IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-1244

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GEORGE DAVIS,
Defendant-Appellant.

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

APPELLEE'S SUPPLEMENTAL BRIEF

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STATEMENT OF THE CASE

Nature of the Case

Davis filed a *pro se* notice of appeal while represented by counsel. Not. App. (filed Sept. 14, 2020); App. 20–25. Iowa Code section 814.6A provides that a court and opposing counsel shall not consider or respond to "such *pro se* filings." Iowa Code § 814.6A (2019). The Supreme Court *sua sponte* ordered the parties to brief the court's jurisdiction over this appeal. Order No. 20-1244 (filed Aug. 13, 2021).

Course of Proceedings

The State accepts the defendant's statement procedural history. Iowa R. App. P. 6.903(3). For simplicity's sake, the State notes the following. Attorney Heidi Young represented Davis when judgment entered on August 24, 2020. App. 15–19.

On September 10, 2020, Davis filed a three-page notice of appeal asserting ineffective assistance of counsel and seeking appointment of appellate counsel. App. 20–23.

Four days later, Attorney Young moved to withdraw. Appellant's Suppl. Br. p. 45 (Addendum E). The district court granted the motion that day and appointed the Appellate Defender. *Id*. pp. 47–48 (Addendum F), pp. 43–44 (Addendum D).

The parties completed appellate briefing on July 2, 2021. *See* Appellant's Br. p. 1; Appellee's Br. p. 1.

The Iowa Supreme Court reviewed the docket. Order No. 21-1244 (filed Aug. 13, 2021). Davis filed notice of appeal *pro se* while still represented by counsel. *Id.* The Court ordered supplemental briefing to address jurisdiction. *Id.*

Ten days later, appellate counsel filed a notice of appeal in the district court. Not. App. Polk No. OWOM088092/S. Ct. No. 20-1244 (filed Aug. 23, 2021).

ARGUMENT

I. Davis was represented by counsel at and after sentencing following his guilty plea who could have filed a notice of appeal. Instead, he filed notice *pro se*. The Court could grant a delayed appeal but should not.

Iowa Code section 814.6A bars a represented party from filing "any *pro se* document … in any court." Davis has had counsel continuously. Nevertheless, he filed a notice of appeal *pro se*. Without a valid notice of appeal within thirty days of judgment, the Court lacks jurisdiction. Iowa R. App. P. 6.101(1)(b); *Doland v. Boone County*, 376 N.W.2d 870, 875–76 (Iowa 1985). The State recognizes this Court can restore its jurisdiction by granting a delayed

appeal. *See*, *e.g.*, *Swanson v. State*, 406 N.W.2d 792, 793 (Iowa 1987). Reluctantly, the State cannot recommend it.

A. Iowa Code section 814.6A applies to all *pro se* filings in all courts.

Iowa Code section 814.6A provides:

> 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.
>
> This section does not prohibit a defendant from proceeding without the assistance of counsel
>
> 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 (emphasis added); *see also* Iowa Code § 822.6A (providing same). Davis proposes that "any pro se document, including a brief, reply brief, or motion in any court" means a "substantive" filing in the appellate courts. Appellant's Suppl. Br. pp. 8–29. To the contrary, the statute's meaning is clear. It applies to "any pro se document" in "any Iowa court."

"When interpreting a statute, we look to the express language of the statute and, if it is ambiguous, to the legislative intent behind the statute. When a word is not defined in the statute, we look to

precedent, similar statutes, dictionaries, and common usage to define the term." *Sanford v. Fillenwarth*, 863 N.W.2d 286, 289 (Iowa 2015) (citing *Kay-Decker v. Iowa State Bd. of Tax Review*, 857 N.W.2d 216, 223 (Iowa 2014)). "If the 'text of a statute is plain and its meaning clear, we will not search for a meaning beyond the express terms of the statute or resort to rules of construction.' " *Doe v. State*, 943 N.W.2d 608, 610 (Iowa 2020) (quoting *In re Estate of Voss*, 553 N.W.2d 878, 880 (Iowa 1996)).

Section 814.6A(1) regulates "any document" in "any Iowa Court." The word "any" has an elastic meaning. It can indicate "'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends on the context and the subject matter of the statute." *Black's Law Dict*. p. 94 (6th ed. 1990). But here "any" modifies "document" rather than the parenthetical list "brief, reply brief, or motion." Iowa Code § 814.6A(1). It conveys expansiveness, as opposed to the more limited modifier, "a," as in "a document." Thus, section 814.6A(1)'s regulation of "any pro se document" means every written document that a represented party might file himself. *Merriam-Webster's Collegiate Dictionary*, p. 56, 268 (11th ed. 2014).

Davis offers three counterpoints. First, he argues that section 814.6A applies only to filings in the appellate courts. Thus, because he filed his *pro se* notice of appeal in district court, he maintains, section 814.6A does not apply. Appellant's Pr. Br. pp. 17–20. He supports this with legislative history. *See* Iowa Code § 4.6 (providing rules of interpretation for ambiguous statutes).

Section 814.6A is clear, making resort to floor speeches and amendments unnecessary. Still, those sources tend to point away from Davis' preferred meaning. For example, Davis notes to explanatory language in S.F. 589 limiting section 814.6A's reach to "any appellate court." S.F. 589 (introduced), Explanation at p. 28, ll. 6-13, found at https://www.legis.iowa.gov/legislation/BillBook?ga=88&ba=SF%20589&v=I (emphasis added). He explains away the deletion of this limiting modifier by S3093 by noting the bill's sponsor said it was a non-substantive, "technical" matter. Appellant's Pr. Br. pp. 19–20. Other legislators need not have shared his view. And the personal views of a legislator, even the bill's sponsor, are less persuasive than the Legislature's actions themselves. This is why the State as cited to Sen. Dawson's floor speeches in the past with reluctance. So, taking

what the Legislature has done—as opposed to what some legislators said—tends to confirm the expansiveness of the statute's reach. When given the opportunity to make clear the statute only applies to filings in the appellate courts, the Legislature said, "no."

Next, Davis proposes that section 814.6A applies only to substantive filings. Appellant's Suppl. Br. pp. 20–23. In support, he draws on *State v. Thompson*, 954 N.W.2d 402, 418 (Iowa 2021) for the proposition that the Legislature may bar such filings to ensure client and counsel speak with one voice. He also relies on *Garza v. Idaho*, 139 S.Ct. 738, 746 (2019) for the proposition that a notice of appeal is not a substantive filing. *See* Appellant's Suppl. Br. pp. 20–23.

The State can agree that filing a notice of appeal is a "simple, nonsubstantive act that is within the defendant's prerogative." *Garza*, 139 S.Ct. at 746. But *Thompson's* observation remains apt. Even non-substantive filings can create confusion…and to the defendant's own detriment.

For example, notice of appeal is not always the correct vehicle for appeal. *See* Iowa Code § 814.6 (listing rulings for which a defendant has a right of appeal and those for which he must seek

discretionary review); *but see* Iowa R. App. P. 6.108 (providing court will not dismiss a case initiated incorrectly). Suppose an attorney seeks discretionary review (which does not deprive a court of jurisdiction until the Court grants it) and her client files notice of appeal (which does). *See State v. Hillery*, 956 N.W.2d 492, 501 (Iowa 2021) (noting grant of discretionary review deprives district court of jurisdiction); *State v. Mallett*, 677 N.W.2d 775, 776–77 (Iowa 2004) ("Generally, an appeal divests a district court of jurisdiction"). By filing a notice of appeal, the defendant deprives the court of jurisdiction at a time when counsel's approach might have better served his interests.

Or, like here, suppose the defendant wishes to pursue ineffective assistance of counsel. That is not available on direct appeal. App. 21–24; *see* Iowa Code § 814.7 (stating ineffective assistance of counsel claims shall be filed in postconviction relief); *State v. Tucker*, 959 N.W.2d 140, 151 *et seq.* (Iowa 2021) (upholding section 814.7). It is available in a postconviction relief action. But that action is likely foreclosed because the defendant and counsel were not speaking with one voice. The Legislature could rightly seek to limit client and attorney working at cross-purposes.

Finally, Davis contends he was unrepresented in the appellate court when he filed the notice of appeal in district court. Appellant's Suppl. Br. pp. 24–29. He is correct that the Code, Rules of Criminal Procedure, and Administrative Code contemplate that the Appellate Defender's office will represent a defendant on appeal. *See id.*; *see also* Iowa Code § 814.11 (appointment of the appellate defender); Iowa Admin. Code r. 493–11.2(4), (8), 12.2(1)(b)(1), (5) (governing contracts for trial attorneys). But the fact remains that once a defendant has an attorney, appointed or not, that attorney represents the defendant until relieved. That is true of any licensed attorney in the state. But specifically, the Rules of Criminal Procedure provide "[t]rial counsel shall continue as defendant's appointed appellate counsel unless the trial court or the Supreme Court orders otherwise." Iowa R. Crim. P. 2.29(6). Davis had counsel, was barred from filing "any document" *pro se* in "any court," and neither the court nor the State should have responded to his notice of appeal.

B. Given Davis' complaints, a delayed appeal is not warranted.

Generally, a notice of appeal must be filed within thirty days from the entry of a final order or judgment. Iowa R. App. P.

6.101(1)(b). The failure to file a timely notice of appeal deprives the Supreme Court of jurisdiction. *Doland*, 376 N.W.2d at 876.

Davis' *pro se* notice of appeal is a legal nullity. *See Boring v. State*, No. 20-0129, 2021 WL 2453045, at *3 (Iowa Ct. App. June 16, 2021) (considering identically-worded section 822.6A); *see also Commonwealth v. Nischan*, 928 A.2d 349, 355 (Pa. Super. Ct. 2007) ("Appellant had no right to file a *pro se* motion because he was represented by counsel. This means that his *pro se* post-sentence motion was a nullity, having no legal effect."). So, there was no valid notice of appeal on file within 30 days of judgment to confer jurisdiction on the Supreme Court.

Appellate counsel did file a notice of appeal in district court on August 23, 2021, nine months after judgment entered. *See* Appellant's Suppl. Br. p. 49 (Addendum G). That, too, is meaningless. A late notice of appeal cannot cure a defective notice of appeal. *See State Sav. Bank of Rolfe v. Ratcliffe,* 111 Iowa 662, 82 N.W. 1011, 1012 (1900) (a defective notice of appeal is not notice of appeal); *Doer v. Sw. Mut. Life Ass'n*, 92 Iowa 39, 60 N.W. 225, 226 (1894) (flawed notice is not notice); *Jeffries v. Mills,* 995 P.2d 1180, 1187 (Or. 2000) (meaningful defect in notice of appeal cannot be

cured); *but see State v. Wetzel*, 192 N.W.2d 762, 764 (Iowa 1971) (directing defendant to file a notice of appeal within 60 days of the Supreme Court order recognizing right to delayed appeal); *Blink v. McNabb,* 287 N.W.2d 596, 598 (Iowa 1980) (substantial compliance with the provisions of rule 6 is sufficient to perfect notice of appeal). There is some authority that one may correct minor defects to an otherwise proper and timely filed notice of appeal. But Davis' notice was a nullity, thus counsel's late notice does not itself confer jurisdiction on the court.

The State recognizes, however, the Court's practice of extending its jurisdiction by granting a delayed appeal. *See, e.g.*, *Swanson v. State*, 406 N.W.2d 792, 792–93 (Iowa 1987). Davis seeks this alternative remedy. With reluctance, the State cannot agree.[1]

The Court may grant a delayed appeal where 1) the defendant has evinced a good faith effort to appeal and 2) state action or "other circumstances" beyond the defendant's control frustrated that

[1] Recently, the State has acceded to a delayed appeal where a represented party files a notice of appeal, and the Supreme Court has ordered supplemental briefing to address its jurisdiction. *See State v. Cox*, No. 20-0086, Appellee's Supplemental Br. (filed Sept. 13, 2021); *State v. Jackson-Douglass*, No. 20-1530, Appellee's Supplemental Br. (filed Aug. 27, 2021).

intention. *Swanson*, 406 N.W.2d at 792; *State v. Anderson*, 308 N.W.2d 42, 46 (Iowa 1981) (granting delayed appeal where "defendant made good faith effort to appeal and at all times clearly intended to appeal"); *State v. Horstman*, 222 N.W.2d 427, 430 (Iowa 1974) (granting delayed appeal where failure to perfect appeal due to circumstances beyond the defendant's control); *Wetzel*, 192 N.W.2d at 764 (granting delayed appeal where defendant attempted to appeal and failure was due to incarceration, lack of knowledge, and insufficient actions of counsel); *Ford v. State*, 258 Iowa 137, 142, 138 N.W.2d 116, 120 (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.").

Davis expressed an intent to directly appeal. But, his appeal brief does not—and cannot—pursue the ineffective assistance of counsel claims he raised. His intent to raise a sentencing claim does not jump from the page of his *pro se* filing. Thus, the intent to appeal is thinner than one would hope for purposes of granting a delayed appeal.

Also, nothing impeded a proper notice of appeal. There was no malfeasance by the State. There were no circumstances beyond Davis' control, with one possible exception.

Failure by trial counsel or the Appellate Defender's office to file a notice of appeal within 30 days poses the strongest argument in favor of granting a delayed appeal. Attorney Young represented Davis until September 14, 2020, and the Appellate Defender's office represented him from that point forward. Either could have filed a notice of appeal by September 25, 2020, when the 30-day limitations period ended. Mere neglect, *Swanson* explained, does not warrant a delayed appeal. 406 N.W.2d at 793.

The Court ought not grant a delayed appeal, but rather should dismiss under the reasoning expressed in *Boring v. State*.

C. Due process does not require a delayed appeal.

Davis argues that if the Court does not grant a delayed appeal, he will suffer a due process injury from counsels' failure to file a notice of appeal. Appellant's Suppl. Br. pp. 33–36 (citing *Blanchard v. Brewer*, 429 N.W.2d 89, 90 (8th Cir. 1970) (holding counsel's failure to commence appeal a "blatant denial of due process") and *Shipman v. Gladden*, 453 P.2d 921, 925 (Ore. 1969) (stating failure to

file notice of appeal after request is a denial of due process)). But Davis filed a *pro se* notice alleging an error the courts cannot consider. And, with counsel, he presents a sentencing issue that the record contradicts; that is, a meritless appeal issue. Under the circumstances, dismissing the appeal will not offend due process.

As an initial matter, the federal constitution does not require appeal as a matter of right or collateral review. U.S. Const. amend. V, XIV; *Halbert v. Michigan*, 545 U.S. 605, 610 (2005); *Martinez v. Court of Appeal of California, Fourth Dist.*, 528 U.S. 152, 159 (2000); *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987); *McKane v. Durston*, 153 U.S. 684, 687 (1894). There is no constitutional right to counsel on appeal, much less a right file documents *pro se* while represented by counsel. *Martinez*, 528 U.S. at 159; *Finley*, 481 U.S. at 556-57; *see Hrbek v. State*, 958 N.W.2d 779, 788–89 (Iowa 2021) (collecting cases); *State v. McKee*, 223 N.W.2d 204, 205 (Iowa 1974) ("Ordinarily the accused must either conduct his own defense or be represented by counsel and cannot combine both…") (internal quotation omitted).

There might be a due process concern where counsel fails to perfect a viable appeal. But that concern diminishes when the

defendant wishes to pursue an unavailable form of review. For instance, Davis's notice of appeal complains of solely of ineffective assistance of counsel. App. 20–22. The Code will not allow that appeal. Iowa Code § 814.7; *Tucker*, 959 N.W.2d at 151 *et seq*. Counsel is not typically branded incompetent for declining to pursue a meritless—or prohibited—action. *See, e.g.*, *State v. Hoskins*, 711 N.W.2d 720, 730–31 (Iowa 2001). Nor must counsel advance a claim merely because it would not hurt. *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1419 (2009). Failure to file a notice of appeal to pursue an unavailable claim must be harmless.

With the assistance of counsel, Davis has filed a brief alleging a sentencing error. Appellant's Br. pp. 8–12. This challenge is a narrow exception to the rule that the Code bars direct appeals from guilty pleas. Iowa Code § 814.6(1)(*a*)(3) (prohibiting direct appeal except upon "good cause"); *State v. Damme*, 944 N.W.2d 98, 105 (Iowa 2020) (stating "good cause" exists for direct appeal where the defendant challenges the sentence rather than the guilty plea). Like above, Davis suffers no due process injury from the lack of notice of appeal if the claim he makes lacks merit.

George Davis pleaded guilty to Third Offense Operating While Intoxicated in exchange for an agreed-upon sentence. Pet. Plead Guilty; App. 7; Iowa Code § 321J.2 (2019). The Court conducted a sentencing hearing at which it twice invited Davis "to address the court" before imposing the agreed sentence. Sent Tr. p. 5, l. 8–p. 7, l. 8; Iowa R. Crim. P. 2.23(3)(d). Davis' claim that he was denied his right of allocution lacks merit for the reasons expressed in the State's merits brief. And because that is true, failure to grant a delayed appeal causes Davis no injury.

CONCLUSION

The Court should dismiss the appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **2,868** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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