FILED
JAN 28 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed January 28, 1987
vs.	)	**136**
JAMES EDWARD FLORIE,	)	6-225 85-1014
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Lee County (1041(s)) - D. B. Hendrickson, Judge.

Defendant appeals his conviction, following a jury trial, for second-degree murder. **AFFIRMED.**

Barry M. Anderson, Keokuk, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Pamela Greenman Dahl, Assistant Attorney General, for plaintiff-appellee.

Considered by Donielson, P.J., Schlegel, and Hayden, JJ., but decided en banc.

SCHLEGEL, J. 137

The defendant James Florie appeals his conviction, following a jury trial, for second degree murder. He contends he was denied his rights to speedy trial and speedy indictment; he challenges several jury instructions, the admission of a great deal of testimony, and the sufficiency of the evidence to prove his guilt. We affirm.

James Varner was murdered in May of 1977. The investigation of the murder focused primarily on three suspects, including the defendant, James Florie. In September 1977 Florie was charged with the murder. However, in November 1977 the State moved to dismiss the charge against Florie on the grounds that certain material witnesses had left the jurisdiction and others had changed their stories. The district court granted the State's motion and dismissed the charge against Florie. The court dismissed under Iowa Code section 795.5 (1977), and said it was not deciding the issue of whether or not Florie's speedy trial rights would be violated if he were to be recharged. The court noted that section 795.5 did not contain the words "with prejudice" or "without prejudice."

In October 1984, nearly seven years later, the State once again charged Florie with murder for the killing of Varner. At the same time the State filed murder charges against the other two original suspects, Michael Burrows and George Hall; the State's theory was that Burrows had hired Hall and Florie to kill Varner in order to prevent Varner from testifying against Burrows in another criminal case.

After numerous motions and a mistrial, a jury found Florie guilty of second-degree murder in April 1985. Florie has appealed the resulting conviction.

Generally, our review of criminal proceedings is at law for correction of errors only. Iowa R. App. P. 4. However, when issues involve constitutional

rights, we review the evidence de novo in view of the totality of the circumstances. State v. Aldape, 307 N.W.2d 32, 36 (Iowa 1981).

I. **Speedy Trial.** Florie contends that his right to a speedy trial under both the federal constitution and the state constitution was violated. Florie argued at the trial court level that the seven-year delay between the charging of the crime and subsequent dismissal in November 1977 and the refiling of the charges in October 1984 violated his right to a speedy trial. In his first assignment of error, Florie argues that the trial court erred in overruling his motion to dismiss.

Florie made a motion to dismiss for lack of a speedy trial on December 13, 1984. He asserted his right to a speedy trial under the United States Constitution; the Iowa Constitution, article 1, section 10, the 1977 Iowa Code, Chapter 795; and Rule 27 of the Iowa Rules of Criminal Procedure. On January 7, 1985, the trial court overruled Florie's motion to dismiss. The trial court based its conclusion on a sixth amendment analysis. The court concluded as well, "Also, Section 10, Article 1 of the Constitution of the State of Iowa affords the same rights as the Sixth Amendment." No citations were given to support this conclusion.

On March 7, 1985, the trial court, in response to Florie's amended motion to dismiss for lack of speedy trial, incorporated its ruling of January 7, 1985 into its finding that Florie was not denied his right to a speedy trial. In this ruling, the court based its conclusion solely on the sixth amendment to the United States Constitution.

At the close of the State's evidence on April 1, 1985, the court again overruled Florie's motion for dismissal based on his speedy trial rights. Again, the court based its conclusion on Florie's sixth amendment rights. On April 8, at the close of all evidence, the court again overruled Florie's speedy trial motions

"for the same reasons prior [sic] stated by this court in written rulings and oral rulings."

On April 29, 1985, the trial court, in response to posttrial motions, relied on the reasoning of its former rulings in denying Florie's assertion of a violation of speedy trial rights.

A. The State Constitutional Right. We are firmly committed to the rule that we can affirm a trial court where any proper basis appears for its ruling. Citizens First National Bank v. Hoyt, 297 N.W.2d 329, 332 (Iowa 1980). We may reverse only on grounds stated or argued. Newmire v. Maxwell, 161 N.W.2d 74, 80 (Iowa 1968). We will consider those constitutional questions which are specifically raised in the trial court. State v. Meeks, 245 Iowa 1231, 65 N.W.2d 76 (1954). Florie raised both the state and federal constitutional issue in the trial court and on appeal.

The Iowa Supreme Court has not as yet addressed the question of whether the dismissal of an indictment eliminates constitutional speedy trial protections. The defendant claims that both his federal and state constitutional rights to a speedy trial were violated by the government's actions in this case. In assessing the defendant's challenges to his conviction, we note that the right to a speedy trial is guaranteed him by both our state and federal constitutions. Iowa Const. art. 1, section 10; U.S. Const. Amend. VI. Just as it is a fundamental rule of appellate procedure to avoid expressing opinions on constitutional questions when some other resolution of the issues renders a constitutional ruling unnecessary, In Interest of J.A.N., 346 N.W.2d 495, 498 (Iowa 1984), a similar policy of judicial restraint moves us to forbear from ruling on federal constitutional issues before consulting our state constitution. See, e.g., Massachusetts v. Upton, 466 U.S. 727, 737, 104 S. Ct. 2085, 2089, 80 L. Ed. 2d 721, 729 (1984) (J. Stevens concurring); State v. Cadman, 476 A.2d 1148, 1150 (Me. 1984); Carson,

Last Things Last: A Methodological Approach to Legal Argument in State Courts, 19 Willamette L. Rev. 641 (1983). It is only when we conclude that a defendant's claim must fail under the state constitution that we must then examine this conviction from the standpoint of federal constitutional law. Linde, First Things First: Rediscovering the States' Bills of Rights, 9 U. Balt. L. Rev. 379, 383 (1980).

It is also helpful to bear in mind one of the basic principles of our federal system: state legislatures and state courts are free to interpret their own constitutions as granting more protections to individuals than does the federal constitution. See City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293, 102 S. Ct. 1070, 1076, 71 L. Ed. 2d 152, 161 (1982); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980), 100 S. Ct. 2035, 2040, 64 L. Ed. 2d 741, 752 (unanimous court); O'Connor, Our Judicial Federalism, 35 Case W. Res. L. Rev. 1, 5-6 (1984-85). State courts are not required to adopt a "lock step" approach to United States Supreme Court interpretations of federal constitutional provisions as the only way to interpret parallel provisions in state constitutions. Absolute deferential conformity is "contrary to the history of both the federal and state constitutions, [is] inconsistent with the concept of federalism and the philosophy underlying the original and subsequent interpretation of the federal bill of rights, [is] contrary to the state judge's oath to support the state constitution, and [is] poor public policy." [Footnotes omitted.] Abrahamson, Criminal Law and State Constitutions: The Emergence of State Constitutional Law, 63 Texas Rev. 1141, 1168 (1985).

Consonant with the United States Supreme Court's directive in Michigan v. Long, 463 U.S. 1032, 1042, 103 S. Ct. 3469, 3474-78, 77 L. Ed. 2d 1201 (1983), we expressly observe that our decision today rests, in part, upon state constitutional grounds independent of federal law.

Article one, section ten of the Iowa Constitution provides in part: "In all criminal prosecutions, and in cases involving the life, or liberty or an individual the accused shall have a right to a speedy and public trial . . . ."

The trial court, in the instant case, concluded that this right to a speedy trial guaranteed by the State of Iowa does not arise until charges are pending. We believe this is accurate only in those instances where an offense has been committed, the defendant has been charged, and there is a subsequent delay in trying the defendant. We do not believe the trial court's conclusion is accurate when applied to those situations where a defendant is charged, the charges are dismissed, the defendant does not waive his right to a speedy trial, and, in fact, resists the motion to dismiss, and then the same charges are refiled at a later date. We base this conclusion on the public policy of the State of Iowa with regard to the speedy trial right as this right has evolved in our laws and jurisprudence. We reach this conclusion, which is contrary to the holding in United States v. MacDonald, 456 U.S. 1, 102 S. Ct. 1497, 71 L. Ed. 2d 696 (1982), for the following five reasons.

First, it is the stated public policy of the State of Iowa that criminal prosecutions be concluded at the earliest possible time consistent with a fair trial to both parties. Iowa R. Crim. P. 27(2). The predecessor to this Rule of Criminal Procedure was Iowa Code chapter 795. The Iowa Supreme Court has said that these Iowa statutory provisions embody the legislative concept of what the term "speedy trial" means as used in our state constitution. Pines v. District Court, 233 Iowa 1284, 1291, 10 N.W.2d 574, 578 (1943), rev'd. on other grounds, 206 N.W.2d 908, 913 (Iowa 1973). We believe that those cases which deal with extraconstitutional speedy trial rights illustrate a clear preference for a flexible standard of proscribing unnecessary delay. For instance, State v. Donnell, 239 N.W.2d 575, 579 (Iowa 1976), applies the flexible "facts and circumstances"

test even to statutes and rules that are separate from the state constitutional rights. See also State v. Steadham, 231 N.W.2d 29, 30 (Iowa 1975) (trial court should have applied balancing test before passing on defendant's motion to dismiss for lack of speedy trial under Iowa Code section 795.2); State v. Albertson, 228 N.W.2d 94, 97 (Iowa 1975) (relevant factors in determining speedy trial issue under Iowa Code section 795.2 are length of delay, defendant's assertion of his right to speedy trial, and prejudice to defendant from delay); State v. Lybarger, 263 N.W.2d 545, 546 (Iowa 1978) (murder indictment dismissed under section 795.2 when state could not justify delay between trial and retrial). These cases illustrate that even though the statutory extraconstitutional rights could be interpreted as separate from the constitutional speedy trial right, our courts have refused to do so and have emphasized the appropriateness of using the constitutional balancing test to interpret our statutes and rules.

The second reason that we must conclude that the period between dismissal and reindictment is protected by the speedy trial right in our constitution is the emphasis our courts have put on using a balancing approach to speedy trial issues in all post-arrest situations in which the issue is raised. We have consistently adopted the language of Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), in applying this balancing analysis to those cases which allege both federal and state constitutional speedy trial violations. See, e.g., State v. Wright, 234 N.W.2d 99, 102 (Iowa 1975) ("The constitutional guaranty of speedy trial, of course, provides protection in the retrial situation as in all situations, in accordance with four factor test of Barker v. Wingo"); In Interest of C.T.F., 316 N.W.2d 865, 869 (Iowa 1982) (Barker test is appropriate for determining whether juvenile has been denied right to speedy trial under applicable due process provisions of both federal and state constitutions); State v. Johnson, 217 N.W.2d 609, 612 (Iowa 1974) (Barker rationale appropriate in insuring that

the constitutional guarantee of a speedy trial adequately protects against prolonged delay that may subject defendant to emotional stress that can be presumed to result in ordinary person from uncertainties in the prospect of facing a public trial). We think that the broad scope given to the speedy trial right in Iowa justifies its application in the period between dismissal and reindictment.

The third reason that we apply the state constitutional right in the instant case is because of the belief that our courts are able to apply the sensitive balancing process in the special circumstances of successive prosecutions. Our courts are sophisticated enough to weigh the facts and circumstances of each case to determine if the basic right to a speedy trial has been violated in any post-arrest situation in which the issue is raised. We believe that the reasoning of the dissent in United States v. MacDonald, 456 U.S. 1, 12, 102 S. Ct. 1497, 1504, 71 L. Ed. 2d 696, 706 (1982), best embodies the approach of fundamental fairness that this state has consistently taken toward speedy trial questions:

> The majority's insistence that the dismissal of an indictment eliminates speedy trial protections is not only inconsistent with the language and policies of the Speedy Trial Clause and with this Court's decisions. It is also senseless. Any legitimate government reason for delay during the period between prosecutions can, indeed must, be weighed when a court determines whether the defendant's speedy trial right has been violated. No purpose is served by simply ignoring that period for speedy trial purposes. In Barker v. Wingo, 407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972), this Court rejected an inflexible approach to the right to a speedy trial in favor of "a difficult and sensitive balancing process." Id., at 533, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (footnote omitted). Lower court opinions indicate that this responsibility can be faithfully discharged in the special circumstances of successive prosecutions. (footnotes omitted)

456 U.S. at 20, 102 S. Ct. at 1507, 71 L. Ed. 2d at 710.

The fourth reason we believe that the speedy trial right attaches in the period between dismissal and refiling is that due process guarantees are not sufficient to protect the defendant against state negligence or delay in this period. Again, we follow the language of the dissent in MacDonald:

> It is no answer that the Due Process Clause protects against purposeful or tactical delay that causes the accused actual prejudice at trial. The due process constraint is limited, and does not protect against delay which is not for a tactical reason but which serves no legitimate prosecutorial purpose. See United States v. Lovasco, 431 U.S. 783, 52 L. Ed. 2d 752, 97 S. ct. 2044 (1977). According only limited protection is appropriate prior to the first arrest or indictment because the state has a substantial interest in conducting a relatively unrestricted preaccusation investigation, see id., at 790-795, 52 L. Ed. 2d 752, 97 S. Ct. 2044, and because a person not yet accused has a lesser interest in a speedy prosecution. But when a government has already investigated and accused a defendant, it is in a much better position, and properly shoulders a greater responsibility, to reinvestigate and reprosecute the defendant with reasonable promptness. Moreover, as explained above, delay between public accusation, dismissal of charges, and renewed indictment causes peculiar anxiety to the accused, as well as the other consequences of arrest described in Marion. Thus, the government must affirmatively demonstrate a legitimate reason, other than neglect or indifference, for such a delay.
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> The majority's approach denigrates speedy trial policies and presents a serious potential for abuse. Under that approach, the government could indefinitely delay a second prosecution for no reason, or even in bad faith, if the defendant is unable to show actual prejudice at trial. The Court of Appeals in this very case suggested that the Government may have proceeded on the assumption that preindictment delay would be of no speedy trial consequence. MacDonald I, supra, at 206, n. 17. I fear that, as a consequence of today's decision, unreasonable and unjustifiable delay between prosecutions may become commonplace. (Footnotes omitted.)

456 U.S. at 20, 102 S. Ct. at 1508, 71 L. Ed. 2d at 711. We agree with commentators who conclude that MacDonald made it more difficult for individuals accused of a crime to protect themselves from prosecutorial delay since the due process test is often insurmountable. Note, Criminal Procedure--United

States v. MacDonald, Continued Uncertainty in the Right to a Speedy Trial, 61 N.C.L. L. Rev. 563, 574 (1983). We also agree with the commentator who concluded "In effect, the Supreme Court's decision in MacDonald replaces the protection offered by the Sixth Amendment with that offered by the Fifth Amendment despite the fact that the latter Amendment is neither designed nor intended to address speedy trial issues and concerns." Moore, Sixth Amendment—Limited Protection Against Prosecutorial Delay, 73 J. Crim. L. & Crim. 1491, 1505 (1983). We choose to give state constitutional speedy trial guarantees to those post-arrest situations where government neglect, indifference, or delay are real possibilities. We believe that the period between dismissal and refiling of charges is one of those situations. This situation is not like the situation in which a person has never been accused. In the latter situation, the government must be given wide latitude to conduct a thorough investigation. However, once the process of prosecution begins, the dangers of inappropriate delay become apparent.

The fifth reason for our conclusion that the period between dismissal and refiling is protected by the speedy trial guarantee of our state constitution is that we find convincing the reasoning of other state courts who, in acknowledging their power to interpret their state constitutions, require that the speedy trial rights of defendants be harmonized with the state constitutional guarantees prior to determining the remedy under the federal constitution. In State v. Lindsay, 96 Idaho 475, 475, 531 P.2d 236, 237 (1975), the Idaho Supreme Court agreed with the ad hoc approach of the Barker balancing test and concluded that, the Barker test was consistent with its decisions interpreting the Idaho constitution. In State v. Cadman, 476 A.2d 1148 (Maine 1984), the Maine Supreme Court concluded that the defendant's speedy trial claim must be decided under the line of Maine cases dealing with the constitutional speedy trial right before

deciding whether the state deprived him of his federal right. Both of these state supreme courts have adopted the Barker test as an interpretive base in defining their own constitutions. This is, we believe, the approach that most closely weighs all relevant criteria, without overlooking or ignoring any. An inflexible standard does not allow us to assess a "delay" of justice when it has no reason other than neglect, procrastination, or deliberate choice. See In the Matter of the Application of Haynes, 619 P.2d 632, 638 (Ore. 1980).

B. Applying the Speedy Trial Test. The Supreme Court of Iowa has said that the four factors of Barker should be used in each case where there is a state or federal constitutional guarantee of a speedy trial. State v. Petersen, 288 N.W.2d 332, 334 (Iowa 1980). The Barker factors include length of delay, defendant's assertion of his right to a speedy trial, prejudice resulting from the delay, and reason for delay. Since we have decided that there is a state constitutional right to a speedy trial in the period between dismissal and refiling of charges, it remains to "balance" these elements. The proper disposition in an individual case is not accomplished by a process of addition or subtraction but rather by examining the relevance of each of the Barker factors in giving effect to the constitutional guarantee. See In the Matter of the Application of Haynes, 619 P.2d at 637.

1. Length of delay. The length of the delay serves in part as a "triggering mechanism." Barker v. Wingo, 407 U.S. at 530, 92 S. Ct. at 2192, 33 L. Ed. 2d at 117. In State v. Steadham, 231 N.W.2d 29, 31 (Iowa 1975), the supreme court stated that the length of delay can be a significant factor in applying the Barker balancing test. In Steadham there was a delay of 224 days between the time the defendant was charged and first tried and a delay of 245 days between the charge and a second trial.

The policy behind not permitting lengthy delays in going to trial was set forth in State v. Johnson, 217 N.W.2d 609, 612 (Iowa 1974), a case involving the refiling of charges after the initial charges were dismissed for lack of a speedy trial.

> If the State is free to commence repeated prosecutions for the same offense following undue delay in going to trial, subject only to the running of the statute of limitations, there is nothing to deter delays at prosecution's convenience, in pushing forward to trial, and defendant's constitutional right is rendered largely meaningless.

In the instant case, 2,548 days passed between the dismissal of the charges against Florie and the refiling of those same murder charges. We find that a seven-year delay is sufficiently serious to consider the reasons for delay and other elements of the appellant's speedy trial claim. In fact, seven years is an extraordinary length of time to wait for a "speedy trial," unless of course, plaintiff is himself responsible for much of the delay.

2. Defendant's assertion of his right to a speedy trial. Defendant Florie asserted his rights in a timely fashion. In October of 1977, Florie requested a speedy trial. In November of 1977, the State moved to dismiss the charges. The motion was sustained by the district court.

Our courts have given considerable weight to whether the defendant is responsible for delay in the case. If the defendant is responsible for most of the delay, he may find it difficult to assert his constitutional right to a speedy trial. State v. Bass, 320 N.W.2d 824, 831 (Iowa 1982); State v. Steadham, 231 N.W.2d at 31.

The record does not show that Florie contributed to or caused the delay. He requested a speedy trial in 1977. In the intervening seven years Florie did nothing to cause delay in refiling the charges. After charges were refiled in

October, 1984, Florie filed motions to dismiss for lack of a speedy trial. Florie did not contribute to the delay.

3. Prejudice to the defendant. The next element to be balanced is the prejudice to the defendant that resulted from the delay. In order to appraise the prejudice caused by the seven year delay in Florie's case, we must look to the interests sought to be protected by the speedy trial guarantee. These interests are: 1) to prevent oppressive pretrial incarceration; 2) to minimize anxiety and concern of the accused; and 3) to limit the possibility the defense will be impaired. See, e.g., Barker v. Wingo, 407 U.S. at 533, 92 S. Ct. at 2193, 33 L. Ed. 2d at 117; State v. Petersen, 288 N.W.2d at 334-35. In this case our attention is directed to the second and third interests.

Florie has claimed emotional distress from the delay. We presume that prolonged delay subjects the accused to some emotional stress which is caused by the uncertainties in the prospect of facing public trial. State v. Johnson, 217 N.W.2d at 612. However, Florie was not incarcerated for the period of time before the refiling of charges and there is little available evidence relating to the stress incurred by him.

Florie claims his defense was impaired by the delay. The State suggests that Florie must show that the delay caused actual prejudice to the defense. The trial court held that Florie was required to show actual prejudice. We agree with the necessity to show actual prejudice when asserting due process rights. State v. Williams, 264 N.W.2d 779, 783 (Iowa 1978). However, when asserting speedy trial rights, the more difficult standard of actual prejudice need not be met. See, e.g., United States v. Avalos, 541 F.2d 1100, 1116 (5th Cir. 1976) (en banc). Any prejudice caused to the defendant may be weighed when balancing all of the factors. State v. Petersen, 288 N.W.2d at 334-35. Slight differences

in trial testimony may well influence a verdict. See United States v. MacDonald, 456 U.S. at 713, 102 S. Ct. at 1504, 71 L. Ed. 2d at 706 (Marshall, J., dissenting).

Florie sets out numerous allegations of prejudice. It is very difficult to measure the prejudice that resulted to Florie from the death or absence of various witnesses and the disappearance of certain evidence. Presumably the inability to have one's favorable witnesses testify in person and the inability to impeach the State's witnesses must cause some prejudice to a defendant charged with murder. We do note the State considered its own case substantially harmed when, in the motion to dismiss in November 1977, it said that the absence of three witnesses and the changing of the previous statements of two other witnesses, made it impossible to prosecute the case.

However, the Iowa Supreme Court's analysis of the circumstances in State v. Hall, No. 85-976, slip op. (Iowa November 12, 1986), is directly relevant here. In Hall, the defendant had been accused along with Florie and Michael Burrows of the murder of Varner. Hall, however, was not indicted along with Florie due to the change in testimony of the State's key witness, William Smith. The court noted that the State was uncertain of the likelihood of a conviction of any of the codefendants without the testimony of Smith. Since the State's role in the delay (see below) was basically the same in Hall as in the present case, we do not find more than a minimum amount of prejudice caused to Florie by the State's delay.

4. Reasons for delay. The Iowa Supreme Court has said, "if the delay has been a long one, or if the defendant has demanded a speedy trial, or is prejudiced, a stronger reason is necessary to constitute good cause." State v. Petersen, 288 N.W.2d at 335.

In considering speedy trial claims there are generally recognized three classes of reasons for delay in bringing a defendant to trial: deliberate delay,

negligent delay, and justified delay. See Turner v. Estelle, 515 F.2d 853 (5th Cir. 1975), cert. denied, 424 U.S. 955, 96 S. Ct. 1431, 47 L. Ed. 2d 361 (1976). We shall attempt to identify the reasons for the delay in the case at bar, to accord weight to each type of reason, and to the extent possible, to determine the amount of delay attributable to each type of reason.

a. Deliberate delay. "A deliberate attempt to delay the trial in order to hamper the defense should be weighed heavily against the government." Barker v. Wingo, 407 U.S. at 531, 92 S. Ct. at 2192, 33 L. Ed. 2d at 116. Appellant Florie claims that the dismissal of the original charges was a deliberate attempt on the part of the State to "end run" Florie's speedy trial rights because the State's case was falling apart. The State asserts that the dismissal was predicated on the absence of certain witnesses and the changing of the statements of other witnesses. According to the State, these factors necessitated the 1977 motion that charges be dropped. In order to evaluate these contrary assertions, we must evaluate the facts and circumstances relevant to the testimony of each of the witnesses the State asserts was unavailable or changed his story.

William Smith originally gave a statement to the prosecutors which implicated Florie in the murder. Smith's statements asserted that he saw Florie flush out Florie's car with a hose and he heard Florie state, while viewing a newscast showing the murder area, "That's the place." Smith later refused to implicate Florie in the murder. The State says this change in testimony was the "central reason" for the dismissal. Florie claims that Smith's testimony was all but useless to the State due to credibility problems.

The State also argues that Robert Kohl originally claimed the defendant made admissions to him regarding the Varner murder, but later denied any know-

ledge of these admissions in his 1977 deposition. Florie claims that Kohl's testimony would have been contradictory and unreliable.

In examining the different statements of Robert Kohl and the effect of the absence of George Hall, Jackie Hall, and Harold Meyers, Jr., we agrée that these factors hindered the State's case. The State admits that it may not have followed all possible leads in locating the missing witnesses. However, we do not think that the record shows that the State acted out of bad faith or intentionally delayed for tactical advantage. The State may have been dilatory in locating witnesses and overly cautious about the changed testimony of some unreliable witnesses. Alone, this governmental delay in investigating and prosecuting is not independently sufficient to constitute deliberate delay and require Florie's conviction be overturned.

b. Negligent delay. The second type of reason for a postaccusation delay involves such reasons as negligence or overcrowded courts. This type of reason should be weighed less heavily but should nevertheless be considered since the responsibility for such circumstances rests with the government and not the defendant. Barker v. Wingo, 407 U.S. at 531, 92 S. Ct. at 2192, 33 L. Ed. 2d at 117.

The Iowa Supreme Court has held that administrative delays such as docket congestion are not good cause for significant delays in the trial of criminal cases. State v. Hines, 225 N.W.2d 156, 158 (Iowa 1975); State v. Wright, 234 N.W.2d at 104. The Iowa Supreme Court has emphasized that the reason for not permitting such administrative factors to permit long delays is because Iowa has traditionally elevated speedy trial statutes to an important role. State v. Hines, 225 N.W.2d at 158-59.

The State asserts that one of the principal reasons the case was not actively prosecuted until 1984 was administrative delay. In its appellate brief, the State

says, "During the period between 1977 and 1984 there was a high turnover of both prosecutors and investigators which contributed to the lack of activity." The record shows minimal investigation in the Florie case during the 1977-84 period.

The new leads that the government said developed in 1984 were tips about the whereabouts of some of the witnesses or potential witnesses. There is no indication that the government actively sought out this information. Presumably an active investigation would have turned up more and better leads during the seven-year interval. Furthermore, Florie asserts, and the government does not deny, that most of the witnesses listed in the 1984 minutes of testimony, except the then current DCI agent, were known to the State in 1977. Kohl, one of the witnesses who changed his story in 1977, was actually called by Florie in 1985. At that time, the government did precisely what it could have done in 1977--attempt to impeach him on cross-examination.

We must conclude, however, that given the essential nature of Smith's testimony in 1977 and 1985, the State was not negligent in its delay. Administrative reasons may have been partially responsible for the delay, however, the government's inaction was not responsible for the major reason for the seven year delay.

c. Justified delay. Some portion of the delay is attributable to the third type of reason. "[A] valid reason, such as a missing witness, should serve to justify appropriate delay." Barker v. Wingo, 407 U.S. at 531, 92 S. Ct. at 2192, 33 L. Ed. 2d at 117. A proportion of the delay resulted from government conduct that was entirely justified. It is significant that some of the seven-year delay was justified by the government's need to accumulate evidence necessary to make a case out against the accused. The need to make out a prima facie case was perhaps not fully underlined by a vigorous effort to locate

and reinterview witnesses. Still, since the trial court thought that there was justifiable reason for the delay, we give weight to those findings.

In conclusion, we must find that no deliberate delay occurred. Any inaction or negligence in prosecuting the case was outweighed by the justified delay on the part of the State, especially when the evidence presented by the State at the 1985 trial could not have been substantially presented at the 1977 trial.

The defendant demanded a speedy trial; the defendant did nothing to contribute to the seven-year delay; the government had some good reason for the delay; government inaction and negligence in prosecuting were not the main reasons for the delay; the government'sdelay over a seven-year period was not prima facie prejudicial; and Florie did not show he was more than minimally prejudiced by the delay. Weighing these factors, we have no choice but to conclude that Florie was not denied his state constitutional right to a speedy trial.

II. Due Process. Iowa has adopted the rule articulated in United States v. Marion, 404 U.S. 307, 324, 92 S. Ct. 455, 465, 30 L. Ed. 2d 468, 481 (1971), that defendant's due process rights are violated if it is shown at trial that preindictment delay caused actual and substantial prejudice to defendant's right to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused. State v. Sunclades, 305 N.W.2d 491, 494 (Iowa 1981); State v. Cuevas, 282 N.W.2d 74, 77 (Iowa 1979); State v. Williams, 264 N.W.2d 779, 783 (Iowa 1978).

As discussed above, no actual prejudice was shown to have been inflicted on the defendant and it was not demonstrated that delay was an intentional device to gain a tactical advantage. Therefore, under both state and federal constitutional guarantees of due process, Florie's assignment of error, based on a violation of his due process rights, must fail.

Our due process analysis is substantiated by the supreme court's recent decision in State v. Hall, No. 85-976, slip op. (Iowa Nov. 12, 1986). In that case George Hall, accused of the same murder as Florie, was not charged until seven years after Varner's death. Hall claimed that this preaccusatorial delay violated his due process rights under the United States Constitution. Although the Hall situation was very different than the circumstances where charges are filed, dismissed, and subsequently refiled, the due process analysis in Hall is essentially the same as we employ here. Following the line of cases of United States v. Marion, 404 U.S. 307, 925 Ct. 455, 30 L. Ed. 2d 468 (1971); State v. Williams, 264 N.W.2d 779 (Iowa 1978); State v. Cuevas, 282 N.W.2d 74 (Iowa 1979); and State v. Sunclades, 305 N.W.2d 491 (Iowa 1981); the supreme court found that neither actual prejudice was shown nor did the State delay in order to gain a tactical advantage over Hall. State v. Hall, No. 85-976, slip op. at 6, 8. We think the same conclusions should be reached in our assessment of Florie's due process challenge.

III. Other Issues. Our scope of review on the further issues raised by Florie is at law for corrections of error only. Iowa R. App. P. 4.

Florie contends that the trial court erred in overruling his motion to dismiss for denial of his right to a speedy indictment. The background of this contention is as follows. Because the alleged crime occurred before January 1, 1978, and because Florie never chose under Iowa Code section 801.5(2) to have the case tried under post-1978 criminal procedures, the case is governed by pre-1978 law. Pre-1978 section 795.1 required that when a person is held to answer for a public offense, an indictment or information must be returned within 30 days unless good cause is shown. Florie contends that this 30-day requirement was violated under the following circumstances. Florie's trial on the October 1984 information resulted in a mistrial, for reasons not relevant here, on January 11,

1985. On the same date it was discovered that the October 1984 information did not comply with the requirements of pre-1978 law. However, the State did not file a proper pre-1978 information until February 25, 1985. Florie contends the 30-day provision of pre-1978 section 795.1 required the substituted information to be filed within 30 days of January 11, 1985. He contends the February 25 information should have been dismissed on this ground. The court found that any challenge to the trial information must fail because Florie did not raise any issue as to the form of the information, filed October 29, 1984, until after the commencement of trial on January 8, 1985.

We conclude that the court did not err in finding that Florie waived any defects as to the form of the trial information and was informed upon after being held to answer within the time limits of section 795.1 of the 1977 Code. Since the form of the October information was amended before it was successfully challenged by Florie, defendant's claim that he was denied his right to speedy indictment must fail.

Florie also contends the district court erred by finding that Florie was part of a conspiracy to murder Varner and that statements by coconspirators were therefore admissible under Iowa Rules of Evidence 801(d)(2) in spite of the hearsay rule. Florie argues there was not substantial evidence that he had participated in a conspiracy; he argues that the statements of alleged coconspirators should therefore have been excluded from evidence.

The trial court concluded that adequate circumstantial evidence was presented to support a finding of substantial evidence of a conspiracy. Since the record shows that the court did not solely rely on coconspirator statements and found independent evidence of a conspiracy, the statements of the alleged conspirators were admissible. See State v. Elam, 328 N.W.2d 314, 319 (Iowa 1982); State v. Kidd, 239 N.W.2d 860, 864 (Iowa 1976).

Florie contends the district court erred by admitting certain testimony that Florie had displayed a knife and bragged of a murder while at a party shortly after the crime. The witnesses in question did not come forward at all in the 1977 investigation, and they did not come forward during the 1984-1985 proceedings until the second trial was under way. Florie argues that under these circumstances he was unable to prepare for their testimony. He contends the State's motion to present the additional witnesses should have been denied. Florie also contends the district court should have excluded the testimony of one of these witnesses concerning her identification of Florie as the party-going braggart from an allegedly suggestive photographic array.

The trial court did not abuse its discretion in allowing the testimony of the witnesses in question. Iowa law gives the trial court considerable discretion in allowing additional testimony as long as the defense is permitted adequate time to prepare for the new evidence. Iowa Code §§ 780.10, 780.11 (1975); Iowa R. Crim. P. 18(2); State v. Ellis, 350 N.W.2d 178, 182 (Iowa 1984). Florie was given a continuance to prepare to meet the testimony, during which time the defense both deposed the witnesses and prepared a full cross-examination. The trial court did not err in permitting the State to admit the testimony of the witnesses in question.

Florie contends that one of the witnesses' testimony was inadmissible due to an unnecessarily suggestive identification procedure. Under the totality of the circumstances test set forth in State v. Mark, 286 N.W.2d 396, 405 (Iowa 1979), and after an examination of the record, we conclude the court was correct in ruling that under the totality of the circumstances the identification was reliable. The witness had sufficient time to hear and see Florie at a party; she testified that Florie acted in such a way as to impress his conduct upon her; she was certain of her identification; she made a positive in-court identif-

ication. Even if there was an impermissibly suggestive identification procedure, the court was correct to admit the identification evidence since other factors relating to the identification did not suggest there was any substantial likelihood of irreparable misidentification. Manson v. Braithwaite, 432 U.S. 98, 116, 97 S. Ct. 2243, 2254, 53 L. Ed. 2d 140, 155 (1977).

Florie contends the district court erred by overruling his motion in limine. This motion objected to a great deal of proposed testimony and relied on a great many grounds. Its primary focus was to exclude testimony concerning codefendant Burrows' motive for murdering Varner; Florie contends that evidence about Burrow's motive could not be admitted because Florie's participation in a conspiracy with Burrows had not been established.

We believe that most of the issues involved in the motion in limine filed in March 1985 are not properly presented on appeal since the contentions and reasons therefor only incorporate by reference the trial court proceedings. Iowa R. App. P. 14(a)(h). Florie does argue that the evidence regarding Burrows' motive for murdering Varner was inadmissible since it was more prejudicial than probative. Determinations of relevancy and materiality rest largely in the discretion of the trial court. State v. Horn, 282 N.W.2d at 728. Relevancy is the sine qua non of the admissibility of other offenses into evidence. State v. Cuevas, 282 N.W.2d 74, 80 (Iowa 1979). Florie does not indicate which rule of evidence he finds a violation under for the admission of the evidence relating to the shooting out of Judge Altmix's windows. However, we believe that the State's principle use of such evidence was to establish a reason that Florie would plan Varner's death. The court's relevancy evaluation must always be if such evidence is more probative than prejudicial. State v. Webb, 309 N.W.2d 404, 412 (Iowa 1981). As the evidence admitted went to establish Florie's reason

to murder Varner, we find no error in the conclusion that such evidence was more probative than prejudicial.

Florie contends that several of the instructions were erroneous. He challenges instructions stating theories of conspiracy and aiding and abetting. The trial court used the Uniform Jury Instructions. If the court decides that these instructions are adequate, it is not under the obligation to give proposed instructions. State v. Horn, 282 N.W.2d 717, 730 (Iowa 1979). The trial court did not err by choosing to use the Uniform Instructions.

Florie also contends the court should have instructed the jury on pre-1978 law regarding circumstantial evidence rather than on a more recent standard. Florie did very little to alert the trial court to the basis for such instructions. Objections must be made in such a way as to specify the grounds for objection. See State v. Sallis, 262 N.W.2d 240, 248 (Iowa 1978). General objections such as "the court erred in refusing a request for instruction" or "the instruction is not a correct statement of the law are not sufficient to preserve error." See Allbee, Kincaid, Error Preservation in Civil Litigation: A Primer for the Iowa Practitioner, 35 Drake L. Rev. 1, 22-23 (1985-86). The defendant informed the court merely that the defendant's instruction was the proper one. In addition, we do not believe that a jury instruction of a general nature such as on the difference between direct and circumstantial evidence in effect in 1977 and later changed by the supreme court for clarity's sake need be given in its pre-altered form when the defendant was being tried under pre-1978 law. Such a jury instruction did not go to any element of the crime of murder. Nothing in defendant's proposed instruction would have negated the possibility that defendant was guilty of the crime charged. As such, the instruction was not a theory of defense and was properly rejected. See State v. Kase, 344 N.W. 223, 226-27 (Iowa 1984).

Florie contends the district court should have excluded testimony from a witness who had committed perjury during the trial proceeding which led to the January 1985 mistrial. The witness testified that he had heard Florie admit his involvement in the Varner murder; the State asserts that the prior perjury was motivated by fear of the defendant. Florie contends that Harold Meyers, Jr.'s testimony denied Florie a fair trial since Meyers had previously committed perjury in this case and had caused a mistrial. We do not agree. There is a reasonable explanation for Meyers' former perjury—fear of repercussions from Varner's murderer. Furthermore, the prosecution presented the entire story of Meyers' perjury to the jury. As the supreme court said in State v. Frank, 298 N.W.2d 324, 329 (Iowa 1980), when a recantation was fully explained to a jury and the recanted testimony was not the only evidence supporting the defendant's guilt; no error occurred when the trial court permitted the jury to hear the recanted testimony. We find a similar situation in the present case. The trial court committed no error in permitting Harold Meyers to testify.

Florie also contends that the prosecutors should have been removed from the case since it was the intent of the defendant to call the prosecutors as witnesses to Harold Meyers' prior perjury. Florie, in fact, did not call the prosecutors as witnesses. In addition, even if the prosecutors had been called by Florie, the trial court noted that under Iowa Code of Professional Responsibility DR5-102(B), the prosecutors would have been able to testify for Florie as to the prior perjury of Meyers. If the prosecutors were called to testify, the State could then have determined if such testimony would be prejudicial to its case. The court was not in error in permitting the prosecutors to continue trying the case. Furthermore, as EC-5-10 of the Code of Professional Responsibility states, "It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testi-

mony would be merely cumulative or if his testimony will relate only to an uncontested issue." Meyers' prior perjury was uncontested and other witnesses could have provided the same testimony. The trial court did not err in permitting the prosecutors to continue on the case.

Finally, Florie contends the evidence was insufficient to permit a jury to find him guilty. He asserts the district court should have granted his motion for a directed verdict. In reviewing a motion for a directed verdict based upon the insufficiency of the evidence in a criminal case, the evidence must be viewed in a light most favorable to the State and a refusal to grant a directed verdict will withstand challenge if there is any substantial evidence in record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981). The record clearly reveals that a jury could reasonably have concluded that Florie committed the murder. The trial court's refusal to direct a verdict for Florie was supported by substantial evidence and therefore no error occurred.

AFFIRMED.

Oxberger, C.J., and Snell, J., concur; Donielson, Hayden, and Sackett, JJ., specially concur.

While I agree with the majority's conclusion that Florie's right to a speedy trial was not violated in the present case, I would affirm Florie's conviction based on the principles previously enunciated by the United States Supreme Court in United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982), rather than on state constutitional grounds.

I do not disagree with the majority's rationale that it is a fundamental rule that state courts, when considering both state and federal constitutional grounds, should forbear on ruling on the federal constitutional question before resolving those claims based on state constitutional grounds. It is also without question that states are free to adopt greater protections under their constitutions than those required by the federal constitution. California v. Ramos, 463 U.S. 992, 1014, 103 S. Ct. 3446, 3460, 77 L. Ed. 2d 1171, 1189 (1983). I do believe, however, that when considering the question of state v. federal law, there should be consistency between those two bodies of law wherever possible, rather than fashioning precedent so diametrically opposed to one another as is the analysis adopted by the majority. When state and federal constitutions contain similar provisions, we usually deem the provisions to be identical in scope, import, and purpose. Chicago Title Ins. Co. v. Huff, 256 N.W.2d 17, 23 (Iowa 1977). While we have recognized we are the final arbiters of the meaning of the Iowa Constitution, we must also accord special respect and deference to the United States Supreme Court interpretations of similar language in the federal constitution. Redmond v. Ray, 268 N.W.2d 849, 852 (Iowa 1978). This is further evidenced by the fact that a significant number of states have applied or noted with approval the MacDonald standard subsequent to that decision. See e.g., Serna v. Superior, 40 Cal. 3d 239, 251, 707 P.2d 793, 800, 219 Cal. Rptr. 420, 427 (1985); State v. Fairchild, 108 Idaho 225, 228, 697 P.2d 1239, 1240 (Idaho Ct. App. 1985);

State v. Foat, 442 So.2d 1146, 1155 (La. Ct. App. 5 Cir. 1983) (special concurrence); Lee v. State, 61 Md. App. 169, 173-74, 485 A.2d 1014, 1016-17 (Md. Ct. App. 1985); People v. Boucher, 131 Mich. App. 216, 219, 345 N.W.2d 670, 671 (Mich. Ct. App. 1983); State v. McNeal, 699 S.W.2d 457, 460 (Mo. Ct. App. 1985); State v. Bailey, 655 P.2d 494, 497 (Mont. 1982) (distinguishing that case from MacDonald); City of Akron v. Downey, 24 Ohio App. 3d 225, ___, 495 N.E.2d 28, 30 (Ohio Ct. App. 1985); State v. Dykast, 300 Or. 368, ___, 712 P.2d 79, 84 (1985); State v. Holiday, 335 N.W.2d 332, 334 (S.D. 1983); State v. McCrary, 100 N.M. 671, 675, 675 P.2d 120, 124 (1984); Caton v. State, 709 P.2d 1260, 1264 (Wyo. 1985).

Because we have not heretofore been called upon to decide whether the right to speedy trial guaranteed by Iowa Constitution art. 1, section 10 attaches to the period between dismissal of charges against a defendant and the refiling of those charges, I, like the majority, look to the line of federal cases deciding this issue for guidance.

In United States v. MacDonald, 456 U.S. 1, 7, 102 S. Ct. 1497, 1501-02, 71 L. Ed. 2d 696, 703 (1983), the United States Supreme Court held that for purposes of the sixth amendment right to a speedy trial, such right has no application where the government, in good faith, formally drops charges and that any undue delay after the charges have been dismissed must be scrutinized under the due process clause, not the speedy trial clause. The MacDonald court reasoned that at the point where charges are dismissed, the formerly accused stands in the same position as any other subject of a criminal investigation. 456 U.S. at 8, 102 S. Ct. at 1502, 71 L. Ed. 2d at 704. The Court, in distinguishing the MacDonald case from those cases where a person has been arrested, accused, and indicted but the government has failed to timely proceed with trial, discussed the protections afforded by the speedy trial clause:

> Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

(citing United States v. Marion, 404 U.S. 307, 320, 92 S. Ct. 455, 463, 30 L. Ed. 2d 468, 478 (1971)). The speedy trial clause was therefore designed to minimize the possibility of lengthy incarceration before trial and to reduce the substantial impairment of an accused's liberty while released on bail. It is not primarily intended to prevent prejudice to the defense caused by passage of time. As the Court stated in MacDonald, a criminal investigation undoubtedly causes some stress and disruption in everyday life, but that such a situation would be true whether or not charges had been filed and dismissed. 456 U.S. at 9, 102 S. Ct. at 1502, 71 L. Ed. 2d at 704. But where no charges are pending but have been dismissed, as in the present case, a person such as Florie suffers no restraints on his liberty and is not the subject of public accusation.

In the present case Florie was not under arrest, was not in custody, and was not subject to a criminal prosecution. While the initial investigation undoubtedly subjected Florie to adverse conditions, once the charges were dismissed, Florie was legally and constitutionally in the same position as if not charges had been made, essentially the same as the defendant in Hall. Though Florie claims that he suffered anxiety during the seven-year period between the dismissal and refiling, such a bald assertion is, without more, insufficient to hold that Florie was denied a speedy trial.

I do not believe that by adopting the rationale of MacDonald, we would be holding against the grain of those Iowa cases discussing the right to speedy trial. The majority correctly points out that we have consistently adopted the principles set forth in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). The cases cited by the majority do not, however, deal with the factual situation where charges have been dismissed, but rather dealt with those periods between arrest and time of trial and the length of delay involved. State v. Wright, 234 N.W.2d 99 (Iowa 1975), is particularly not on point because the issue in that case concerned the time period for retrial after the court had granted a mistrial. In the present case, the charges had been dismissed against Florie.

I would therefore conclude that Florie's right to a speedy trial did not attach until charges were pending against him. Since the original charges had been dismissed in 1977, Florie stood in the same position as any other subject of a criminal investigation. He was in the same position as if no charges had been made. Thus, while I concur with the majority that Florie's conviction should be affirmed, I would base such affirmance on the standards set forth in MacDonald.

Hayden and Sackett, JJ., joins this special concurrence.