

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,  
  
Plaintiff-Appellee,  
  
v.  
  
GEORGE DAVIS,  
  
Defendant-Appellant.

SUPREME COURT 20-1244

APPEAL FROM THE IOWA DISTRICT COURT  
FOR POLK COUNTY  
HONORABLE MARK SCHLENKER, JUDGE

APPELLANT'S SUPPLEMENTAL BRIEF

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## **CERTIFICATE OF SERVICE**

On the 7th day of September, 2021, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to George Davis, 3205 Kingman Blvd., Apt. 206, Des Moines, IA 50311.

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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

**I. The Supreme Court has jurisdiction over this appeal. Section 814.6A only applies to substantive filings in the appellate court and does not apply to pro se notices of appeal from criminal convictions.**

### **Authorities**

Iowa Code § 814.6A (2019)

Iowa Code § 822.3A (2019)

Iowa ch. 813 (2019)

State v. Thompson, 954 N.W.2d 402, 409 (Iowa 2021)

#### **A. Section 814.6A only applies in the appellate courts.**

Iowa Code § 4.6(3)

S.F. 589 (introduced), Explanation at p. 28 L. 6-13, found at <https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=SF%20589&v=I>

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#### **B. A “notice of appeal” is not a prohibited filing under section 814.6A(1).**

Iowa Code § 814.6A(1) (2019)

State v. Thompson, 954 N.W.2d 402, 418 (Iowa 2021)



Garza v. Idaho, 139 S. Ct. 738, 746, 203 L. Ed. 2d 77 (2019)

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Iowa R. App. P. 6.102(2) (2019)

Jones v. Barnes, 463 U.S. 745, 751 (1983)

**C. At the time Davis filed the notice of appeal, he was unrepresented in the appellate court.**

Iowa Code § 814.11(2)(a) (2021)

Iowa Admin. Code. r. 493-11.2(4)

Iowa Admin. Code. r. 493-11.2(8)

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Burns, B. John, 4A Iowa Practice Series, Criminal Procedure 32:5 (Apr. 2021)

**II. In the alternative, this court may grant a delayed appeal or recognize appellate counsel's attempt to rectify the inadequate pro se notice of appeal.**

### **Authorities**

State v. Anderson, 308 N.W.2d 42, 46 (Iowa 1981)

Ford v. State, 258 Iowa 137, 142 (1965)

State v. Wetzel, 192 N.W.2d 762, 764 (Iowa 1971)

State v. Horstman, 222 N.W.2d 427, 430 (Iowa 1974)

Matter of L.H., 890 N.W.2d 333, 339 (Iowa Ct. App. 2016)

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Swanson v. State, 406 N.W.2d at 792, 792-93 (Iowa 1987)

Iowa Code § 814.20 (2021)

**III. If Davis's notice of appeal is invalid and this court lacks jurisdiction, the denial of his right to appeal is a violation of due process under the Fifth and Fourteenth Amendments and article I, section 9.**

#### **Authorities**

Swanson v. State, 406 N.W.2d 792, 793 (Iowa 1987)

Garza v. Idaho, 139 S. Ct. 738, 746 (2019)

Jones v Barnes, 463 U.S. 745, 751 (1983)

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Iowa R. App. P. 6.101(1)(b) (2019)

Ford v. State, 258 Iowa 137, 142 (1965)

Blanchard v. Brewer, 429 F.2d 89, 90 (8th Cir. 1970)

Shipman v. Gladden, 453 P.2d 921, 925 (Ore. 1969)

State v. Cason, 532 N.W.2d 755, 757 (Iowa 1995)

## **STATEMENT OF THE CASE**

Defendant-Appellant George Davis submits this brief pursuant to the Supreme Court's order of August 13, 2021, requesting additional briefing on whether the court has jurisdiction over this appeal, given that the Defendant-Appellant filed a pro se notice of appeal while he was represented by trial counsel, in light of Iowa Code section 814.6A (2019).

**Relevant Proceedings:** After being arrested for OWI, George Davis requested the appointment of counsel. (App/Counsel) (Addendum A).<sup>1</sup> The court found Davis was unable to afford his own attorney and appointed counsel at the State's expense to represent Davis in his criminal case. (Order/Initial App) (Addendum B). Ultimately, Davis pled guilty pursuant to a plea agreement to OWI third offense, and

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<sup>1</sup> Because appellate briefing has been completed in this case, including the preparation of the appendix, for ease of reference, any document referenced in this brief but not included in the appendix are attached as addendum to this brief.

the district court accepted his plea on June 1, 2020. (Order Accepting Plea) (App. p. 9-11).

After the plea was entered and before sentencing occurred, Davis's attorney withdrew and new counsel was appointed to handle sentencing. (Motion/Withdraw 6/15/20; Order Approving Withdrawal 6/30/20) (App. pp. 12-14) (Appearance 7/24/20) (Addendum C).

Davis was sentenced August 24, 2020. (Sentencing Order) (App. p. 15). The district court advised Davis regarding his right to appeal:

Should the defendant wish to appeal, he must do so within 30 days within the manner required by law. If he wishes to appeal and cannot afford counsel, assistant counsel can be appointed for him at state expense upon application. Also, a transcript of these proceedings can be prepared upon application and qualification, that if he qualified for Court appointed counsel and for a copy of the transcript at state expense.

(Sentencing Tr. p. 10 L. 21 – p. 11 L. 3). On September 10, 2020, Davis filed a pro se notice of appeal from jail, requesting the appointment of appellate counsel. (Notice of Appeal) (App. pp. 20-24).

On September 14, 2020, the district court appointed the State Appellate Defender's Office to represent Davis in his appeal. (Order for Counsel) (Addendum D). Later that day, Davis's trial counsel filed a motion to withdraw, noting that her representation of Davis ended when the court entered sentence against Davis and noting the district court had already appointed the State Appellate Defender for the appeal. (Motion to Withdraw) (Addendum E). The motion was granted. (Order Withdrawing Counsel) (Addendum F).

After briefing was completed, on August 13, 2021, the Supreme Court ordered the parties to file supplemental briefs on the applicability of Iowa Code section 814.6A(1) prohibiting certain pro se filings when a defendant is represented and whether the court had jurisdiction over the appeal. (8/13/21 Order).

On August 23, appellate counsel filed a notice of appeal. (8/23/21 Notice of Appeal) (Addendum G).

## **ARGUMENT**

### **I. The Supreme Court has jurisdiction over this appeal. Section 814.6A only applies to substantive filings in the appellate court and does not apply to pro se notices of appeal from criminal convictions.**

In 2019 legislature enacted Senate File 589, the Omnibus Crime Bill. Included in this bill were two provisions limiting the ability of certain litigants to file documents pro se while represented by counsel. Specifically, the legislature amended Chapter 814 (Appeals from the District Court) by adding section 814.6A (pro se filings by defendants currently represented by counsel):

1. A defendant who is currently represented by counsel shall not file any pro se document, including a brief, reply brief, or motion, in any Iowa court. The court shall not consider, and opposing counsel shall not respond to, such pro se filings.
2. This section does not prohibit a defendant from proceeding without the assistance of counsel.
3. A defendant currently represented by counsel may file a pro se motion seeking disqualification of the counsel, which a court may grant upon a showing of good cause.

Iowa Code § 814.6A (2019). The legislature also amended Chapter 822 (Post Conviction Proceedings) by adding a similar

provision. See Iowa Code § 822.3A (2019). The legislature did not, however, include an analogous provision in Chapter 813 (Rules of Criminal Procedure) governing district court criminal proceedings. See Iowa ch. 813 (2019).

The Iowa Supreme Court addressed the application of section 814.6A(1) to a pro se appellate brief filed by a defendant-appellant represented by appellate counsel. State v. Thompson, 954 N.W.2d 402, 409 (Iowa 2021) (“Because the specific issue in this case is whether the court is required to strike Thompson's pro se supplemental brief, we focus our inquiry on the constitutionality of the law as applied in this appeal.”) The court found the statute was constitutional in that context, but had no occasion to determine whether section 814.6A(1)’s prohibition applied to filings in the district court in a criminal case.

In this case, George Davis was represented by court-appointed counsel when he filed his pro se notice of appeal following his conviction and sentencing in the district court.



Because 814.6A(1) does not apply to pro se notices of appeal, the notice of appeal was valid, the Supreme Court jurisdiction over this appeal.

**A. Section 814.6A only applies in the appellate courts.** Notably, the provision at issue is found in Chapter 814—the chapter addressing “appeals from the district court.” The legislature also similarly amended Chapter 822—the chapter addressing postconviction relief proceedings. However, the legislature failed to modify chapter 813—addressing the rules of criminal procedure. The placement of the new laws indicates the prohibition on pro se filings applies only in appellate proceedings (and in postconviction relief proceedings). It does not apply to filings in the district court in a criminal case.

Although not dispositive, the legislative history also supports an interpretation that pro se filings in the district court are not affected by section 814.6A. See Iowa Code § 4.6(3) (court may also consider legislative history). When

SF589 was introduced, it included an explanation making clear that the prohibition in 814.6A(1) only applied in the appellate court:

The bill provides that a defendant who is currently represented by counsel shall not file any pro se document in *any Iowa appellate court*. The *appellate court* shall not consider, and opposing counsel shall not respond to, such pro se filings.

S.F. 589 (introduced), Explanation at p. 28 L. 6-13, found at <https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=SF%20589&v=I> (emphasis added).

Although the original proposed text of section 814.6A(1), as introduced in S.F. 589, similarly made explicit the prohibition was limited to the appellate court by expressly identifying “any Iowa appellate court” and “appellate court,” this language was removed in amendment S3093. Critically however, the amendment did not move the language out of chapter 814 which would have indicated an intent to broaden

the scope of the statute.<sup>2</sup> Instead, when introducing the amendment, Senator Dawson explained the changes to the prose filings section was merely “technical cleanup” and not a substantive change. Senate Video SF589 Criminal Law Procedure S-3093 by Dawson of Pottawattamie, Iowa Legislature (March 28, 2019, 1:49:48 PM), <https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190328125735925&dt=2019-03-28&offset=3054&bill=SF%20589&status=i>. Later, when the amendment was adopted, no further comments were made about the amendment. Senate Video SF589 Criminal Law Procedure S-3093 by Dawson of Pottawattamie, Iowa Legislature (April 1, 2019, 5:00:00PM), <https://www.legis.iowa.gov/dashboard?view=video&chamber=>

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<sup>2</sup> Compare the amendment to 814.6A to the amendment moving the aggravated theft provision to the more appropriate robbery division of the Code. See Senate Video SF589 Criminal Law Procedure S-3093 by Dawson of Pottawattamie, Iowa Legislature (March 28, 2019, 1:50:14 PM), <https://www.legis.iowa.gov/dashboard?view=video&chamber=S&clip=s20190328125735925&dt=2019-03-28&offset=3054&bill=SF%20589&status=i>.

S&clip=s20190401125340169&dt=2019-04-

01&offset=14871&bill=SF%20589&status=i. Thus, removing the express limitation of the prohibition to appellate court filings does not demonstrate a legislative intent to expand the reach of the statute, but instead indicates the express reference to “appellate court” was surplusage and unnecessary due to the placement of the new law in the chapter addressing appeals.

Accordingly, because Davis’s pro se notice of appeal was filed in the district court, section 814.6A(1) does not apply and the Supreme Court has jurisdiction over his appeal.

**B. A “notice of appeal” is not a prohibited filing under section 814.6A(1).** Section 814.6A(1) prohibits a defendant from filing a pro se “document, including a brief, reply brief, or motion” while represented by counsel. Iowa Code § 814.6A(1) (2019). When the Supreme Court considered the validity of this section as applied to a pro se brief filed in the appellate court, the court explained the purpose of the legislation.

Section 814.6A is merely another example of the legislative department's constitutional and historical

prerogative to regulate practice and procedure in Iowa's courts. There are legitimate regulatory reasons why the legislature would seek to restrict represented parties from filing pro se documents on appeal. Requiring that briefs be filed only by counsel “ensure[s] that counsel and client speak with one voice.” *Turner*, 677 F.3d at 579. “When a client seeks to raise additional issues, counsel must evaluate them and present only the meritorious ones, rather than simply seeking leave for the client to file a supplemental brief. This promotes effective advocacy because it prevents counsel from allowing frivolous arguments to be made by the client.” *Id.* The prohibition against represented parties also reduces procedural confusion. *See Montgomery*, 592 F. App'x at 416 (“Indeed, the prohibition against hybrid representation is intended to prevent the exact type of procedural confusion presented in this appeal.”). The legislative department's decision to advance these interests does not impede the immediate, necessary, efficient, and basic functioning of our appellate courts.

State v. Thompson, 954 N.W.2d 402, 418 (Iowa 2021).

The goals outlined by the Supreme Court—wanting a client and attorney to speak with one voice, assuring that only non-frivolous issues are raised and considered by the court, and the reduction of procedural confusion—are promoted by section 814.6A(1)'s ban on filing briefs, reply briefs and motions. These types of filings are substantive filings. However, a notice

of appeal is an entirely different creature. It is merely the mechanism by which a defendant initiates an appeal as of right. “In other words, filing a notice of appeal is, generally speaking, a simple, nonsubstantive act that is within the defendant’s prerogative.” Garza v. Idaho, 139 S. Ct. 738, 746, 203 L. Ed. 2d 77 (2019). See also Roe v. Flores-Ortega, 528 U.S. 470, 478, 120 S.Ct. 1029, 1035 (2000) (“filing a notice of appeal is a purely ministerial task”). Conversely, “the choice of what specific arguments to make within the appeal belongs to appellate counsel.” Garza v. Idaho, 139 S.Ct. at 746.

Rule of Appellate Procedure 6.102(2), prescribing the requirements for taking an appeal as a matter of right, confirms the nonsubstantive nature of a notice of appeal:

An appeal from a final order appealable as a matter of right in all cases other than termination-of-parental-rights and child-in-need-of-assistance cases under Iowa Code chapter 232 is taken by filing a notice of appeal with the clerk of the district court where the order or judgment was entered within the time provided in rule 6.101(1)(b). The notice of appeal shall be signed by either the appellant's counsel or the appellant.

a. *Contents of the notice of appeal.* The notice of appeal shall specify the parties taking the appeal and the decree, judgment, order, or part thereof appealed from. The notice shall substantially comply with form 1 in rule 6.1401.

Iowa R. App. P. 6.102(2) (2019). The rule does not require the notice contain any substantive arguments or identification of issues to be raised in the appeal—it is merely a form to identify the parties involved and the order from which the appeal is taken.

The limitation of section 814.6A(1) to substantive pro se filings aligns with “the broader division of labor between defendants and their attorneys.” Garza v. Idaho, 139 S.Ct. at 746. “While ‘the accused has the ultimate authority’ to decide whether to ‘take an appeal,’ the choice of what specific arguments to make within that appeal belongs to appellate counsel.” Garza v. Idaho, 139 S. Ct. at 746 (quoting Jones v. Barnes, 463 U.S. 745, 751 (1983)).

Thus, even if section 814.6A(1) applies to district court filings, a notice of appeal is not a prohibited filing under the

statute, and Davis's pro se notice of appeal was valid and this court has jurisdiction over the appeal.

**C. At the time Davis filed the notice of appeal, he was unrepresented in the appellate court.** As described above, a notice of appeal is the mechanism by which an appeal is triggered and appellate jurisdiction is invoked. When Davis filed his notice of appeal on September 10, 2020, he was unrepresented in the appellate court until the Appellate Defender's Office was appointed to represent him on September 14, 2020. (Notice of Appeal) (App. 20-24) (requesting appointment of appellate counsel); (Order for Counsel) (Addendum D).

When Davis's trial counsel moved to withdraw, she noted her representation of Davis ended when the court entered judgment and sentence. (Motion to Withdraw) (Addendum E). The course of proceedings in this case conforms to Iowa Code section 814.11 and administrative rules.



Section 814.11 provides that if the appellant is entitled to court-appointed counsel, the State Appellate Defender's Office must be appointed if the appeal involves an indictable offense. Iowa Code § 814.11(2)(a) (2021). Additionally, a court-appointed lawyer's contract to perform legal services to a particular client does not extend beyond the case to which the attorney was appointed. See Iowa Admin. Code. r. 493-11.2(4) (contract types); Iowa Admin. Code. r. 493-11.2(8) (contract terms); Iowa Admin. Code. r. 493-12.2(1)(b)(1) (claims must include all orders appointing attorney to the case); Iowa Admin. Code. r. 493-12.2(1)(b)(5) (a new appointment order is not necessary for trial counsel to request or resist an interlocutory appeal or an application for discretionary review.).

Rules of criminal procedure 2.29(6) and 2.30 arguably conflict with the administrative code and section 814.11. Rule 2.29(6) requires trial counsel to continue as defendant's appointed counsel in the appellate court unless a court orders otherwise. Iowa R. Crim. P. 2.29(6). Rule 2.30(1) prohibits

court-appointed trial counsel from withdrawing without leave of the court until filing of the notice of appeal or until the expiration of the 30-day time period to file the notice of appeal. Iowa R. Crim. P. 2.30(1). Notably, though, neither rule requires trial counsel to personally file the notice of appeal. Iowa Rs. Crim. P. 2.29(6), 2.30(1). See also Iowa R. App. P. 6.102(2) (“The notice of appeal shall be signed by either the appellant's counsel or the appellant.”)

“[T]he decision to appeal rests with the defendant.” Roe v. Flores-Ortega, 528 U.S. 470, 478-79, 120 S.Ct. 1029, 1035 (2000); see also Garza v. Idaho, 139 S.Ct. 738, 746 (Iowa 2019). A consideration of the entirety of rules surrounding the filing of the notice of appeal and application for counsel demonstrate they were intended to protect a defendant’s right to appeal and ensure a smooth transition to the appellate court system after a criminal conviction—a situation usually involving the immediate incarceration of the defendant. See Iowa Rs. Crim. P. 2.29(2) (allowing defendant to orally apply for appointment of

appellate counsel); 2.29(3) (allowing defendant to apply for appointment of counsel by writing directly to the court); 2.29(4) (requiring court to respond to application for counsel within seven days); 2.29(5) (presumption that defendant is indigent for appeal if was indigent for trial); 2.29(6) (requiring counsel to determine if defendant wants to appeal and file notice and application for counsel if so); 2.30(1) (requiring counsel to file notice and application for appellate counsel if defendant wishes to appeal and prohibiting counsel from withdrawing until then); 2.30(2) (counsel of record “will be deemed” counsel in the appeal until new counsel appointed). See also Iowa R. Crim. P. 2.23(3)(f) (district court may ask defendant wishes to appeal at sentencing and if so shall direct counsel to file notice and shall appoint appellate counsel). The relevant rules contemplate trial counsel continuing as appellate counsel for administrative purposes and the overall goal is that new appellate counsel will be appointed to handle the merits of the appeal. The Iowa Supreme Court has noted the hazards of trial counsel acting as

appellate counsel and generally discourages such practice. See, e.g., Villa Magana v. State, 908 N.W.2d 255, 260 (Iowa 2018) (“Villa's *appellate* PCR counsel was always in a difficult spot to raise ineffective assistance by Villa's *trial* PCR counsel, because the two individuals were one and the same. Although Villa's trial PCR counsel probably should have withdrawn from handling this appeal, Villa himself should not suffer the consequences.”); Jones v. Scurr, 316 N.W.2d 905, 911 (Iowa 1982) (acknowledging the limited ability of appellate counsel recognizing errors when he was also trial counsel).

Appellate attorneys who also functioned as trial counsel occasionally feel that meticulous review is unnecessary because “they were there” and already know what the issues are. This is one of two reasons why a party, especially a criminal defendant, may in certain cases be better served by being represented on appeal by an attorney who was not trial counsel. The existence of and the merit in potential issues take on a different light viewed from the deliberative perspective of appellate evaluation, as opposed to during the heat of trial. Appellate counsel must be willing to engage in a fresh and exhaustive reading of the whole record.

Burns, B. John, 4A Iowa Practice Series, Criminal Procedure 32:5 (Apr. 2021).

Accordingly, because Davis was unrepresented in the appellate court at the time he filed his notice of appeal, this court has jurisdiction over the appeal.

**II. In the alternative, this court may grant a delayed appeal or recognize appellate counsel's attempt to rectify the inadequate pro se notice of appeal.**

In the alternative, this court may maintain jurisdiction by permitting a delayed appeal. See State v. Anderson, 308 N.W.2d 42, 46 (Iowa 1981) (granting a delayed appeal where “defendant has made a good faith effort to appeal and at all times clearly intended to appeal”); Ford v. State, 258 Iowa 137, 142 (1965) (“We should entertain a delayed appeal where the grounds seeking to excuse the delay set forth a denial of a constitutional right in the appellate process due to malfeasance or misfeasance of the state or its agents.”); State v. Wetzel, 192 N.W.2d 762, 764 (Iowa 1971) (granting delayed appeal when defendant had “at all times attempted to appeal his conviction to this court” and his failure to do so was a result of his incarceration, lack of knowledge, and insufficient actions of counsel); State v. Horstman, 222 N.W.2d 427, 430 (Iowa 1974)

(delayed appeals are granted when it is demonstrated that failure to timely perfect an appeal was due, at least in part, to circumstances beyond the defendant's control).

During sentencing, on August 24, 2020, the district court advised Davis that if he wanted to appeal, he “must do so within 30 days within the manner required by law.” (Sentencing Tr. p. 10 L. 21-22). The sentencing order also notified Davis that the notice of appeal must be filed within thirty days: “TO CHALLENGE THIS JUDGMENT defendant must file for EITHER 1) appeal OR 2) Discretionary Review – either must be filed with the clerk of court within 30 days or the request will be denied as untimely.” (Sentencing Order p. 4) (App. p. 18).

Thus, the court did not advise Davis that his attorney had to file the notice of appeal on his behalf. Davis filed his pro se notice of appeal on September 10, 2020, within the 30-day deadline to perfect an appeal. Appellate counsel filed a notice of appeal on August 23, 2021, as a precaution in the event this

Court determined Davis's pro se notice was a "nullity." The notice of appeal filed by counsel was not timely.

The court "liberally construe[s] notices of appeal so as to preserve the right of review and, if possible, permit consideration on the merits." Matter of L.H., 890 N.W.2d 333, 339 (Iowa Ct. App. 2016); see also Iowa Dept. of Human Services ex rel. Greenhaw v. Steward, 579 N.W.2d 321, 323-24 (Iowa 1998) (holding a notice of appeal need only substantially comply with the rules and is sufficient "as long as opposing party is not misled to his irreparable harm.") This liberal rule of construction is consistent with the court's "oft repeated preference for disposition of cases on the merits and not on mere technicalities." Hawkeye Sec. Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 378 (Iowa 1972).

Davis's pro se notice of appeal demonstrates his timely intention to appeal from the judgment after a jury trial. State v. Anderson, 308 N.W.2d 42, 46 (Iowa 1981) (stating "[u]nder these circumstances, we conclude that defendant has made a

good faith effort to appeal and at all times clearly intended to appeal.”).

We have, in certain criminal cases, granted a right of delayed appeal. That remedial procedure originated with federal courts which order the granting of delayed appeals where it appears that state action or other circumstances beyond appellant’s control have frustrated an intention to appeal. Under such circumstances, the denial of a right of appeal would violate the due process or equal protection clause of the fourteenth amendment to the federal constitution.

Swanson v. State, 406 N.W.2d at 792, 792-93 (Iowa 1987).

Because Davis demonstrated an intention to timely appeal the conviction, he should be allowed to pursue an appeal.

As well, this court should find any inadequacy in Davis’s pro se notice of appeal was remedied by appellate counsel’s filing of a notice of appeal on August 23, 2021. (8/23/21 Notice of Appeal) (Addendum G). “An appeal or application taken by the defendant shall not be dismissed for an informality or defect in taking it if corrected as directed by the appellate court.” Iowa Code § 814.20 (2021). Accordingly, Davis’s appeal should



not be dismissed for any informality or defect that has been rectified. See id.

**III. If Davis’s notice of appeal is invalid and this court lacks jurisdiction, the denial of his right to appeal is a violation of due process under the Fifth and Fourteenth Amendments and article I, section 9.**

Where state action frustrates an appellant’s intention to appeal, the denial of the right to appeal violates due process. Swanson v. State, 406 N.W.2d 792, 793 (Iowa 1987). “[T]he accused has the ultimate authority’ to decide whether to ‘take an appeal.’” Garza v. Idaho, 139 S. Ct. 738, 746 (2019) (quoting Jones v Barnes, 463 U.S. 745, 751 (1983)). See also Roe v. Flores-Ortega, 528 U.S. 470, 478-79, 120 S.Ct. 1029, 1035 (2000) (“[T]he decision to appeal rests with the defendant.”). If this court concludes it does not have jurisdiction over Davis’s appeal, the combination of Iowa Code section 814.6A, Iowa Rule of Criminal Procedure 2.30(2), the district court’s failure to adequately advise Davis, and trial counsel’s failure to file a separate timely notice of appeal frustrated Davis’s ability and intention to appeal and

constitutes a due process violation under the United States and Iowa Constitutions.

Davis made a good faith effort to timely appeal the conviction by preparing and mailing the pro se notice within 30 days of judgment. See Iowa R. App. P. 6.101(1)(b) (2019). The district court's failure to properly advise Davis that he could not file his own notice and counsel's failure to refile the notice of appeal violates due process if Davis's right to appeal is frustrated. See Ford, 258 Iowa at 142; Swanson, 406 N.W.2d at 793.

While a failure to perfect an appeal may sometimes constitute ineffective assistance of counsel, the "failure by appointed or retained counsel to commence the simple steps for appeal is a blatant denial of due process." Blanchard v. Brewer, 429 F.2d 89, 90 (8th Cir. 1970). The reason for counsel's actions do not matter. "Whether counsel's conduct is classified as gross or excusable negligence or whether the state's activity is classified as passive or active is irrelevant,

since in either case appellee has been denied effective and complete appellate review through no fault of his own.” Id. at 90. See also Shipman v. Gladden, 453 P.2d 921, 925 (Ore. 1969) (“The failure of counsel to timely file a notice of appeal after he has been requested or agreed to do so is incompetence as a matter of law and a denial of due process.”).

If Iowa Code section 814A.6(1) does prevent the court from recognizing a pro se notice of appeal, the sentencing court must advise the defendant of this restriction. In the absence of such an advisement, this court should acknowledge and consider appeals generated by pro se filings to avoid due process problems.<sup>3</sup> The district court’s failure to advise Davis of any

---

<sup>3</sup> The district court’s advisement that Davis must file a notice of appeal “within the manner required by law” was insufficient to advise Davis that the notice of appeal must be filed by his attorney. As described above in subsection C, the interplay of the applicable statutes, court rules, and administrative code provisions confusing and inconsistent with each other. Thus, the court’s order for this supplemental briefing. Accordingly, when the law is in flux, as has been since the enactment of S.F. 589, and as evidenced by this court’s order requesting supplemental briefing on the applicability of section 814.6A, advice to follow the law is useless.

preclusive effect of filing his own notice of appeal is not harmless if it results in the dismissal of his appeal should this court find it lacks jurisdiction. Cf. State v. Cason, 532 N.W.2d 755, 757 (Iowa 1995) (holding error was harmless where trial court failed to advise the defendant of the jurisdictional prerequisite to appeal because Cason's notice was timely filed in the manner prescribed).

### **CONCLUSION**

This court has jurisdiction to consider Davis's appeal because his pro se notice of appeal was adequate and Iowa Code section 814.6A(1) does not apply to such filings. Further, the circumstance of this case justify granting a delayed appeal, and a denial of Davis's right to appeal in this situation would be a violation of due process.

## **ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$4.58, and that amount has been paid in full by the Office of the Appellate Defender.

### **CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS**

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 4,319 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



MELINDA J. NYE  
Assistant Appellate Defender  
Appellate Defender Office  
Lucas Bldg., 4<sup>th</sup> Floor  
321 E. 12<sup>th</sup> Street  
Des Moines, IA 50319  
(515) 281-8841  
mnye@spd.state.ia.us  
appellatedefender@spd.state.ia.us

Dated: 9/7/21

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

STATE OF IOWA,

Plaintiff

VS

Defendant

Case Number:

OWDM 088692

FINANCIAL AFFIDAVIT AND APPLICATION FOR  
APPOINTMENT OF COUNSEL

In support of my application for appointment of counsel, and under penalty of perjury, the undersigned states:

Name:

Date of Birth:

Home Phone

George DAVI

Cell Phone

515 718-4007

Email

George.GRDAG.com

Street address

3205 Kingman Blvd. Apt #206

Street/PO Box

Apt #

City

State

Zip Code

OWDM 50311

Pending Charges:

O.W.I.

Are you in Jail?

☒ Yes

☐ No

Do you have a job?

☒ No Job

☐ Yes, Full Time

☐ Yes, Part-Time (List Hours/week: \_\_\_\_\_)

Who do you work for?

NONE

How much do you earn before taxes or other deductions?

NONE

Per

☐ hour

☐ month

☐ year

How much money have you made in the last 12 months from any source, before taxes or deductions?

\$75.00<sup>00</sup>

How many family members are supported by or live with you?

# 2

If a spouse lives with you, how much money does your spouse make?

8.00 H.R.

Per

☒ hour

☐ month

☐ year

List all other money you, and anyone else living in the household has coming in:

12.00 yr

List what you own, including money in banks, cars, trucks, other vehicles, land, houses, buildings, cash, or anything else worth more than \$100:

NONE

List amounts you pay monthly for mortgages, rent, car loans, credit cards, child support, and any other debts:

NONE

I understand I may be required to repay the State for all or part of my attorney fees and costs, I may be required to sign a wage assignment, and I must report any changes in the information submitted on this financial affidavit. I promise under penalty of perjury that the statements I make in this application are true and I am unable to pay an attorney to represent me.

Date:

12-31-19

Signature:

George Davis

**DO NOT BEND, FOLD, OR ROLL THIS PAPER!!!**

U.S. DISTRICT COURT

19 DEC 31 AM 10:56

FILED  
POLK COUNTY IA.

IN THE IOWA DISTRICT COURT FOR POLK COUNTY  
ORDER OF INITIAL APPEARANCE (IN-CUSTODY)

**DEFENDANT:** GEORGE RAYMOND DAVIS

**ATTORNEY:** PUBLIC DEFENDER-POLK COUNTY

**ADDRESS:** 505 5TH AVENUE STE 506 DES MOINES, IA 50309

**PHONE:** (515) 725-1825

**FAX: (515) 281-7275**

Date of Order: 12/31/19

Defendant's Application for Appointment of Counsel is approved.

The above named attorney is hereby appointed to represent the Defendant on the charges listed and scheduled below. The conditions are pursuant to the agreement between the State Public Defender and the above named Attorney and will continue until the case is disposed of, including representation at any post-sentencing matters. Counsel appointed to represent Defendant is the local public defender office, nonprofit organization, or attorney designated by the State Public Defender pursuant to Iowa Code Section 13B.4(2) to represent indigent person in this type of case in the county. **Counsel is advised of the responsibility to be prepared to provide the court with a current statement of any and all fees and expenses incurred as of the date of any scheduled proceedings, in order to properly address issues or restitution, if applicable.**

Based on the Defendant's financial affidavit/application the Court finds as follows: Income at or below 125% of guidelines, Defendant unable to pay an attorney.

---

Upon review of the Preliminary Complaint filed in this matter, Court finds Probable Cause to believe that the offense(s) set forth in the complaint have been committed and the Defendant committed said offense(s).

**THE DEFENDANT IS ORDERED TO APPEAR AT THE POLK COUNTY CRIMINAL COURTS BUILDING ON THE FOLLOWING CHARGES ON THE DATES SHOWN BELOW:**

**CASE:** 05771 OWOM088092

Arraignment is

**COURT DATE:** 02/13/2020 AT 08:30 AM Criminal Court  
Bldg, 1st Floor Clerk Office, 110 6th Ave, DSM .

**CHARGE:** 321J.2(2)(c)

OPERATING WHILE UNDER THE INFLUENCE 3RD  
OFFENSE

**CHARGE:** 124.401(5)

POSSESSION OF CONTROLLED SUBSTANCE 1ST  
OFFENSE

**IF OUT OF CUSTODY, DEFENDANT MUST CHECK IN ON THE 1ST FLOOR OF THE CRIMINAL COURTS BUILDING, 110 6TH AVE., DES MOINES, IOWA PRIOR TO ARRAIGNMENT TIME.**

**IF THE DEFENDANT REMAINS IN CUSTODY, the expedited arraignment date is set for 01/29/2020 at 1:30PM in the Jail Courtroom, located at 1985 51st Place, DSM IA, 50313**

Total Bond is set at \$5,000 cash

The Court finds probable cause that the Defendant committed the following related offenses(s). The simple misdemeanor and traffic case(s) (if any) shall be placed on hold by the Clerk until disposition of this indictable case. Failure to appear on any of the charges below may result in a warrant being issued for the Defendant's arrest and/or forfeiture of the bond posted in each case. In addition, a judgment of conviction may be entered on related traffic citations.

05771 NTA0942209 - STATE VS GEORGE RAYMOND DAVIS  
01 - 321.288(1) FAILURE TO MAINTAIN CONTROL

Bond is set as follows: Own Recognizance

**Additional condition of release: Due to the nature of the pending charge(s), Defendant is ordered to obtain a Substance Abuse Evaluation with a completed NARRATIVE REPORT OF THE EVALUATION FILED WITH THE COURT by the next court date. NONCOMPLIANCE may result in bond revocation and DETENTION in the Polk County Jail.\*\*\* If the Defendant remains in custody, EFR shall conduct the evaluation and submit a report prior to the next court date.**

***If you have been charged with a simple misdemeanor, you are hereby advised that trial in that matter will be without a jury unless a jury demand is made within 10 days of the entry of a not guilty plea. Failure to make a jury demand by this deadline constitutes a waiver of the right to a jury trial.***

**ATTN:PCSO:** The Sheriff is ordered to take into custody the defendant who has been charged in the District Court of Polk County, Iowa with the offenses listed above. The Defendant is committed to the custody of the Polk County Sheriff, to be detained in the Polk County Jail until discharged by due course of law. The Defendant is admitted to bail in the amount set out above.

**If the Defendant is being released on PTR Levels I,II, III, IV or Max Services, the PCSO WILL NOT RELEASE the Defendant until all paperwork has been signed and submitted to the PCSO.**

Defendant was personally served with a copy of this order.

PCJ was personally served with a copy of this order.

In addition to all other persons entitled to a copy of this order, the Clerk shall provide a copy to the following:

PCJ BOOKING

JAIL CC

EFR (only if not released by  
PSA)

5CR01





State of Iowa Courts

**Case Number**  
OWOM088092  
**Type:**

**Case Title**  
STATE VS GEORGE RAYMOND DAVIS\*\*C  
HEARING FOR INITIAL APPEARANCE

So Ordered

William A. Price, Senior judge,  
Fifth Judicial District of Iowa

Electronically signed on 2019-12-31 09:25:16

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

|   |  |
|---|--|
| STATE OF IOWA,<br><br>Plaintiff,<br><br>vs.<br><br>GEORGE RAYMOND DAVIS,<br><br>Respondent. | CASE NO. OWOM088092,<br>NTA0942209<br><br>APPEARANCE |
|---|--|

**COMES NOW** the undersigned counsel, Heidi Young, and hereby enters her appearance for the above-named Defendant, George Raymond Davis, in the above-entitled action.

**GRIBBLE, BOLES, STEWART & WITOSKY LAW**

BY: /s/ Heidi Young

Heidi Young  
2015 Grand Avenue, Suite 200  
Des Moines, Iowa 50312  
Telephone: (515) 235-0551  
Fax: (515) 243-3696  
Email: [hyoung@gbswlaw.com](mailto:hyoung@gbswlaw.com)  
**ATTORNEY FOR DEFENDANT**

**PROOF OF SERVICE**

The undersigned certifies that the foregoing instrument was **electronically filed** on EDMS on July 24, 2020. Subject to the exceptions cited therein, Iowa Court Rule 16.315 provides that this electronic filing, once electronically posted to the registered case party's EDMS account, constitutes service for purposes of the Iowa Court Rules.

Copies have been provided to all registered parties because once the document is posted, those parties are able to view and download the presented or filed document.

/s/ Heidi Young

## IN THE IOWA DISTRICT COURT FOR POLK COUNTY

|   |  |
|---|--|
| <b>STATE OF IOWA</b><br><b>Plaintiff,</b><br><br><b>vs.</b><br><br><b>GEORGE RAYMOND DAVIS,</b><br><b>Defendant</b><br><br>GEORGE RAYMOND DAVIS<br>3205 KINGMAN BLVD APT 20 **BAD<br>ADDRESS**<br>DES MOINES IA 50311 | 05771 OWOM088092<br><br><b>Order Appointing Appellate Counsel<br/>         and Order For Payment for Transcripts</b> |
|---|--|

A Notice of Appeal was filed by the Defendant. The Defendant is indigent. Counsel shall be appointed to represent Defendant on this appeal.

The Appellate Defender's Office is appointed to represent the Defendant in this appeal.

The transcripts in all proceedings in this matter shall be prepared at State expense.

Counsel is advised that the combined certificate must be filed and served within four (4) days after the filing of the notice of appeal. See Iowa R. App.P.10(b). If it is not possible to meet that deadline at the time of appointment, counsel shall file an application for extension of time with the Clerk of the Supreme Court. The combined certificate may be contemporaneously filed with the application for extension of time. The appeal must then be docketed within the applicable deadline set forth under Iowa R. App. P.12(a) or (b).

**SO ORDERED** this 09/14/20.

Appellate Defender's office

5CR51



State of Iowa Courts

**Case Number**  
OWOM088092  
**Type:**

**Case Title**  
STATE VS GEORGE RAYMOND DAVIS  
ORDER APPOINTING

So Ordered

---

Brendan Greiner, District Associate Judge  
Fifth Judicial District of Iowa

Electronically signed on 2020-09-14 09:34:48

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

|  |  |
|--|--|
| <b>STATE OF IOWA,</b><br><br><b>Plaintiff,</b><br><br><b>v.</b><br><br><b>GEORGE RAYMOND DAVIS,</b><br><br><b>Defendant.</b> | <b>CASE NO. OWOM088092</b><br><br><b>MOTION TO WITHDRAW AS<br/>COUNSEL FOR DEFENDANT</b> |
|--|--|

**COMES NOW** the Defendant, George Raymond Davis, by and through the undersigned counsel, Heidi Young, and for the motion to withdraw as counsel for Defendant, appoint state appellate public defender and for transcript at state expense, respectfully states to the Court as follows:

1. On August 24, 2020, the Court entered an OWI Sentencing Order (Third Offense).
2. The undersigned's representation of the Defendant has therefore concluded.
3. The Defendant filed a Notice of Appeal on September 10, 2020.
4. On September 14, 2020, the Court entered an Order appointing the Appellant Defender's Office.
5. Therefore, the undersigned counsel requests to withdraw from the above-captioned matter.

**WHEREFORE**, the undersigned respectfully request the Court grant her motion to withdraw as counsel in the above-captioned case.

**GRIBBLE, BOLES, STEWART & WITOSKY LAW**

BY: /s/ Heidi M. Young

Heidi M. Young  
2015 Grand Avenue, Suite 200  
Des Moines, Iowa 50312  
Telephone: (515) 235-0551  
Facsimile: (515) 243-3696  
Email: [hyoung@gbswlaw.com](mailto:hyoung@gbswlaw.com)  
**ATTORNEY FOR DEFENDANT**

**PROOF OF SERVICE**

The undersigned certifies that the foregoing instrument was **electronically filed** on EDMS on September 14, 2020. Subject to the exceptions cited therein, Iowa Court Rule 16.315 provides that this electronic filing, once electronically posted to the registered case party's EDMS account, constitutes service for purposes of the Iowa Court Rules.

**Copies have been provided** to the following registered parties:

Jordan Roling  
Polk County Attorney's Office  
222 5th Avenue  
Des Moines, Iowa 50309  
515-286-3737  
515-286-3428 Fax  
[Jordan.roling@polkcountyia.gov](mailto:Jordan.roling@polkcountyia.gov)  
**ATTORNEY FOR PLAINTIFF**

George Raymond Davis  
**DEFENDANT**

/s/ Heidi Young

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

|  |   |
|--|---|
| <b>STATE OF IOWA,</b><br><br><b>Plaintiff,</b><br><br><b>v.</b><br><br><b>GEORGE RAYMOND DAVIS,</b><br><br><b>Defendant.</b> | <b>CASE NO. OWOM088092</b><br><br><b>ORDER GRANTING MOTION TO<br/>WITHDRAW AS COUNSEL FOR<br/>DEFENDANT</b> |
|--|---|

**BE IT REMEMBERED**, this matter comes before the Court on the Motion to Withdraw as Counsel for Defendant. The Court being fully advised in the premises **FINDS** that the Motion is proper and should be **GRANTED**.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that Heidi Young is withdrawn as counsel for the Defendant from the above-captioned case.

**IT IS SO ORDERED.**



State of Iowa Courts

**Type:** ORDER APPROVING WITHDRAWAL OF COUNSEL

| <b>Case Number</b> | <b>Case Title</b>             |
|--------------------|-------------------------------|
| OWOM088092         | STATE VS GEORGE RAYMOND DAVIS |

So Ordered

A handwritten signature in cursive script, appearing to read 'Cynthia Moisan', written in dark ink.

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Cynthia Moisan, District Associate Judge,  
Fifth Judicial District of Iowa

Electronically signed on 2020-09-14 13:59:49 page 2 of 2



IN THE IOWA DISTRICT COURT FOR POLK COUNTY

|  |  |
|--|--|
| STATE OF IOWA,<br><br>Plaintiff,<br><br>v.<br><br>GEORGE R. DAVIS,<br><br>Defendant. | Polk No. OWOM088092<br>S.Ct. No. 20-1244<br><br>NOTICE OF APPEAL |
|--|--|

TO: THOMAS J. MILLER, Attorney General of the State of Iowa; COUNTY ATTORNEY for Polk County, Iowa; and CLERK of the Polk County District Court

Notice is given that Defendant George Davis appeals to the Supreme Court of Iowa from the final order entered in this case on the 24th day of August, 2020, and from all adverse rulings and orders inhering therein. A Pro se notice of appeal was filed on September 10, 2020.

Dated this 23<sup>rd</sup> day of August, 2021.

APPELLATE DEFENDER OFFICE

/s/ Melinda J. Nye  
MELINDA J. NYE  
Assistant Appellate Defender  
Fourth Floor Lucas Building  
Des Moines, IA 50319  
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