recognition that the constitutional right to a public trial "has never existed as a rigid, inflexible straight jacket upon the courts."²⁶³ Instead, this right has been generally viewed as being

subject to the inherent power of the court to limit attendance as the conditions and circumstances reasonably require for the preservation of order and decorum in the courtroom, and to reasonably protect the rights of parties and witnesses.²⁶⁴

Accordingly, a judge may, in his discretion, "exclude anyone from the courtroom who does not conduct himself properly."²⁶⁵ Conversely, however, spectators who do conduct themselves properly may not constitutionally be "excluded from any major portion of a trial."²⁶⁶ To do so constitutes "arbitrary exclusion" which fails to meet the constitutional guarantee of a public trial.²⁶⁷

Applying these principles to the facts in *Lawrence*, the supreme court reversed the conviction because it could find no necessity for the exclusion of the public in order to preserve order and decorum in the courtroom.²⁶⁸ Indeed, it appeared in *Lawrence* that the public was excluded as a result of a mistake or misunderstanding on the part of the bailiff, who evidently overreacted to the judge's directive during a recess to not permit ingress or egress of spectators *during* the court's

²⁶⁰ *Id.*

²⁶¹ See 19 DRAKE L. REV. 204, 205 (1969).

²⁶² 167 N.W.2d 912 (Iowa 1969).

²⁶³ *Id.* at 914.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 915.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 916.

subsequent reading of the instructions.²⁶⁹ While the judge's directive was a proper exercise of his discretion, the bailiff's total exclusion of the public was arbitrary. Because the state failed to overcome the implied prejudice resulting therefrom, the supreme court reluctantly reversed the conviction.²⁷⁰

The most sensational aspect of the courtroom decorum issue involves the defendant who consistently disrupts the trial proceedings. While the Iowa Supreme Court has not yet faced this problem, the United States Supreme Court has formulated some guidelines for the exercise of the trial court's discretion.

In *Illinois v. Allen*,²⁷¹ the Court said:

[t]here are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; [or] (3) take him out of the courtroom until he promises to conduct himself properly.²⁷²

The Court left it to the trial court to determine which of the above alternatives, if not others, is followed in a particular situation.²⁷³

Consistent with the *Allen* guidelines, the *ABA Standards Relating to the Function of the Trial Judge* provide:

A defendant may be removed from the courtroom during his trial when his conduct is so disruptive that the trial cannot proceed in an orderly manner. Removal is preferable to gagging or shackling the disruptive defendant. If removed, the defendant should be required to be present in the court building while the trial is in progress, be given the opportunity of learning of the trial proceedings through his counsel at reasonable intervals, and be given a continuing opportunity to return to the courtroom during the trial upon his assurance of good behavior. The removed defendant should be summoned to the courtroom at appropriate intervals, with the offer to permit him to remain repeated in open court each time.²⁷⁴

Similarly, it is suggested in the *ABA Standards Relating to Trial by Jury* that physical restraint of the defendant (or witnesses) should occur only when "reasonably necessary to maintain order" and that the jurors accordingly should be instructed that "such restraint is not to be considered in assessing the proof and determining guilt."²⁷⁵

Despite the flexibility that *Allen* accords the trial court, it is advisable for the court to exercise its powers with care, for at least one state appellate court has reversed a conviction because a trial court

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 919.

²⁷¹ 397 U.S. 337 (1970).

²⁷² *Id.* at 343-44.

²⁷³ See *id.* at 347.

²⁷⁴ ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 6.8 (Approved Draft 1972).

²⁷⁵ ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY § 4.1 (Approved Draft 1968).

took premature remedial actions under the *Allen* standards.²⁷⁶ The trial court, upon observing a scuffle in the courtroom between the defendant and four deputies, ordered shackling and gagging of the defendant for the trial, although the scuffle had occurred prior to convening of court.²⁷⁷ During the trial, however, there was no disruptive or unruly behavior, and accordingly both the shackles and gag were removed, but only after a substantial portion of the trial had been completed.²⁷⁸ Reversing the conviction, the appellate court held that the *Allen* standards did not authorize the trial judge to act without first warning the defendant, at trial, to abstain from obstreperous behavior and then only if the defendant subsequently flouts this order.²⁷⁹ In other words, mere "potentially disruptive" conduct is not enough to justify shackling and gagging a defendant.²⁸⁰

B. The Jury Selection Process

In addition to the trial court's general obligation to maintain decorum, it has innumerable, more highly structured responsibilities that are no less crucial to the conduct of the trial. One such duty is that of overseeing the jury selection process, an area in which its discretion is almost as unfettered as it is in maintaining order in the court.

1. Drawing the Jury

In Iowa, jury selection is done on a random basis with the clerk of court called on to "prepare and deposit in a box separate ballots containing the names of all persons returned or added as jurors."²⁸¹ From this box, the clerk is to select 16 names, but the court may, in its discretion, decide to wait for the return of the entire jury panel before directing the drawing of the prospective jurors for another case.²⁸² Thus, while "litigants ordinarily are entitled to have the names in the drum of all the then-serving and available jurors," the supreme court nevertheless has held that a litigant "is only entitled to a fair and im-

²⁷⁶ *Jones v. State*, 11 Md. App. 686, 693-94, 276 A.2d 666, 670 (1971).

²⁷⁷ *Id.* at 688, 276 A.2d at 667.

²⁷⁸ *Id.* at 688-89, 276 A.2d at 668.

²⁷⁹ *Id.* at 694, 276 A.2d at 670.

²⁸⁰ Various aspects relating to another alternative, citation for contempt, are discussed elsewhere in the Article. See text accompanying notes 149-60 *supra*. See generally ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 7.1-5 (Approved Draft 1972).

²⁸¹ IOWA R. CRV. P. 187(a); see IOWA CODE § 779.1 (1973).

²⁸² IOWA R. CRV. P. 187. The rule provides in part:

Before drawing [of the trial jury] begins, either party may require that the names of all jurors be called, and have an attachment for those absent who are not engaged in other trials; but the court may wait for its return or not, in its discretion.

partial jury" rather than to "any particular jurors."²⁸³ Consequently, jury selection can proceed although some names drawn for a previous jury "inadvertently" are not replaced in the drum "and no harm is shown to have occurred."²⁸⁴

2. Scope of the Voir Dire Examination

Once the jury panel has been drawn, the litigants have the right,²⁸⁵ as interpreted by the supreme court, "to examine prospective jurors on voir dire in order to enable them to select a jury composed of persons qualified and competent to judge and determine the facts in issue without bias, prejudice or partiality."²⁸⁶ The scope of counsels' examination "cannot be governed by fixed rules, but is subject to the sound discretion of the trial court," the exercise of which will not be interfered with on appeal "unless abuse is shown."²⁸⁷ The trial court accordingly can grant wide latitude to counsel in their voir dire examination provided, of course, that counsel do not use the examination as a convenient forum for placing inadmissible or prejudicial evidence before the jury.²⁸⁸ Within these strictures, counsel essentially are free to discuss practically anything relevant and can even attempt to curry favor with the jurors.²⁸⁹

²⁸³ *State v. Jones*, 193 N.W.2d 509, 513 (Iowa 1972).

²⁸⁴ *Id.*

²⁸⁵ *Elkin v. Johnson*, 260 Iowa 46, 49, 148 N.W.2d 442, 444 (1967). But see *People v. Crowe*, 106 Cal. Rptr. 359, 506 P.2d 193 (1973) (voir dire can be confined, in the court's discretion, to examination by the judge with requested written questions submitted by counsel). *Id.* at 375-78, 506 P.2d at 199-202. See also ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 5.1 (Approved Draft 1972):

The judge should initiate the voir dire examination by identifying the parties and their respective counsel and by referring to the charge against the accused, and by putting to the prospective jurors questions touching their qualifications, including impartiality, to serve as jurors in the case. The judge should also permit such additional questions by the defendant or his attorney and the prosecutor as he deems reasonable and proper.

²⁸⁶ *Elkin v. Johnson*, 260 Iowa 46, 49, 148 N.W.2d 442, 444 (1967), citing 31 AM. JUR. JURY § 136 (1967), 50 C.J.S. JURIES § 2756 (1947). But see *State v. Cunha*, 193 N.W.2d 106, 110-11 (Iowa 1972) (no error in trial court's granting of state's pretrial motion in limine to prevent defense attorney from asking questions on voir dire about prospective jurors' knowledge of jury verdict in defendant's accomplice's case).

²⁸⁷ *Elkin v. Johnson*, 260 Iowa 46, 50, 148 N.W.2d 442, 444 (1967).

²⁸⁸ For example, the prosecutor may not imply that the defendant plans to exercise his constitutional right not to testify. See *State v. LaMar*, 260 Iowa 957, 965-66, 151 N.W.2d 496, 501 (1967) (record not preserved here, however).

²⁸⁹ See *Anderson v. City of Council Bluffs*, 195 N.W.2d 373, 378 (Iowa 1972) (not an abuse of discretion to permit plaintiff's counsel in civil case to ask prospective jurors, "is there anybody on the panel who is going to have a hardship of some kind, a personal hardship, if they are selected to serve as a juror in this case?").

Traditionally, one aspect of this flexibility has been a broad range of judicial discretion in determining the scope of voir dire as to the possible racial prejudices of prospective jurors. This discretion was sharply curtailed by the United States Supreme Court recently in *Ham v. South Carolina*.²⁹⁰ Claiming that the possession-of-marijuana offense with which he was charged was nothing but a ruse to enable the police "to get him," the defendant, a black civil rights worker, requested the judge to utilize voir dire to ask prospective jurors two specific questions relating to racial prejudice against Negroes.²⁹¹ Declining to do so, the trial court instead asked three *general* questions about bias, prejudice, or partiality as prescribed in the state statute.²⁹² In reversing, the Supreme Court held that "the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice."²⁹³

Nevertheless, the high court agreed that the trial judge

was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner.²⁹⁴

In other words, despite the fact that due process demanded that certain questions be asked, the trial court was afforded a "broad discretion"²⁹⁵ as to the form and number of those questions. In addition, the Court agreed that the trial judge's refusal on voir dire "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."²⁹⁶ The Supreme Court reasoned:

²⁹⁰ 93 S. Ct. 848 (1973).

²⁹¹ These were:

1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race? 2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term "black"? *Id.* at 849 n.2.

²⁹² These included:

1. Have you formed or expressed any opinion as to the guilt or innocence 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?
Id. at 850 n.3.

²⁹³ *Id.* at 850. The Court noted that its holding in *Aldridge v. United States*, 283 U.S. 308 (1931) which reversed a negro's conviction for the murder of a white policeman because of the trial court's refusal to interrogate prospective jurors about any racial prejudice, "was not expressly grounded upon any constitutional requirement." 93 S. Ct. at 849-50. See also *United States v. Rivers*, 468 F.2d 1355, 1357 (4th Cir. 1972) (harmless error rule applied to violation of *Aldridge v. United States*).

²⁹⁴ 93 S. Ct. at 850.

²⁹⁵ *Id.* at 851, citing *Aldridge v. United States*, 283 U.S. 308, 310 (1931).

²⁹⁶ *Id.*

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.²⁹⁷

Another aspect of the trial courts' broad voir dire discretion is evidenced by their relatively unrestricted right to rule on motions for segregated, individualized voir dire of the jury panel. In this regard, no Iowa case has been found in which it has been successfully alleged that a court has erred in *refusing* to order such voir dire nor has the supreme court condemned the *granting* of such an order.²⁹⁸ In *State v. Elmore*,²⁹⁹ for example, the defendant claimed that pretrial excitement and prejudice against him were engendered by a "constant barrage"³⁰⁰ of stories in a local newspaper and over a local radio station. Declining to order segregated voir dire, the trial court also restricted counsel's freedom to ask what the prospective jurors had read or heard. Instead, each prospective juror was asked, in the others' presence, if he had read or heard any news accounts of the incident in issue, and, if so, if he had formed an opinion as to the defendant's guilt or innocence. The trial court based this approach on the theory that "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."³⁰¹ Affirming, the supreme court noted that "[a] wide discretion must be left to the judgment of the trial court"³⁰² in dealing with these situations. Conceding "[t]here is merit in the American Bar Standards . . . that under some circumstances each juror should be examined out of the presence of other jurors,"³⁰³ the court nevertheless reiterated that "this has never been the practice in Iowa."³⁰⁴

By way of contrast, the Pennsylvania Supreme Court has reversed a defendant's conviction because of the court's refusal to order separate voir dire for each juror outside the hearing of other jurors in a case involving a barrage of inflammatory pretrial publicity with strong

²⁹⁷ *Id.* Similarly, the Massachusetts Supreme Judicial Court has refused to accord an absolute right for a defendant in an abortion case to have prospective jurors questioned about any religious prejudices which could affect their decision—even though the Roman Catholic Church takes a strong stand against abortion. *Commonwealth v. Kudish*, 289 N.E.2d 856, 858-59 (Mass. 1972).

²⁹⁸ See *State v. Cunha*, 193 N.W.2d 106, 112 (Iowa 1972).

²⁹⁹ 201 N.W.2d 443 (Iowa 1972).

³⁰⁰ *Id.* at 444.

³⁰¹ *Id.* at 446.

³⁰² *Id.*, quoting *Holub v. Fitzgerald*, 214 Iowa 857, 859, 243 N.W. 575, 576 (1932).

³⁰³ *State v. Elmore*, 201 N.W.2d 443, 446 (Iowa 1972), quoting *State v. Albers*, 174 N.W.2d 649, 652 (Iowa 1970).

³⁰⁴ *Id.*

racial overtones.³⁰⁵ A few weeks before the trial, the defendant was arrested for attacking a police officer during a scuffle at a city council meeting.³⁰⁶ The sensationalist reporting of that incident included the banner headline: "BLACK MOB BEATS TOP COP KELLY,"³⁰⁷ and defendant, a black militant, was singled out in this and other accounts of the incident. Determining that the court's refusal to order segregated voir dire was an abuse of its express authority to do so,³⁰⁸ the supreme court reversed, saying:

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.³⁰⁹

In addition, this approach would facilitate the development of possible challenges for cause based upon the specific information that each juror retained. This approach appears more plausible than that taken in *Elmore*, which, in effect, allows each juror to determine if he is prejudiced. The *Elmore* approach precludes the possibility of a defendant being able to challenge a juror for what he had retained, since the juror is not required to answer *what* he had heard or read.

3. Challenges for Cause

Once the jurors have been examined, trial courts have "a large, but not unlimited, discretion"³¹⁰ under the Iowa Code³¹¹ in ruling upon challenges of prospective jurors for cause. Thus, for example, a court's denial of a defendant's challenge for cause has been affirmed where the challenged juror admitted knowing both parties involved and having heard the case discussed, but nevertheless pledged to give each party a "fair deal."³¹² Likewise, it is within the trial court's discretion to refuse to disqualify a prospective juror who admits that he might have formed some opinions about the case, but indicates he will listen to all of the evidence before actually making up his mind.³¹³

In marked contrast to the limits placed on the court's power to deny a motion to strike for cause, its power to permit striking for cause appears to be essentially unlimited. For example, the defendant in *State v. Grove*³¹⁴ claimed that the reason he waited until filing a motion for

³⁰⁵ *Commonwealth v. Johnson*, 440 Pa. 342, 351-52, 269 A.2d 752, 757 (1970).

³⁰⁶ *Id.* at 344, 269 A.2d at 753.

³⁰⁷ *Id.*, 269 A.2d at 753.

³⁰⁸ Pursuant to PA. R. CRIM. P. 1106(b), voir dire "may be conducted beyond the hearing and presence of other jurors." 440 Pa. at 352, 269 A.2d at 757 (emphasis added).

³⁰⁹ 440 Pa. at 352-53, 269 A.2d at 757.

³¹⁰ *State v. Beckwith*, 242 Iowa 228, 232, 46 N.W.2d 20, 23 (1951).

³¹¹ See IOWA CODE § 779.5 (1973).

³¹² *State v. Sommer*, 249 Iowa 160, 175-76, 86 N.W.2d 115, 124-25 (1957).

³¹³ *State v. McClain*, 256 Iowa 175, 182, 125 N.W.2d 764, 768 (1963).

³¹⁴ 171 N.W.2d 519 (Iowa 1969).

a new trial to challenge jurors for cause was that any timely challenge would have been unavailing since his particular objection, that five of the jurors had served on the jury on defendant's other charge, would not come within any of the statutory grounds for dismissal for cause.³¹⁵ Rejecting this contention, the supreme court said:

We do not take such a restricted view of that section. It would be strange indeed if the trial court were powerless to prevent before trial a known injustice which could later be the basis for granting a new trial.³¹⁶

Accordingly, trial courts "should use the utmost caution in overruling challenges for cause in criminal cases where there appears to be a fair question as to their soundness."³¹⁷ In this regard, the supreme court

see[s] no occasion in the ordinary administration of the criminal law in this state for the close rulings on the qualifications of jurors Although a ruling may be technically right, if it must be so doubtful as to raise a fair question as to its correctness, it is far better to give the accused the benefit of the doubt³¹⁸

4. Peremptory Challenges

There is also considerable discretion in the way the court permits the parties to make their peremptory challenges.³¹⁹ As a guiding principle, the right to exercise any unused peremptory challenges continues until the jury is sworn. In *State v. Brown*,³²⁰ the supreme court opined:

We think the court might very well permit a party to exercise his right at any time before the jury is actually sworn, provided such party is acting in good faith, and not with intent to gain advantage, or to delay the trial of the cause.³²¹

Because there was no rule of court, statute, or decision supporting the defendant's contention that consecutive waivers of peremptory challenges by both parties amounted to acceptance of the jurors already in the box, the supreme court in *Brown* held that the trial court was free to exercise its discretion in deciding to permit the state to subsequently exercise a peremptory challenge rather than having to use one of its strikes.³²² Because the trial court, from its vantage point, "thought

³¹⁵ *Id.* at 519-20.

³¹⁶ *Id.* at 520. The supreme court continued: "Actually the trial court has considerable discretion in acting on challenges to prospective jurors. We believe it is easily broad enough to have justified the excuse of these jurors upon proper challenge." *Id.*

³¹⁷ *State v. Beckwith*, 242 Iowa 228, 238, 46 N.W.2d 20, 26 (1951).

³¹⁸ *Id.* at 238-39, 46 N.W.2d at 26, quoting *State v. Teale*, 154 Iowa 677, 682, 135 N.W. 408, 410 (1912).

³¹⁹ See IOWA CODE § 779.10 (1973).

³²⁰ 253 Iowa 658, 113 N.W.2d 286 (1962).

³²¹ *Id.* at 665, 113 N.W.2d at 291.

³²² *Id.* at 665-66, 113 N.W.2d at 291; see IOWA CODE § 779.11 (1973).

the prosecutor did not act in bad faith nor for the purpose of delaying the trial,³²³ the supreme court refused to intervene. Accordingly, absent any bad faith, it should be an abuse of discretion for a trial court to refuse to allow the taking of peremptory challenges after consecutive waivers by the opposing parties.³²⁴

5. *Excusing a Juror*

Once a juror has been accepted by both parties he can still be excused from serving if the court so chooses. The supreme court has said that the statutory exemptions from jury service "are not exclusive"³²⁵ and accordingly, the trial court can even discharge a juror who offers strictly personal reasons to being sworn onto the panel.³²⁶ The exercise of this discretionary power "will not be interfered with unless it is clearly shown to have been abused to the actual prejudice of the complaining party."³²⁷ Indeed, "it will be presumed, in the absence of evidence to the contrary, that the action of the court was based upon sufficient grounds."³²⁸

6. *Impanelling Alternate Jurors*

The courts have express statutory authority to impanel one or two alternate jurors,³²⁹ but the exercise of this power rests strictly in the court's discretion.³³⁰ Nevertheless, the impanelling of at least one alternate juror would seem to be in the interest of sound administration as a protection against losing a juror through illness³³¹ or other sufficient cause.³³²

7. *Sequestration of the Jury*

Upon swearing of the jury or at any time thereafter during the trial, the court may order it sequestered.³³³ The decision to permit the jury to separate or to have them kept together throughout the trial is a matter resting in the trial court's discretion,³³⁴ and the statute no

³²³ 253 Iowa at 666, 113 N.W.2d at 291.

³²⁴ Indeed, the supreme court has held erroneous a trial court's ruling that one party's waiver of his first peremptory challenge constituted a waiver of his remaining challenges. *State v. Hunter*, 118 Iowa 686, 690, 92 N.W. 872, 873 (1902).

³²⁵ *State v. Critelli*, 237 Iowa 1271, 1280, 24 N.W.2d 113, 118 (1946).

³²⁶ *Id.*, 24 N.W.2d at 118.

³²⁷ *Id.* at 1281, 24 N.W.2d at 118.

³²⁸ *Id.*, 24 N.W.2d at 118.

³²⁹ IOWA CODE § 779.18 (1973).

³³⁰ 1946 REPORT OF ATTY. GEN. OF IOWA 211, 212.

³³¹ See IOWA CODE § 780.18 (1973).

³³² Cf. *State v. Coffee*, 182 N.W.2d 390, 395 (Iowa 1970) (bias displayed by juror during recess in trial).

³³³ IOWA CODE § 780.19 (1973); see *State v. Albers*, 174 N.W.2d 649, 653-55 (Iowa 1970) (sequestration of jury during its deliberations).

³³⁴ IOWA CODE § 780.19 (1973); see *State v. Lowder*, 256 Iowa 853, 864, 129

longer requires the court to sequester the jury upon either party's request.³³⁵ The court's election presumably would be subject to scrutiny only upon a strong showing of actual prejudice to the party who unsuccessfully sought sequestration or separation.³³⁶

C. Motion for a Mistrial

Another instance of the trial court's continuous responsibility to supervise and control the conduct of the trial process involves the motion for a mistrial, which may be made at any time during the trial. The purpose of the motion is to terminate the instant proceeding, without barring retrial, whenever it becomes apparent that the defendant cannot or will not get a fair trial because the jury—or individual jurors—has been exposed to prejudicial matter.³³⁷

Perhaps the most common ground for granting such a motion is prosecutorial misconduct.³³⁸ It must be emphasized, however, that not

N.W.2d 11, 18 (1964); cf. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 5.2 (a) (App. Draft 1972):

The trial judge should take appropriate steps ranging from admonishing the jurors to sequestration of them during trial, to insure that the jurors will not be exposed to sources of information or opinion, or subject to influences, which might tend to affect their ability to render an impartial verdict on the evidence presented in court.

³³⁵ For an example of how the statute sharply limited judicial discretion before its amendment in 1969 see *State v. Giudice*, 170 Iowa 731, 742, 153 N.W. 336, 340 (1915):

This statute permits the separation of the jury at any time before the final submission of the cause to them "except where one of the parties objects thereto." . . . Upon the request of either party, the jury must be kept together, and it is error not to do so."

The phrase "except where one of the parties objects thereto" was deleted in 1969. See IOWA CODE § 780.19 (1966).

³³⁶ See generally *State v. Lowder*, 256 Iowa 853, 129 N.W.2d 11 (1964). In that case, some of the jurors sat on other juries during the 1 month continuance granted in the midst of Lowder's trial. The supreme court, noting that the defendant never objected to separation of the jury, concluded:

No matter of prejudice of any nature appears in the record by reason of the service in civil cases of some of the members of the jury on defendant's trial. Appellant's counsel contends prejudice is presumed from the facts herein. Prejudice can only be presumed if it appears clearly that some substantial rights of defendant have been transgressed The record does not disclose that a substantial right of defendant was denied him. *Id.* at 863-64, 129 N.W.2d at 17 (citations omitted).

³³⁷ *State v. Wright*, 203 N.W.2d 247, 251 (Iowa 1972).

³³⁸ The presiding judge of the Texas Court of Criminal Appeals "estimates that at least 60 percent of the cases that come before his court involve a claim of prosecutorial misconduct, although he adds that only occasionally is the claim well founded." Alschuler, *Courtroom Misconduct*, 50 TEX. L. REV. 629, 631 (1972).

all prosecutorial misconduct will support a motion for a mistrial. Rather, it is only that misbehavior which "appears to [be] so prejudicial as to deprive defendant of a fair trial."³³⁹ In making its determination of whether the prosecutorial misconduct is such that a mistrial should be declared, the trial court is afforded substantial leeway, and its decision will not be interfered with "unless it clearly appears there has been a manifest abuse of such discretion."³⁴⁰ Clearly, however, the discretion is not unbounded.

It must be utilized fairly and impartially, not arbitrarily, by application of relevant legal and equitable principles to all known or readily available facts of a given issue or cause to the end that justice may more nearly be effectuated.³⁴¹

Within these parameters, even when the trial court agrees that a mistrial might otherwise be ordered, it is still free, as a general rule, to take some alternative action. The most common palliative measure is to order the objectionable matter stricken from the record and to admonish the jury, specifically and clearly,³⁴² to disregard it. The supreme court has said repeatedly:

Ordinarily the striking of improper testimony cures any error Only in extreme instances where it is manifest that the prejudicial effect of the evidence on the jury remained, despite its exclusion, and influenced the jury is the defendant denied a fair trial and entitled to a reversal.³⁴³

The court "may exercise its discretion on its own motion to strike evidence it deems erroneously admitted,"³⁴⁴ notwithstanding the defendant's contention that the court's *sua sponte* action "placed undue emphasis on the testimony and was prejudicial error."³⁴⁵ However, it appears that a trial court should not order a mistrial on its own motion where the defendant does not consent thereto.³⁴⁶

³³⁹ *State v. Barton*, 258 Iowa 924, 931, 140 N.W.2d 886, 891 (1966); *accord*, *State v. Schmidt*, 259 Iowa 972, 980-81, 145 N.W.2d 631, 636 (1966).

³⁴⁰ *State v. Hephner*, 161 N.W.2d 714, 721 (Iowa 1968).

³⁴¹ *State v. Vickroy*, 205 N.W.2d 748, 751 (Iowa 1973).

³⁴² *State v. Coffee*, 182 N.W.2d 390, 392 (Iowa 1970).

³⁴³ *State v. Peterson*, 189 N.W.2d 891, 896 (Iowa 1971).

³⁴⁴ *State v. Shimon*, 182 N.W.2d 113, 115 (Iowa 1970).

³⁴⁵ *Id.*

³⁴⁶ *See United States v. Horn*, 400 U.S. 470, 485 (1971):

The *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.

See also *People v. Gardner*, 195 N.W.2d 62, 70 (Mich. Ct. App. 1972):

We believe that a trial court's declaration, *sua sponte*, of a mistrial cannot be grounded on "a scrupulous exercise of judicial discretion" where under the circumstances of the case it fails to consult the defendant before summarily aborting the proceedings.

This strike-and-admonition approach is inappropriate when the objectionable evidence has constitutional undertones, however; a mistrial is mandated as a matter of law in such situations. In the recent case of *State v. Ware*,³⁴⁷ the defendant's oral confession was introduced at trial before it became known during cross examination that the confession had been obtained in violation of the defendant's so-called *Miranda* rights.³⁴⁸ Although the testimony was thereupon stricken and a comprehensive admonition was given the jurors to not consider it, the supreme court reversed. In so doing, it proposed the following standard:

[P]rejudice inherent in the constitutionally proscribed evidential display of defendant's inculpatory statement [is] not dissipated by trial court's request that the jury disregard it.³⁴⁹

This principle apparently applies also to the use of the defendant's tacit admissions, for the Iowa Supreme Court has also said:

[W]e now hold, evidential use of "tacit admissions" by an accused offends the [self-incrimination clause of the fifth amendment] and is therefore no longer permissible in criminal trials within this jurisdiction.³⁵⁰

Another way that the trial court can deal with a mistrial situation, under certain circumstances, is to deny the motion and permit the examination to continue in order to show the context of an otherwise highly prejudicial remark. As a general rule,

reference to a defendant's prior criminal record is frequently so prejudicial as to require a mistrial, but it does not follow that mere mention thereof always dictates that result.³⁵¹

Accordingly, it was properly within the trial court's discretion in *State v. Kendrick* to allow the state "to show the entire transaction."³⁵² On cross examination, the defense attorney had elicited from the police officer that the defendant had remained free overnight before being arrested and then had implied that the police obviously had considered the defendant to be trustworthy. On redirect, the officer noted that the defendant had a "past record." Overruling the defendant's motion for mistrial, the trial court then allowed the prosecution to bring out the entire conversation in which the officer had said that he had been reluctant to leave the defendant free overnight because of his "past record." With the benefit of this additional information, the trial court had sufficient basis to deny the motion for mistrial.

³⁴⁷ 205 N.W.2d 700 (Iowa 1973).

³⁴⁸ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

³⁴⁹ *State v. Ware*, 205 N.W.2d 700, 705 (Iowa 1973).

³⁵⁰ *State v. Kelsey*, 201 N.W.2d 921, 927 (Iowa 1972).

³⁵¹ *State v. Kendrick*, 173 N.W.2d 560, 562 (Iowa 1970).

³⁵² *Id.* at 563.

The courts generally accord wide latitude to counsel in their arguments to the jury. Accordingly, the prosecutor

is entitled to some latitude in analyzing the evidence admitted in the trial, and he may draw conclusions and point out permissible inferences and weaknesses in . . . testimony.³⁵³

The trial court still has "the duty to see that the arguments are kept within proper bounds," however.³⁵⁴

One recent case³⁵⁵ provides an example of an abuse of discretion in refusing to order a mistrial because of prosecutorial misconduct both in the opening *and* the closing arguments. In the opening argument, the prosecutor said he knew the defendant was guilty. The supreme court said "he improperly commissioned himself an expert witness, then exceeded his prerogative as such by expressing an impermissible opinion as to defendant's guilt."³⁵⁶ On closing argument he undertook to inflame the passions of the jurors by "inferentially urging the jurors to place themselves and members of their families in a hypothetical position of peril created by a drunken, car operating defendant."³⁵⁷ Both of these arguments were countenanced by the trial court, which not only refused to order a mistrial, but also refused to admonish the jury to disregard these remarks. It appears, however, that even an admonition would not have sufficed since the supreme court observed: "Prejudice flowing therefrom is self-evident."³⁵⁸

The Iowa Supreme Court's express adoption of one section of the ABA *Standards Relating to Fair Trial and Free Press*³⁵⁹ recently in *State v. Bigley*³⁶⁰ has removed one aspect of the trial courts' discretion in matters of interrogating jurors concerning the prejudicial effect of in-trial publicity. Until *Bigley*, the Iowa rule was that the decision whether or not to interrogate the jurors rested in the sound discretion of the trial court.³⁶¹ Indeed, the court's refusal to do so was upheld in *Bigley*, and the new rule given only prospective application.³⁶² In *Bigley*, the trial court examined the improper newspaper account but refused the defendant's request that he question each juror about it—because of the court's earlier standard admonition to the jury not to

³⁵³ *State v. Wesson*, 260 Iowa 331, 340, 149 N.W.2d 190, 196 (1967).

³⁵⁴ *Id.*, 149 N.W.2d at 196.

³⁵⁵ *State v. Vickroy*, 205 N.W.2d 748 (Iowa 1973).

³⁵⁶ *Id.* at 751.

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 3.5(f) (Approved Draft 1968).

³⁶⁰ 202 N.W.2d 56 (Iowa 1972).

³⁶¹ *Id.* at 57.

³⁶² *Id.* at 58.

discuss the case or to read accounts of it, as well as because there was no evidence that this admonition had been violated.³⁶³

In all trials begun after November 15, 1972, however, the trial court *must* interrogate each juror, outside the presence of the others, upon the motion of either party, and *may* do so upon its own motion. This examination "shall take place in the presence of counsel, and an accurate record of the examination shall be kept."³⁶⁴ The test for excusing a juror challenged for such exposure is governed by standard 3.4(b) of the fair trial-free press guidelines.

Guidelines for excusing jurors exposed to prejudicial publicity occurring during trial were also adopted in *Bigley*, with the supreme court once again looking to the ABA *Standards*. These standards leave little to the court's discretion in deciding a challenge for cause. For example, a juror "shall be excused" if he is exposed to material which would have required declaration of a mistrial were that evidence introduced at trial.³⁶⁵ Likewise, a juror who states that he will be unable to overcome any prejudicial conceptions engendered by this extrajudicial publicity "shall be subject to challenge for cause no matter how slight his exposure."³⁶⁶ Moreover, a juror who was exposed to and remembers reports of inadmissible incriminatory matters "shall be subject to challenge for cause without regard to his testimony as to his state of mind."³⁶⁷ On the other hand, if a juror is exposed to and remembers admissible (but extrajudicial) evidence or inadmissible evidence that is not highly prejudicial, his acceptability "shall turn on whether his testimony as to impartiality is believed."³⁶⁸ In that connection, if he has formed an opinion then he "shall be subject to challenge for cause unless the examination shows unequivocally that he can be impartial."³⁶⁹ Whether or not a showing of unequivocality has been made presumably would be left to the sound discretion of the trial court, but in making this determination, the trial courts must consider "[b]oth the degree of exposure and the . . . juror's testimony as to his state of mind. . . ."³⁷⁰

D. Amendment of Charge

The Code permits the trial court to order amendment of the indict-

³⁶³ *Id.* at 57.

³⁶⁴ *Id.* at 58, citing ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 3.5(f) (Approved Draft 1968).

³⁶⁵ *Id.*, citing ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 3.4(b) (Approved Draft 1968).

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ *Id.*

ment or information during the trial.³⁷¹ Whether to do so is left to the trial court's discretion, but it nevertheless can only act on the state's motion,³⁷² and then only "to correct errors or omissions in matters of form or substance."³⁷³ In no instance can it order an amendment which would have the effect of charging a new offense.³⁷⁴

Amendments ordered during trial most commonly become necessary in order to conform the charge to the proof adduced from testimony at trial. However, they are also made before introduction of any evidence, as, for example, to allege the specific manner or mode of the commission of the offense charged,³⁷⁵ to strike surplusage from the charge,³⁷⁶ or to substitute the name of the true owner of the property involved.³⁷⁷ Regardless of whether they are ordered before or during trial, however, as long as the court confines the amendments to the correction of errors or omissions, its decision to allow amendment will not, absent special circumstances, be an abuse of discretion.

However, the court's characterization of the effect of a particular amendment as doing nothing more than correcting errors or omissions is subject to appellate review. The court may also abuse its discretion, in certain circumstances, by ordering an otherwise proper amendment but refusing to grant the defendant a continuance to respond to it.³⁷⁸

*State v. Young*³⁷⁹ is an illustration of a trial court's properly ordering an amendment even though it destroyed one of the defendant's theories of the case. The amendment corrected the date of the alleged rape to conform the charge to the proof. The defendant theretofore had been prepared to prove that the apartment where the alleged rape took place was not leased by prosecutrix on the date listed in the county attorney's information, but this defense was rendered worthless by the amendment because she had leased the apartment by the subsequent date. The supreme court remarked:

While it must have been disappointing to see this defense evaporate when the date was corrected, the state is not bound to an incorrect date because defendant could have shown the crime could not have occurred on the original date.³⁸⁰

The court conceded, however, that the situation "might have been

³⁷¹ See IOWA CODE §§ 773.43-.47 (1973).

³⁷² See *id.* § 773.43.

³⁷³ *Id.*

³⁷⁴ *Id.* § 773.46.

³⁷⁵ *State v. Crutcher*, 174 N.W.2d 449, 451-52 (Iowa 1970).

³⁷⁶ *State v. Bruno*, 204 N.W.2d 879 (Iowa 1973).

³⁷⁷ *State v. Osborn*, 200 N.W.2d 798, 807 (Iowa 1972).

³⁷⁸ See IOWA CODE § 773.47 (1973); see text accompanying notes 431-438 *infra*.

³⁷⁹ 172 N.W.2d 128 (Iowa 1969).

³⁸⁰ *Id.* at 129-30.

different"³⁸¹ if the defendant could have established an alibi for the corrected date but "had no opportunity to do so because of the belated amendment."³⁸² The defendant had made no such claim, however. If he had, the supreme court suggested that the proper remedy would have been the granting of a continuance.³⁸³

In order for the amendment to be impermissible on its face, it must have the effect of charging a new offense. An appellant who either cannot show prejudice because of the court's refusal to grant him a continuance thereafter, or one who was in fact granted a continuance, thus must assert that the amendment had such an effect. This argument has been successful, for example, when the information was amended during trial to change the offense from forgery to uttering a forged instrument,³⁸⁴ as well as when the amendment changed an indictment to charge second offense OMVUI instead of first offense OMVUI.³⁸⁵

Because the Code merely provides that an amendment may be ordered "during the trial,"³⁸⁶ the question is left open as to how far along in the trial process an amendment may be ordered and still be "during the trial." Amendments ordinarily are made some time during, or at the close of, the state's case. Whether or not an amendment can be ordered at the close of all evidence has not been decided by the Iowa Supreme Court. This would appear to be possible, but only where the need for the amendment has been occasioned by evidence adduced in the defendant's case.

Parenthetically, it is arguable that it would be an abuse of discretion for a court, during *any* stage of the pretrial or trial process, to refuse to order an amendment that clearly does nothing more than correct the form of substance of the indictment or information. Because of the defendant's qualified right to a continuance following the ordering of such an amendment,³⁸⁷ the court could protect the defendant from being prejudiced thereby, while at the same time protecting the interests of the state.

E. Continuances

Continuances may be granted during trial in the court's discretion rather than as a matter of right.³⁸⁸ Thus, the court's decision to grant

³⁸¹ *Id.* at 130.

³⁸² *Id.*

³⁸³ *Id.*; see IOWA CODE § 780.12 (1973).

³⁸⁴ *State v. Hancock*, 164 N.W.2d 330, 334-36 (Iowa 1969).

³⁸⁵ *State v. Herbert*, 210 Iowa 730, 731, 231 N.W. 318 (1930).

³⁸⁶ IOWA CODE § 773.45 (1973).

³⁸⁷ *Id.* § 773.47.

³⁸⁸ See IOWA R. CIV. P. 182-84; IOWA CODE § 780.2 (1973).

or deny a requested continuance is likely to be upheld on review unless the appellant can demonstrate not only that the court acted arbitrarily, but also that its actions were prejudicial.

One common ground for seeking a continuance is that of unavailability of witnesses. When the trial court determines whether to grant a continuance on such a basis, two principal questions are presented for the court's determination. These are whether the movant has demonstrated due diligence in attempting to secure the missing witness' attendance and whether this witness' testimony would be material to the movant's case. These two principles coalesced in *State v. King*,³⁸⁹ in which the supreme court approved the half-day continuance during trial that was granted the state because its expert witness, an FBI agent, was testifying in another case.³⁹⁰ The supreme court concluded:

Certainly the one-half day continuance to enable a witness to attend trial was not unreasonable and did not in and of itself deny defendant due process.³⁹¹

On the other hand, the supreme court has upheld a trial court's denial of a continuance to permit the defendant to belatedly interpose an alibi defense.³⁹² After the state had rested, the defendant filed notice that he was going to rely on an alibi defense. He moved for a 4-day continuance to permit the state the same time to prepare for this new development, just as if the standard 4-day notice had been given before trial.³⁹³ Affirming the trial court's refusal to utilize a continuance during trial to offset the defendant's failure to meet a statutory pretrial requisite, the supreme court said, "We also think the language of the [alibi-notice] statute clearly means the notice must be filed before commencement of the trial."³⁹⁴ This statement appears a bit too broad or generalized, since it is possible that the defendant would not turn up an alibi witness until after the trial has started. A better approach would be to follow the same procedure as that for allowing testimony by additional state's witnesses (whose names were not endorsed on the indictment nor included in a pretrial 4-day notice of additional testimony).³⁹⁵

In *State v. Moline*,³⁹⁶ for example, the prosecutor learned of new state's witnesses during the voir dire examination of jurors.³⁹⁷ He

³⁸⁹ 191 N.W.2d 650 (Iowa 1971).

³⁹⁰ *Id.* at 657.

³⁹¹ *Id.*

³⁹² *State v. Rowrick*, 245 Iowa 319, 324-25, 60 N.W.2d 529, 531-32 (1953).

³⁹³ *Id.* at 322, 60 N.W.2d at 530; see IOWA CODE § 777.18 (1973).

³⁹⁴ *Id.* at 324, 60 N.W.2d at 531.

³⁹⁵ See IOWA CODE §§ 780.10-.12 (1973).

³⁹⁶ 164 N.W.2d 151 (Iowa 1969).

³⁹⁷ *Id.* at 155.

then filed a motion for leave to introduce additional testimony under section 780.11,³⁹⁸ which generally requires a two-pronged showing that the evidence is so newly discovered as to permit insufficient time for the state to give the standard 4-day pretrial notice of additional testimony and that diligence has been shown in attempting to discover such evidence in a timely fashion.³⁹⁹ The state is required "to show the same diligence as is required to support a motion for a continuance,"⁴⁰⁰ and determination of the state's diligence is a matter in which the trial court has wide discretion.⁴⁰¹ Indeed, the supreme court has said,

Matters concerning due diligence are so much in the discretion of the trial court that we cannot say the ruling was improper. We will not interfere unless an abuse appears.⁴⁰²

The defendant has an absolute right to a continuance if the court grants this motion.⁴⁰³ Upon the defendant's failure to elect a continuance, the witness is then allowed to testify when called.⁴⁰⁴

F. Motion for a Directed Verdict

The defendant commonly makes a motion for a directed verdict at the close of the state's case and, if unsuccessful, then again at the close of all the evidence. No error can be predicated on the court's failure to sustain the motion when made at the close of the state's case.⁴⁰⁵ The court may, of course, sustain the motion and terminate the case at that time.

If the court overrules the defendant's motion for a directed verdict, and the jury returns a verdict of guilty, it must be determined on appeal whether there was sufficient evidence in the record to generate a jury question on "each essential element of the crime."⁴⁰⁶ In making the initial determination, the trial court is to consider whether the evidence, both direct and circumstantial,⁴⁰⁷ "raise[s] a fair inference of guilt"⁴⁰⁸ and it is not enough that the state's evidence merely

³⁹⁸ *Id.*

³⁹⁹ IOWA CODE § 780.11 (1973).

⁴⁰⁰ 164 N.W.2d at 155.

⁴⁰¹ *Id.* at 156.

⁴⁰² State v. Gilliland, 252 Iowa 664, 669, 108 N.W.2d 74, 77 (1961).

⁴⁰³ IOWA CODE § 780.12 (1973).

⁴⁰⁴ *Id.*

⁴⁰⁵ State v. Tokatlian, 203 N.W.2d 116, 119 (Iowa 1972).

⁴⁰⁶ State v. Williams, 179 N.W.2d 756, 758 (Iowa 1970).

⁴⁰⁷ A special problem arises whenever the state is relying solely on circumstantial evidence, in that this evidence "must be entirely consistent with defendant's guilt and wholly inconsistent with any rational hypothesis of defendant's innocence" *Id.* at 760 (reversal of conviction because of error in denying motion for directed verdict).

⁴⁰⁸ *Id.* at 758.

"raise[s] a suspicion, speculation or conjecture."⁴⁰⁹ If the court finds "there is substantial evidence reasonably tending to support the charge the issues should be submitted to the jury."⁴¹⁰ If not, then the court should direct a verdict of acquittal as a matter of law.

Determination of the sufficiency of the evidence thus is essentially a matter for the fact finder, whose function it is "to decide disputed questions of fact and to draw permissible inferences therefrom. . . ."⁴¹¹ This determination is subject to review only to the extent of determining whether there was a substantial basis for the court's determination. In making this limited review, the supreme court views the evidence "in the light most favorable to the state" and "consider[s] only the supporting evidence whether contradicted or not."⁴¹² Thus, the trial court's determination is binding unless the supreme court concludes it "is without substantial support in the evidence or is clearly against the weight thereof."⁴¹³

G. Reopening the Record

One way the trial court can properly avoid immediately directing a verdict when it determines that there is insufficient evidence in the record is to order reopening of the record to give the state an opportunity to correct such defect. Additionally, this privilege would also apply to the defendant who prematurely rests his case. "[A]llow[ing] a litigant to reopen after he has rested"⁴¹⁴ is another area in which trial courts are accorded broad, but structured, leeway.⁴¹⁵ While the Rules of Civil Procedure⁴¹⁶ authorize the courts to reopen the record, the supreme court has added: "[E]ven in the absence of statute we could see no tenable ground for denying existence of inherent court power to order reopening in the furtherance of justice."⁴¹⁷ Nevertheless, reopening is structurally confined by statute to correction of "an evident oversight or mistake," and must be done before "final submission of the case."⁴¹⁸ Moreover, the court is empowered to impose "such terms as it deems just" when ordering a reopening of either party's case.⁴¹⁹

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ *State v. Wesson*, 260 Iowa 331, 334, 149 N.W.2d 190, 196 (1967).

⁴¹² *State v. Bruno*, 204 N.W.2d 879, — (Iowa, 1973).

⁴¹³ *State v. Wesson*, 260 Iowa 331, 334, 149 N.W.2d 190, 192 (1967).

⁴¹⁴ *State v. Mason*, 203 N.W.2d 292, 295 (Iowa 1972).

⁴¹⁵ "We have allowed wide leeway in reviewing discretion of trial court in permitting a case to be reopened." *Id.*

⁴¹⁶ Iowa R. Civ. P. 192.

⁴¹⁷ *State v. Mason*, 203 N.W.2d 292, 296 (Iowa 1972).

⁴¹⁸ Iowa R. Civ. P. 192.

⁴¹⁹ *Id.*

The Iowa Supreme Court has encouraged reopenings when necessary for a full and complete hearing on the matter, and has said:

But it must not be forgotten that the primary purpose of the trial was neither the acquittal nor the conviction of the defendant, but to ascertain with the requisite degree of certainty the truth of the matter charged in the indictment. To that end, as a general rule, all competent and material evidence was admissible.⁴²⁰

Put differently, the supreme court believes that no conviction or acquittal should be based on false or mistaken testimony "when the mistake is discovered before the case is closed and submitted."⁴²¹

Reopenings have been upheld on appeal where necessary: to establish proof of venue;⁴²² to correct testimony on direct examination;⁴²³ to reiterate previous testimony after the judge indicated he did not recall any evidence on a particular aspect of the case;⁴²⁴ and to allow a witness to clarify his previous testimony.⁴²⁵ Reopenings have also been approved for introduction of an exhibit into evidence after a proper foundation therefore was laid during the state's case but the exhibit was not introduced because of mere oversight,⁴²⁶ as well as for reintroduction of an exhibit into evidence after a determination that the state had prematurely offered such evidence during its case.⁴²⁷

The breadth of judicial discretion in permitting reopening of the record was demonstrated in *State v. Thomas*,⁴²⁸ in which the state was permitted to reopen after completion of the defense counsel's closing

⁴²⁰ *State v. Thomas*, 158 Iowa 687, 692, 138 N.W. 864, 865 (1912).

⁴²¹ *Id.* at 692, 138 N.W. at 866.

⁴²² *State v. Anderson*, 209 Iowa 510, 514, 228 N.W. 353, 355 (1929).

⁴²³ *State v. Thomas*, 158 Iowa 687, 690, 138 N.W. 864, 865 (1912).

⁴²⁴ *State v. Martin*, 199 Iowa 643, 647, 200 N.W. 213, 215 (1924).

⁴²⁵ *State v. Mason*, 203 N.W.2d 292, 295-96 (Iowa 1972); *accord*, *State v. Shean*, 32 Iowa 88 (1871) (permissible to recall witness whose previous testimony was "misunderstood by the court, counsel or jury" or "when counsel differ as to the evidence given, and the court is unable to determine the precise statements of the witness.") *Id.* at 93.

⁴²⁶ *State v. Moreland*, 201 N.W.2d 713 (Iowa 1972). The supreme court noted that the *Moreland* situation was remarkably similar to a case in which the Tenth Circuit stated:

The government first presented expert testimony relating to the chemical composition of the drug. A chain of custody was established from the time of seizure of the drug until the time it was brought into court. The jury heard testimony concerning the article and saw it. The only thing remaining to be done before the drug was admissible in evidence was for the prosecution to offer it. Nothing in the record indicates that the government's failure to do so was the product of anything other than mere inadvertence. Under these circumstances, we are unable to say that the trial court abused the wide discretion committed to it with respect to permitting a party to reopen after resting. *United States v. Keine*, 424 F.2d 39, 40 (10th Cir. 1970).

⁴²⁷ *State v. Johnson*, 162 N.W.2d 453, 456-57 (Iowa 1968).

⁴²⁸ 158 Iowa 687, 138 N.W. 864 (1912).

argument.⁴²⁹ The recalled state's witness thereupon corrected her previous testimony as to the date that certain events occurred.⁴³⁰ After receipt of this corrected testimony, however, the judge permitted the defense counsel to make another closing argument. The supreme court affirmed, notwithstanding the defendant's contention that he was prejudiced because of his undue emphasis in the original closing argument that he could not possibly have committed the crime since his alibi witnesses placed him elsewhere on the incorrect date.⁴³¹

*State v. Edwards*⁴³² illustrates that timeliness of a motion for reopening the record is also an important factor to be considered in ruling thereon. In that bootlegging case, which was tried to the court, the state moved to reopen on the day following the submission of the case, when the court was about to render its decision. The county attorney claimed he previously was unaware of the availability of the proffered evidence concerning illegal transportation, but the court refused to reopen the record, and subsequently acquitted the defendant.⁴³³ Upon a state's appeal, the supreme court affirmed, noting:

To reopen the case at this juncture would be to open up the case to a retrial, rather than to a momentary correction of a mistake or oversight. It cannot be assumed that such testimony would go undenied. It might become necessary to seek additional witnesses on the issue.⁴³⁴

The one instance in which the Iowa Supreme Court has found an abuse of discretion in this area involved a *refusal* (in a civil case) to order reopening of the record.⁴³⁵ Both parties had rested at the end of the day, and upon the court's convening the next day the appellant asked leave to reopen the case for the purpose of cross examining certain witnesses regarding statements contained in records appellant had discovered the night before.⁴³⁶ Noting that "[d]ue diligence must always be shown"⁴³⁷ to discover evidence sought to be introduced in

⁴²⁹ *Id.* at 690, 138 N.W. at 865.

⁴³⁰ *Id.* at 691, 138 N.W. at 865.

⁴³¹ *Id.* at 693, 138 N.W. at 866.

⁴³² 205 Iowa 587, 218 N.W. 266 (1928).

⁴³³ *Id.* at 588, 218 N.W. at 277.

⁴³⁴ *Id.* at 591, 218 N.W. at 278; cf. *Schipfer v. Stone*, 206 Iowa 328, 218 N.W. 568, *rehearing denied and opinion modified on another point*, 219 N.W. 933 (Iowa 1928) (notation in this case of abuse of discretion in refusing to order reopening of case where further examination would have taken but a few minutes).

⁴³⁵ *Schipfer v. Stone*, 206 Iowa 328, 218 N.W. 568, *rehearing denied and opinion modified on another point*, 219 N.W. 933 (1928).

⁴³⁶ *Id.* at 331, 218 N.W. at 570.

⁴³⁷ *Id.* at 331, 218 N.W. at 570; cf. *State v. Edwards*, 205 Iowa 587, 218 N.W. 266 (1928):

The only showing of diligence and excuse for failure to offer the testimony at the trial was that the county attorney did not know that such evidence was available. But the captain of police . . . did know it. *Id.* at 591, 218 N.W. at 268.

such an application, the supreme court determined there was an abuse of discretion in the court's refusal to reopen this case since there was such a showing of diligence.⁴³⁸ Moreover, the supreme court seemingly put another condition on reopening, namely, that the evidence sought to be introduced must be material, since it noted: "The showing of materiality was sufficient . . ."⁴³⁹

H. Judicial Notice

The taking of judicial notice of certain facts is a second way in which the trial court, under certain circumstances, can avoid directing the verdict because of insufficiency of evidence relating to an essential element of the crime charged. One of the most common uses of judicial notice at this stage of the proceedings is in the setting of venue, when the testimony itself does not establish that the alleged events occurred in the county where venue lies.

Because venue is a jurisdictional element which the state must prove beyond a reasonable doubt, judicial notice must be more restrictively used in this situation than it is generally. That is, while the taking of judicial notice during trial operates to establish a fact without the production of evidence, the taking of judicial notice in venue situations is much more limited in scope. The state's case has already been closed and the taking of judicial notice must be founded on the evidence in the record. This may be accomplished if the courts take "notice" that a certain city is within that county and thus raise the evidence to the level necessary to generate a jury question on venue. A condition precedent to this taking of judicial notice, of course, is the existence of testimony in the record placing the events in or near that city or other well-known landmark.⁴⁴⁰ The supreme court has noted that:

[T]he application of judicial notice is more and more becoming a matter resting in the sound judicial discretion of the trial court with the real test being whether sufficient notoriety attaches to the fact involved, so as to make it safe and proper to assume its existence without specific proof.⁴⁴¹

The general standard for determining whether or not judicial notice of venue can be taken was expressed in *State v. Conley*:

This court has repeatedly held courts will take judicial notice of the geography of the state and a witness need not testify in words that the crime was committed in the county in question, but that such fact, if fairly inferable from the testimony given, is sufficient to carry the question of venue to the jury.⁴⁴²

⁴³⁸ 206 Iowa at 332, 218 N.W. at 570.

⁴³⁹ *Id.*, 218 N.W. at 570.

⁴⁴⁰ *State v. Cameron*, 254 Iowa 505, 508, 117 N.W.2d 816, 818 (1962); *State v. Brooks*, 222 Iowa 651, 652-54, 269 N.W. 875, 876-77 (1936).

⁴⁴¹ *State v. Ladd*, 252 Iowa 487, 490, 106 N.W.2d 100, 101 (1960).

⁴⁴² 176 N.W.2d 213, 215 (Iowa 1970).

As to the quantum of direct or circumstantial evidence which is required as a foundational basis, the supreme court has said:

[T]he state can generate a jury question on the issue of venue by producing evidence which is either direct or circumstantial from which it may be inferred. No positive testimony that the violation occurred at a specific place is required, it is sufficient if it can be concluded from the evidence as a whole that the act was committed in the county where the indictment is found. Circumstantial evidence may be and often is stronger and more convincing than direct evidence.

. . . If, from the facts and evidence, the only rational conclusion which can be drawn is that the crime was committed in the state and county alleged, the proof is sufficient. . .⁴⁴³

That the Iowa Supreme Court does not leave the matter of setting venue by judicial notice entirely to the trial court's discretion has been made clear in at least two cases, in which no towns, geographical boundaries, or discernible places were mentioned. Instead, the testimony in one case⁴⁴⁴ merely named certain streets and buildings without locating them in a city or the county. Reversing the conviction on the issue of the trial court's erroneous taking of judicial notice, the supreme court determined that the mere naming of streets and buildings was an insufficient foundation to support the trial court's locating them by inference in the county where the crime was alleged to have taken place. The court pointed out that in establishing venue by inference, it is necessary that "the place where the offense was committed was identified as being in a certain town, or within a certain distance of a town within the county."⁴⁴⁵ Likewise, the supreme court said in the second case: "We do not take judicial notice of the location of banks or their names in various places."⁴⁴⁶

It is arguable that, in certain circumstances, the trial court *must* take judicial notice and that refusal to do so would constitute an abuse of discretion. Such an extreme approach should only be taken in instances where the alleged site of the crime is clearly within the county, as where the witness expressly testifies that the events occurred within the city limits of Des Moines but neglected to add that Des Moines is in Polk County. Although the supreme court has never been faced with this issue, the conclusion finds some support in the language of cases in which the supreme court has upheld the trial court's taking of judicial notice. For example, the court has said: "Where the fair inference under the testimony is that the crime was committed within the county, a *jury question on venue is presented*."⁴⁴⁷ The court has even stated:

⁴⁴³ State v. Wardenburg, 261 Iowa 1395, 1403, 158 N.W.2d 147, 152 (1968).

⁴⁴⁴ State v. Brooks, 222 Iowa 651, 653, 269 N.W. 875, 876 (1936).

⁴⁴⁵ *Id.*, at 653, 269 N.W. at 876.

⁴⁴⁶ State v. Cameron, 254 Iowa 505, 508, 117 N.W.2d 816, 818 (1962).

⁴⁴⁷ State v. Stumbo, 253 Iowa 276, 279, 111 N.W.2d 664, 665 (1961) (emphasis added).

[W]here a witness locates the place of the commission of a crime at a certain number of miles in a certain direction from a city or town, the court *shall* take judicial notice that such point falls within or without the boundaries of the county in which the crime is charged to have been committed.⁴⁴⁸

IV. JUDICIAL DISCRETION IN THE JURY STAGE

Once the prosecution and defense have rested, the trial enters the jury stage, the period during which the jury considers the evidence presented and attempts to return a verdict. In this stage of the trial process, the court has the duty to properly instruct the jury and submit the case to it for deliberation. In addition, the court has the continuing duty during the jury's deliberations to exercise proper discretion in taking whatever actions it deems necessary to protect the propriety of the jury process and assure that justice is done.

A. *Instructing the Jury*

The trial court has the duty to instruct the jury as to the points of law applicable to the evidence developed as part of the record in the instant case.⁴⁴⁹ This must be done fairly and impartially, but with an adequate explanation of the principles concerning the issues that are essential to proper submission of the case.⁴⁵⁰

1. *Evidentiary Basis*

The trial court has no authority to give an instruction on a matter for which *no* evidence at all was introduced at trial. This happened recently in *State v. Mays*,⁴⁵¹ in which the jury was given an instruction on aiding and abetting although there was no evidence that "anyone else had anything to do with the crime."⁴⁵² Reversing the conviction for breaking and entering, the supreme court explained that the unwarranted instruction "opened up to speculation participation by others, without any proof of such participation."⁴⁵³ Because this situation fell under the principle that "an instruction submitting an issue unsubstantiated by evidence is generally prejudicial," it did not matter to the supreme court that "under the evidence, defendant was the only one who could possibly be convicted of committing the

⁴⁴⁸ *State v. Caskey*, 200 Iowa 1397, 1398, 206 N.W. 280, 281 (1925) (emphasis added).

⁴⁴⁹ For examples of such jury instructions, see IOWA STATE BAR ASS'N SPECIAL COMM. ON UNIFORM COURT INSTRUCTIONS, IOWA UNIFORM JURY INSTRUCTIONS NOS. 1.2, 1.4 (1960).

⁴⁵⁰ *State v. Cunha*, 193 N.W.2d 106, 111 (Iowa 1971).

⁴⁵¹ 204 N.W.2d 862 (Iowa 1973).

⁴⁵² *Id.* at 864.

⁴⁵³ *Id.* at 865.

crime."⁴⁵⁴ The mere possibility of jury speculation was enough to warrant a reversal.⁴⁵⁵

The trial court has some discretion in deciding whether to submit an instruction on the defendant's affirmative defense, but this discretion is limited to a determination of whether there is sufficient evidence to warrant such an instruction. Once the court determines that there is such evidence, the instruction must be given. In *State v. Broten*,⁴⁵⁶ for example, the supreme court held that an instruction on self-defense

is not required in every case involving an argument or pushing such as we have here. It is only when the evidence, taken as a whole, raises a substantial issue of self-defense that an instruction on the subject need be given.⁴⁵⁷

In the same case, the supreme court indicated that the standard of review of the decision not to give the requested instruction may be somewhat more stringent than is usually the case in matters involving the exercise of discretion, since it said that it would give the record "careful examination to determine if the denial of the defendant's request was justified."⁴⁵⁸ In *Broten*, however, the only applicable evidence indicated that the defendant was the aggressor and thus, since self-defense was not available to him as a defense, the court's refusal to give the instruction was proper.

2. Lesser Included Offenses

The trial court also has some discretion in deciding whether to submit instructions on lesser included offenses.⁴⁵⁹ Under a new standard announced recently by the Iowa Supreme Court, "the evidence of the case must be considered in determining whether one offense

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* Under certain circumstances, however, the trial court can give an instruction on aiding and abetting another in the commission of an offense even though the defendant was specifically charged, instead, as the principal perpetrator and the latter was the state's theory of the case at trial. Upholding such an instruction in *State v. Hamilton*, 179 N.W.2d 369 (Iowa 1970), the supreme court noted that

the possibility of the wrongful act having been committed by the defendant's companion Lee was interjected into the case by the defendant himself while testifying in his own behalf. *Id.* at 371.

⁴⁵⁶ 176 N.W.2d 827 (Iowa 1970).

⁴⁵⁷ *Id.* at 831.

⁴⁵⁸ *Id.*

⁴⁵⁹ If the court, under the evidence, would be justified in directing a verdict for either one of said offenses, then said offenses need not be submitted. *State v. Pilcher*, 158 N.W.2d 631, 634 (Iowa 1968).

is includable within another."⁴⁶⁰ Pursuant to this standard, "the evidence must justify the submission of the included offense,"⁴⁶¹ and if there is such an evidentiary justification, then it is reversible error to fail to instruct the jury on the appropriate lesser offenses.⁴⁶² Accordingly, if the trial court determines that 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."⁴⁶³ Conversely, it is also permissible to refuse to give a lesser included offense instruction if the evidence shows that the defendant is clearly guilty of the offense charged or is not guilty of any offense.⁴⁶⁴

3. *Theories of the Case*

The court has somewhat more discretion in deciding whether to give a party's requested instruction concerning his theory of the case than it does with either the affirmative defense or the lesser included offense. Accordingly, it is proper for a court to refuse to give an instruction that a "defendant's action in turning himself in to the law enforcement officials [is] evidence of innocence."⁴⁶⁵ Similarly, the trial court can refuse a defendant's request to call the jury's attention to the fact that the defendant had not confessed nor made any other admission of guilt.⁴⁶⁶ Nor does the court *have* to instruct the jury that the state, although contending that the defendant had attempted an armed robbery, did not introduce a gun into evidence.⁴⁶⁷ These matters can be left to the parties' arguments.⁴⁶⁸

Notwithstanding this latitude, the court must be careful that it remains impartial in determining what it will tell the jury concerning either party's theory of the case. Thus, the instructions given the jury

should not argue the case for either side or call special attention to matters of evidence thought to be favorable to one party, at least without mention of related matters favorable to his adversary.⁴⁶⁹

Neither can the court give instructions casting doubts upon a party's evidence or motives. Rather, it must confine itself to outlining the law and leave the matters of weighing the evidence and determining the credibility of the witnesses to the jury free from any judicial

⁴⁶⁰ *State v. Hawkins*, 203 N.W.2d 555, 557 (Iowa 1973).

⁴⁶¹ *Id.*

⁴⁶² *See State v. Pilcher*, 158 N.W.2d 631, 633 (Iowa 1968).

⁴⁶³ *State v. Hawkins*, 203 N.W.2d 555, 557 (Iowa 1973), quoting *State v. Marshall*, 206 Iowa 373, 375, 220 N.W. 106 (1928).

⁴⁶⁴ *Id.*; see *State v. Franklin*, 163 N.W.2d 437, 440 (Iowa 1968).

⁴⁶⁵ *State v. Cunha*, 193 N.W.2d 106, 111 (Iowa 1971).

⁴⁶⁶ *State v. Gillespie*, 163 N.W.2d 922, 927 (Iowa 1969).

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

suggestions.⁴⁷⁰ For example, in *State v. McCarty*,⁴⁷¹ the trial court committed reversible error by instructing that "[t]he evidence of an alibi should be scanned with caution."⁴⁷² The supreme court concluded that this type of instruction

none too subtly suggest[s] that evidence of alibi is easily manufactured and is, therefore, singling out one facet of the record evidence for special mention, and invades the province of the jury in its function as sole judge of the credibility of all of the witnesses.⁴⁷³

4. Cautionary Instructions

The giving of a particularized cautionary instruction is another action that "rests largely in the discretion of the trial court,"⁴⁷⁴ and the supreme court has indicated that a general instruction for the jury to act impartially, without bias, sympathy, or prejudice in favor of or against either party,⁴⁷⁵ should be sufficient "in almost all instances."⁴⁷⁶ It is up to the trial court, in its discretion, to determine if "something arise[s] during the trial which might indicate a need for a specific instruction . . ."⁴⁷⁷ Thus, in the absence of special circumstances, it is proper for a court to refuse to give a black defendant's proffered instruction that the law is the same for blacks and whites,⁴⁷⁸ since there is no general requirement that a court instruct the jury on "all matters which might incite prejudice against a defendant in specific areas."⁴⁷⁹

One major exception to this general rule leaving cautionary instructions to the trial court's discretion is the matter of jury instructions concerning prior felony convictions of defendants who testify in their own behalf. Although it is clear that if a defendant admits, on cross-examination, that he has been convicted of one or more felonies prior to the instant prosecution, such an admission may be used "to impeach the witness and for no other purpose."⁴⁸⁰ However, until the recent decision of *State v. Mays*,⁴⁸¹ it was not clear whether a court *had* to give an instruction to the jury to that effect. In *Mays*, however, the supreme court made it clear, albeit in dictum, that, prospectively from

⁴⁷⁰ See generally IOWA STATE BAR ASS'N SPECIAL COMM. ON UNIFORM COURT INSTRUCTIONS, IOWA UNIFORM JURY INSTRUCTION No. 1.3 (1960).

⁴⁷¹ 179 N.W.2d 548 (Iowa 1970).

⁴⁷² *Id.* at 553.

⁴⁷³ *Id.* See generally IOWA STATE BAR ASS'N SPECIAL COMM. ON UNIFORM COURT INSTRUCTIONS, IOWA UNIFORM JURY INSTRUCTION No. 1.5 (1960).

⁴⁷⁴ *State v. Shepard*, 255 Iowa 1218, 1231, 124 N.W.2d 712, 719 (1964).

⁴⁷⁵ IOWA STATE BAR ASS'N SPECIAL COMM. ON UNIFORM COURT INSTRUCTIONS, IOWA UNIFORM JURY INSTRUCTION No. 1.6 (1960).

⁴⁷⁶ *State v. Shepard*, 255 Iowa 1218, 1231, 124 N.W.2d 712, 720 (1964).

⁴⁷⁷ *Id.*, 124 N.W.2d at 720.

⁴⁷⁸ *Id.* at 1230-31, 124 N.W.2d at 719.

⁴⁷⁹ *Id.* at 1231, 124 N.W.2d at 719-20.

⁴⁸⁰ *State v. Anderson*, 159 N.W.2d 809, 812 (Iowa 1968).

⁴⁸¹ 204 N.W.2d 862 (Iowa 1973).

February 21, 1973, "such an instruction must be given by trial courts on their own initiative."⁴⁸²

5. Verdict-Urging Instructions

It is also proper, although not required, for a court to give a verdict-urging instruction,⁴⁸³ provided the court does not in any way imply what the verdict should be.⁴⁸⁴ In *State v. Hackett*,⁴⁸⁵ the trial court cautioned the jurors that "[a]n inconclusive trial is always highly undesirable," and that they should "not hesitate to re-examine [their] own views and change [their] opinions if convinced it [sic] is erroneous."⁴⁸⁶ The supreme court approved this admonition, noting that because the instruction was given to the jury before it began deliberating, the charge was "not subject to the abuses said to attend the giving of an 'Allen' charge,"⁴⁸⁷ the so-called "dynamite" charge given to deadlocked juries to encourage them to reach a verdict.⁴⁸⁸

B. Jury Deliberations⁴⁸⁹

Once the trial court has instructed the jury and committed the case to it for deliberation, it is still under a continuing duty to supervise the conduct of the trial and ensure the integrity of the jury process. To this end, it must be continually aware "that the jury is to be above suspicion and that any practice which brings its proceedings under suspicion is to be prohibited."⁴⁹⁰ However, concomitant with this responsibility, it must also recognize the general rule that "misconduct

⁴⁸² *Id.* at 867.

⁴⁸³ See IOWA STATE BAR ASS'N SPECIAL COMM. ON UNIFORM COURT INSTRUCTIONS, IOWA UNIFORM JURY INSTRUCTION No. 1.1 (1960). A verdict-urging instruction as part of the original instructions is endorsed in ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY § 5.4(a) (Approved Draft 1968). Included in the commentary thereto is the statement: [I]t is most appropriate for the court to instruct the jury initially as to the nature of its duties in the course of deliberations, and section 5.4(a) so provided. *Id.*, Comment.

⁴⁸⁴ See generally IOWA STATE BAR ASS'N SPECIAL COMM. ON UNIFORM COURT INSTRUCTIONS, IOWA UNIFORM JURY INSTRUCTION No. 1.3 (1960).

⁴⁸⁵ 200 N.W.2d 493 (Iowa 1972).

⁴⁸⁶ *Id.* at 496.

⁴⁸⁷ *Id.*

⁴⁸⁸ But see text accompanying notes 515-29 *infra*.

⁴⁸⁹ See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 5.12(a) (Approved Draft 1972):

The trial judge should provide assistance to the jury during deliberation by permitting materials to be taken to the jury room and responding to requests to review evidence and for additional instructions, under appropriate safeguards as provided in ABA Standards, Trial by Jury §§ 5.1, 5.2 and 5.3. *Id.*

⁴⁹⁰ *State v. Carey*, 165 N.W.2d 27, 29 (Iowa 1969).

with respect to the jury, whether it be by litigant, counsel, or officer of the court, will not be grounds for a new trial unless prejudice is shown."⁴⁹¹

*State v. Carey*⁴⁹² is an example of a case in which a conviction was reversed because of the appearance of possible improper influence on the jury. The bailiff had placed a sign in the jury room: "Coffee will be furnished in the jury room by the county clerk and the county attorney."⁴⁹³ It appeared that the county attorney had intended to make the coffee available to anybody in the courthouse and that the sign had been placed there without his consent or knowledge. Although absolving the county attorney of any misconduct, the supreme court felt that "the result unfortunately is nevertheless the same. As far as the jury was concerned, coffee *was* furnished with the compliments of the prosecutor for the State."⁴⁹⁴ The supreme court reiterated: "All blandishments, or apparent blandishments, all attempts to ingratiate one side or the other with the jury must be prevented."⁴⁹⁵ The fact that only a cup of coffee was involved in *Carey* was immaterial, "for tomorrow something of perhaps greater value might be tendered."⁴⁹⁶

The fact that the conduct was innocent was also considered immaterial. The effect would be the same on a juror or a member of the public as if it had been "an intentional attempt to secure favor" with the jurors.⁴⁹⁷ Thus, a defendant's conviction was reversed in *State v. Faught*,⁴⁹⁸ where the sheriff and his deputy, both of whom had been key state's witnesses at the trial, transported the jurors during their deliberations from the jury room to a restaurant where they visited with the jurors both before and during the meal. Recognizing there was no allegation of intentional wrong, the supreme court nevertheless pointed out:

it was imperative that the verdict be based solely on the evidence and the court's instructions. To permit the sheriff and his deputies, under the facts here, to associate with the jurors after the case was submitted, before, during and after the evening meal, was not conducive to this end.⁴⁹⁹

Not every outside contact with the jurors during their deliberations necessitates a new trial, however. In *State v. Bruno*,⁵⁰⁰ for example, the record indicated that the sheriff "may have spoken to one of the

⁴⁹¹ *Id.*

⁴⁹² 165 N.W.2d 27 (Iowa 1969).

⁴⁹³ *Id.* at 28.

⁴⁹⁴ *Id.* at 29.

⁴⁹⁵ *Id.* at 30.

⁴⁹⁶ *Id.*; see *State v. Neville*, 227 Iowa 329, 331-32, 288 N.W. 83, 84-85 (1939).

⁴⁹⁷ 165 N.W.2d at 30.

⁴⁹⁸ 254 Iowa 1124, 120 N.W.2d 426 (1963).

⁴⁹⁹ *Id.* at 1134, 120 N.W.2d at 432.

⁵⁰⁰ 204 N.W.2d 879 (Iowa 1973).

jurors" while unlocking the door to the jury room, but "there was no further contact between the sheriff and the jury."⁵⁰¹ Affirming the defendant's conviction, the supreme court said:

While the sheriff's conduct was objectionable and avoidable, his slight encounter with the jurors 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.⁵⁰²

As a part of its aforementioned continuing supervisory responsibilities, it is proper for the trial court to make periodic inquiries of the jury to determine whether they are making progress towards reaching a verdict. The Iowa Supreme Court takes the position that a trial court properly can inquire "as to whether there is any likelihood the jury can reach a verdict," after the jury has been deliberating "for some time."⁵⁰³ It also recognizes, however, that "too many inquiries in a short period of time might raise an inference of undue pressure and amount to an abuse of the trial court's discretion."⁵⁰⁴ *State v. McConnell*⁵⁰⁵ indicates that reversible error on this point requires an affirmative showing that the court's inquiries resulted in an unfair trial. The supreme court noted, for example, that "there were no affidavits of jurors which even suggested they were aware of the court's concern as to the time of their deliberation."⁵⁰⁶ Accordingly, since no prejudice was shown, there was no basis for overturning the defendant's conviction.

In addition to inquiring of the jury whether they are making progress toward reaching a verdict, the court, in its discretion, may give additional instructions while the jury is deliberating.⁵⁰⁷ However, this can only be done "in the presence of or after notice to counsel," and the entire procedure is governed by the same rules applicable to the giving of instructions prior to jury deliberation.⁵⁰⁸

Both the correct and incorrect ways to give additional instructions have been illustrated in recent decisions of the Iowa Supreme Court. In *State v. Broten*,⁵⁰⁹ the jury requested an additional instruction after deliberating for some time. The instruction was given after defense counsel had examined it for any objections as to its content. The supreme court affirmed, overruling the defendant's principal contention

⁵⁰¹ *Id.* at 885.

⁵⁰² *Id.*

⁵⁰³ *State v. McConnell*, 178 N.W.2d 386, 390 (Iowa 1970).

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.* at 390-91.

⁵⁰⁶ *Id.* at 390.

⁵⁰⁷ Iowa R. Civ. P. 197.

⁵⁰⁸ *Id.*

⁵⁰⁹ 176 N.W.2d 827 (Iowa 1970).

that the court had forestalled its discretion to give this additional instruction because it refused to include it in the original instructions.⁵¹⁰

In marked contrast, the judge in *State v. Grady*⁵¹¹ recalled the deliberating jury himself and gave an additional instruction, without notifying the defendant or his counsel.⁵¹² Reversing, the supreme court said this procedure deprived the defendant of his right of personal presence at his trial.⁵¹³ Noting that the additional instruction was given after 10 hours of jury deliberation and that a verdict of guilty was reached within an hour thereafter, the supreme court determined that "the conduct described is so tainted with suspicion as to constitute prejudicial error requiring a new trial."⁵¹⁴

One particular type of additional instruction deserves special attention since it is given to a deadlocked jury.⁵¹⁵ The so-called *Allen* or "dynamite" charge⁵¹⁶ is used to urge a jury to break its deadlock and thus to reach a verdict by encouraging each dissenting juror, in no uncertain terms, to reassess his position with a view to adopting the position held by the majority jurors, if such can be done without violating individual conscience.⁵¹⁷ Although some appellate courts have recently condemned its use,⁵¹⁸ the Iowa Supreme Court recently reaf-

⁵¹⁰ Having concluded under this record [that the defendant] was not entitled to an instruction on self-defense, the failure to permit him to argue that issue before the jury was in no way prejudicial to him. *Id.* at 832.

⁵¹¹ 183 N.W.2d 707 (Iowa 1971).

⁵¹² *Id.* at 709.

⁵¹³ *Id.* at 710; see IOWA CODE § 777.19 (1973).

⁵¹⁴ 183 N.W.2d at 710.

⁵¹⁵ For an example of such a jury instruction see IOWA STATE BAR ASS'N SPECIAL COMM. ON UNIFORM COURT INSTRUCTIONS, IOWA UNIFORM JURY INSTRUCTIONS No. 1.1 (1960). But see the restrictive language in ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 5.11(b) (Approved Draft 1972):

The court may recall the jury after they have retired and give them additional instructions in order: (i) to correct or withdraw an erroneous instruction; (ii) to clarify an ambiguous instruction; or (iii) to inform the jury on a point of law which should have been covered in the original instructions. *Id.*

The standard in § 5.12(b) leaves no doubt:

In dealing with what appears to be a deadlocked jury, the trial judge should avoid instructions which imply that a majority view is the correct one, by complying with ABA Standards, Trial by Jury § 5.4. *Id.* § 5.12(b).

⁵¹⁶ See *Allen v. United States*, 164 U.S. 492, 501-02 (1896).

⁵¹⁷ *State v. Quitt*, 204 N.W.2d 913 (Iowa 1973).

⁵¹⁸ See *Evans v. State*, — Ark. —, 478 S.W.2d 874, 875-76 (1972). See also ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY § 5.4(b) (Approved Draft 1968). This definitive statement is made in the commentary accompanying § 5.4(a):

firmed, in *State v. Quitt*,⁵¹⁹ that the giving of the *Allen* charge, followed by a conviction, does not per se deprive the defendant of a fair trial. Instead, the trial court "has considerable discretion in determining whether it should be given" ⁵²⁰ However, once the court has given the *Allen* charge, the supreme court will determine after the fact whether the giving of this instruction was appropriate, based upon its subsequent effect. The ultimate test upon appellate review is

whether the giving of a verdict-urging instruction [after the jury has begun its deliberation] forced or helped to force an agreement, or merely started a new train of real deliberation which ended the disagreement.⁵²¹

This means that the trial court, in exercising its discretion to give the instruction, must give special consideration to the length of the deliberation at this juncture. If the duration has been extraordinarily lengthy at the time that a deadlock is reported, the trial court should carefully consider whether the length of the deliberation can be attributed to any special circumstances, such as complexity of the issue, amount of the evidence to be considered, a jury's request for additional instructions on substantive points, or whether it stems from a substantial dispute over the correct inferences to be drawn from the evidence submitted. If the latter, the court should be reluctant to give the *Allen* charge because of its potential for "browbeating" those jurors who happen to be in the minority, however reasonable their position may be. This cautious approach is advisable in light of the supreme court's observation in *State v. Pierce*⁵²² that:

[W]here the disagreement is of more than ordinary and usual duration, and after the giving of such an instruction as this, a verdict is reached in a time short in comparison with the duration of the disagreement, a presumption arises that the instruction was prejudicial; that, . . . there should be a reversal where in such circumstances, "there is no competent evidence in the record to indicate that the jurors . . . were brought to a final agreement resulting in a verdict, other than through the coercive influence of this instruction, and the long hours of involuntary servitude to which they were subjected, with the tentative suggestion of longer confinement in the event they failed to agree."⁵²³

Upon appeal, "each case must be decided on its own circumstances."⁵²⁴ One factor the supreme court considers is "the total elapsed time between the giving of the verdict-urging instruction and the return of

[T]he Advisory Committee has concluded that the [Allen charge] should not be given to a jury which has been unable to agree after some deliberations. *Id.* § 5.4(a), Comment.

⁵¹⁹ 204 N.W.2d 913 (Iowa 1973).

⁵²⁰ *Id.* at 914.

⁵²¹ *Id.*

⁵²² 178 Iowa 417, 159 N.W. 1050 (1916).

⁵²³ *Id.* at 427, 159 N.W. at 1055 (citations omitted).

⁵²⁴ *State v. Quitt*, 204 N.W.2d 913, 914 (Iowa 1973).

the verdict."⁵²⁵ In *State v. Quitt*, this period was approximately 4 hours, and the supreme court concluded that this "rather demonstratively negatives" any suggestion of coercion since this interval "indicates the jury gave additional consideration to the record before a verdict was reached."⁵²⁶

The specific content of the verdict-urging instruction can also be crucial. The supreme court has "intimated strongly" that such instructions are erroneous *at the time they are given* if "their language (1) indicates an intention to coerce into agreement, or (2) suggests that the jury would be kept together until it agreed."⁵²⁷ However, the language in the Iowa Bar's Uniform "verdict-urging" instructions, which was approved in *State v. Quitt*,⁵²⁸ refers to "the desirability of agreement if possible," as well as the direction for the jury to retire to the jury room "and try to arrive at a verdict."⁵²⁹

The special considerations attending the use of the *Allen* charge aside, the general problems of marathon jury deliberations are a matter left to the trial court's sound discretion. The length and lateness of deliberation are controlled neither by statute nor by judicial fiat. Instead, the trial court can exercise its discretion in the particular circumstances as to both "the total length of jury deliberation" and "the length of deliberation without normal time to sleep and rest."⁵³⁰ Nevertheless, the supreme court, reversing the conviction in *State v. Albers*,⁵³¹ has opined that "unreasonably late deliberations by a jury are not conducive to a fair trial." Thus refusing to leave the matter entirely in the trial court's discretion, the supreme court laid down this guideline: "The criterion is not the number of hours which a jury uses in deliberation, but the conditions under which such deliberation takes place."⁵³²

⁵²⁵ *Id.*

⁵²⁶ *Id.*

⁵²⁷ *State v. Pierce*, 178 Iowa 417, 424, 159 N.W. 1050, 1054 (1916).

⁵²⁸ 204 N.W.2d 913 (Iowa 1973).

⁵²⁹ See IOWA STATE BAR ASS'N SPECIAL COMM. ON UNIFORM COURT INSTRUCTIONS, IOWA UNIFORM JURY INSTRUCTION No. 1.1 (1960).

⁵³⁰ *State v. Albers*, 174 N.W.2d 649, 653 (Iowa 1970).

⁵³¹ *Id.* at 655; *accord*, *State v. Kittelson*, 164 N.W.2d 157, 167 (Iowa 1969).

⁵³² 174 N.W.2d at 653, *quoting* *State v. Green*, 254 Iowa 1379, 1387, 121 N.W.2d 89, 93 (1963). By way of contrast with *State v. Albers*, the supreme court in two civil cases has upheld the trial court's exercise of their discretion in granting new trials because of late-hour deliberations of the jury. See *Kracht v. Hopner*, 258 Iowa 912, 140 N.W.2d 913 (1966); *Coulthard v. Keenan*, 256 Iowa 890, 129 N.W.2d 597 (1964). In a related development, the supreme court has held (in a civil case) that the trial court did not abuse its discretion in requiring the jury "to deliberate into Sunday before being discharged." While not recommending deliberation on Sunday, the court noted that such practice seemed statutorily permissible. *Lessenhop v. Norton*, 261 Iowa 44, 57, 153 N.W.2d 107,

Subject to the concurrence of both the defendant and the state, the trial court, in its discretion, can excuse a juror during deliberation even though this results in submitting the case to less than a statutorily prescribed full jury. As pointed out by a federal appellate court:

The defendant here did not waive . . . his right to a unanimous verdict. He did have a unanimous verdict. His waiver, knowingly and advisedly given, was of his right to a jury of 12.⁵³³

Similarly, the Iowa Supreme Court has declared it

settled doctrine in this State that a defendant in a criminal action, with the consent of the State and court, may waive a statute enacted for his benefit.⁵³⁴

Although such an expeditious procedure has been followed most commonly when a juror has become ill,⁵³⁵ it has even been allowed when a juror, while not disclosing how the jury was leaning, reported that he was the primary holdout and would not change his mind.⁵³⁶ This latter case, however, may not be persuasive in Iowa, since the juror was dismissed pursuant to a federal procedural rule permitting the parties to stipulate to a jury of less than 12 at any time before its rendition of verdict.⁵³⁷

C. Taking the Verdict

Once the jury has returned a verdict, either party may have the jury polled before the court accepts the verdict.⁵³⁸ The court *must* do so, if either party requests it, and the statutory scheme provides that "each member thereof shall be asked whether it is his verdict."⁵³⁹ Nevertheless, in light of *State v. McConnell*,⁵⁴⁰ the trial court seemingly is granted some latitude in the *way* it actually polls the jury. In *McConnell*, rather than addressing the jurors individually, the court, on its own initiative following the defense counsel's decision not to poll the jury, addressed the jury as a body: "Is this your unanimous verdict? If so, raise your right hand."⁵⁴¹ Because it was clear that every

115 (1967). The statutory authorization for such a practice can be derived from IOWA CODE § 605.18 (1973).

⁵³³ United States v. Vega, 447 F.2d 698, 701 (2d Cir. 1971).

⁵³⁴ State v. Kaufman, 51 Iowa 578, 579, 2 N.W. 275, 275-76 (1879).

⁵³⁵ See State v. Browman, 191 Iowa 608, 633, 182 N.W. 823, 833-34 (1921); State v. Kaufman, 51 Iowa 578, 2 N.W. 275 (1879).

⁵³⁶ United States v. Vega, 447 F.2d 698, 700-01 (2d Cir. 1971).

⁵³⁷ *Id.* at 701; see FED. R. CRIM. P. 23(b).

⁵³⁸ IOWA CODE § 785.15 (1973).

⁵³⁹ *Id.* If any jury member answers negatively, "the jury must be sent out for further deliberation." *Id.*

⁵⁴⁰ 178 N.W.2d 386 (Iowa 1970).

⁵⁴¹ *Id.* at 390.

juror raised his hand, the supreme court considered the polling requirement "substantially complied with."⁵⁴² However, the court added that the defense counsel had apparently waived any irregularity, so it is not clear that the supreme court will uphold "substantial compliance" in all circumstances.

D. *Rendering Judgment on a Verdict of Not Guilty*

Upon the jury's return of a verdict of not guilty and the court's acceptance thereof (following the polling of the jury, if any), the court "must render judgment of acquittal immediately."⁵⁴³ If, however, the jury's verdict of not guilty is based upon a finding of insanity, this fact must be stated in the verdict.⁵⁴⁴ The trial court is then authorized to determine whether a defendant acquitted on this ground should be committed to a mental institution. The court may do this if it finds that defendant's discharge would be "dangerous to the public peace and safety."⁵⁴⁵ This determination is made by the court without the requirement of a jury trial.⁵⁴⁶ This determination is essentially one of fact, and the supreme court does not interfere with the determination made so long as the trial court shows some factual basis therefore.⁵⁴⁷

V. JUDICIAL DISCRETION AND PRESENTENCE APPLICATIONS

In contrast with the requirement that a court enter a judgment immediately upon acceptance of a verdict of not guilty, if the defendant has been convicted, upon a plea or verdict, the court is required by statute to fix a time for pronouncing judgment.⁵⁴⁸ The statutory waiting period between conviction and sentencing permits the defendant to file any presentence motions he desires, and also gives the court an opportunity to obtain a presentence report. In this section, we will discuss the presentence motions a defendant may file. The presentence report, being an integral part of the sentencing process itself, is dis-

⁵⁴² *Id.*

⁵⁴³ IOWA CODE § 789.1 (1973).

⁵⁴⁴ *Id.* § 785.19. This special verdict form is one of the few exceptions to the standard general verdict forms (of either "guilty" or "not guilty") prescribed by law. *Id.* § 785.1; see *State v. Fagan*, 190 N.W.2d 800, 802-03 (Iowa 1971) (proper for trial court to refuse to submit requested verdict form of "not guilty because of entrapment").

⁵⁴⁵ IOWA CODE § 785.19 (1973).

⁵⁴⁶ The constitutionality of the nonjury trial proceeding was upheld in *Hansen v. Haugh*, 260 Iowa 236, 244-47, 149 N.W.2d 169, 174-75 (1967).

⁵⁴⁷ *State v. Allan*, 166 N.W.2d 752, 759 (Iowa 1969). The court's finding is influenced by a presumption that insanity, once established, continues until the contrary is shown by the party asserting a return to sanity. *Id.* at 758.

⁵⁴⁸ IOWA CODE § 789.2 (1973); see notes 611-15 *infra* and accompanying text.

cussed in the immediately following section, "Judicial Discretion in the Sentencing Process."⁵⁴⁹

A. Bill of Exceptions

As a prelude to, or concomitant with, the filing of any presentence motions, either the defendant or the state may file a bill of exceptions.⁵⁵⁰ This bill, which may also be used to lay a foundation for a subsequent appeal or application for postconviction relief, is designed "to make the proceedings or evidence appear of record which would not otherwise so appear."⁵⁵¹ Because "it is not necessary to except to any action or decision of the court so appearing of record,"⁵⁵² the bill of exceptions is applicable only when either party wishes to have heretofore unrecorded oral evidence made part of the record.⁵⁵³ Because the general practice is not to record the voir dire examination of prospective jurors,⁵⁵⁴ the opening and closing argument of counsel,⁵⁵⁵ or the polling of jurors after the verdict,⁵⁵⁶ any assignment of error based upon incidents or rulings during these proceedings will not be considered unless the objectionable portion thereof is made part of the record through such a bill (or a bill of bystanders).⁵⁵⁷ Neither an affidavit by counsel⁵⁵⁸ nor by the official court reporter⁵⁵⁹ is sufficient.

Although the bill of exceptions allows the incorporation into the record of allegedly objectionable evidence, it serves only that purpose and is not an after-the-fact curative measure that can be substituted for the party's failure to object to an alleged impropriety in a timely manner. In *State v. Horsey*,⁵⁶⁰ for example, the defendant waited un-

⁵⁴⁹ See notes 622-56 *infra* and accompanying text.

⁵⁵⁰ IOWA CODE § 786.3 (1973).

⁵⁵¹ *Id.* § 786.1.

⁵⁵² *Id.* § 786.2.

⁵⁵³ For the grounds for exceptions see *id.* §§ 786.3, .4. One such ground for exception is the court's alleged improper action "[i]n deciding any matter of law, not purely discretionary on the trial of the issue." *Id.* § 786.3(4).

⁵⁵⁴ See *State v. LaMar*, 260 Iowa 957, 965, 151 N.W.2d 496, 501 (1967).

⁵⁵⁵ See *State v. Horsey*, 180 N.W.2d 459, 460 (Iowa 1970).

⁵⁵⁶ See *State v. Morelock*, 164 N.W.2d 819, 823 (1969).

⁵⁵⁷ *State v. Hemrick*, 62 Iowa 414, 414-15, 17 N.W. 594 (1883):

The only way oral evidence introduced on the trial of a cause can be preserved and identified, for the purposes of an appeal to this court, is by a bill of exceptions, signed by the trial judge.

But see IOWA CODE § 786.6 (1973) (bill of bystanders).

⁵⁵⁸ *State v. LaMar*, 260 Iowa 957, 966, 151 N.W.2d 496, 501 (1967).

The alleged objectionable remarks cannot be regarded as a part of the record when set out simply in an affidavit attached to a motion for new trial. The language alleged to be objectionable should be presented in a bill of exceptions.

⁵⁵⁹ See *State v. Hemrick*, 62 Iowa 414, 17 N.W. 594 (1883).

⁵⁶⁰ 180 N.W.2d 459 (Iowa 1970).

til filing a motion for new trial to bring to the court's attention the matter of misconduct by the prosecutor in the unrecorded closing argument. The defendant set out the objectionable part of the argument in his bill of exceptions, but he made no objection at trial. The trial court overruled the defendant's motion for new trial and the ruling was affirmed on appeal. The supreme court said:

We have permitted alleged impropriety in final arguments to be set out in this fashion. . . . However . . . the fact that such matter may become part of the record by way of bill of exceptions does not eliminate the necessity for having made proper objection at the time the error allegedly occurred.⁵⁶¹

The only opportunity for the exercise of judicial discretion in relation to the bill lies in the trial court's decision whether to sign it. The Code provides that the court "shall sign it if true,"⁵⁶² thus leaving the court some latitude if it is not convinced of the truth of the matters set out in a bill presented for its signature. When the court refuses to sign the bill of exceptions, the moving party can substitute a bill of bystanders,⁵⁶³ which must be signed by at least two attorneys or other officers of the court or by two or more disinterested bystanders.⁵⁶⁴

It is not clear what effect the trial court's refusal to sign the bill of exceptions will have in every case, but the fact that the court refused to sign was given some consideration in *State v. Horsey*.⁵⁶⁵ The defendant set forth in a bill of exceptions the objectionable remarks by the prosecutor in closing arguments, but the court refused to sign it. The defendant then proceeded on a bill of bystanders—which must state that the judge refused to sign the bill of exceptions.⁵⁶⁶ Commenting on the trial court's refusal to sign the bill of exceptions, the supreme court said:

Neither can we disregard the fact that there is serious disagreement over the language actually used [in the closing arguments]. The trial court refused to sign the defendant's bill of exceptions. . . . Quite obviously court and counsel were at odds over the accuracy of the recitations in the

⁵⁶¹ *Id.* at 460 (citations omitted); *accord*, *State v. LaMar*, 260 Iowa 957, 967, 151 N.W.2d 496, 502 (1967):

Defendant made no objections when the incident occurred. Objections to claimed improper conduct in argument must be made at the time. They are too late when raised for the first time in motion for new trial.

⁵⁶² IOWA CODE § 786.5 (1973) (emphasis added).

⁵⁶³ *Id.* § 786.6.

⁵⁶⁴ *Id.*

The bill cannot be signed and sworn to by an attorney for the defense after the judge's refusal to do so. *State v. LaMar*, 260 Iowa 957, 967, 151 N.W.2d 496, 502 (1967).

⁵⁶⁵ 180 N.W.2d 459 (Iowa 1970).

⁵⁶⁶ IOWA CODE § 786.6 (1973).

bill. This is, at best, an unsatisfactory record to ask our acceptance of defendant's disputed version of what was argued.⁵⁶⁷

B. Motion in Arrest of Judgment

Unlike the bill of exceptions, which serves an essentially appellate purpose, that is, to clarify and amplify the existing trial record with a view to prosecuting an appeal, there are several presentence motions on which a trial court may be called to rule which serve primarily to give the court an opportunity to correct any alleged errors while the case is still at the trial level. One such motion is the motion in arrest of judgment, an application to the trial court that no judgment be rendered upon the verdict or plea of guilty. This motion may be made by the defendant, either before or after judgment. The trial court *shall* grant it "when upon the whole record no legal judgment can be pronounced."⁵⁶⁸ In addition, the court *may* arrest the judgment *sua sponte* on the same grounds.⁵⁶⁹

It is immaterial that the statute authorizing the motion contains no specific grounds delineating the situations where "no legal judgment can be pronounced," since this is a matter of law determinable generally through other statutory guidelines and case law. For example, the supreme court has said:

Thus if upon the whole record here it is determined, as defendant contends, that the plea of guilty was not voluntarily entered, but was procured by undue influence, coercion and fraud, no valid judgment or sentence could be pronounced herein.⁵⁷⁰

On the other hand, the motion in arrest of judgment "cannot be sustained upon the grounds which would be grounds for demurrer."⁵⁷¹ Thus, the remedy in situations of this type is an appeal from the final judgment. In other words, a motion in arrest of judgment is too late for the defendant to raise such issues as defects in the presentment of the indictment.⁵⁷²

In making its determination whether "no legal judgment can be pronounced," the court is given some latitude. As a starting point, the defendant's motion "must point out wherein the deficiency exists."⁵⁷³ Assuming that the alleged ground is sufficiently particularized, the court must then determine whether this ground would, as a matter

⁵⁶⁷ 180 N.W.2d at 461.

⁵⁶⁸ See IOWA CODE § 788.1 (1973). "The motion may be made at any time before or within ninety days after judgment." *Id.* § 788.2. For a discussion of the peculiar aspects of a motion in arrest of judgment made after judgment see text accompanying notes 759-67 *infra*.

⁵⁶⁹ IOWA CODE § 788.3 (1973).

⁵⁷⁰ State v. Bastedo, 253 Iowa 103, 107, 111 N.W.2d 255, 257 (1961).

⁵⁷¹ State v. Bading, 236 Iowa 468, 472, 17 N.W.2d 804, 807 (1945).

⁵⁷² See *id.*, 17 N.W.2d at 807.

⁵⁷³ State v. Stennett, 220 Iowa 388, 395, 260 N.W. 732, 736 (1935).

of law, constitute a bar to pronouncement of legal judgment. If the court decides that it would not, then the motion must be overruled and final judgment entered.⁵⁷⁴ If, on the other hand, the trial court determines that the motion does raise an issue which is a proper ground for barring pronouncement of a legal judgment, the court would abuse its discretion by overruling the motion without first holding a hearing, if requested, to permit the defendant to present evidence in support of his contentions.⁵⁷⁵

Once the controverted matters have been adequately placed before the trial court, it can thereupon exercise its discretion in deciding whether the evidence indicates that no legal judgment can be pronounced.⁵⁷⁶ If it overrules the motion, appellate review of its action is quite limited, since the supreme court confines its task on appeal to determining "only whether there is substantial evidence supporting the findings and conclusions reached by the trial court . . ."⁵⁷⁷ On the other hand, if the trial court concludes that no legal judgment can be entered, then it has no discretion; under the statute, it must grant the motion.⁵⁷⁸ After granting it, the trial court must arrest the entering of the judgment of conviction, and, in its discretion, after arresting the judgment, order that the defendant be "held to answer the offense in like manner as upon a preliminary examination,"⁵⁷⁹ which

⁵⁷⁴ This decision is appealable, even without the entry of the final judgment. See *State v. Alverson*, 105 Iowa 152, 156, 74 N.W. 770, 771 (1898). See also text accompanying notes 576-84 *infra*.

⁵⁷⁵ See *State v. Hellickson*, 162 N.W.2d 390, 393 (Iowa 1968); *State v. Bastedo*, 253 Iowa 103, 106, 111 N.W.2d 255, 257 (1961). The state must also be afforded an opportunity to rebut the defendant's evidence. However, the fact that the state offers no resistance to a defendant's motion in arrest of judgment "does not mean defendant's testimony stands alone or uncontroverted." *State v. Hellickson*, *supra*, at 394.

⁵⁷⁶ *State v. Rinehart*, 255 Iowa 1132, 1138, 125 N.W. 2d 242, 246 (1963):

These matters were placed before the court at the time of the hearing on the motion in arrest of judgment. That it found them without merit is shown by the fact that motion was denied. In such circumstances, the trial court's findings of fact are binding upon us.

⁵⁷⁷ *State v. Hellickson*, 162 N.W.2d 390, 394 (Iowa 1968); *accord*, *State v. Bastedo*, 253 Iowa 103, 107, 111 N.W.2d 255, 257 (1961):

If the court accepts and considers the competent and material testimony introduced and, after weighing the same, finds it is either sufficient or insufficient to sustain the burden of proof necessarily devolved upon applicant, that determination is usually binding upon us.

⁵⁷⁸ IOWA CODE § 788.1 (1973).

⁵⁷⁹ *Id.* § 788.4. In *State v. Alverson*, 105 Iowa 152, 74 N.W. 770 (1898), the record showed that the trial court sustained the motion in arrest of judgment

and ordered the defendant held to appear before the next grand jury. The ruling on the motion put an end to all proceedings on that indictment [T]he ruling did operate to discharge the defendant from further prosecution in the pending case *Id.* at 156, 74 N.W. at 771.

could lead to recharging and reprosecution.

Because an order in arrest of judgment "serves to place a defendant in the same situation or position as he was before commencement of the prosecution,"⁵⁸⁰ the court cannot make its arrest of judgment operate as an acquittal.⁵⁸¹ This was done in *State v. Deets*,⁵⁸² and the supreme court declared that the trial court's entry of a post-conviction judgment of acquittal "was totally void and of no legal force or effect because not permitted by law."⁵⁸³ Accordingly, the case was remanded "for entry of lawful judgment . . ."⁵⁸⁴

C. Motion for a New Trial

In contrast to the trial court's rather limited discretionary authority in ruling on a motion in arrest of judgment, it has considerable discretion in ruling upon a motion for a new trial,⁵⁸⁵ especially when the motion is heard by the judge who presided at the trial.⁵⁸⁶ This motion, which can only be made by the defendant,⁵⁸⁷ must be made before judgment.⁵⁸⁸ When a new trial is granted, the parties are placed "in the same position as if no trial had been had,"⁵⁸⁹ except that a new trial on the *same indictment* is specifically authorized for "re-examination of the issue in the same court before another jury."⁵⁹⁰

The trial court can grant a new trial only on one or more of eight statutorily enumerated grounds. These include: (1) in a felony prosecution, trial without the defendant's presence; (2) out-of-court

⁵⁸⁰ *State v. Deets*, 195 N.W.2d 118, 123 (Iowa 1972).

⁵⁸¹ This means that relief in the trial court from a verdict of guilty (or guilty plea) is limited to arrest of judgment, a new trial, or postconviction relief. *Id.* at 124.

⁵⁸² 195 N.W.2d 118 (Iowa 1971).

⁵⁸³ *Id.* at 125.

⁵⁸⁴ *Id.*

⁵⁸⁵ *State v. Wheelock*, 218 Iowa 178, 182, 254 N.W. 313, 316 (1934):

The matter of granting a new trial for alleged misconduct of counsel and the many incidents that happen in the trial of a case is peculiarly within the discretion of the trial court.

⁵⁸⁶ *State v. Benson*, 247 Iowa 406, 410, 72 N.W.2d 438, 440 (1955).

⁵⁸⁷ IOWA CODE § 787.2 (1973). In civil cases, on the other hand, either party can file a motion for a new trial and the granting of a new trial can be reversed upon appeal with the case remanded for reinstatement of the verdict and judgment in favor of the appellee. See *Lind v. Schenley Industries*, 278 F.2d 79, 88-90 (3d Cir. 1960); accord, *Meyer v. Noel*, 206 N.W. 290 (Iowa 1925) (not officially reported) (burden on appellant, in attempting to get overturned a motion granting a new trial, to show that the lower court's action was not warranted under any of the grounds specified in the motion).

⁵⁸⁸ IOWA CODE § 787.2 (1973).

⁵⁸⁹ *Id.* § 787.4.

⁵⁹⁰ *Id.* § 787.1. Cf. note 579 *supra*.

receipt, by the jury, of unauthorized evidence; (3) juror misconduct; (4) use, by the jury, of unauthorized means to reach a verdict; (5) misdirection of the jury on a material matter of law by the court; (6) verdict contrary to the law or evidence; (7) refusal, by the court, to properly instruct the jury; and (8) failure of the defendant to receive a fair and impartial trial "from any other cause."⁵⁹¹ Most of the multitudinous issues which can be raised under the guise of one or more of these eight categories are discussed on an individual topical basis elsewhere in this Article, but three others are included here for illustrative purposes.

1. *Newly Discovered Evidence*

One ground on which a motion for a new trial may be based is that newly discovered evidence has come to light which has a bearing on the question of the defendant's guilt. The problem of newly discovered evidence bears on the question of whether the defendant has received a fair and impartial trial,⁵⁹² and although such motions "are not favored in the law and should be closely scrutinized and granted sparingly,"⁵⁹³ the trial court hearing such a motion is afforded wide discretion, the exercise of which will not be interfered with unless "it is reasonably clear that such discretion was abused."⁵⁹⁴

In determining whether to grant a motion for new trial because of newly discovered evidence, the trial court must determine

"whether [the new evidence] is sufficient to justify the trial court, in the exercise of legal discretion, in concluding there is a reasonable probability of a different result upon another trial."⁵⁹⁵

In effect, the trial court must determine whether the new evidence adds anything that is both new and materially different than the evidence introduced at trial.

2. *Matters Inhering in the Verdict*

Influence on the verdict through juror misconduct is another ground which can support a motion for a new trial, and it is "within province of the [trial] court to deny a new trial for such alleged misconduct."⁵⁹⁶

⁵⁹¹ *Id.* § 787.3.

⁵⁹² *State v. Compiano*, 261 Iowa 509, 516, 154 N.W.2d 845, 849 (1967).

⁵⁹³ *Id.*, 154 N.W.2d at 849.

⁵⁹⁴ *Id.* at 515-16, 154 N.W.2d at 849.

⁵⁹⁵ *Id.* at 520, 154 N.W.2d at 851, quoting *Westergard v. Des Moines Ry.*, 243 Iowa 495, 500, 52 N.W.2d 39, 43 (1952).

⁵⁹⁶ *State v. Reynolds*, 201 Iowa 10, 13, 206 N.W. 635, 636 (1925); see *State v. White*, 205 Iowa 373, 376, 217 N.W. 871, 872 (1928):

We have held . . . that statements of fact [made] by a juror during deliberation, bearing on a *material issue in the cause* and made of the juror's personal knowledge, constitutes error that will vitiate the verdict.

Limiting this discretion, however, the supreme court has held that jurors' affidavits cannot impeach a verdict.⁵⁹⁷ Nor can it be shown

"in such [a] manner, to avoid the verdict, that a juror did not assent to it, *misunderstood the court's instructions* or the testimony, was unduly influenced by statements of fellow jurors, was mistaken in his calculations or judgment, or other matters resting alone in the juror's breast. These all inhere in the verdict."⁵⁹⁸

In one case, for example, some jurors took an unauthorized inspection of an area material to the case and then discussed it in the jury room. The trial court held a hearing after three other jurors filed affidavits to this effect, but overruled the defendant's motion for new trial.⁵⁹⁹ In reviewing, the supreme court said that "[c]ertainly if this discussion had been prejudicial to defendant, it would have been set out in the affidavits,"⁶⁰⁰ thus it was not an abuse of discretion to refuse the new trial motion.

3. Instructions to the Jury

The third ground for a new trial which we will consider is the contention that the jury was improperly instructed.⁶⁰¹ The supreme court has interpreted the Code⁶⁰² as permitting a defendant in a criminal case to raise this objection for the first time in a motion for a new trial. In *State v. Lelchhook*,⁶⁰³ for example, the supreme court reversed a trial court's refusal to grant such a motion because the instruction improperly omitted a material matter of law. Even where the instruction complained of does materially misstate the law, however, the defendant has no absolute right to have his motion for a new trial granted:

[T]his right is subject to exceptions. [It] may expressly be waived, or if the instruction was correct as given but not as explicit as the defendant might have desired, he is required to request an additional instruction before the jury is charged.⁶⁰⁴

4. Appellate Review

Appellate review of the trial court's refusal to grant a new trial is

⁵⁹⁷ *State v. Washington*, 160 N.W.2d 337, 340 (Iowa 1968):

It is not competent to show by statements of jurors what influenced the verdict. That is a matter of opinion which inheres in the verdict. See also *State v. White*, 205 Iowa 373, 376, 217 N.W. 871, 872 (1928).

⁵⁹⁸ *State v. Washington*, 160 N.W.2d 337, 340 (Iowa 1968), quoting *State v. Brown*, 253 Iowa 658, 671, 113 N.W.2d 286, 294 (1962).

⁵⁹⁹ *State v. Little*, 164 N.W.2d 81, 82-83 (Iowa 1969).

⁶⁰⁰ *Id.* at 83.

⁶⁰¹ See text accompanying notes 449-89 *supra*.

⁶⁰² IOWA CODE § 787.3 (1973).

⁶⁰³ 186 N.W.2d 655, 656-57 (Iowa 1971).

⁶⁰⁴ *State v. Hamilton*, 179 N.W.2d 369, 371 (Iowa 1970).

limited in scope, and the defendant must overcome a presumption in favor of the court's action.⁶⁰⁵ This burden is "heavy,"⁶⁰⁶ since the trial court's finding on conflicting evidence, being a matter within the court's discretion, is controlling on appeal if there is sufficient factual basis upon which the court *could* have made the challenged finding.⁶⁰⁷ The supreme court's most definitive statement in this regard is found in *State v. Compiano*:⁶⁰⁸

The rule is firmly established that to be entitled to a new trial as a matter of law, the rulings of the trial court must appear to have been so prejudicial as to deprive defendant of a fair trial. However, a fair trial does not necessarily mean a perfect trial. . . . *We may disagree* with the trial court on close questions of this nature, but must uphold its ruling if not clearly erroneous.

The court continued:

Although defendant's counsel attacked the court's stated reasons for this disbelief, and it seems some of those reasons would not be proper, we are bound by the rule that if the court could properly find as it did, its ruling must stand.⁶⁰⁹

Nevertheless, the supreme court has said it "will interfere more

⁶⁰⁵ For example, the supreme court has said that the burden is on the appellant to show an abuse of judicial discretion in refusing to grant a new trial. To carry this burden, he must disclose and prove facts which would have seen sufficient to sustain the trial court's action had the motion for a new trial been granted. *Hutchinson v. Fort Des Moines Community Services, Inc.*, 252 Iowa 536, 540, 107 N.W.2d 567, 570 (1961) (a civil case).

⁶⁰⁶ *State v. Benson*, 247 Iowa 406, 410, 72 N.W.2d 438, 440 (1955):

Defendant's burden here is heavy. In order to obtain a reversal of the trial court's action in overruling his motion for a new trial, he must show clearly that counsel . . . was so incompetent . . . as to make the proceeding a farce and mockery of justice, or that it so prejudiced him that substantial justice was not done.

⁶⁰⁷ *State v. Ebelshaiser*, 242 Iowa 49, 60, 43 N.W.2d 706, 713 (1950):

There was no such impropriety or error nor did the court abuse its discretion in overruling the motion. There was a disputed question of fact involved and the trial court's decision, upon conflicting evidence, is controlling.

This standard applies also to disputes over the *existence* of evidence, as illustrated by *State v. Robinson*, 183 N.W.2d 190, 192 (Iowa 1971). In *Robinson*, the defendant, moving for a new trial, contended that the verdict was contrary to the evidence because there was no evidence in the record to rebut the defendant's testimony that he had in fact given some notification. The supreme court, affirming the denial of the motion for new trial, concluded:

There is considerable evidence which, *if believed*, would establish that defendant deliberately avoided giving the department head such notification *Id.* (emphasis added).

⁶⁰⁸ 261 Iowa 509, 521, 154 N.W.2d 845, 852 (1967) (emphasis added).

⁶⁰⁹ *Id.* at 520-21, 154 N.W.2d at 851.

readily with a verdict, because contrary to the weight of evidence, in a criminal case than in a civil case.'"⁶¹⁰

VI. JUDICIAL DISCRETION IN THE SENTENCING PROCESS

Assuming the defendant's presentence motions, if any, have been resolved in favor of the state, the trial court must then proceed to the sentencing stage.

A. Time for Judgment After Conviction

No fixed maximum time after conviction is statutorily prescribed in Iowa for the imposition of sentence. Instead, section 789.2 merely places specific minimum time limitations on the sentencing process by providing that after conviction the court

must fix a time for pronouncing judgment, which must be at least three days after the verdict is rendered, if the court remains in session so long . . . but in no case can it be pronounced in less than six hours after the verdict is rendered, unless defendant consents thereto.⁶¹¹

As the above quoted portion of the statute indicates, a convicted defendant who prefers "to get it over with" may waive his right to the 6 hour minimum period between conviction and sentencing.⁶¹² Indeed, although the supreme court has discouraged such practice,⁶¹³ a defendant may even plead guilty and be immediately sentenced at his arraignment, if he so requests.⁶¹⁴ Once the defendant has requested immediate sentencing however, he has the burden, on appeal, of establishing that "the disposition of his case with such dispatch is a circumstance entitling him to prevail in [his application for postconviction relief]."⁶¹⁵

At least in part because there is no set time when a sentence *must* be imposed, the widespread practice of deferred sentencing upon a plea of guilty developed among Iowa trial courts, starting in 1964.⁶¹⁶

⁶¹⁰ State v. Carlson, 224 Iowa 1262, 1265, 276 N.W. 770, 772 (1937), quoting State v. McKenzie, 204 Iowa 833, 834, 216 N.W. 29, 30 (1927).

⁶¹¹ IOWA CODE § 789.2 (1973).

⁶¹² See State v. Rinehart, 255 Iowa 1132, 1140, 125 N.W.2d 242, 247 (1963) (waiver to avoid undesirable publicity drawing crowds to separate sentencing proceeding).

⁶¹³ State v. Kephart, 202 N.W.2d 62, 67 (Iowa 1972). In that case, the court said:

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. *Id.*

⁶¹⁴ State v. Rinehart, 255 Iowa 1132, 1140, 125 N.W.2d 242, 247 (1963).

⁶¹⁵ State v. Kephart, 202 N.W.2d 62, 67 (Iowa 1972).

⁶¹⁶ See Contemporary Studies Project: Perspectives on the Administration of Criminal Justice in Iowa, 57 IOWA L. REV. 598, 612-13 (1972).

Under deferred sentencing, the trial court would accept the defendant's guilty plea but would not enter the judgment or impose sentence. Instead, the court would set sentencing for some time in the future and place the defendant on probation in the interim. Following the defendant's successful completion of probation, the court would allow withdrawal of the guilty plea and the case would then be dismissed. Upon violation of probation, however, the court would enter a judgment of guilty and proceed to impose the sentence.

This practice was recently declared invalid in *State v. Wright*⁶¹⁷ on the ground that there was no statutory authority for it. Since a court's authority to defer imposition of a criminal sentence "is not inherent but is regulated by statute and can only be exercised in accordance with the terms of the statute,"⁶¹⁸ and since Iowa's probation statute⁶¹⁹ "refers only to a suspended sentence and has no application to a deferred sentence," the supreme court concluded that the trial court was "without judicial power to defer imposition of sentence and place defendant, who had been convicted by plea of guilty, on probation. . . ."⁶²⁰

B. Presentence Hearing

Although the *Wright* case invalidated the use of deferred sentences as an alternative method of sentencing, it specifically approved the practice of deferring pronouncement of judgment for other purposes. In discussing section 789.2, the opinion said that a court

has judicial power to defer the pronouncement of judgment for the purpose of hearing and determining motions for a new trial or in arrest of judgment or for such *reasonable* time as may be necessary to complete [a presentence investigation].⁶²¹

The Iowa Supreme Court considers it the trial court's duty "to ascertain any and all facts that would assist in the proper exercise of its discretion in fixing defendant's sentence, whether in or out of the record."⁶²² Accordingly, the court has said:

The trial court and we on review should weigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform. The courts owe a duty to the public as much as to defendant in determining a proper sentence. The punishment should fit both the crime and the individual.⁶²³

⁶¹⁷ 202 N.W.2d 72 (Iowa 1972).

⁶¹⁸ *Id.* at 76.

⁶¹⁹ IOWA CODE § 247.20 (1973).

⁶²⁰ 202 N.W.2d at 79. *But see* ch. 295, [1973] Iowa Acts (deferred sentencing authorized).

⁶²¹ *Id.* at 78 (emphasis added).

⁶²² *State v. Kendall*, 167 N.W.2d 909, 911 (Iowa 1969); *State v. Myers*, 241 Iowa 670, 672, 42 N.W.2d 79, 80 (1950).

⁶²³ *State v. Cupples*, 260 Iowa 1192, 1197, 152 N.W.2d 277, 280 (1967).

In ascertaining the facts necessary to ensure that the punishment does "fit both the crime and the individual," a trial court need not rely solely on a formal presentence investigation and report. Although this is the "recommended" method, the supreme court observed in *State v. Patterson*⁶²⁴ that the sentencing court can discharge its duty of informing itself "as to matters important to the proper exercise of its sentencing discretion" in other ways. For example, it was held, in *State v. Myers*,⁶²⁵ that the trial court did not abuse its discretion in permitting the county attorney at a presentence hearing to read a statement by the sheriff concerning the latter's investigation of the facts surrounding the defendant's commission of another offense subsequent to the entry of his guilty plea on the instant charge. Approving the trial court's actions, the supreme court said:

In exercising that discretion it is not error for the court to ascertain any and all facts that will assist it in the proper exercise of that discretion, whether it [sic] be in or out of the record.⁶²⁶

Although a presentence report is not required, the supreme court frequently alludes to any such report when reviewing the severity of a sentence or the refusal to grant probation. For example, the observation was made in *State v. Brace*: "The presentence report was certified to us as part of the record and has been helpful in comprehending the reasons for the sentence imposed."⁶²⁷ Thus, a trial court would be well advised to order such a report in those cases where there is good likelihood that a severe sentence will be imposed on a crime with a broad-ranged penalty or that probation will not be granted.⁶²⁸

The Iowa Criminal Code Review Study Committee has proposed changing the law to make the ordering of a presentence investigation mandatory when the offense is a felony.⁶²⁹ A better approach may

⁶²⁴ 161 N.W.2d 736, 737 (Iowa 1968).

⁶²⁵ 241 Iowa 670, 672, 42 N.W.2d 79, 80 (1950).

⁶²⁶ *Id.*, 42 N.W.2d at 80.

⁶²⁷ 181 N.W.2d 244, 246 (Iowa 1970). This was in accordance with the ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES § 2.3, at 42 (Approved Draft 1968).

⁶²⁸ See generally *United States v. Warren*, 453 F.2d 738, 744 (2d Cir. 1972):

It would be wise . . . for trial judges, in those rare cases in which they dispense with the pre-sentence report, to state on the record the reasons for failing to make use of a tool which has proven helpful in individualizing and thus improving the sentencing process. Such a requirement will provoke thought about the decision to bypass this potentially valuable step in the criminal process.

⁶²⁹ Iowa Criminal Code Rev. Study Comm., Proposed Iowa Criminal Code, ch. 3, § 103 (1973). The nature of the investigation is spelled out in detail in section 104:

Whenever a presentence investigation is ordered by the court, the investigator shall promptly inquire into the characteristics, circumstances,

be to assure the defendant's right to have such an investigation made, but to permit him to waive this right. In its discretion, the court would still be free to order one to prevent the defendant from concealing an undesirable past. A recent Michigan case⁶³⁰ illustrates the folly of a mandatory, no-exceptions statute. In that case, the sentencing judge erred in pronouncing sentence without ordering a presentence report, even though the defendant himself did not want one.⁶³¹ By way of contrast with such an inflexible approach, a federal appellate court⁶³² has held that a trial court did not abuse its discretion by skipping a presentence report where the defendant did not want one, in spite of the circuit rule of "adopting a restrictive view of the trial judge's discretion to impose sentence without taking advantage of presentencing procedures."⁶³³

When a presentence report is prepared, the Iowa Supreme Court prefers to leave the scope of inquiry concerning a proper sentence in the hands of the sentencing judge.⁶³⁴ Positing that "sentencing procedures are governed by different evidentiary rules than the trial itself," the supreme court, in *State v. Cole*,⁶³⁵ said that the sentencing judge should obtain "the fullest information possible concerning the defendant's life and characteristics" and thus he should not be denied "an opportunity to obtain pertinent information by requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."⁶³⁶ Thus, as the United States Supreme Court has noted, presentence reports "may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged."⁶³⁷ Accordingly, the Iowa Supreme Court concluded in *Cole*:

Defendant may not successfully challenge the soundness of the trial court's discretion even though involved therein were conclusions or matters not ordinarily admissible.⁶³⁸

needs, and potentialities of the defendant; his criminal record and social history; the circumstances of the offense; the time defendant has been in detention; and the harm to the victim, his immediate family, and the community. All local and state mental and correctional institutions, courts, and police agencies shall furnish to the investigator on request the defendant's criminal record and other relevant information. With the approval of the court, a physical examination of the defendant may be ordered, or the defendant may be committed to a psychiatric facility for an evaluation of his personality and mental health. The results of any such examination shall be included in the report of the investigator.

⁶³⁰ *People v. Amos*, 202 N.W.2d 486 (Mich. Ct. App. 1972).

⁶³¹ *Id.* at 489.

⁶³² *United States v. Spadoni*, 435 F.2d 448 (D.C. Cir. 1970).

⁶³³ *Id.* at 449.

⁶³⁴ *State v. Cole*, 168 N.W.2d 37, 42 (Iowa 1969).

⁶³⁵ *Id.*

⁶³⁶ *Id.* at 40, citing *Williams v. New York*, 337 U.S. 241 (1949).

⁶³⁷ *Gregg v. United States*, 394 U.S. 489, 492 (1969).

⁶³⁸ 168 N.W.2d 37, 41 (Iowa 1969).

Once the trial court has obtained a presentence report, it is assumed that, in the absence of evidence to the contrary, the court used the report in a proper manner and did not consider anything "based only upon rumor or at a stage prejudicial to the defendant."⁶³⁹ There are some limits on the kind of information that may be considered by the court in setting the punishment, however. The United States Supreme Court in *United States v. Tucker*,⁶⁴⁰ while conceding that the presentence inquiry can be "broad in scope, largely limited either as to the kind of information [considered], or the source from which it may come," nevertheless held that a sentence cannot be based, even in part, upon "misinformation of constitutional magnitude."⁶⁴¹ In *Tucker*, the tainted information utilized by the sentencing court in its decision to impose the statutory maximum penalty included two prior felony convictions obtained when defendant was unconstitutionally denied his right to assistance of counsel.⁶⁴²

There is no federal constitutional requirement for disclosure of the contents of a presentence report,⁶⁴³ nor is there such a requirement under Iowa law. Nevertheless, the Iowa Supreme Court, in *State v. Delano*,⁶⁴⁴ without judicially imposing such a procedural rule, made several references to statutory and case law in other states and to model legislation that either afford disclosure as a matter of absolute right or that qualify the right to disclosure only in deference to the need to maintain a probation officer's confidential sources.⁶⁴⁵ It concluded:

As a note of caution it has been suggested "*Kent . . . and Specht . . . read together, seem to indicate that some form of hearing or opportunity to*

⁶³⁹ *State v. Delano*, 161 N.W.2d 66, 71 (Iowa 1968); *accord*, *State v. Cooper*, 161 N.W.2d 728, 732 (Iowa 1968).

⁶⁴⁰ 404 U.S. 443 (1972).

⁶⁴¹ *Id.* at 446-47.

⁶⁴² *Id.* at 444. At least one lower federal court has construed *Tucker* strictly, refusing to apply it to an applicant who had not made a *Tucker*-type argument until after *Tucker* was announced. *Mitchell v. United States*, (N.D. Fla., Nov. 7, 1972), noted in 12 CRIM. L. REPR. 2304 (1973).

⁶⁴³ *Gregg v. United States*, 394 U.S. 489, 492 (1969): "Pre-sentence reports are documents which the rule does not make available to the defendant as a matter of right." *Accord*, *Thompson v. United States*, 381 F.2d 664, 666-67 (10th Cir. 1967) (due process of law not violated by government's refusal to disclose pre-sentence investigation report). *But see* *United States v. Bryant*, 442 F.2d 775, 778 (D.C. Cir. 1971):

We hold that the discretion whether—and to what extent—defendant or his counsel is to have access to the presentence report . . . must be exercised in each individual case.

⁶⁴⁴ 161 N.W.2d 66 (Iowa 1968).

⁶⁴⁵ *See, e.g., United States v. Fischer*, 381 F.2d 509, 513 (2d Cir. 1967) (Where

rebut matters in confidential reports which significantly affect important dispositional or sentencing decisions may emerge as a constitutional necessity in the not too distant future."⁶⁴⁶

On the basis of the United States Supreme Court's determination that the sixth amendment right of confrontation is inapplicable at the sentencing stage,⁶⁴⁷ the Iowa Supreme Court has also concluded, in *State v. Cole*,⁶⁴⁸ that a defendant had "neither constitutional nor statutory right" to examine the investigating officer as to the validity of the officer's conclusion, in his presentence report, that defendant was not a fit subject for probation. The supreme court reasoned that since probation is only a matter of grace, and not a "right," and since the trial court's source of information concerning determination of the sentence is unlimited, "it follows that it was not error to refuse examination into the validity of a recommendation [by the parole agent] the court was in no way bound to accept."⁶⁴⁹ Noting that the defendant was allowed to testify in his own behalf, as well as to call other witnesses, at the presentence hearing,⁶⁵⁰ the supreme court determined there was no abuse of discretion in the trial court's refusal to require cross-examination concerning the presentence report.

The supreme court's two opinions in *State v. Boston*⁶⁵¹ illustrate that a trial court "has a duty to hear an application for a parole but has

material in no manner relates to a confidential declaration, there is little reason to avoid disclosure of what is reported to the sentencing judge. "This is a matter, however, which must rest in his sound discretion."); MODEL PENAL CODE § 7.07(5) (1963):

Before imposing sentence, the Court shall advise the defendant or his counsel of the factual contents and the conclusions of any pre-sentence investigation or psychiatric examination and afford fair opportunity, if the defendant so requests, to controvert them. The sources of confidential information need not, however, be disclosed.

⁶⁴⁶ *State v. Delano*, 161 N.W.2d 66, 72 (Iowa 1968), quoting Bach, *The Defendant's Right to Access to Presentence Reports*, 4 CRIM. L. BULL. 160, 167 (1968). The cases referred to were *Kent v. United States*, 383 U.S. 541 (1966) and *Specht v. Patterson*, 386 U.S. 605 (1967).

⁶⁴⁷ *Specht v. Patterson*, 386 U.S. 605, 606-08 (1967).

⁶⁴⁸ 168 N.W.2d 37, 41 (Iowa 1969).

⁶⁴⁹ *Id.*

⁶⁵⁰ *Id.* at 40. Because a defendant is entitled to present relevant evidence concerning his claim for leniency or mitigation of sentence, *State v. Boston*, 233 Iowa 1249, 1258, 11 N.W.2d 407, 411 (1943), the supreme court has implied that he must do so before sentencing. In *State v. Patterson*, 191 N.W.2d 757 (Iowa 1971), the supreme court discounted a defendant's claim that the trial court did not have before it evidence of his cooperation in the trials of his two co-conspirators, noting that the defendant had been represented by counsel throughout the trial process and that the court had received a presentence report. *Id.*

⁶⁵¹ 234 Iowa 1047, 14 N.W.2d 676 (1944); 233 Iowa 1249, 11 N.W.2d 407 (1943).

wide discretion in what must be considered in granting or denying the application."⁶⁵² In that case, the trial court refused to hold a hearing to consider a defendant's application for a bench parole. This refusal was pursuant to the trial court's personal policy of never allowing a parole. Vacating the sentence of imprisonment and remanding, the supreme court ruled that the defendant was entitled "to have his application considered on its merits."⁶⁵³ On remand, the same judge held a hearing at which the defendant's witnesses testified as to his personal history, the circumstances surrounding his commission of the crime, and his character and reputation.⁶⁵⁴ Again refusing to grant probation, the court nevertheless received evidence supporting defendant's application and subsequently issued a written ruling detailing the considerations for such refusal. Thus, even though the trial court did not change its original decision, the second denial of parole was affirmed. In so ruling, the supreme court pinpointed the significance of properly exercised judicial discretion, saying:

The record abundantly shows that the court decided fairly and impartially, and having done so, that decision is not open to question. Whether the decision was as some other court would have decided is beside the point.⁶⁵⁵

In the final analysis, once significant information has been brought to the court's attention, the court must exercise its discretion in selecting the proper sentence on an individual basis, as per the peculiar facts of the specific situation. The Iowa Supreme Court, emphasizing the necessity for individualized sentencing, has said:

Each case must be decided upon its peculiar facts and there is no hard and fast rule by which the punishment of those convicted of crimes must be determined within the limits of the governing statutes.⁶⁵⁶

That trial courts cannot bind themselves to prescribe uniform minimum sentences when the statutes set no such limits was made clear recently in *State v. Jackson*.⁶⁵⁷ In that case, the judges in one judicial district entered into a written agreement that each would impose a minimum, mandatory penalty for every conviction for operating a motor vehicle while under the influence of intoxicants (OMVUI) of 20 days' imprisonment in the county jail, subject to probation in individual cases.⁶⁵⁸ However, the statutory penalty for a first OMVUI offense

⁶⁵² *State v. Cole*, 168 N.W.2d 37, 40 (Iowa 1969).

⁶⁵³ 233 Iowa at 1258, 11 N.W.2d at 411.

⁶⁵⁴ *State v. Boston*, 234 Iowa at 1048-49, 14 N.W.2d at 677-78.

⁶⁵⁵ *Id.* at 1053, 14 N.W.2d at 680.

⁶⁵⁶ *State v. Kramer*, 252 Iowa 916, 921-22, 109 N.W.2d 18, 21 (1961).

⁶⁵⁷ 204 N.W.2d 915 (Iowa 1973).

⁶⁵⁸ The agreement, styled GENERAL ORDER, provided:

In all O.M.V.U.I. cases on a plea of guilty or conviction the penalty imposed will be a minimum sentence of imprisonment for twenty (20) days

is *either* a fine or a jail sentence "for a period of [sic] *not to exceed one year*," or both, but without a minimum penalty or a mandatory term of imprisonment.⁶⁵⁹

Pointing out that the setting of upper and lower limits for criminal penalties is a matter of *legislative* prerogative, the supreme court said:

When judges adopt a general order that a minimum penalty shall be different than a statute provides, they are changing the statute, for they are depriving themselves of the discretion to impose the minimum provided by the statute.⁶⁶⁰

Since no statutory minimum is prescribed in the OMVUI statute, the exact amount of imprisonment, if any, is left to the court's discretion and may range from 1 day to 1 year. Indeed, *no* amount of imprisonment is required at all, since the court can select a fine as the alternative mode of punishment.

Stressing that the court must exercise its discretion in sentencing on a case-by-case basis, the supreme court, quoting from a New York case,⁶⁶¹ said that sentencing "under a predetermined fixed policy cannot satisfy a statutory requirement for the exercise of discretion." Rather, what is required is "an actual exercise of judgment upon the part of the [individual] court"; that is, "a consideration by the court of the facts and circumstances which are necessary to make a sound, fair and just determination."⁶⁶² Refusing to demean sentencing conferences to broaden judges' knowledge about sentencing to reduce unwarranted discrepancies,⁶⁶³ the supreme court nevertheless concluded:

But in the end no judge can abdicate his individual responsibility to pass sentence in each case according to his lights, within the statutory limits. Each judge must grapple with the facts and circumstances in the case before him and arrive at the sentence he regards as right.⁶⁶⁴

Thus, had the judge in the instant case exercised his discretion and not considered the general order as binding, then the sentence imposed

and a fine in the sum of \$300.00. The foregoing must be understood as minimums.

Consideration bearing on suspension of a sentence of imprisonment and parole will depend in these as in other cases on the circumstances surrounding each individual case.

The foregoing policy is effective as to all sentences on and after January 3, 1972. *Id.* at 916.

⁶⁵⁹ IOWA CODE § 321.281 (1973) (emphasis added).

⁶⁶⁰ 204 N.W.2d 915, 916 (Iowa 1973).

⁶⁶¹ Application of Frazzita, 147 N.Y.S.2d 11, 16-17 (Sup. Ct. 1955).

⁶⁶² 204 N.W.2d 915, 916 (Iowa 1973).

⁶⁶³ See, e.g., ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, §§ 7.1-7.3 (Approved Draft, 1968).

⁶⁶⁴ 204 N.W.2d 915, 917 (Iowa 1973).

would not have been erroneous even though the general order itself was invalid.

C. Allocation

Irrespective of whether the defendant has exercised his prerogatives to file any of the aforementioned presentence motions or whether he has simply proceeded directly to sentencing—either after the normal delay or, upon his request, immediately—the court must afford him the right of allocution before imposing the sentence.⁶⁶⁵

A defendant's right of allocution when appearing for judgment is statutorily prescribed in detail, with the court directed to ask the defendant "whether he has any legal cause to show why judgment should not be pronounced against him."⁶⁶⁶ However, while a court ordinarily has no discretion to skip this stage of the sentencing process, the supreme court recently held, in *State v. Christensen*,⁶⁶⁷ that the opportunity for a defendant to make a statement need not be verbalized in the precise words of the statute, it being sufficient for the court to ask: "Is there anything you would like to say to the court before I pronounce sentence?"⁶⁶⁸

Similarly, the supreme court held, in *State v. Patterson*,⁶⁶⁹ that the trial court did not abuse its discretion in pronouncing sentence although merely allowing the defendant as well as the defense counsel to "make a statement" rather than specifically referring to the prescribed inquiry concerning allocution. Noting that the court's extended question-and-answer colloquy with defendant prior to sentencing had afforded ample opportunity for the defendant to volunteer such information, the supreme court determined: "The important thing is

⁶⁶⁵ See generally Comment, 48 IOWA L. REV. 172 (1962). Although the defendant must be afforded the right of allocution, it is clear that it can be waived. Two ways that the requirement of allocution may be waived were discussed in *State v. Rinehart*, 255 Iowa 1132, 125 N.W.2d 242 (1967). First, the court noted that the general rule is that "the answer of counsel is binding on the accused," and thus it is sufficient that defense counsel (rather than defendant) answered that there was no "legal cause" why sentence should not be imposed. *Id.* at 1134, 125 N.W.2d at 246. Secondly, the court observed:

So, where accused moves for a new trial, assailing the verdict for several reasons, and is afforded every opportunity to interpose objections to the judgment, he cannot complain that the court, in pronouncing sentence, fails to inform him of the verdict, and to ask him to show cause why judgment should not be pronounced. *Id.* at 1140, 125 N.W.2d at 247, quoting 24 C.J.S. Criminal Law § 1576 (1961).

Apparently, the same rule would apply on a motion in arrest of judgment.

⁶⁶⁶ IOWA CODE § 789.6 (1973).

⁶⁶⁷ 201 N.W.2d 457 (Iowa 1972).

⁶⁶⁸ *Id.* at 460.

⁶⁶⁹ 161 N.W.2d 736, 738 (Iowa 1968).

whether defendant had his chance to point out any reason for withholding judgment."⁶⁷⁰ The court added: "[N]othing appears in the record to suggest defendant in fact had any legal cause why sentence should not be imposed."⁶⁷¹

Notwithstanding the possibility that a court may have some flexibility in wording its offer of the right of allocution, it is still advisable to adhere to the standard sentencing colloquy. This was illustrated in a recent case in the District of Columbia.⁶⁷² Before sentencing a defendant convicted of possession of narcotic drugs, the court told the defendant that if he divulged the name of the supplier "it might possibly make a difference in the type of sentence that I impose in respect to the user."⁶⁷³ After the defendant stood silent, the court decided not to grant probation,⁶⁷⁴ and sentenced the defendant to 180 days in jail, one-half the 360-day statutory maximum. Vacating the judgment and remanding for resentencing, the appellate court observed:

What is demonstrated, therefore in this record, is not so much an abuse of discretion as a failure to exercise discretion in the sentencing process.⁶⁷⁵

Even though the actual sentence was only half the maximum authorized sentence, the appellate court said that "the error in the sentencing process was so egregious as to require that the sentence be vacated."⁶⁷⁶

D. Determination of the Specific Penalty

The trial court's determination of the specific penalty, where such a determination may be made from within a range of permissible alternatives, is the one stage in the criminal trial process in which the exercise of judicial discretion will most likely be left undisturbed upon appellate review. Although the supreme court has the statutory duty to determine whether the punishment imposed was too severe, and may reduce it if it is found to be excessive,⁶⁷⁷ it will not interfere with the lower court's determination

[u]nless there is an error in the sentence by reason of failure to follow a specific statutory provision or there is an abuse of discretion . . .⁶⁷⁸

When the sentence imposed is faulty because it fails to comply with statutory guidelines, the supreme court is freed from the normal re-

⁶⁷⁰ *Id.*

⁶⁷¹ *Id.*

⁶⁷² *Williams v. United States*, 293 A.2d 484 (D.C. Ct. App. 1972).

⁶⁷³ *Id.* at 485-86.

⁶⁷⁴ *Id.* at 486.

⁶⁷⁵ *Id.* at 487.

⁶⁷⁶ *Id.*

⁶⁷⁷ See IOWA CODE § 793.18 (1973).

⁶⁷⁸ *State v. Simpson*, 254 Iowa 637, 645, 118 N.W.2d 606, 611 (1962); *accord*, *State v. Cupples*, 260 Iowa 1192, 1197, 152 N.W.2d 277, 280 (1967).

quirement that sentences will be overturned as excessive only where there has been abuse of discretion and then it makes its own independent determination of the "right" sentence.⁶⁷⁹ This type of sentencing error is most likely to occur in those situations where the court's discretion is substantially restricted. For example, there are a few crimes for which the punishment is fixed or mandatory, thus leaving nothing to the sentencing court's discretion. These include the five crimes punishable exclusively by life imprisonment.⁶⁸⁰ Some of the other more serious felonies are punishable for a term of years up to and including life, with the number of years to be selected from within the permissible range by the trial court in the exercise of its sound discretion.⁶⁸¹ Other serious felonies are punishable exclusively by an indeterminate term of imprisonment, subject to a statutory maximum, in the penitentiary or reformatory,⁶⁸² thus leaving the effective determination of the amount of time to be served in the hands of the parole board.⁶⁸³ This leaves the sentencing judge with no discretion since he can choose neither the mode of punishment nor the length of incarceration within the one mode.

On the other hand, many of the less serious felonies are punishable in the alternative. Thus, if the court decides to imprison the defendant, it may impose either an indeterminate term in the penitentiary or reformatory, or a shorter, more definite term in the county jail.⁶⁸⁴ As the supreme court has observed:

Neither the trial court nor this court has any discretion as to the period of confinement in the penitentiary. . . . The discretion is only between a penitentiary sentence and a fine and jail sentence.⁶⁸⁵

Nevertheless, if the trial court selects the jail-sentence alternative, it can exercise broad discretion in determining the exact duration of sen-

⁶⁷⁹ See *State v. Stevenson*, 195 N.W.2d 358, 360 (Iowa 1972). Notwithstanding the statutory stricture on increasing punishment on appeal, Iowa Code § 793.18 (1973), a sentence may be modified in some cases even where the end result of the supreme court's action may be an increase in punishment. See *State v. Weise*, 201 N.W.2d 734, 738 (Iowa 1972).

⁶⁸⁰ See Iowa Code §§ 690.2 (first-degree murder), 689.1 (treason), 706.3 (kidnapping for ransom), 697.1 (death caused by explosives), 711.4 (train robbery) (1973).

⁶⁸¹ See, e.g., *id.* § 708.2 (1973) (aggravated burglary).

⁶⁸² See, e.g., *id.* § 690.10 (1973) (manslaughter).

⁶⁸³ *State v. Kulish*, 260 Iowa 138, 145, 148 N.W.2d 428, 433 (1967) (dictum); *State v. Johnson*, 196 N.W.2d 563, 571 (Iowa 1972):

The indeterminate sentencing act, section 789.13, requires the sentence, if it imposes a penitentiary term shall not be fixed by the court, but it is imposed by law.

⁶⁸⁴ See, e.g., Iowa Code § 703.1 (1973) (bigamy).

⁶⁸⁵ *State v. Simpson*, 254 Iowa 637, 645, 118 N.W.2d 606, 611 (1962).

tence. This is possible not only because the indeterminate sentencing provision applies only to terms of imprisonment in the penitentiary or reformatory, but also because practically all of these alternative jail sentences are for periods "not to exceed one year," thus permitting the judge to choose any number of days between 1 and 365.

The crime of burglary with aggravation, punishable by imprisonment in the penitentiary for any term of years up to and including life,⁶⁸⁶ presents the trial court with the broadest range of permissible imprisonment in the Iowa criminal code. This sentencing authority permits the judge, in his discretion, to sentence a defendant to a period of from 1 year to life. Even when a life term is imposed, the sentence will not be disturbed in the absence of an abuse of discretion. A life term was upheld in *State v. Kendall*,⁶⁸⁷ for example, with the supreme court merely noting that the trial court's action was justifiable because the defendant had assaulted a person with intent to commit rape during the burglary.

*State v. Johnson*⁶⁸⁸ is a recent illustration that the trial court's selection of even a harsh alternative penalty will not be overturned upon appeal merely because the supreme court might disagree with the severity of the sentence imposed. The defendant had been convicted of false drawing and uttering of a check and sentenced to an indeterminate term of 7 years in the penitentiary, although the court could have sentenced him to a mere jail term of any number of days up to a maximum of 1 year.⁶⁸⁹ Conceding the trial court's right within the prescribed statutory alternatives "to fix such punishment for the crime as it thought defendant deserved," the supreme court mused: "Although the sentence seems quite severe in view of the amount of the check, we cannot say there was an abuse of discretion."⁶⁹⁰

In *State v. O'Dell*,⁶⁹¹ the supreme court, summarizing its philosophy regarding reduction of sentences it considers too severe, said:

[T]his power will be exercised when the court below has manifestly visited too severe a penalty, one disproportionate to the degree of guilt, as shown by the proof.⁶⁹²

The court added that there must be "some legal data" upon which to base any reduction of sentence.⁶⁹³

*Knox v. Harrison*⁶⁹⁴ is one of the rare instances in which the Iowa

⁶⁸⁶ IOWA CODE § 708.2 (1973).

⁶⁸⁷ 167 N.W.2d 909, 911-12 (Iowa 1969).

⁶⁸⁸ 196 N.W.2d 563 (Iowa 1972).

⁶⁸⁹ See IOWA CODE § 713.3 (1973).

⁶⁹⁰ 196 N.W.2d at 571.

⁶⁹¹ 240 Iowa 1157, 39 N.W.2d 100 (1949).

⁶⁹² *Id.* at 1161, 39 N.W.2d at 102.

⁶⁹³ *Id.*, 39 N.W.2d at 102.

⁶⁹⁴ 185 N.W.2d 718 (Iowa 1971).

Supreme Court has reduced an otherwise legally imposed criminal penalty for being excessive. In this bizarre series of events, the defendant spat in the judge's face upon being sentenced on a simple misdemeanor charge. Following an adjudication of guilt on a charge of contempt for the spitting incident, he was sentenced by a second judge to 6 months' imprisonment in the county jail.⁶⁹⁵ However, the defendant's conduct during the hearing before the second judge led to a second citation for contempt and ultimately to an additional 6 months' imprisonment, with the two terms to run consecutively, as well as a \$500 fine, the statutory maximum penalty.⁶⁹⁶ Modifying the judgment in the second case, the supreme court said it "believe[d] the sentence was excessive under the record here."⁶⁹⁷ Speculating that the sentencing judge, who had heard both contempt cases and imposed both sentences, had been influenced in the second case by the defendant's conduct against the first judge, the supreme court said that the earlier incident should not affect the penalty for the contemptuous conduct in the second judge's court. Therefore, the supreme court modified the judgment by making the second 6-month term run concurrently with the sentence imposed in the first case and withdrew the \$500 fine.⁶⁹⁸ Although not discussing this case in such terms, the supreme court's approach amounted to a determination that the trial court had abused its discretion in exercising its statutory authority to order that the two sentences run consecutively.⁶⁹⁹

E. Special Sentencing Considerations

To this point, the discussion of the sentencing process has focused on factors which apply to all cases. In addition to these generally applicable sentencing considerations, there are a number of more specific elements that are applicable only in certain situations. Some of these can have the effect of increasing the court's discretionary powers, while others tend to narrow the scope of the court's sentencing options. The most significant of these specific factors include the determination of the locus of imprisonment, the sentencing options available in OMVUI cases, the sentencing of juveniles convicted in criminal court, and the problem of the unrepresented indigent defendant.

1. Locus of the Imprisonment

Once a court has decided to imprison a convicted felon, it may have some discretion as to the locus of the imprisonment. The factors in-

⁶⁹⁵ This sentence was upheld in *Knox v. Municipal Court*, 185 N.W.2d 705 (Iowa 1971).

⁶⁹⁶ 185 N.W.2d at 720; see IOWA CODE § 665.4 (1973).

⁶⁹⁷ 185 N.W.2d at 720 (Iowa 1971).

⁶⁹⁸ *Id.*

⁶⁹⁹ The statute authorizing consecutive sentences is IOWA CODE § 789.12 (1973).

volved in determining whether there is discretion in selection of the place of commitment include: the nature of the crime, the age of the defendant, the sex of the defendant, and the defendant's prior criminal record.

The penalty for some felonies is statutorily prescribed in the alternative, leaving it to the sentencing court's discretion whether the defendant is to be imprisoned in the penitentiary or adult reformatory or in the county jail.⁷⁰⁰ The most innovative development in this connection has been the statutory authorization for sentencing, at the court's discretion, to a local minimum-security correctional facility, if available, instead of exclusively to the county jail.⁷⁰¹ To date, however, this sentencing option is only available to judges in central Iowa, since the only such local correctional facility in operation is in Des Moines.⁷⁰²

Whenever a male defendant is to be incarcerated in the penitentiary or reformatory, there may be some discretion as to which of these state institutions the sentencing court selects. However, there is no such discretion if the defendant is a female, since there is no women's penitentiary in Iowa, only a women's adult reformatory. On the other hand, a male defendant, unless he has been convicted of certain felonies,⁷⁰³ must be committed to the men's reformatory if he is under 30 at the time of commitment *and* has never before been convicted of a felony.⁷⁰⁴ If he has been convicted of murder, treason, sodomy, or incest, however, he must be sent to the penitentiary irrespective of his age or prior record. Selection of the locus of commitment is a matter of the trial court's discretion "as the particular circumstances may warrant," irrespective of age and prior record, when the crime is rape, robbery, or breaking and entering a "dwelling house" in the nighttime.⁷⁰⁵

2. OMVUI Dispositions

When the offense is operating a motor vehicle while under the influence of intoxicants, the trial court's sentencing options include not only imposition of imprisonment and/or a fine, but the court may also "order the defendant, at his own expense, to enroll [in], attend and successfully complete a course for drinking drivers."⁷⁰⁶ On a defend-

⁷⁰⁰ See notes 684-86 *supra* and accompanying text.

⁷⁰¹ See IOWA CODE § 356A.3 (1973).

⁷⁰² See generally Oxberger, *Revolution in Corrections*, 22 DRAKE L. REV. 250 (1973).

⁷⁰³ These include murder, treason, sodomy, and incest. IOWA CODE § 789.16 (1973).

⁷⁰⁴ *Id.*

⁷⁰⁵ *Id.*

⁷⁰⁶ *Id.* § 321B.16.

ant's first OMVUI conviction, this provision is operative, in the court's discretion, either "in lieu of, or prior to or after the imposition of [criminal] punishment," as well as being in addition to the court's authority to commit OMVUI offenders to a state treatment facility.⁷⁰⁷ For subsequent OMVUI convictions, the court can still order the defendant to attend the instructional course, but this alternative cannot be imposed as a substitute for the prescribed criminal penalty.⁷⁰⁸ Moreover, while the court is authorized to order the defendant committed to a state treatment facility after any conviction for OMVUI, such commitment can be in lieu of the prescribed criminal penalty only on the second or subsequent conviction.⁷⁰⁹

3. *Juvenile Defendants in Criminal Court*

When a defendant is a juvenile whose case has been transferred to criminal court from juvenile court, the special sentencing provisions of section 232.72 come into play. Specifically, the trial court may, with the consent of the defendant, transfer the convicted juvenile back to juvenile court for further disposition under the juvenile system, or it may put the defendant on probation and then set aside his conviction after successful completion of at least 1 year of probation.⁷¹⁰ However, the supreme court has repeatedly made it clear that the trial court can also sentence the juvenile under the criminal statutes like any other convicted defendant. As with sentencing in general, choosing among these three options is a matter for the trial court's sound discretion.⁷¹¹

*State v. Davis*⁷¹² is the most recent, and possibly the most comprehensive, opinion upholding an exercise of judicial discretion in not affording special treatment for juveniles convicted of a crime. Following transfer from juvenile court, the defendant pleaded guilty to breaking and entering. In addition to the two leniency options under section 232.72, the trial court could have imposed sentence under section 708.8. This provision, as the general penalty clause for breaking and entering, prescribes alternative sentences, in the court's discretion, of imprisonment not exceeding 10 years in the penitentiary, or a jail term

⁷⁰⁷ *Id.*; see *id.* § 321.281.

⁷⁰⁸ See *id.* § 321B.16.

⁷⁰⁹ *Id.* § 321.281.

⁷¹⁰ IOWA CODE § 232.72 (1973).

⁷¹¹ See, e.g., *Ethridge v. Hildreth*, 253 Iowa 855, 859, 114 N.W.2d 311, 314 (1962); *State v. Reed*, 207 Iowa 557, 561, 218 N.W. 609, 610 (1928):

[I]t was within the discretion of the district court whether or not the penalty should be attached for the crime, or whether the defendant should be referred to the juvenile court for final disposition of his case thereunder.

⁷¹² 195 N.W.2d 677 (Iowa 1972).

not to exceed 1 year and a fine not exceeding \$100.⁷¹³ Although the defendant was a juvenile, the court opted for the more severe alternative and sentenced the defendant to a term of imprisonment in the men's reformatory not to exceed 10 years.

Affirming, the supreme court said the trial court rightfully did not use its powers for special disposition here since "[t]he information at the court's disposal did not merit special action."⁷¹⁴ Recognizing that the trial court had fulfilled its general responsibility of determining a proper sentence after a consideration of "all pertinent matters,"⁷¹⁵ the supreme court noted that the defendant had committed a number of previous offenses and was on parole from the boy's training school at the time of the instant offense. Once the criminal court determined not to exercise its option to afford him special treatment, the defendant, albeit a juvenile, stood on the same footing as any other convicted defendant. Accordingly, there was no abuse of discretion in the imposition of the penalty and the supreme court did not interfere with the sentence imposed, since it did not exceed the statutory limit. Moreover, it was no abuse of the trial court's discretion to deny the defendant a bench parole, since its discretion in granting or withholding bench paroles is apparently as "broad" when acting specially under section 232.72⁷¹⁶ as it is when acting under the general probation provision, section 247.20.⁷¹⁷

4. *The Unrepresented Indigent Defendant*

A sentencing court's scope of judicial discretion in choosing among alternative modes of authorized penalties can be narrowed when the defendant is an indigent. In light of the United States Supreme Court's decision in *Argersinger v. Hamlin*,⁷¹⁸ unless an indigent defendant knowingly and intelligently waives his sixth amendment right to counsel, a trial court can maintain its ordinary option under an alternative sentencing statute to impose a sentence of imprisonment only by appointing trial counsel for him. In other words, an unrepresented indigent defendant who did not waive his right to counsel cannot be sentenced to imprisonment even though the applicable criminal statute provides for punishment either by imprisonment or by fine or by both. The trial court's failure to appoint trial counsel, absent a waiver, thus operates to destroy the court's statutory authority to exercise its ordi-

⁷¹³ IOWA CODE § 708.8 (1973).

⁷¹⁴ 195 N.W.2d at 678.

⁷¹⁵ *Id.*

⁷¹⁶ *See id.*

⁷¹⁷ IOWA CODE § 247.20 (1973); see text accompanying notes 812-32 *infra*.

⁷¹⁸ 407 U.S. 25, 36-37 (1972).

nary discretion in choosing among sentencing alternatives by limiting the sentence to a fine.⁷¹⁹

F. Resentencing

Another area in which recent federal constitutional decisions have intervened to reduce judicial discretion has been that of resentencing persons reconvicted subsequent to successful appeals of their original convictions. A court's discretion in imposing harsher penalties after a retrial in such circumstances was significantly curtailed in 1969 by the United States Supreme Court in *North Carolina v. Pearce*.⁷²⁰

Until *Pearce*, there was nothing in Iowa's statutes or in Iowa Supreme Court pronouncements that precluded a trial court from imposing a harsher penalty upon reconviction for any reason whatsoever.⁷²¹ In that case, however, the Supreme Court, conceding that "neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction,"⁷²² nevertheless held that due process of law, under the fourteenth amendment, "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial."⁷²³ To ensure against such vindictiveness, the Court concluded that the reasons for the harsher resentence must "affirmatively appear" in the record and, further, that these reasons

must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.⁷²⁴

Thus, *Pearce* does not preclude harsher resentencing when a factual basis therefore appears in the record for appellate review. This was made clear in *Moon v. Maryland*,⁷²⁵ in which the United States Supreme Court upheld a more severe sentence upon reconviction.

The *Pearce* doctrine was applied by the Iowa Supreme Court in *State v. Pilcher*,⁷²⁶ in which a defendant's sentence was increased from 50 to 60 years following his reconviction after a successful appeal. Because the case had been tried before *Pearce*, the supreme court applied the *Pearce* doctrine under its statutory authority to reduce the

⁷¹⁹ In addition, it may be constitutionally improper to imprison such an indigent defendant if he subsequently fails to pay his fine. See text accompanying notes 795-811 *infra*.

⁷²⁰ 395 U.S. 711, 726 (1969).

⁷²¹ *State v. Pilcher*, 171 N.W.2d 251, 253 (Iowa 1969).

⁷²² 395 U.S. at 723.

⁷²³ *Id.* at 725.

⁷²⁴ *Id.* at 726.

⁷²⁵ 398 U.S. 319, 320-21 (1970) (per curiam).

⁷²⁶ 171 N.W.2d 251 (Iowa 1969).

sentence so as to bring it within proper limits.⁷²⁷ The second sentence was reduced to 50 years since "the constitutional legitimacy of the extra ten years [did] not appear [in the record]."⁷²⁸ Although there was no claim that the trial court "was motivated in the slightest degree by vindictiveness,"⁷²⁹ the supreme court nevertheless pointed out that the reasons for increasing the duration of the sentence did not appear in the record, as required by *Pearce*.⁷³⁰

In *Colten v. Kentucky*,⁷³¹ the United States Supreme Court refused to apply the *Pearce* doctrine to an increased sentence following conviction on a de novo trial before a different, higher court than the one in which the defendant was originally convicted. Pointing out that two different courts are involved in this type of two-tier trial court system, the Supreme Court observed that the higher court on a de novo appeal is not "asked to find error in another court's work."⁷³² Rather, the Court declared:

[T]he Kentucky court in which Colten had the unrestricted right to have a new trial was merely asked to accord the same trial, under the same rules and procedures, available to defendants whose cases are begun in that court in the first instance.⁷³³

Thus, no additional evidence was necessary to justify a more severe penalty imposed by the higher court after the new trial. Indeed, the latter court was not required to justify the harsher penalty at all, since the penalty imposed was within the permissible range under the applicable statute.

The Iowa Supreme Court has followed *Colten* in upholding a harsher penalty after trial de novo in district court following a guilty plea on a non-indictable misdemeanor in municipal court.⁷³⁴ In *City of Cedar Rapids v. Klees*,⁷³⁵ the defendant had pleaded guilty to a violation under city ordinance and was fined \$25. Upon reconviction in a trial de novo in the district court, however, he was sentenced to a 5 days in jail.

VII. JUDICIAL DISCRETION AND POSTSENTENCING ISSUES

Once the defendant has been sentenced, the criminal process, at

⁷²⁷ IOWA CODE § 793.18 (1973).

⁷²⁸ 171 N.W.2d at 254.

⁷²⁹ *Id.*

⁷³⁰ *Id.*

⁷³¹ 407 U.S. 104 (1972).

⁷³² *Id.* at 117.

⁷³³ *Id.*

⁷³⁴ Such courts will be abolished as of July 2, 1973, when Iowa's Unified Trial Court Act becomes effective. See Unified Trial Court Act, ch. 1124, § 45 [1972] Iowa Laws 454.

⁷³⁵ 201 N.W.2d 920, 921 (Iowa 1972) (per curiam).

least at the trial court level, is nominally completed. However, the trial court may still have an opportunity to exercise judicial discretion in a number of proceedings that may occur either individually or in combination after sentence has been imposed.

A. Appeal

One such postsentencing procedure involves the decision to appeal, which, under Iowa law, may be made by either the defendant or the state.⁷³⁶ In either case, the appeal can only be from a final judgment,⁷³⁷ and the criminal court, unlike its civil counterpart,⁷³⁸ has absolutely no discretion in permitting or denying an appeal. When the defendant is the appellant: "The matter of appeal . . . in a criminal case is not discretionary in Iowa. He may appeal as a matter of right."⁷³⁹ This right of appeal is purely statutory,⁷⁴⁰ however, and certain requisites ordinarily still must be met if the defendant is to successfully invoke the jurisdiction of the appellate court.⁷⁴¹

The trial court does have some discretion in the appellate process⁷⁴² when the defendant is alleged to be indigent. In the first instance, this discretion is exercised in the court's determination of whether the defendant is in fact indigent. In doing so, "it is proper for the court to require a reasonable showing [that the defendant] is unable to employ counsel."⁷⁴³ As discussed earlier,⁷⁴⁴ however, there are no statutory rules as to what constitutes indigency for purposes of appointing private counsel nor has the supreme court fashioned any guidelines other than a listing of general factors for the trial court to consider.

⁷³⁶ IOWA CODE § 793.1 (1973).

⁷³⁷ *Id.* § 793.2; see, e.g., *State v. Coughlin*, 200 N.W.2d 525, 526 (Iowa 1972); *State v. Hocker*, 178 N.W.2d 317 (Iowa 1971); *State v. Hellickson*, 162 N.W.2d 390, 392 (Iowa 1968).

Because the supreme court may not *increase* a criminal penalty set by the sentencing judge, IOWA CODE §§ 793.18, .20 (1973), the trial court's authorized exercise of its discretion, in setting less than maximum penalties, see text accompanying notes 677-98 *supra*, is nonreviewable at least as to that particular defendant.

⁷³⁸ See IOWA R. CIV. P. 33 (trial court can certify for appeal any action, except one involving an interest in real estate, where "the amount in controversy, as shown by the pleadings, is less than \$1000 . . .").

⁷³⁹ *Weaver v. Herrick*, 258 Iowa 796, 799, 140 N.W.2d 178, 180 (1966).

⁷⁴⁰ *State v. Olsen*, 180 Iowa 97, 99, 162 N.W. 781, 782 (1917) (dictum).

⁷⁴¹ See IOWA CODE § 793.4 (1973).

⁷⁴² For another aspect of judicial discretion in the appellate process, see IOWA CODE § 793.10 (1973) (sentencing court has discretion to order that defendant, who is unable to give appeal bail, continue to be detained in local custody instead of being taken to the penitentiary "to abide the judgment on the appeal, if the defendant desires it").

⁷⁴³ *Frink v. Bennett*, 162 N.W.2d 404, 406 (Iowa 1968) (dictum).

⁷⁴⁴ See text accompanying notes 20-25 *supra*.

In *Sill v. District Court*,⁷⁴⁵ the trial court was held to have abused its discretion in refusing to appoint appellate counsel for a defendant who had appointive counsel at trial. The trial court may have been swayed by its reflections that the defendant suffered from no known infirmities and that he had been seen drinking with some friends, but the implication in *Sill* is that the trial court improperly exercised its discretion by considering these factors since they were extraneous to the issue of whether the defendant had the financial resources to employ his own attorney for his appeal.

An additional opportunity for the exercise of discretion in the case of an indigent defendant, the decision whether to order that he be furnished a free transcript of the trial proceedings for use on appeal,⁷⁴⁶ was eliminated in 1956 by the United States Supreme Court decision in *Griffin v. Illinois*.⁷⁴⁷ Applying *Griffin*, the Iowa Supreme Court ruled in *Larson v. Bennett*⁷⁴⁸ that "an indigent is now entitled on direct appeal from his conviction to a transcript sufficient to insure an adequate appellate review."⁷⁴⁹ Nevertheless, it is still proper for the trial court to require a reasonable showing that the applicant is unable to pay for his own transcript.⁷⁵⁰

As previously mentioned, the state may also appeal under Iowa law,⁷⁵¹ but, unlike the defendant, not as a matter of right. The supreme court's guideline for permitting an appeal by the state, which, in any case is limited to questions of law and may not result in a reversal or modification of a judgment "so as to increase the punishment,"⁷⁵² is that the case must involve questions of law whose determination will be generally beneficial or guide the trial courts in the future.⁷⁵³ Even a successful state's appeal, by statute, "in no case stays the operation of a judgment in favor of the defendant."⁷⁵⁴

⁷⁴⁵ 184 N.W.2d 699, 700 (Iowa 1971).

⁷⁴⁶ The statute provides that after perfection of an appeal and a showing of indigency, the judge *may* order a transcript "made at the expense of the county where said defendant was tried." IOWA CODE § 793.8 (1973). The ordering of a free transcript rests in the sound discretion of the trial court. *State v. Waddle*, 94 Iowa 748, 64 N.W. 276, 277 (1895). For specific abuses of discretion in the trial court's refusal to order a free transcript under the particular circumstances see *Weaver v. Herrick*, 258 Iowa 796, 800-02, 140 N.W.2d 178, 180-81 (1966); *State v. Harris*, 151 Iowa 234, 237, 130 N.W. 1082, 1083 (1911).

⁷⁴⁷ 351 U.S. 12, 19-20 (1956).

⁷⁴⁸ 160 N.W.2d 303 (Iowa 1968).

⁷⁴⁹ *Id.* at 306.

⁷⁵⁰ See *Frink v. Bennett*, 162 N.W.2d 404, 406 (Iowa 1968) (no absolute right to free transcript of the defendant's former trial). See also *Britt v. North Carolina*, 404 U.S. 226, 227-30 (1971).

⁷⁵¹ IOWA CODE § 793.1 (1973).

⁷⁵² *Id.* § 793.20.

⁷⁵³ *State v. Kriens*, 255 Iowa 1130, 1131, 125 N.W.2d 263, 264 (1963).

⁷⁵⁴ IOWA CODE § 793.9 (1973).

These general principles notwithstanding, the supreme court can reverse an *unauthorized* judgment of acquittal, one which is deemed totally void because not permitted by law, and order entry of lawful judgment upon remand. In *State v. Deets*,⁷⁵⁵ the trial court sustained a postconviction motion in arrest of judgment and then entered a judgment of acquittal. The entry of this judgment went beyond the limited purpose of an order in arrest of judgment, that is, to place a defendant "in the same situation or position as he was before commencement of the prosecution."⁷⁵⁶ The acquittal in effect transformed the order in arrest of judgment into a motion for judgment notwithstanding the verdict, a motion unauthorized in the Iowa criminal code.⁷⁵⁷ Holding that the trial court's entry of a postconviction judgment of acquittal was "totally void and of no legal force or effect because not permitted by law," the supreme court remanded the case for entry of lawful judgment.⁷⁵⁸

B. Motion in Arrest of Judgment

Another postsentencing procedure that provides the trial court with an opportunity to exercise its discretion is the motion in arrest of judgment. Unlike a motion for a new trial, which must be made *before* judgment,⁷⁵⁹ a motion in arrest of judgment may be made *before* or *after* judgment.⁷⁶⁰ As previously discussed, a motion in arrest of judgment made *before* judgment is an application to the court that no judgment be rendered upon the verdict or plea of guilty.⁷⁶¹ When this motion is made *after* judgment and sentencing, however, it is in effect a motion to set aside both the conviction and the sentence.⁷⁶² In *State v. Hellickson*,⁷⁶³ for example, defendant had pleaded guilty and been sentenced, but subsequently filed a motion to arrest the judgment together with motion for leave of court to withdraw his guilty plea.

Hellickson's asserted ground for arrest of judgment was that his guilty plea had not been entered knowingly and intelligently and was therefore void. The trial court, exercising its discretion, in the limited vein of reaching an "either-or" type decision from the conflicting evidence, determined that the plea was not coerced and denied relief.

⁷⁵⁵ 195 N.W.2d 118 (Iowa 1972).

⁷⁵⁶ *Id.* at 123.

⁷⁵⁷ *Id.* at 124.

⁷⁵⁸ *Id.* at 125.

⁷⁵⁹ IOWA CODE § 787.2 (1973).

⁷⁶⁰ *Id.* § 788.2.

⁷⁶¹ See text accompanying note 568 *supra*.

⁷⁶² The order in arrest of judgment cannot be used to acquit the defendant, however. See text accompanying notes 581-84 *supra*.

⁷⁶³ 162 N.W.2d 390 (Iowa 1968).

Affirming, the supreme court defined its own task as being limited to determining "whether there is substantial evidence supporting the findings and conclusions reached by the trial court."⁷⁶⁴

In most circumstances, however, a trial court's ruling on a motion in arrest of judgment made after entry of judgment is not appealable. This general rule applies when "the grounds for the [motion] appeared in the record at the time final judgment was entered" and the record "could have been reviewed on appeal from the judgment."⁷⁶⁵ As the quoted statement suggests, the general rule is not applicable when the grounds for the motion "are not apparent but inhere in the whole record," and thus "would not appear on the record had appeal been taken from the judgment imposing sentence."⁷⁶⁶ Allowing the defendant to appeal the denial of his motion, however, cannot lead to successive appeals. A defendant thus cannot move for an arrest of judgment, appeal from a denial thereof, and upon affirmance, seek additional postconviction relief "on the same grounds previously asserted."⁷⁶⁷

C. Postconviction Relief

Another method by which the defendant can attack the validity of his conviction or sentence is by way of application for postconviction relief.⁷⁶⁸ This remedy, which was established by the Iowa General Assembly in 1971, supersedes the writ of habeas corpus in all situations in which persons have been "convicted of, or sentenced for, a public offense."⁷⁶⁹ Otherwise, this remedy, by statute, "is not a substitute for nor does it affect any remedy, incident to the proceedings in the trial court, or of direct review of the sentence or conviction,"⁷⁷⁰ and it cannot be used to relitigate any issues already *adequately* raised in a previous proceeding.⁷⁷¹ This is an action at law, triable to the court in which the challenged conviction or sentence took place.⁷⁷²

The trial court's adjudication on this petition is critical, since appellate review "is on assigned errors and not de novo."⁷⁷³ Accordingly, the supreme court does not disturb the postconviction judgment

⁷⁶⁴ *Id.* at 394.

⁷⁶⁵ *Id.* at 393.

⁷⁶⁶ *Id.*

⁷⁶⁷ *Id.*

⁷⁶⁸ IOWA CODE §§ 663A.1-.11 (1973).

⁷⁶⁹ *Id.* § 663A.1.

⁷⁷⁰ *Id.* § 663A.2.

⁷⁷¹ *Id.* § 663A.8. As to the adequacy of the earlier raising of the issue see *State v. Masters*, 196 N.W.2d 548, 550-51 (Iowa 1972).

⁷⁷² *State v. Mulqueen*, 188 N.W.2d 360, 362 (Iowa 1971).

⁷⁷³ *Benton v. State*, 199 N.W.2d 56, 57 (Iowa 1972).

entered in such a proceeding "[i]f the trial court's findings of fact are supported by substantial evidence and are justified as a matter of law."⁷⁷⁴ Stated differently, the trial court's "attendant findings are binding on [the supreme court] if substantially supported by the record, unless induced by an erroneous concept of the law."⁷⁷⁵

With respect to indigent defendants, it is not clear whether they must be afforded appointive counsel in postconviction relief hearings. In *State v. Mulqueen*,⁷⁷⁶ the supreme court held that, *under the circumstances*, the trial court erred in refusing to appoint counsel for an indigent applicant of subnormal intelligence who also had psychiatric problems.⁷⁷⁷ However, the court added: "That is not to be construed, however, as meaning an attorney must *always* be appointed . . ."⁷⁷⁸ Also, because the authority to provide a free transcript appears to stem from the same provision as that which authorizes the appointment of counsel,⁷⁷⁹ it appears that a trial court possesses some discretion in determining whether to order a free transcript of the proceeding being challenged on postconviction petition by an indigent.

In *Mulqueen*, the supreme court pointed out that the existence of discretion in deciding whether or not to hold an evidentiary hearing on a petition for postconviction relief depends upon which of the two methods of summary disposition of the hearing question is being sought.⁷⁸⁰ When the court is acting on its own initiative, it can exercise its discretion in determining whether there are sufficient material facts at issue to warrant an evidentiary hearing. To properly exercise this discretion, the court can dispose of the matter without an evidentiary hearing only when " 'the motion and files and records of the case conclusively show that the prisoner is entitled to no relief.' "⁷⁸¹ This conclusive determination that no material issue of fact exists cannot be made, however, when the factual allegations relate "to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light," unless the circumstances were of a kind that the judge " 'could completely resolve by drawing upon his own personal knowledge or recollection.' "⁷⁸² On the other hand, a motion for summary disposition by the opposing party, being in reality a

⁷⁷⁴ *Id.*

⁷⁷⁵ *Parsons v. Brewer*, 202 N.W.2d 49, 52 (Iowa 1972).

⁷⁷⁶ 188 N.W.2d 360 (Iowa 1971).

⁷⁷⁷ *Id.* at 365-66.

⁷⁷⁸ *Id.* at 366.

⁷⁷⁹ IOWA CODE § 663A.5 (1973).

⁷⁸⁰ *Id.*, § 663A.6.

⁷⁸¹ 188 N.W.2d at 367, quoting *Machibroda v. United States*, 368 U.S. 487, 495 (1962).

⁷⁸² *Id.*, quoting 368 U.S. at 495.

motion for summary judgment,⁷⁸³ cannot be granted absent an evidentiary hearing. Thus, in *Mulqueen*, the supreme court decided that the trial court "proceeded erroneously in peremptorily sustaining respondent State's motion to dismiss movant's application."⁷⁸⁴

D. *Nunc Pro Tunc* Orders

Once the court has pronounced sentence, the defendant is usually no longer subject to further execution by that court. However, proceedings *nunc pro tunc* can alter this pursuant to a statute which allows amendments of the record within 60 days of signature by the judge.⁷⁸⁵ This statutory power has also been enlarged so as to inhere in the court independent of the statute.⁷⁸⁶ Generally, *nunc pro tunc* entries are restricted to corrections of records which may be made to conform to the actual pronouncement of a court and can be made during or after expiration of term of court.⁷⁸⁷ Lapse of time will not bar exercise of this power,⁷⁸⁸ although it has been held that a *nunc pro tunc* order correcting a judgment by adding the insertion in the record of an original oral pronouncement of a fine 6 years after execution and satisfaction of judgment was not permissible.⁷⁸⁹ This was later differentiated from a *nunc pro tunc* order imposed as conditional and contingent commitment for "the mode of enforcing payment of the fine"⁷⁹⁰ which was permitted. This was based on the reasoning that the latter order was a "ministerial" or "clerical" error (recording of judgment) and not a "judicial" error (rendition of judgment).⁷⁹¹ In the same case,

the power of the court to amend records of its judgments by correcting mistakes must not be confused with the power of the court to modify or vacate an existing judgment.⁷⁹²

It thus can be presumed that after the 60-day statutory limit,⁷⁹³ defendants are ultimately free from court execution through amendment

⁷⁸³ *Id.* at 368.

⁷⁸⁴ *Id.*

⁷⁸⁵ IOWA CODE § 602.15 (1973).

⁷⁸⁶ See *Peterson v. Eitzen*, 173 N.W.2d 848, 853 (Iowa 1970).

⁷⁸⁷ *State v. Harbour*, 240 Iowa 705, 710-11, 37 N.W.2d 290, 293 (1949):

The correction was sought to make the record entry conform to the actual pronouncement of the court Such proceedings are clearly within the inherent power of the court and the existing statutes are merely cumulative.

⁷⁸⁸ *Parenti v. District Court*, 198 Iowa 560, 564, 199 N.W. 259, 260-61 (1924).

⁷⁸⁹ *Smith v. District Court*, 132 Iowa 603, 607, 109 N.W. 1085, 1087 (1906).

⁷⁹⁰ *State v. Harbour*, 240 Iowa 705, 712, 37 N.W.2d 290, 294 (1949).

⁷⁹¹ *Id.*, 37 N.W.2d at 294.

⁷⁹² *Id.* at 714, 37 N.W.2d at 295.

⁷⁹³ IOWA CODE § 602.15 (1973).

by *nunc pro tunc* entries for all but "clerical" errors. In this regard, the trial court's discretionary acts will not be reviewed since the Iowa Supreme Court has said it examines records without regard to "technical errors or defects."⁷⁹⁴

E. Imprisonment for Failure to Pay a Fine

Where the sentence imposed by the trial court includes the requirement that the defendant pay a fine, the court must be prepared to deal not only with the full panoply of considerations attendant to the imposition of a sentence of imprisonment, but also with the significant body of law that limits the court's discretion to imprison a defendant for failure to pay a fine. In this regard, the trial court's actions are governed by statutory prescriptions tempered significantly by federal constitutional doctrine.

The statutory prescriptions are the basic starting point, since they empower the judge to order a defendant jailed upon default of the fine. Iowa's statute, which is permissive rather than obligatory in nature, provides: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine is satisfied," and it gives the defendant a credit not exceeding 3½ dollars for each day he is so imprisoned.⁷⁹⁵ While this provision generally is made part of the original judgment, it need not be, since the Iowa Supreme Court has held that it can be added subsequently pursuant both to the Iowa Code⁷⁹⁶ and the court's own inherent powers.⁷⁹⁷

Until 1971, the states were free to follow their own procedural rules in this area, and Iowa took the position that "[t]he making of the order for jail commitment, in default of payment of the fine, is discretionary with the court."⁷⁹⁸ This discretionary approach was sharply curtailed, however, by the United States Supreme Court in *Tate v. Short*.⁷⁹⁹ In *Tate*, the Supreme Court declared that imprisonment resulting from an indigent's failure to pay a fine is "unconstitutional discrimination"⁸⁰⁰ under the equal protection clause of the fourteenth amendment. That is, the federal constitution

"prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full."⁸⁰¹

Leaving the question open until raised in a concrete case, the Su-

⁷⁹⁴ *State v. Herzoff*, 200 Iowa 889, 892, 205 N.W. 501, 502 (1925).

⁷⁹⁵ IOWA CODE § 789.17 (1973).

⁷⁹⁶ *Id.* § 602.15.

⁷⁹⁷ *Peterson v. Eitzen*, 173 N.W.2d 848, 850 (Iowa 1970).

⁷⁹⁸ *State v. Rand*, 239 Iowa 551, 555, 32 N.W.2d 79, 81 (1948).

⁷⁹⁹ 401 U.S. 395, 398-99 (1971).

⁸⁰⁰ *Id.* at 397-98.

⁸⁰¹ *Id.* at 398, quoting *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970).

preme Court noted, however, that its holding in *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" ⁸⁰²

In *State v. Snyder*,⁸⁰³ the Iowa Supreme Court interpreted *Tate* to preclude a trial court, which is aware of the defendant's indigency, from ordering his imprisonment "solely because he cannot make immediate payment of a fine by reason of indigency" ⁸⁰⁴ In *Snyder*, the trial court was aware of the defendant's indigency since both trial and appellate counsel were appointed for him, and thus it was unnecessary for him to file any motion after pronouncement of sentence to inform the court of his indigency. The Iowa Supreme Court, by vacating the sentence in *Snyder*, appears to be implying that the imprisonment-by-default provision must be administered in the following way: Once the court has pronounced a judgment involving a fine, an indigent defendant should inform the trial court of his indigency as a basis for modification of the judgment requiring immediate payment in one lump sum. If a defendant adequately demonstrates his indigency, then a reasonable alternative plan of payment, for example, payments in installments, based upon his ability to pay, should be established. The provision in the judgment for default imprisonment should then have a qualifying clause to the effect that such imprisonment is to take effect only after the defendant fails to satisfy the fine under the alternative plan. The terms of this plan could be set forth in the judgment itself.

It must be cautioned that neither the United States nor the Iowa Supreme Court has specifically *held* that imprisonment can follow a defendant's failure to meet reasonable alternatives in satisfaction of the fine. However, the United States Supreme Court emphasized in *Tate* that its holding "does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so."⁸⁰⁵ In a similar vein, the Iowa Supreme Court has upheld the imprisonment of an indigent defendant convicted of failing to make court-ordered child support payments.⁸⁰⁶ The court interpreted the child-support statute⁸⁰⁷ as making "no invidious distinction between rich and poor. All who *willfully* fail to support their children are equally subject to its punitive provisions."⁸⁰⁸ Because willfulness is an element of this crime and he had been convicted, it

⁸⁰² *Id.* at 400-01.

⁸⁰³ 203 N.W.2d 280 (Iowa 1972).

⁸⁰⁴ *Id.* at 290.

⁸⁰⁵ *Tate v. Short*, 401 U.S. 395, 400 (1971).

⁸⁰⁶ *State v. Hopp*, 190 N.W.2d 836, 837 (Iowa 1971).

⁸⁰⁷ IOWA CODE § 233.1(5) (1973).

⁸⁰⁸ 190 N.W.2d at 837.

followed that the defendant was imprisoned for violation of the statute rather than merely because of his financial disability.

*State v. Milliken*⁸⁰⁹ illustrates that a trial court is not only restricted in the manner in which it may imprison indigents for failure to pay fines, it is even restricted in what it says regarding a defendant's indigency during the sentencing colloquy. Noting that his sentencing alternatives were either a fine or imprisonment in the penitentiary or both, the trial judge in *Milliken* mused: "There is no jail sentence possible in this case, except possibly to coerce payment of a fine." Noting that the defendant was a pauper and thus probably could not pay a fine, the judge continued:

I am convinced that he ought to spend some time in prison or in jail and the only possibility of that is by sending him to the penitentiary⁸¹⁰

While reversing the conviction on other grounds, the supreme court strongly disapproved the trial court's sentencing remarks. Even if viewed as nothing more than a colloquial rationalization for the sentence imposed, the remarks were to be "condemned." However, if the judge's reference to the defendant's indigency was intended as "an openly expressed determination that defendant's inability to pay a reasonable fine, per se, dictated an institutional commitment," it was not only to be "condemned," it was "patently impermissible."⁸¹¹

F. Probation

Once the trial court has sentenced a defendant to a term of imprisonment, it may then order suspension of the execution of that part of the judgment and place the defendant on probation.⁸¹² Whether it grants probation is a matter that lies strictly within the court's judicial discretion. That is, a decision to refuse to grant probation (bench parole) is not a matter of personal discretion to be made arbitrarily. This means, for one thing, that the court must exercise its discretion by considering a defendant's application on the merits instead of merely denying applications in adherence to a personal policy of not granting probation.⁸¹³ After hearing the evidence on both sides of the question, the trial court should then detail its reasons for granting or denying probation in each particular case to facilitate effective appellate review.⁸¹⁴

Once the trial court has properly exercised its discretion in considering an application for probation, it may decide not to grant probation,

⁸⁰⁹ 204 N.W.2d 594 (Iowa 1973).

⁸¹⁰ *Id.* at 598.

⁸¹¹ *Id.*

⁸¹² IOWA CODE § 247.20 (1973). This provision is not applicable if the defendant has been convicted of treason, murder, or certain drug offenses. *Id.*

⁸¹³ *State v. Boston*, 233 Iowa 1249, 1256-59, 11 N.W.2d 407, 411-12 (1943).

⁸¹⁴ *State v. Boston*, 234 Iowa 1047, 1052-53, 14 N.W.2d 676, 679-80 (1944).

and unless the court has acted in an arbitrary manner,⁸¹⁵ a disappointed defendant has, as a practical matter, lost his fight. This is because the supreme court has consistently held that there is "broad discretion in the granting or withholding of bench paroles . . ."⁸¹⁶ The breadth of this discretion is evidenced by the supreme court's observation, in *State v. Krana*,⁸¹⁷ that it was obvious that the trial judge "was fully aware of his discretionary power to grant . . . a bench parole regardless of defendant's two prior convictions" and the fact that, in the absence of a convincing showing that the trial court has acted arbitrarily, the supreme court has never overturned a trial court's denial of a bench parole.

Iowa's general probation statute requires that probation be granted, if at all, "at time of or after sentence is pronounced but before imprisonment."⁸¹⁸ Accordingly, it would appear that once the trial court has exercised its rather considerable discretion in making the "either-or" decision about granting probation, it has little or no opportunity to exercise discretion in any other phase of the probation procedure. This initial impression may be somewhat deceptive. To begin with, since 1971 the trial courts in Iowa have been able to employ a sentencing option known as "shock" probation, a device that has been tried successfully in several jurisdictions.⁸¹⁹ The Iowa "shock" probation provision⁸²⁰ allows the court to "shock" the defendant by sending him to jail for a short time before making a decision about probation. However, the Iowa statute is only applicable in situations where the defendant has been sentenced to a county jail or other local detention facility.⁸²¹

In addition, the trial court also has the opportunity to exercise substantial discretion in making decisions about whether to revoke probations. Because Iowa's statutes "do not prescribe procedure for

⁸¹⁵ *State v. Boston*, 233 Iowa 1249, 1258, 11 N.W.2d 407, 411 (1943).

⁸¹⁶ *State v. Cole*, 168 N.W.2d 37, 40 (Iowa 1969).

⁸¹⁷ 159 N.W.2d 413, 416 (Iowa 1968).

⁸¹⁸ IOWA CODE § 247.20 (1973).

⁸¹⁹ See Johnson, *Recent Developments in the Law of Probation*, 53 J. OF CRIM. L. & CRIMINOLOGY 194, 197 (1962).

⁸²⁰ IOWA CODE § 356.47 (1973).

⁸²¹ *Id.* The Iowa Criminal Code Review Study Committee has proposed expanding this concept to permit delayed probation on parolable offenses for inmates of all correctional institutions. Iowa Criminal Code Rev. Study Comm., Proposed Iowa Criminal Code, ch. 3, § 203 (1973). However, the Committee suggests two additional provisions to better structure the operation of the statute. First, the court would have to act, if at all, within a prescribed period of time and, secondly, the decision on whether or not to exercise this option would be "discretionary with the court." The court's decision on whether to grant or withhold such delayed probation would be "not subject to appeal." *Id.*

revocation hearings,"⁸²² trial courts must look to supreme court decisions for ground rules concerning procedures at a probation revocation hearing. The general standard is that probation cannot be revoked "arbitrarily, capriciously, or without any information."⁸²³ The substance of a proper revocation proceeding, then, is left essentially to the trial court's discretion, provided there is a showing of a sufficient factual basis for any revocation order.⁸²⁴

In determining whether there is a sufficient factual basis, the supreme court has said that the trial court's order revoking probation will be upheld where "[s]ubstantial evidence was introduced . . . permitting the trial court to make its finding on the basis of a preponderance of the evidence."⁸²⁵ Further, while the strict rules of evidence in criminal trials do not apply in revocation hearings, the facts on which the court bases its revocation decision nevertheless "may not rest on rumor or surmise."⁸²⁶ Thus, hearsay is admissible, but the supreme court has cautioned that, "revocation does not constitute an abuse of discretion if the fact of the violation is established by evidence which is *competent*."⁸²⁷

What has been said so far about evidentiary rules and hearings may be largely inapplicable in a number of cases, for the Iowa Supreme Court has traditionally taken the position that no hearing is required as long as probation is not revoked "arbitrarily, capriciously, or without any information."⁸²⁸ The United States Supreme Court's prescription of minimal due process requirements for *parole* revocation in *Morrissey v. Brewer*,⁸²⁹ however, strongly suggests that probation revocations without hearings may no longer be constitutionally permissible. In *Morrissey*, the Court overturned the Iowa parole revocation "no hearing" procedure and held that, under the fourteenth amendment, a parolee is entitled to written notice of alleged violations; disclosure of evidence against him; the opportunity to present witnesses and evidence; the right of confrontation, unless the hearing officer finds good cause for not allowing confrontation; and a written finding of facts as to reasons for revoking parole.⁸³⁰ The Iowa Supreme Court, without deciding whether a hearing is required on all parole revocations, merely noted, in *State v. Hughes*,⁸³¹ that the instant issues pre-

⁸²² *State v. Hughes*, 200 N.W.2d 559, 561 (Iowa 1972).

⁸²³ *Id.* at 562.

⁸²⁴ *Id.*

⁸²⁵ *Id.* at 563.

⁸²⁶ *Id.*

⁸²⁷ *Id.* (emphasis added).

⁸²⁸ *Cole v. Holliday*, 171 N.W.2d 603, 606 (Iowa 1969).

⁸²⁹ 408 U.S. 471 (1972).

⁸³⁰ *Id.* at 484-90.

⁸³¹ 200 N.W.2d 559 (Iowa 1972).

sented questions of application of the *Morrissey* principles to "a hearing which was in fact held."⁸³² Quite clearly, however, the *Morrissey* principles should logically extend to the requiring of a hearing on a probation revocation proceeding in a state court.

G. Reduction of Sentence

Once the trial court has imposed a valid sentence, it loses jurisdiction over the case except for its authority to subsequently revoke probation where it has imposed a sentence of imprisonment but suspended its execution. This lack of judicial authority to alter sentences is inconsequential for inmates of the penitentiary and the reformatories, since the state parole board determines an inmate's actual release date subject to the maximum time fixed in the court's sentence. However, this leaves the county jail inmate with no possibility of early release and thus with little incentive to cooperate in any rehabilitative program. This void was filled in 1971 with the passage of a statute providing that a county jail inmate "may, upon the recommendation of the sheriff, and at the discretion of the sentencing judge, receive a reduction of his sentence of not more than twenty percent."⁸³³ The court can exercise this discretion, however, only if the inmate has not violated any jail regulations or state laws during his incarceration and if he has faithfully performed all duties assigned to him in the jail.

VIII. CONCLUSION

It should be apparent by now that "discretion is not limited to what is authorized or what is legal but includes all that is within 'the effective limits on the [court's] power.'"⁸³⁴ In seeking to define "the effective limits" of their proper judicial power, trial judges do not have to "search for and find some statute or rule prescribing the manner of doing every act of theirs in the furtherance of proceedings before them."⁸³⁵

When there is a fixed rule they, of course, must follow it. But even then, they sometimes have some latitude in testing the peculiar facts of individual cases against this rule, and it is only after the court has determined that the facts fit the legal standard that the prescribed action must be taken. If the facts were conflicting *and* the proper legal standard was applied, then this ruling will not be disturbed on appeal. This is because the appellate courts, subject to these two aforementioned qualifications, defer to the trial court's advantage of personal contact with the case, especially in matters "where the situ-

⁸³² *Id.* at 561.

⁸³³ IOWA CODE § 356.46 (1973).

⁸³⁴ K. DAVIS, *DISCRETIONARY JUSTICE* 4 (1971).

⁸³⁵ R. BOWERS, *THE JUDICIAL DISCRETION OF TRIAL COURTS* § 10, at 14 (1931).

ation itself is not easily reproduced in its original character, and [thus] cannot safely be reviewed."⁸³⁶ This recognizes the importance of the trial court having "felt the 'climate' of the trial"⁸³⁷ and thus having had the opportunity "to observe the demeanor and personalities of the parties and their witnesses and to feel forces, powers and influences that cannot be discerned by merely reading the record"⁸³⁸ Accordingly, the trial court "can know better than an appellate court what will and what will not further the cause of justice in the case before it."⁸³⁹

In reality, judicial discretion permeates practically every facet of every stage in the criminal trial process. Because the trial court's decision more likely than not will be upheld on appeal, except in instances of the most flagrant abuse, it seems that "in the atmosphere of the courtroom the judge is, speaking with some permissible exaggeration, the center of the universe."⁸⁴⁰ Yet, "he is not altogether a law unto himself, but may be overruled if his action is such as to shock the universal or the common sense of what is right among his fellows."⁸⁴¹ Judicial discretion thus is properly exercisable "only within the bounds of reason and justice in the broader sense"⁸⁴² and it is abused, and subject to reversal of the decision, when "it plainly overpasses these bounds."⁸⁴³

This Article should have made it apparent that there are abuses of discretion, but the abuses appear on balance clearly to constitute the exception and not the rule. Because of the merits of individualized justice, "elimination of all discretionary power is both impossible and undesirable. The sensible goal is development of a proper balance between rule and discretion."⁸⁴⁴

In conclusion, Judge Cardozo probably best summarized the role of the trial judge in these terms:

The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.⁸⁴⁵

⁸³⁶ *Hubbard v. Hubbard*, 77 Vt. 73, 78, 58 A. 969, 970 (1904).

⁸³⁷ *Atchison, Topeka & Santa Fe Ry. v. Barrett*, 246 F.2d 846, 849 (9th Cir. 1957).

⁸³⁸ *Grant v. Corbitt*, 95 So. 2d 25, 28 (Fla. 1957).

⁸³⁹ R. BOWERS, *THE JUDICIAL DISCRETION OF TRIAL COURTS* § 18, at 33 (1931).

⁸⁴⁰ *Id.* § 5, at 9.

⁸⁴¹ *Hubbard v. Hubbard*, 77 Vt. 73, 77-78, 58 A. 969, 970 (1904).

⁸⁴² *Id.* at 78, 58 A. at 970.

⁸⁴³ *Id.*, 58 A. at 970.

⁸⁴⁴ K. DAVIS, *DISCRETIONARY JUSTICE* 42 (1971).

⁸⁴⁵ B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 141 (1921).

