

## APPEAL, PRESERVATION OF ERROR & STANDARDS OF REVIEW

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### ~~~~~PRESERVATION OF ERROR~~~~~

#### GENERAL RULE:

Issues must be presented to and passed (ruled on) on by the district court before they can be raised and decided on appeal. State v. Jefferson, 574 N.W.2d 268, 278 (Iowa 1997).

No plain error rule in Iowa. State v. Johnson, 476 N.W.2d 330 (Iowa 1991)

#### MAIN EXCEPTIONS:

##### **Ineffective Assistance of Counsel**

When ineffective assistance of trial counsel is evident in the record, the issue may be ruled upon on appeal. State v. Schoelerman, 315 N.W.2d 67, 71 (Iowa 1982) State v. Arne, 579 N.W.2d 326, 329 (Iowa 1998). See also State v. Westeen, 591 N.W.2d 203, 207 (Iowa 1999).

Generally such claims decided on post conviction relief where counsel can respond. State v. Taylor, 310 N.W.2d 174, 179 (Iowa 1981), State v. Atley, 564 N.W.2d 817, 833 (Iowa 1997).

##### **Sentencing Errors**

An illegal sentence can be corrected at any time. Iowa Rule of Criminal Procedure 23(5)(a).<sup>1</sup>

Void, illegal or procedurally defective sentences may be corrected on appeal even absent trial level objection. State v. Thomas, 520 N.W.2d 311, 313 (Iowa App 1994) (But footnote encourages both prosecutors and defense attorneys to alert the sentencing judge to “any claim of error.”) See also State v. Cooley, 587 N.W.2d 752,

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<sup>1</sup>. Effective 2/14/02 the Iowa Rules of Court have been renumbered.

754 (Iowa 1999).

## I. PRETRIAL MOTIONS

### a. Time

- i. The following must be made forty (40) days after arraignment unless this time is extended for good cause shown (Iowa R. Crim. P. 10(2); Motion to Suppress, Motion to Dismiss, Motion for Change of Venue, Request for severance of charges or defendants, Request for discovery.

Re severance: see State v. Glessner, 572 N.W.2d 562 (Iowa 1997) and State v. Williams, 574 N.W.2d 298 (Iowa 1997).

- ii. Failure to abide by the Rule of Criminal Procedure 10 (New rule Crim. P. 2.11) timelines or to show good cause for the late filing may result in a claim of ineffective assistance of counsel on appeal, as the appellate court may affirm on any ground. State v. Green, 540 N.W.2d 649, 655 (Iowa 1995); Collins v. State, 477 N.W.2d 374, 376 (Iowa 1991); State v. McCowen, 297 N.W.2d 226, 227 (Iowa 1980). (See new cases State v. Talbert, 622 N.W.2d 297 (Iowa 2001) and State v. Brown, 612 N.W.2d 104 (Iowa App 2000) for possible limitations on this concept.)

This means that if the motion is not filed within the forty day period and the district court has not stated on the record that there is good cause for late filing, the appellate court will not reach the substantive issue. The conviction can then be affirmed without the court reaching the merits on appeal.

Suggestion: If the 40 days are approaching and motions have not been filed, request a court order extending deadlines.

SEE ATTACHED SAMPLES re: Pretrial Motion and Order

- iii. Notice of intoxication, entrapment, self-defense, alibi, insanity, diminished responsibility must also be raised within 40 days after arraignment, unless good cause shown. Iowa R. Crim. P. 11.

40 day pre trial motion requirement not applicable to constitutional question. State v. Milner, 571 N.W.2d 7 (Iowa 1997).

**b. Motion for Bill of Particulars**

- i. Defendant's motion for a bill of particulars under Iowa R. Crim. P. 10(5) is a prerequisite to a motion to dismiss under Rule 10(6)(a), in the absence of a motion by the court or prosecution. State v. Wilt, 333 N.W.2d 457, 460 (Iowa 1983); State v. Graham, 291 N.W.2d 345, 350 (Iowa 1980); State v. Doss, 355 N.W.2d 874, 880 (Iowa 1984); State v. Rideout, 346 N.W. 837, 838 (Iowa 1984).

**HOWEVER**, under Rule of Crim. P. 10(2)(a), a defense or objection based on lack of jurisdiction or on failure to charge an offense, do not require a pretrial motion. State v. Trucke, 410 N.W.2d 242 (Iowa 1987).

**c. Motion to Suppress**

- i. The appellate court may affirm on any ground. State v. Edgington, 487 N.W.2d 846 (Iowa 1976), State v. Greene, 540 N.W.2d 649 (Iowa 1995), (decided on different basis than the one argued). State v. Terry, 569 N.W.2d 364 (Iowa 1997) (motion to suppress not timely filed) OUCH!
- ii. No need to renew objections at trial in order to preserve error. State v. Rockhold, 243 N.W.2d 846 (Iowa 1976). **HOWEVER**, defense counsel cannot say, "No objection," and preserve issue for appeal. State v. Terry, 569 N.W.2d 364 (Iowa 1997). See also State v. Schmidt, 312 N.W.2d 517 (Iowa 1981).
- iii. Remember, a harmless error analysis may apply on appeal. Compare State v. Hensley, 534 N.W.2d 379 (Iowa 1995) with State v. Quintero, 480 N.W.2d 50 (Iowa 1992).
- iv. The Iowa Supreme Court has recently stated that Iowa does not adopt the good faith exception to the exclusionary rule found in United States v. Leon, 468 U.S. 897 (1984). See State v. Cline, 617 N.W.2d 277 (Iowa 2000)
- v. Re: challenge to a search warrant on the basis of Franks v. Delaware, 438 U.S. 154 (1978), defendant bears the burden of proof. State v. Green, 540 N.W.2d 649 (Iowa 1995).
- vi. If challenging the sufficiency or accuracy of the affidavits and application in the case of a search warrant, the appellate court will only consider those matters actually submitted to the issuing magistrate. State v. Thomas, 540 N.W.2d 658, 662 (Iowa 1995).

However, in the case of a warrantless search or an inculpatory statement, appellate review may encompass testimony adduced at trial. State v. Brown, 253 N.W.2d 601 (Iowa 1977).

Issues not raised in district court will not be considered on appeal. State v. Simpson, 528 N.W.2d 627 (Iowa 1995) (illegal search of curtilage argument not raised at trial)

Defendant has duty to seek a ruling on all arguments raised. Error not preserved on arguments not ruled on re motion to suppress. State v. Eames, 565 N.W.2d 323, 326 (Iowa 1997).

- vii. Standing is jurisdictional and may be raised at any time, so if there is the slightest question, make a record on this issue. See State v. Halliburton, 539 N.W.2d 339 (Iowa 1995).
- viii. KNOWLEDGE OF DEFENDANT imputed to lawyer - See State v. Ball, 600 N.W.2d 602 (Iowa 1999), motion to suppress held not timely when raised mid-trial after defense counsel realized that the defendant had confessed only after invoking his Miranda rights.

**d. Motion to Dismiss**

- i. Speedy Trial - State is required to bring defendant to trial within 90 days after indictment returned (or trial information filed) Iowa R. Crim. P. 27(2)(b).
- ii. Statute of Limitations/Constitutionality of Statute - Defendant's motion for a bill of particulars under Iowa R. Crim. P. 10(5) is a prerequisite to a motion to dismiss under Rule 10(6)(a), in the absence of a motion by the court or prosecution. State v. Wilt, 333 N.W.2d 457, 460 (Iowa 1983); State v. Graham, 291 N.W.2d 345, 350 (Iowa 1980).
- III. State is required to file trial information or obtain the return of a grand jury indictment within 45 days of adult's arrest or a juvenile's waiver to adult court. Iowa R. Crim. P. 27(2)(a). (If defendant is out on bond, or otherwise released, the state may be less vigilant about filing a timely trial information.) Motion to dismiss must still be filed with 40 days of arraignment (in-person or file date of written arraignment). Iowa Rs. Crim. P. 10(3) and (4),
- iv. All criminal cases must be brought to trial within one year after initial arraignment, unless court extends the time for good cause. Iowa R. Crim. P. 27(2)(c).

- e. **Motion in Limine** - to be filed when grounds reasonably appear, but no later than 9 days before trial. Iowa R. Crim. P. 10.
- i. Must object at trial on grounds raised in order to preserve error. State v. Howard, 509 N.W.2d 764 (Iowa 1983); State v. Cuevas, 282 N.W.2d 74 (Iowa 1979).
  - ii. The only exception to this rule arises when the district court makes an unequivocal (final) ruling on the record. State v. Harlow, 325 N.W.2d 90, 91-92 (Iowa 1982); State v. Delaney, 526 N.W.2d 170 (Iowa Ct. App. 1994).
    - (1) The purpose of an objection is to alert the trial judge to specific problems. State v. Martin, 385 N.W.2d 549, 551-52 (Iowa 1986).
    - (2) Suggestion when court has ruled in chambers and objection and ruling are on the record with court reporter transcript: object when the evidence is offered and say, "Objection on grounds previously argued."
  - iii. If court rules allowing impeachable offense into evidence, defendant cannot admit to it first, on direct, and still preserve error. Ohler v. U.S., 120 S.Ct. 1851, 146 L.Ed.2d 826 (2000).  
**BUT See State v. Daly**, 623 N.W.2d 799, 800-801 (Iowa 2001). Defendant did not waive error by bringing up a prior crime during defendant's direct examination, after court had ruled in limine that the state could bring it up. The Iowa Supreme Court declined to follow Ohler v. United States, 529 U.S. 753, 759, 120 S.Ct. 1851, 1855, 146 L.Ed.2d 826, 832 (2000).

g. **Miscellaneous**

- i. The burden is on the moving party to request a specific ruling; failure to do so waives error. See Harper v. Cedar Rapids Television Co., 244 N.W.2d 782, 786 (Iowa 1974).  
  
Failure to obtain ruling, error not preserved. State v. Manna, 534 N.W.2d 642 (Iowa 1995).

## II. TRIAL

### a. Opening and Closing Argument

- i. Suggestion: Have them reported to assist the appellate court in ascertaining your theory of the case and/or specific issues in the case.
  - (1) “Upon request of any party, final argument shall be reported.” Iowa R. Crim. P. 18(4).
- ii. If not reported and misconduct occurs, create a record with a bill of exceptions. Iowa R. Crim. P. 23.1. See State v. Blanks, 479 N.W.2d 601 (Iowa Ct. App. 1991).
  - (1) This applies not only to arguments, but also to challenges to individual jurors and the admission/exclusion of evidence and/or witnesses.
- iii. Objections to closing may be made outside the presence of the jury, but before submission to the trier of fact. State v. Nelson, 234 N.W.2d 368, 371 (Iowa 1975).
- iv. A motion for mistrial must be made to preserve error. State v. Radeke, 444 N.W.2d 476, 479 (Iowa 1989).
- v. The only exception lies in the case of misconduct which is “flagrantly improper and evidently prejudicial.” State v. Phillips, 226 N.W.2d 16, 18-19 (Iowa 1975).

**BUT SEE** State v. Rutledge, 600 N.W.2d 324 (Iowa 1999), holding that the Iowa Supreme Court will not consider for the first time on appeal defendant’s claim of misconduct by the prosecutor during closing remarks. Here remarks not “evidently prejudicial.”

### b. Offers of Proof

- i. Request to make an offer of proof on the record out of the presence of the jury on any disputed item of evidence or a witness to secure a preliminary ruling. Iowa Rs. Evid. 103(a)(2) and (b).
  - (1) This allows an appellate court to determine what evidence is excluded, the possible effect on the outcome, and the theory of admissibility. See Johnson v. Interstate Power Co., 481 N.W.2d 310, 317 (Iowa 1992); Strong v. Rothemal, 523 N.W.2d 597 (Iowa Ct. App. 1994).

See State v. Lange, 531 N.W.2d 108 (Iowa 1995), Iowa Supreme Court disapproves of district court's refusal to allow defense counsel to make offer of proof, but no prejudice in this case, re whether anyone ever actually bought a drug tax stamp.

See State v. Green, 592 N.W.2d 24, fn. 4, in regard to an inadequate offer of proof.

**c. Trial Objections**

- i. Remember to renew objections raised in pretrial motions, especially a motion in limine.
- ii. Objections must be made at the earliest opportunity. State v. Yaw, 398 N.W.2d 803, 805 (Iowa 1983). But see State v. Mann, 602 N.W.2d 785 (Iowa 1999), where constitutional issue preserved when defense counsel mentioned it pre hearing and state did not object.
- iii. Objection should state specific ground. Iowa R. Evid. 103(a)(1).

A party is bound by trial objections on appeal. State v. Droste, 232 N.W.2d 483 (Iowa 1973).

- iv. When an objection is late and follows an answer, a motion to strike, coupled with an application to have the objection precede the answer or an excuse for tardiness must be made. State v. Brotherton, 384 N.W.2d 375, 379 (Iowa 1986); Iowa R. Evid. 103(a)(1).

Ask that jury be admonished to disregard the objectionable remarks. The court on appeal will assume that the jury follows instructions from the court. State v. Simpson, 438 N.W.2d 20, 21 (Iowa App. 1989). **BUT SEE** State v. Belieu, 288 N.W.2d 895 (Iowa 1980) (evidence of other crimes in the case so prejudicial that it was not cured by limiting instruction.)

It is sometimes hard, if not impossible, to tell if the answer is in, so when in doubt, make the motion to strike.

- v. An objection that an answer "invades the province of the jury" is inadequate to preserve error on appeal. United States Homes v. Yates, 174 N.W.2d 402, 405 (Iowa 1970); State v. Hines, 223 N.W.2d 190, 191 (Iowa 1974). Correct objection could be that the question is not the proper subject of opinion testimony. State v.

Meyers, 382 N.W.2d 91, 92 (Iowa 1986).

Also “no proper foundation,” not a sufficiently specific objection. State v. Janssen, 247 N.W.2d 260, 262 (Iowa 1976).

Relevancy objection should also include the grounds of unfair prejudice. State v. LeGear, 346 N.W.2d 21 (Iowa 1984). **BUT SEE** State v. Slayton, 417 N.W.2d 432, 437 (Iowa 1987). An objection to evidence on the grounds of relevance is sufficient to raise the issue of probative value of the evidence. See Iowa Rules of Evidence 401, 402, 403.

- vi. A party is bound by the objections made at trial and may not expand on the grounds asserted either in a post-trial motion or on appeal. State v. Gibb, 303 N.W.2d 673 (Iowa 1981). But an issue can be decided in favor of the state on any ground which appears in the record, if the effect is to affirm the conviction.
- vii. Opening the door. If inadmissible evidence is heard by the jury, the court may allow the other party to also introduce inadmissible evidence if it is “fairly responsive.” State v. Williams, 427 N.W.2d 466 (Iowa ); See also State v. Daly, 623 N.W.2d 799 (Iowa 2001).

**d. Motion for Mistrial**

See State v. Yaw 398 N.W.2d 803, 805, and State v. Pachtette 374 N.W.2d 397, 401, in regard to closing argument.

**e. Motion for Judgment of Acquittal**

- i. Motion for judgment of acquittal not required to challenge sufficiency of evidence on appeal of a bench trial. State v. Abbas, 561 N.W.2d 72, 74 (Iowa 1997) (prior case law “disapproved”), State v. Turk, 595 N.W.2d 819 (Iowa 1999). (overruled in part by State v. LaRue, 619 N.W.2d 395 the court makes it clear that on a sufficiency challenge the reviewing court considers all of the evidence.
- ii. Movant must specify grounds upon which element or where the proof is insufficient. A general motion for judgment of acquittal that the evidence is insufficient or that the elements of the crime are not met, may be insufficient to preserve a particular argument for appeal. State v. Crone, 545 N.W.2d 267, 270 (Iowa 1996); State v. Geier, 484 N.W.2d 167, 170 (Iowa 1992), State v. Greene, 592



N.W.2d 24, 29-30 (Iowa 1999).

- iv. It is ok to move for judgment of acquittal only after the state's case. State v. Holderness, 293 N.W.2d 226 (1980). Better to move both after state's case and also after defendant's case.

**f. Jury Instructions**

- i. Iowa Rs. Civ. P. 196 and 197 (describing requirements, procedure and method for objections in regard to jury instructions) apply to criminal proceedings. See State v. Burkett, 357 N.W.2d 632, 635 (Iowa 1984). Objections to instructions required before arguments to the jury. State v. Maghee, 573 N.W.2d 1 (Iowa 1997).
- ii. An objection must be made at the time of the instructional conference and when the court tenders the final instructions. See State v. Welch, 507 N.W.2d 580, 584 (Iowa 1993). (In this case, there was an off the record discussion during which the defendant's attorney objected, but counsel was then silent on the record.)
- iii. Objections must be specific. State v. Hepperle, 503 N.W.2d 735 (Iowa 1995).
- iv. A party may not raise objections to jury instructions in a motion for new trial. State v. Rouse, 290 N.W.2d 911 (Iowa 1980).
- v. If you have a theory of defense instruction, either submit it or dictate it into the record. See State v. Kellogg, 542 N.W.2d 516 (Iowa 1996).
- vi. Lesser-included offenses.
  - (1) Failure to request waives error on appeal. State v. Jeffries, 430 N.W.2d 738 (Iowa 1988).
  - (2) An "all or nothing" defense may be maintained only when the State does not object to the nonsubmission and counsel waives all lessers. State v. Wallace, 475 N.W.2d 197 (Iowa 1991).
    - (a) The State also has a right to the submission of lessers. State v. Greer, 439 N.W.2d 198 (Iowa 1989).
    - (b) Be careful when proceeding on this kind of defense. State v. Hepperle, 530 N.W.2d 735 (Iowa 1995).

- (3) If an instruction is requested on the lowest degree of the crime, you must also accept instructions on all of the lesser included offenses in between. State v. Turecek, 456 N.W.2d 219, 223 (Iowa 1990). (You can't pick and choose.)
- (4) In a jury trial, a determination of whether a lesser included offense must be submitted may begin with the court's marshaling instruction on the greater offense. Turecek, 456 N.W.2d at 223.
- (5) In order to preserve error a defendant must request a lesser-included offense instruction or object to the court's failure to give it. State v. Jeffries, 430 N.W.2d 728, 737, (Iowa 1988).

vii. General objections to an instruction will not preserve error on appeal, even if the lesser submitted is not a lesser included offense. State v. Hepperle, 530 N.W.2d 735, 738-39 (Iowa 1995). This is true even if your client is convicted of the "lesser" which was submitted. Id. at 740.

**g. Stipulated Trials**

- i. Will preserve error for purposes of appeal on a Motion to Suppress and Motion to Dismiss for Speedy Trial/Indictment grounds. State v. Wright, 441 N.W.2d 364, 366 (Iowa 1989); State v. O'Bryan, 522 N.W.2d 103 (Iowa 1994).

DO NOT ADMIT GUILT OR AGREE THAT THE COURT CAN FIND DEFENDANT GUILTY. It is recommended to specify on the record that the purpose of the stipulated trial is to have the appellate court decide suppression issue, or whatever issue is in dispute. See State v. Nikkel, 597 N.W.2d 486, (Iowa 1999), case remanded to determine whether a guilty plea or stipulated bench trial was intended. See also State v. Sayre, 566 N.W.2d 193 (Iowa 1997).

State v. Fry, Iowa Ct. of Appeals, 7/12/00 - In a stipulated bench trial the decision whether to acquit or convict lies with the trial court. (not a published decision.)

**h. Guilty Pleas**

- i. Alford pleas - State v. Antenucci, 608 N.W.2d 19 (Iowa 2000). Defendant did not file motion in arrest of judgment. Therefore

pretrial motion to dismiss waived as an appeal issue.

- ii. A guilty plea waives all valid defenses except that the indictment or information does not charge an offense. State v. Morehouse, 316 N.W.2d 235, 237 (Iowa 1985); State v. Kobrock, 213 N.W.2d 481, 483 (Iowa 1973). State v. Mattly, 513 N.W. 2d 739, 740-741 (Iowa 1994).
- iii. Failure to file a motion in arrest of judgment precludes challenge of guilty plea on appeal, unless failure is due to ineffective assistance of counsel. State v. Brooks, 555 N.W.2d 446, 448 (Iowa 1996)
- iv. With a felony charge, in court colloquy is required. Ludemann 484 N.W.2d 611, 612-613 (Iowa App. 1992). (“a court may not abrogate or delegate to anyone, including the attorney for the accused, the duty to determine defendant’s knowledge of the charge, appreciation of legal consequences of a guilty plea, whether it is voluntarily entered, or existence of facts supporting it.”)
- v. An objection is required to the state’s failure to follow a sentencing recommendation that was part of the plea bargain. State v. Carillo, 597 N.W.2d 497 (Iowa 1999).
- vi. Defendant may withdraw plea at sentencing hearing when the state backs out of deal. State v. Malone, 511 N.W.2d 423 (Iowa App. 1993).

**i. Bench Trial**

Motion for new trial required in order to challenge sufficiency of court’s findings and conclusions. However question of sufficiency of the evidence reached (motion for judgment of acquittal filed.) State v. Miles, 346 N.W.2d 517, 519 (Iowa 1984).

**j. Post Conviction**

Issue should be raised on direct appeal of criminal conviction in order to raise it in post conviction. State v. Berryhill, 603 N.W.2d 243 (Iowa 1999). But post conviction claim that appellate attorney was ineffective may be good reason for not raising the issue on direct appeal. Osborn v. State, 573 N.W.2d 917 (Iowa 1998); Ledezma v. State, 626 N.W.2d 134 (Iowa 2001). (On appeal counsel must bring up issues not in the record in order to preserve for post conviction application.)

**III. POST TRIAL MOTIONS**

- a. A Motion in Arrest of Judgment may not be used to challenge the sufficiency of the evidence. State v. Dallen, 452 N.W.2d 398, 399 (Iowa 1990). (Motion in arrest of judgment usually made in challenge to guilty plea)
- b. Correct motion is Motion for Judgment of acquittal to argue that evidence is insufficient to sustain a conviction. Iowa R. Crim. P. 18 (8)(a).
- c. Correct standard for Motion for New Trial is whether the verdict is contrary to the weight of the evidence, rather than a sufficiency of the evidence standard. State v. Ellis, 578 N.W.2d 655, 656-659 (Iowa 1998). (Remedy is case sent back for court to apply the correct standard.)

#### IV. SENTENCING

- a. If a record is not made, a record must be created where the judgment entry does not reflect reasons for the sentence if the case is going to be appealed. State v. Mudra, 532 N.W.2d 765 (Iowa 1995) (defendant waived transcription of hearing).
- b. Void, illegal or procedurally defective sentences may be corrected on appeal even absent trial level objection. State v. Thomas, 520 N.W.2d 311, 313 (Iowa App 1994). (But footnote encourages both prosecutors and defense attorneys to alert the sentencing judge to “any claim of error.”) This case involved improper sentencing consideration, timing of eligibility of defendant for parole. See also State v. Cooley, 587 N.W.2d 752, 754 (Iowa 1999).

Pre-sentence investigation challenge reached on appeal, but not argued below. State v. Phillips, 561 N.W.2d 355 (Iowa 1997). However, it is recommended that any corrections to the PSI be made on the record at sentencing.

HOWEVER, Issues which are outside of the codified boundaries of allowable sentences, such as double jeopardy, or a constitutional challenge, must be raised before sentencing. State v. Halliburton, 539 N.W.2d 339, 343 (Iowa 1994). State v. Ceaser 585 N.W.2d 192, 195 (Iowa 1998).

- c. Sentences not authorized by law, and improper fines and restitution orders may be challenged on appeal, without objection below. However, appellate court prefers trial counsel to alert sentencing court. State v. Thomas, 520 N.W.2d 311, 313 (Iowa App 1994).

Restitution is a mandatory part of sentencing. State v. Mai, 572 N.W.2d 168, 171 (Iowa App. 1997). A determination of defendant’s reasonable

ability to pay is a constitutional prerequisite to the ordering of criminal restitution, court costs and attorney fees. Iowa Code § 910.2 (1999). State v. Blank, 570 N.W.2d 924, 927 (Iowa 1997).

**BUT SEE** State v. Wagner, 484 N.W.2d 212, 217 (Iowa App. 1992) where the court ruled that since defendant did not object to the county attorney's failure to include an insurance offset in a restitution matter, the error was not preserved.

See also State v. Jose. (Iowa Supreme Court 11/15/01) clearing up some questions about restitution matters.

See also State v. Rodenburg, 562 N.W.2d 186 (Iowa 1997), no record made of time served in jail waived argument that inadequate time credited.

State v. Hawk, 99-826 9/7/00 - Sentencing court need not certify particular number of days of jail credit. The sheriff is to certify the number of days to the clerk of court. Iowa Code § 903.5. (But court should give credit for time served.)

## V. MISCELLANEOUS

- ii. Even constitutional errors are waived if not raised below. State v. Peck, 539 N.W.2d 170 (Iowa 1995). But constitutional issues not subject to pretrial motion to be filed within 40 days of arraignment rule. State v. Milner, 571 N.W.2d 7 (Iowa 1997).
- iii. Where the court informs the defendant of the necessity of filing a motion in arrest of judgment, an attack on the plea proceedings will be precluded on appeal, unless the defect is raised through a claim of ineffective assistance of counsel. State v. Schoelerman, 315 N.W.2d 67, 71 (Iowa 1982).
- iv. Subject matter jurisdiction can be challenged at any time. SS. v. Iowa Dist. Ct. Black Hawk Co., 528 N.W.2d 130 (Iowa 1995).

~~~~~**APPEAL**~~~~~

### a. Perfecting Appeal

- i. Notice of Appeal must be filed with the clerk of the district court within and not after 30 days of judgment and sentence (but not before entry of judgment and sentence). Rule of Appellate

Procedure 5(a). Mailing within 30 days may be considered timely. State v. Toldsdorf, 574 N.W.2d 290 (Iowa 1998).

For appeal of a post conviction relief application denial, see generally State v. Smith, 573 N.W.2d 14 (Iowa 1997).

**b. Simple Misdemeanors**

- i. Appeal of simple misdemeanor is to different district court judge or associate judge, or, if magistrate decision, to district court or associate. Iowa R. Crim. Pro. 54(3). Ten day deadline is involved. Iowa R. Crim. Pro. 54(1). Discretionary review application to Iowa Supreme Court after district court appeal is complete. Iowa Code 814.6 (1999).
- ii. Discretionary review required to challenge a simple misdemeanor judgment and sentence entered by a district court judge or a district associate judge, even if defendant was charged with higher crime. Tyrell v. Iowa District Court, 413 N.W.2d 674 (Iowa 1987). (No appeal to district court as a matter of right when defendant charged with an indictable misdemeanor, but convicted of simple misdemeanor only.)

**c. Probation/Parole Revocation**

- i. A postconviction relief proceeding is the only attack on probation revocation. Iowa Code 822.2(5) (1999). No direct appeal lies from a probation or parole revocation. State v. Allen, 402 N.W.2d 438 (Iowa 1987).

HOWEVER, once a notice of appeal has been filed, the Iowa Supreme Court will not allow a withdrawal. A motion to dismiss the appeal must be filed.

**d. Etc.**

- i. A deferred judgment is not a final judgment for purposes of appeal. Also Certiorari not available. State v. Stressman, 460 N.W.2d 461 (Iowa 1990). Direct appeal is available from an order revoking deferred judgment and entering judgment and sentence.
- ii. Trial counsel continues as appellate counsel, unless the court orders otherwise. Iowa Rule of Criminal Procedure 26.1(6)

But see Iowa Code § 815.7 (Supp. 1999). Contract attorney need not

follow the case into appellate court unless so directed by the court.

- iii. Pending motion for new trial does not excuse failure to timely file notice of appeal. State v. Anderson, 308 N.W.2d 42 (Iowa 1981).

State v. Arne 597 N.W.2d 326, 329 (Iowa 1998) - Petition for certiorari required to challenge finding of contempt. Iowa Code 665.11.

**e. Appellate Defender**

- i. Generally judges are directed to appoint the Office of the Appellate Defender on criminal appeals. See Iowa Code 13B.9 (1999). If a conflict of interest is evident or case overload exists, Appellate Defender will move for appointment of other counsel in district court.
- ii. Appellate Defender does not handle Applications for Discretionary Review, Petitions for Certiorari to the Iowa Supreme Court or Interlocutory Appeals because familiarity with the record is required in order to prepare document.
- iii. An application to withdraw and have the Office of the Appellate Defender appointed may be filed simultaneously with the Notice of Appeal. PLEASE send copies to the Appellate Defender Office. PLEASE do not file a Combined Certificate or a Request to Docket Appeal. This will be handled by Appellate Defender, as long as we receive notice.

SEE ATTACHED SAMPLES, Notice of Appeal, Application to withdraw and have Appellate Defender appointed, and Order.

- iv. No Merit Test - OK to file notice of appeal even if trial counsel feels there is no merit to appeal. Case may be dismissed by client or appellate counsel may file a motion to withdraw based on frivolous appeal. Iowa Rule of Appellate Procedure 104.
- v. Defense counsel has duty to consult with client about appeal, when client has expressed an interest or when grounds for appeal are evident. Roe v. Flores-Ortega, 120 S.Ct. 1029, 145 L.Ed.2 985 (2000).

**f. Collateral matters**

- i. Motion for Reconsideration of Sentence - Can be filed even though notice of appeal has been filed. Deadline is **ONE YEAR** from when

defendant begins to serve felony sentence or 30 days from beginning of misdemeanor sentence. District Court retains limited jurisdiction. No appeal possible from denial or no action by district court. Iowa Code § 902.4, § 903.2 (2001 as amended). (Felony change to one year effective July 1, 2001, Senate File 543)

- ii. Bond Review - District court retains limited jurisdiction. State v. Anderson, 338 N.W.2d 372 (Iowa 1983). Special summary appeal provisions for pre and post trial bond. Iowa Code § 811.2(7)(b) (1999).

**g. Briefs**

New Iowa Rule: 8/31/01 – Iowa Rule of Appellate Procedure 14 (e). Unpublished opinions of the Iowa Court of Appeals or other appellate courts may be cited in a brief, but shall not constitute controlling authority. Copy must be attached together with certification of a diligent search for any subsequent disposition.

See Anastasoff v. U.S. 2000 WL 1182813 (8<sup>th</sup> Cir. Aug. 22, 2000) holding unconstitutional the 8<sup>th</sup> Circuit rule which declared unpublished decisions not precedent.)

New Rule: Jan. 01 - Iowa Rule of Appellate Procedure 13 (b.) *Pro se supplemental proof briefs*. Any criminal defendant or post conviction applicant may file own brief and designation of appendix with permission of the Iowa Supreme Court. Application to be filed within 15 days of service of lawyer's page proof brief. Defendant's attorney is responsible for final copy of pro se brief and for including in appendix matter requested by client (if court grants permission).

**g. Record on appeal.**

Record consist of only documents on file with district court clerk (includes exhibits and transcripts) Iowa R. Crim. P. 23.1(2).

Case can be remanded to the district court for supplemental finding of fact. State v. Rademacher 433 N.W.2d 754 (Iowa 1988). See also State v. (Mary) Weaver, 554 N.W.2d 240 (Iowa 1996). for an interesting example of a remand ordered on appeal in conjunction with a motion for new trial based on newly discovered evidence.

A bill of exceptions can be used to make a record of things not appearing in record, such as remarks made in closing arguments. Iowa R. Crim. P. 23.1(1). State v. McKee, 223 N.W.2d 204 (Iowa



1974).

If documents are missing from the official record due to inadvertent error, the parties can stipulate on appeal and make the document part of the record. Iowa R. App. P. 10(c). See attached form.

~~~~~STANDARDS OF REVIEW~~~~~

**a. Rule of Appellate Procedure 14(a.)(5)**

Appellant's brief shall contain an argument. Each division of the argument shall begin with a discussion citing relevant authority, concerning the scope or standard of appellate review (e.g., "on error," "abuse of discretion," de novo") and shall state how the issue was preserved for review, with references to the places in the record where the issue was raised and decided.

**b. Rule of Appellate Procedure 4**

Scope of review. Review in equity cases shall be de novo. In all other cases the appellate court shall constitute courts for **correction of errors at law**, and findings of fact in jury-waived cases shall have the effect of a special verdict.

**c. Errors at law**

examples:

Meaning of a statute. State v. Hippler, 545 N.W.2d 568,570 (Iowa 1996).

Jury Instructions. State v. Burgess (Iowa 12/19/01); State v. Simpson, 528 N.W.2d 627 630 (Iowa 1995).

Jury Misconduct. State v. Smith, 573 N.W.2d 14 (Iowa 1997).

Sentencing questions. State v. Manser, 626 N.W.2d 872 (Iowa App. 2001)

Guilty Plea challenges, generally. State v. Keene, 630 N.W.2d 579, 581 (Iowa 2001). (But see Abuse of Discretion re withdrawal of plea)

Hearsay. State v. Hallum, 585 N.W.2d 249, 254 (Iowa 1998) (vacated on

other grounds, 144 L.Ed2d 233 (1999); State v. Tornquist, 600 N.W.2d 301, 303(Iowa 1999); State v. Wixom, 599 N.W.2d 481, 484 (Iowa App. 1999). State v. Martinez, 621 N.W.2d 689. 692 (Iowa App. 2000). BUT SEE below generally evidentiary matters reviewed for abuse of discretion.

Sufficiency of the Evidence. State v. Simpson, 528 N.W.2d 627 630 (Iowa 1995).

Restitution. State v. Petrie, 478 N.W.2d 620, 622(Iowa App. 1997).

Merger. State v. Cartee, (IA 4-22-98).

Speedy trial (statutory). State v. Smith, 573 N.W.2d 14 (Iowa 1997). ???

**d. De Novo**

Any constitutional question. State v. Johnston, 406 N.W.2d 794, 796 (Iowa App. 1987). e.g. double jeopardy. State v. Smith, 573 N.W.2d 14 (Iowa 1997).

including ineffective assistance of counsel claims. Kane v. State, 436 N.W.2d 624, 626 (Iowa 1989).

But weight given to trial court's finding of credibility. State v. (Darla) Countryman, 572 N.W.2d 553 (Iowa 1997). (Fifth Amendment challenge).-----

**e. Abuse of Discretion**

Generally all evidentiary questions are reviewed for abuse of discretion. State v. Veal, 564 N.W.2d 797, 807 (Iowa 1997).

Relevancy. State v. Buck, 510 N.W.2d 850, 852 (Iowa 1994).

Jury Misconduct. State v. Smith, 573 N.W.2d 14 (Iowa 1997).

Withdrawal of guilty plea. State v. Speed 573 N.W.2d 594 (Iowa 1998).

Motion for separate trials. State v. Glessner, 572 N.W.2d 562 (Iowa 1997).

Motion to Sever. State v. Jefferson, 574 N.W.2d 268 (Iowa 1997).

~~~~~WEBSITES~~~~~  
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Recent decisions of the Iowa Supreme Court and the Iowa Court of Appeals =

<http://www.judicial.state.ia.us/decisions/>

Legislative information, including copies of Bills =

<http://www.legis.state.ia.us>

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