IN THE SUPREME COURT OF IOWA
Supreme Court No. 21-1147

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MAURICE SALLIS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE DAVID F. STAUDT, GEORGE P. STIGLER, AND
DAVID P. ODERKIRK, JUDGES

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court correctly denied the motion to suppress where the officer recognized Sallis and was aware he lacked driving privileges.

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II. Whether the district court denied Sallis his counsel of choice where he had already been appointed counsel.

Authorities

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III. Whether the district court abused its discretion when it denied Sallis's request for a mistrial.

Authorities

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ROUTING STATEMENT

The State disagrees with Sallis's recommendation for retention. Appellant's Br.13. As his brief describes, a panel of the Iowa Court of Appeals has already answered whether "stale driving information, coupled with information regarding a completed simple misdemeanor, not observed by the officer" can support a brief detention. *Id.*, *see State v. Medrano*, No. 13-1941, 2015 WL 567922, at *3 (Iowa Ct. App. Feb. 11, 2015). And as discussed below, the State believes the challenged seizure can be sustained upon established law. *See State v. Dawdy*, 533 N.W.2d 551, 555–56 (Iowa 1995); *State v. Bumpus*, 459 N.W.2d 619, 621–24 (Iowa 1990).

As to his second ground, whether a district court can refuse to allow a pro bono attorney to make a limited appearance when a defendant already has appointed counsel, other states have examined whether an individual with appointed counsel may also claim a right to counsel of choice as to additional pro bono assistance. Appellant's Br.13; *see State v. Dixon*, 835 N.W.2d 643, 648–49 (Neb. 2013); *Whitney v. State*, 396 S.W.3d 696, 701 (Tex. App. 2013). This case can be decided based on existing legal principles, making transfer to the Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

Nature of the Case

Maurice Sallis appeals following his convictions at a jury trial for possession of a controlled substance with intent to deliver, failure to affix a tax stamp, driving while barred, and his guilty plea to operating while intoxicated. He presents three issues

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

The following facts were available from the suppression and trial record. On April 23, 2016 Brian Dettmer contacted police about a black Kia Soul that was unnecessarily loud in the 100 block of Mosely Street in Waterloo. 6/26/2017 Supp.Tr.p.6 line 1–25. Dettmer also provided his observations of the driver—an African American man wearing a backwards baseball hat. *Id.* Waterloo police officers Frein and Hundley were dispatched to the neighborhood. 6/26/2017 Supp.Tr. p.6 line 1–7. The caller provided a follow-up to notify officials the vehicle had departed. 6/26/2017 Supp. Tr. p.7 line 1–16. Within three minutes of the call, Frein encountered the vehicle and corroborated the information Dettmer had provided. 6/26/2017

Supp.Tr. p.7 line 13–p.11 line 11; p.14 line 5–19; p.23 line 3–p.25 line 23.

He also specifically recognized the driver, Maurice Sallis. 6/26/2017 Supp.Tr. p.7 line 1–p.10 line 15; p.11 line 1–20. From a prior and unrelated investigation, Frein also knew Sallis did not have driving privileges. 6/26/2017 Supp.Tr. p.11 line 24–p.12 line 21; p.13 line 4–21.

He performed a u-turn with the intent to initiate a traffic stop. 6/26/2017 Supp.Tr. p.13 line 22–25. As Frein's vehicle approached Sallis's at a stop sign and after Frein activated his lights, Sallis signaled he would turn left. As he turned, the man tossed a white bindle out the passenger side of his vehicle, which landed near the curb. Supp.Exh.A[1] Frein Z303 19:30:39–19:30:48. Hundley collected the abandoned bindle, which contained cocaine salt. Supp.Exh.A Hundley 507 19:31:57–19:33:10; Exh.D; Trial Vol.II p.24 line 12–p.26 line 22. Frein requested Sallis to immediately step out of the vehicle, and asked him about tossing the item. When asked, Sallis said he didn't know what the officer was talking about. Trial Vol.II p.80 line

[1] This timecode citation is based off the internal time stamp within the L3 Flashback Player.

23–p.81 line 2. Sallis had over $1200 in cash on his person. Trial Vol.II p.81 line 3–p.82 line 6. Sallis admitted he did not have a valid license. Trial Vol.II p.82 line 10–24. He smelled of alcohol and his eyes were bloodshot. Trial Vol.II p.92 line 13–p.93 line 15. Inside the vehicle was a three-quarters empty bottle of Remy Martin. Trial Vol.II p.84 line 2–p.85 line 9.

ARGUMENT

I. Frein initiated a traffic stop of Sallis's vehicle based on his personal knowledge that Sallis lacked a valid driver's license. The district court correctly overruled the motion to suppress.

Preservation of Error

The State does not contest error preservation. Appointed counsel filed a motion to suppress, a hearing on the motion was held, and the district court entered an adverse order. 1/30/2017 Motion to Suppress; 12/11/2017 Order on Supp.; App.36–40; 98–101; 6/26/2017 Tr. This was sufficient.

Standard of Review

This Court reviews a challenge to the denial of a motion to suppress on federal or state constitutional grounds de novo. *State v. Pals*, 805 N.W.2d 767, 771 (Iowa 2011). This review requires an independent evaluation of the totality of the circumstances as shown

by the entire record, including trial. *Id.* (citing *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001)). An appellate court is not bound by the lower court's factual findings in a suppression case, but it nevertheless gives deference to those findings because of the trial court's ability to assess witness credibility. *Id.*

Merits

The Fourth Amendment provides for the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend IV. Article I, section 8 of the Iowa Constitution provides substantially similar protections.[2] *State v. Brown*, 930 N.W.2d 840, 846–47 (Iowa 2019)

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[2] Although Sallis urges this seizure violated article I, section 8 of the Iowa Constitution, he does not articulate why the state constitution would apply differently here. *See generally* Appellant's Br.24, 37. In the absence of any specific advocacy on the Iowa Constitution, this Court should resolve the question under the federal standard, as is its custom. *See, e.g., State v. Warren*, 955 N.W.2d 848, 859 (Iowa 2021) ("[The appellant] does not actually ask us to depart from Fourth Amendment precedent to reach a different conclusion under article I, section 8, nor does she separately brief or analyze her state constitutional argument. Consequently, we will consider Warren's federal and state constitutional claims simultaneously, applying the federal standards as outlined by the United States Supreme Court governing the Fourth Amendment."); *accord. State v. Gibbs*, 941 N.W.2d 888, 902–03 (Iowa 2020) (McDonald, J., concurring specially) (criticizing this practice, and holding that failure to provide specific Iowa constitutional argument should be considered waiver).

("We generally 'interpret the scope and purpose of the Iowa Constitution's search and seizure provisions to track with federal interpretations of the Fourth Amendment' because of their nearly identical language."). By default, both require a warrant supported by probable cause to support a search or seizure. Yet, temporary investigatory seizures—such as a traffic stop—are a well-established exception. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 21-22 (1968); *State v. Vance*, 790 N.W.2d 775, 780 (Iowa 2010); *State v. Tague*, 676 N.W.2d 197, 201 (Iowa 2004).

The indicia necessary to justify a stop does not need to rise to the level of probable cause; it requires a showing considerably less than a preponderance of the evidence. *See, e.g., State v. Kreps*, 650 N.W.2d 636, 642 (Iowa 2002). In order for investigatory seizures to be reasonable, the officer must be presented with "specific and articulable facts that, taken together with rational inferences from those facts, would lead the officer to reasonably believe criminal activity is afoot." *Vance*, 790 N.W.2d at 781. A court considering those facts will review

> the totality of the circumstances confronting a police officer, including all information available to the officer at the time the decision to stop is made. The circumstances under

> which the officer acted must be viewed "through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training."

Id. (quoting *Kreps*, 650 N.W.2d at 642).

Once presented with reasonable articulable suspicion, officers should diligently pursue a reasonable means of investigation to verify or dispel the suspicion. *See State v. Mitchell*, 498 N.W.2d 691, 693 (Iowa 1993) ("[W]e apply an objective standard: 'would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?'"); *see also United States v. Sokolow*, 490 U.S. 1, 11 (1989). Because at the time of the seizure there may be some ambiguity, subsequent clarity presented by hindsight is immaterial—whether the seizure was lawful is judged by the totality of the circumstances present at the time of the stop. *Tague*, 676 N.W.2d at 204; *United States v. Mendoza*, 691 F. 3d 954, 959 (8th Cir. 2012), cert. denied, 568 U.S. 1137 (2013).

Sallis raises several interrelated arguments on appeal. Appellant's Br.26–39. Rather than address them piecemeal, the State offers this Court two apparent reasons why the district court should be affirmed, turning then to Sallis's claims.

A. Frein knew Sallis and that he lacked a valid license. He could temporarily detain him to confirm his suspicion.

The first reason why this Court should affirm was explicit within the district court's ruling. Frein knew Sallis personally and believed him to be driving without a valid license. This alone was sufficient cause for an investigatory stop:

> The officer was familiar with the driver of the vehicle, Maurice Sallis, the defendant. He knows him on sight. . . . The officer was also aware of the status of Mr. Sallis's driver's license. He had run it a couple of months earlier and knew that the defendant was barred from operating a motor vehicle. The officer had a specific recollection concerning Mr. Sallis's barment.

12/11/2017 Order on Supp. p.1–2; App.98–99. The suppression court's finding was supported by the suppression record. Frein explained he had been dispatched to the scene based on a known person's—Brian Dettmer—complaint of loud noises coming from a black Kia Soul driven by an African-American man wearing a backwards baseball cap. 6/26/2017 Supp.Tr. p.6 line 1–25. Frein arrived within moments and observed a black Kia Soul being driven by Sallis, whom Frein knew on sight. 6/26/2017 Supp.Tr. p.7 line 1–p.10 line 15; p.11 line 1–20. Frein also was aware Sallis did not have

valid driving privileges. 6/26/2017 Supp.Tr. p.11 line 24–p.12 line 21; p.13 line 4–21. The district court credited Frein's testimony, and found sufficient support for the stop.

This was correct. Iowa law has long recognized that an officer has cause to conduct an investigatory seizure where the officer recognizes a person and reasonably believes illegal activity is occurring. *See Bumpus*, 459 N.W.2d at 621–24. And an investigatory traffic stop is reasonable even where the officer only possesses knowledge that a vehicle's registered owner has had their driving privileges suspended. *See, e.g., Vance*, 790 N.W.2d at 781 ("[A]n officer has reasonable suspicion to initiate an investigatory stop of a vehicle to investigate whether the driver has a valid driver's license when the officer knows the registered owner of the vehicle has a suspended license, and the officer is unaware of any evidence or circumstances indicating the registered owner is not the driver of the vehicle."); *see also Kansas v. Glover*, 140 S.Ct. 1183, 1187–88 (2020); *State v. Haas*, 930 N.W.2d 699, 702-03 (Iowa 2019) (applying *Vance* to a claim a similar stop violated article I, section 8 of the Iowa Constitution); *State v. Grady*, No. 19-0865, 2020 WL 1049833, at *2–*3 (Iowa Ct. App. Mar. 4, 2020) (same); *State v. Saffold*, No. 14-

0223, 2015 WL 1849398, at *2 (Iowa Ct. App. Apr. 22, 2015). This alone supports affirmance.

And even accepting for a moment that Officer Krein was mistaken as to whether Sallis had a valid driver's license, this would have been a reasonable mistake of fact. Such mistakes do not support suppression. *See, e.g., State v. Andrews*, 705 N.W.2d 493, 495–97 (Iowa 2005); *State v. Lloyd*, 701 N.W.2d 678, 679–81 (Iowa 2005). Sallis suggests that "Frein's good faith belief will not rectify his failure to verify Sallis's driving status," citing *State v. Cline*, 617 N.W.2d 277 (Iowa 2000). Appellant's Br.35. But of course, *Cline* addressed whether Iowa would recognize the good faith exception for invalid warrants. These are distinct legal principles, and *Cline* is inapplicable here. *Compare Lloyd*, 701 N.W.2d 680–82 *with Cline*, 617 N.W.2d at 286–93.

Nor is the "staleness" of Frein's knowledge grounds to reverse. Appellant's Br.34–38. As the district court correctly noted, individuals barred for being a habitual violator as Sallis are subject to a two-to–six year revocation of their driving privileges. 12/11/2017 Order on Supp. p.2; App.99; Iowa Code § 321.560(1). The officer's belief Sallis's privileges remained revoked was reasonable even if his

last check of the man's privileges occurred six months earlier. The fact that Sallis conceivably "could have had his license restored, or could have obtained a temporary restricted license" merely supposes an innocent explanation for the conduct Frein observed. Appellant's Br.37–38. Innocent alternative explanations do not render an investigative stop unreasonable, their very purpose is to investigate and clarify whether or not the circumstances the officer observes are actually lawful. *See Kreps*, 650 N.W.2d at 643 ("[S]uspicious conduct by its very nature is ambiguous, and the principle function of the investigative stop is to quickly resolve that ambiguity. Therefore, if any reasonable inference of wrongful conduct can be objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, the officers have the right to temporarily detain the individual for the purpose of inquiry."). Briefly conducting an investigatory seizure was reasonable, and the district court correctly denied the motion to suppress.

B. Sallis's act of throwing contraband out the window of his moving vehicle was highly suspicious and independently supported the seizure.

Were the Court were to disagree, this brings us to the second ground to affirm the district court's ruling—Sallis's attempt to rid

himself of contraband prior to submitting to police authority. This was ground was raised by the State and implicit in the district court's ruling: "When Mr. Sallis took the left turn on Adams he threw something out of the windows. It appeared to be a plastic baggy filled with something." 12/11/2017 Order on Supp. p.2; App.99; *see* 6/26/2017 Suppression Tr. p.34 line 10–p.35 line 21. At the suppression hearing Frein explained seeing the item fly from Sallis's vehicle and later at trial, Frein explained he believed the material was contraband. 6/26/2017 Suppression Tr. p.15 line 16–p.17 line 20; Trial Vol.II p.74 line 5–14. He testified it was not common to "see items thrown from a vehicle during a traffic stop;" when attempts to dispose of evidence did occur however, it was "very common when that happens to be either in the middle of a turn or while completing a turn." Trial Vol.II p.73 line 17–p.74 line 8; p.75 line 7–10. That is to say, Frein observed Sallis engaged in incriminating and distinct criminal conduct from the initial crime the officer was investigating. This furnished additional cause to investigate and temporarily seize Sallis.

For a seizure to occur, not only must a police officer's actions constitute a show of authority—here, Frein turning on the emergency

lights to signal Sallis he should pull-over—but the person being seized must acquiesce to that authority. *See California v. Hodari D*, 499 U.S. 621, 628–29 (1991); *see also United States v. Mendenhall*, 446 U.S. 544, 554–55 (1980) (finding that in order for a seizure without physical force to have been effected, submission to a show of authority is required); *State v. Johnson-Hugi*, 484 N.W.2d 599, 601 (Iowa 1992) ("It has been said that an assertion of authority and purpose to arrest followed by submission of the arrestee constitutes arrest." (internal quotation marks and citation omitted)). Almost immediately after Frein activated his lights, Sallis tossed a white bindle out the passenger side of his vehicle as he slowly turned. Supp.Exh.A Frein Z303 19:30:39–19:30:48. Hundley collected this abandoned bindle, which contained cocaine salt. Supp.Exh.A Hundley 507 19:31:57–19:33:10; Exh.D; Trial Vol.II p.24 line 12–p.26 line 22. Sallis abandoned this evidence prior to being seized and it was not subject to suppression. *See Hodari D.*, 499 U.S. at 628–29 ("In sum, assuming that [the officer's] pursuit in the present case constituted a "show of authority" enjoining Hodari to halt, since Hodari did not comply with that injunction he was not seized until he was tackled. The cocaine abandoned while he was running was in this

case not the fruit of a seizure, and his motion to exclude evidence of it was properly denied."); *Bumpus*, 459 N.W.2d at 625; *see also State v. Brown*, No. 14–0667, 2015 WL 5577971, at *2 n.1 (Iowa Ct. App. Sept. 23, 2015); *State v. Phipps*, 528 N.W.2d 665, 668 (Iowa Ct. App. 1995).

Accepting arguendo that at the moment he activated his lights Frein lacked sufficient cause to seize Sallis, this Court still should not suppress the evidence of Sallis's consequent illegal conduct—actual possession of contraband. Were this the case, an officer's error would seemingly provide an individual carte blanche to commit crimes in response—including *assaults* of the officer.

A significant number of jurisdictions to consider the issue—including Iowa—have concluded that evidence of subsequent crimes after an initial, invalid police seizure should not be suppressed. *See State v. Wilson*, 968 N.W.2d 903, 917–18 (Iowa 2022) (subsequent crime exception did not apply where officers unlawfully entered home and vial of cocaine was dropped prior to subsequent crime) *and Dawdy*, 533 N.W.2d at 555–56 (defendant's subsequent act of struggling when officer attempted to handcuff him provided independent probable cause for arrest); *State v. Pranschke*, No. 16-

1104, 2017 WL 2461556, at *6 (Iowa Ct. App. June 7, 2017); *see also United States v. King*, 724 F.2d 253, 255–56 (1st Cir. 1984); *United States v. Remington*, 208 F.2d 567, 569–70 (2d Cir. 1953); *United States v. Nooks*, 446 F.2d 1283, 1288 (5th Cir. 1971); *United States v. Dawdy*, 46 F.3d 1427, 1431 (8th Cir. 1995) ("[W]e now hold that a defendant's response to even an invalid arrest or Terry stop may constitute independent grounds for arrest."); *United States v. Garcia*, 516 F.2d 318, 319–20 (9th Cir. 1975); *People v. Smith*, 870 P.2d 617, 619 (Colo. Ct. App. 1994); *People v. Abrams*, 271 N.E.2d 37, 43–44 (Ill. 1971); *Commonwealth v. Saia*, 360 N.E.2d 329, 332 (Mass. 1977); *State v. Bale*, 267 N.W.2d 730, 732–33 (Minn. 1978); *State v. Courville*, 61 P.3d 749, 753–54 (Mont. 2002); *People v. Townes*, 41 N.Y.2d 97, 101–02 (N.Y. 1976); *State v. Miller*, 194 S.E.2d 353, 357–58 (N.C. 1973); *State v. Indvik*, 382 N.W.2d 623, 627–28 (N.D. 1986); *State v. Gaffney*, 583 P.2d 582, 584 (Or. 1978); *But see United States v. Beck*, 602 F.2d 726 (5th Cir. 1979) (reasoning "the abandoned contraband was itself the product of unlawful action" and "it would be sheer fiction to presume . . . [the act of abandonment was] caused by anything other than the illegal stop").

Although Sallis's decision to present this evidence to a police officer was curious, this independent volitional act provided alternate grounds for an investigatory seizure. The district court did not expressly base its ruling on this reasoning, but the State asked it to review *Dawdy*, a case in which the Iowa Supreme Court applied the doctrine. *See* 6/26/2017 Suppression Tr. p.34 line 10–p.35 line 21. If necessary, it provides an independent ground to affirmance. *See, e.g., Matter of Estate of Voss*, 553 N.W.2d 878, 879 n.1 (Iowa 1996) ("Although the district court did not rely on this ground for its decision, we will affirm a trial court on any basis appearing in the record and urged by the prevailing party.").

* * *

A portion of Sallis's brief warrants mention. He likens this case to *State v. Medrano*, No. 13-1941, 2015 WL 567922 (Iowa Ct. App. Feb. 11, 2015) and seeks a similar outcome. Appellant's Br.31, 33, 38–39 ("A stop based upon a completed misdemeanor, not observed by police, is not reasonable."). But already discussed, this case is readily distinguished on its facts and posture. Prior to initiating the stop, Frein was provided presumptively correct information tip about the vehicle *and* its driver. *Cf. Medrano*, 2015 WL 567922, at *2. Unlike

Medrano, Frein corroborated the information within minutes—not days—when he observed a vehicle and driver that matched the tip. *Id*. These facts are sufficient to distinguish the two cases. And of course, the cases are not similarly postured. The officer in *Medrano* had no other cause to stop the defendant. Frein on the other hand, had independently identified Sallis as driving the vehicle. The officer possessed reasonable suspicion another crime was occurring based on his prior investigation of Sallis and his belief he lacked a valid license. The two cases are not the same, and *Medrano* does not undermine the district court's ruling. In sum, this Court should affirm.

II. As an indigent person who already had appointed counsel, Sallis's right to counsel of choice was circumscribed. The district court did not abuse its discretion in denying attorney Montgomery's limited appearance.

Preservation of Error

The State does not contest error preservation. Twice Montgomery filed a limited appearance in the case and twice the district court denied his application. 4/19/2018 Ruling; App.215–20; 12/8/2017 Second Limited Appearance; App.90–97; 2/24/2017 Order; App.56–58; 12/19/2016 Limited Appearance; App.26–27. The matter was set for a full hearing and following the hearing the district

court denied his application. *See generally* 12/20/2017 Hearing Tr. *and* 4/19/2018 Ruling; App.215–20.

Standard of Review

The right to counsel of choice is a constitutional question, which this Court reviews *de novo*. *See State v. Smith*, 761 N.W.2d 63, 68 (Iowa 2009); Iowa R. App. P. 6.907. The narrower questions of whether a district court errs when it permits or denies substitution of counsel or decides to disqualify counsel is reviewed for abuse of discretion. *See State v. Vanover*, 559 N.W.2d 618, 627 (Iowa 1997); *State v. Williams*, 285 N.W.2d 248, 254 (Iowa 1979); *see generally Wheat v. United States*, 486 U.S. 153, 157–58 (1988).

Merits

The Sixth Amendment[3] provides a defendant the assistance of counsel when defending the State's criminal charge. U.S. Const. Amend. 6. When an individual *retains* counsel, this right also encompasses a right to the counsel of the defendant's choice. *See*

[3] Although invoked below and on appeal, Sallis presents no explanation how article I, section 10 of the Iowa Constitution applies differently. *See generally* Appellant's Br.40, 43, 53–55. In the absence of any specific advocacy on the Iowa Constitution, this Court should resolve the question under the federal constitution alone. *See, e.g., Warren*, 955 N.W.2d at 859; *accord. Gibbs*, 941 N.W.2d at 902–03 (McDonald, J., concurring specially).

Chaplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624–25 (1989) ("[T]he Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds."); *Wheat*, 486 U.S. at 189. But this latter right is circumscribed when a defendant relies upon the public to furnish his defense. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151–52 (2006) ("[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them."); *Chaplin*, 491 U.S. at 624 ("The Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts."); *Williams*, 285 N.W.2d at 254; *see also State v. Kirchner*, 600 N.W.2d 330, 333 (Iowa Ct. App. 1999) ("While there is an absolute right to counsel, no defendant, indigent or otherwise, has an absolute right to be represented by a particular lawyer."). *But see State v. Jones*, 707 So.2d 975, 976–77 (La. 1998) (removal of third-attorney paid for by defendant's family violated right to counsel of choice).

And that is not all. The right to counsel of choice is also subject to case-specific limitations. A district court may be called upon to balance the defendant's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice. *See, e.g., Hannan v. State*, 732 N.W.2d 45, 54–55 (Iowa 2007); *Gonzalez-Lopez*, 548 U.S. at 151–52. "A defendant's right to choose particular counsel is circumscribed by trial court discretion, which may be exercised to effectuate an orderly disposition of the case." *Williams*, 285 N.W.2d at 254; *see also United States v. Vallery*, 108 F.3d 155, 157 (8th Cir. 1997) ("The right to choice of counsel must not obstruct orderly judicial procedure or deprive courts of their inherent power to control the administration of justice"). The trial court also may "disqualify counsel if necessary to preserve the integrity, fairness, and professionalism of trial court proceedings." *Vanover*, 559 N.W.2d at 626. "The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court." *Id.* (quoting *Wheat*, 486 U.S. at 164).

This case presented a unique confluence of events and before proceeding further, an abridged timeline may be helpful:

- 4/23/2016 – Sallis is arrested

- 4/24/2016 – Criminal complaints are filed
- 4/25/2016 – Sallis files application for appointment of counsel, alleging he is indigent and without income
- 4/26/2016 – Fisher of the Black Hawk County PDO files his appearance
- 12/19/2016 – Montgomery files limited appearance
- 1/30/2017 – Montgomery files motion to suppress
- 2/8/2017 – Fisher files first request to withdraw
- 2/20/2017 – Hearing on Fisher's first request to withdraw
- 2/24/2017 – Court orders Montgomery to file a full appearance or withdraw
- 3/3/2017 – Court enters clarification order; Montgomery files request for reconsideration
- 3/16/2017 – Court declines reconsideration
- 6/26/2017 – Court holds hearing on motion to suppress
- 6/30/2017 – Fisher files second request to withdraw, citing "an irreparable breakdown in the attorney-client relationship"
- 8/25/2017 – Hearing on Fisher's motion to withdraw, Fisher withdraws and Smith is appointed
- 11/9/2017 – Smith files closing suppression brief

- 12/8/2017 – Montgomery files second application for limited appearance and supplemental suppression brief
- 12/11/2017 – District Court overrules motion to suppress
- 12/19/2017 – Smith moves to reopen record on suppression
- 12/20/2017 – District Court holds hearing on Montgomery's second limited appearance
- 1/10/2018 – Smith files interlocutory appeal on court's 12/11/2017 suppression ruling
- 1/11/2018 – Iowa Supreme Court denies interlocutory appeal and discretionary review
- 1/20/2018 – Smith seeks three-justice review
- 2/5/2018 – Iowa Supreme Court three-justice review confirms 1/11/2018 order and denies interlocutory appeal
- 4/19/2018 – District Court denies Montgomery's limited appearance and motion to reopen the suppression record
- 5/21/2018 – Montgomery files for interlocutory appeal (see docket in S.Ct. Docket No. 18-0895), notice is filed on 5/25/2018
- 6/19/2018 – Iowa Supreme Court denies interlocutory appeal
- 6/29/2018 – Montgomery seeks three-justice review

- 7/12/2018 – Iowa Supreme Court three justice review confirms 6/19/2018 order and denies interlocutory appeal
- 8/15/2018 Sallis fails to appear for hearing, warrant issues
- 1/13/2020 Sallis re-arrested, requests appointment of counsel
- 1/14/2020 Lanigan Appointed
- 1/26/2020 Smith Withdraws

4/24/2016 Complaint; App.6–13; 4/25/2016 Application for Counsel; App.14; 4/26/2016 Order Appointing Fisher; App.15–17; 12/19/2016 Limited Appearance; App.26–27; 1/30/2017 Motion to Suppress; App.36–40; 2/1/2017 Order; App.41–42; 2/8/2017 Fisher's First Motion to Withdraw; App.55; 2/24/2017 Order; App.56; 3/3/2017 Order; App.83; 3/3/2017 Motion for Reconsideration; App.59–82; 3/16/2017 Order; App.85–86; 6/30/2017 Fisher's Second Motion for Withdrawal; App.87; 8/25/2017 Order; App.88–89; 11/9/2017 Suppression Br.; 12/8/2017 Second Limited Appearance; 12/8/2017 Montgomery's Proposed Suppression Br.; 12/11/2017 Order on Supp.; App.98–101; 12/19/2017 Motion to Reopen; App.102–05; 4/19/2018 Ruling; App.215–20; 1/13/2020 Warrant Service; App.264; 1/14/2020 Order Appointing Lanigan; App.266–67; 1/13/2020 Application for Counsel; App.265; 1/26/2020 Smith's Motion for

Withdrawal; App.268; *see generally* 2/20/2017 Hearing Tr.; 6/26/2017 Suppression Tr.; 8/25/2017 Withdrawal Hearing Tr.; 12/20/2017 Hearing Tr.

This abridged history discloses three essential points. First, Sallis was indigent and needed appointed counsel—initially through the Waterloo office of the State Public Defender, and later through Attorneys Smith and then Lanigan, on contract through the State Public Defender. Second, during the initial motion for limited appearance, Montgomery's services were paid by Sallis's family; later Montgomery insisted he would be providing legal services pro bono. 12/20/2017 Hearing Tr. p.7 line 2–p.9 line 9; 2/20/2017 Hearing Tr. p.2 line 21–p.3 line 12. The attorney did not intend to proceed to trial as Sallis's counsel. 10/20/2017 Hearing Tr. p.8 line 21–p.9 line 5; p.32 line 12–p.38 line 15. Despite his vigorous advocacy and insistence that following a reversal in this appeal "I'll take it pro bono all the way through. It means that much to me," Montgomery never filed a full appearance below. 12/20/2017 Hearing Tr. p.43 line 1–12. Third, however well-meant Montgomery's intervention in the case was, it was disruptive. After the district court's first order for Montgomery to file a withdrawal or a full appearance in the case, he

continued interacting with Sallis and questioning Fisher's conduct. *See* 12/20/2017 Email Exhibit; App.107–36. His intervention resulted in considerable filings, hearings, delay in the proceedings, and the replacement of Sallis's appointed counsel. *See* 2/8/2017 Fisher's First Motion to Withdraw; App.56–58; 6/30/2017 Fisher's Second Motion to Withdraw; App.87; *see also* 8/25/2017 Withdrawal Hearing Tr.; 12/20/2017 Hearing Tr.

Turning to Sallis's arguments before this Court, he first asserts that the district court's ruling denied him the counsel of his choice. But Sallis had no such right. His ability to rely upon the counsel of his choosing was circumscribed because he sought and was appointed counsel at the public's expense. *Gonzalez-Lopez*, 548 U.S. at 151–52 ("[T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them."); *see also Montejo v. Louisiana*, 556 U.S. 778, 784, 785–86 (2009) ("How does one affirmatively accept counsel appointed by court order? An indigent defendant *has no right to choose his counsel* . . ." (emphasis added) (citing *Gonzalez-Lopez*, 548 U.S. at 151)). Once an attorney was appointed, Sallis's rights were satisfied. "The Amendment guarantees defendants in criminal cases the right to adequate representation, but

those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts." *Caplin & Drysdale*, 491 U.S. at 624.

This specific factual array has not been previously resolved by Iowa courts, however, our supreme court has previously rejected the notion that an out-of-state attorney of the defendant's choice may replace appointed in-state counsel, even where the attorney agrees to waive certain fees. *Williams*, 285 N.W.2d at 253, 254–55 (rejecting Williams's claim he had a right to out-of-state counsel of choice based upon the Sixth Amendment, as well as principles of equal protection and due process). *But see English v. Missildine*, 311 N.W.2d 292, 294 (Iowa 1981) (commenting in dicta, "We have recognized that an indigent does not have this right of choice when counsel is paid from public funds. However, no reason exists for depriving an indigent of the same right of choice as a person of means when the indigent is able to obtain private counsel without public expense." (citation omitted)). By statute, unless charged with a class "A" felony, a defendant is only entitled to the assistance of a single attorney. Iowa Code § 815.10(1)(b). A defendant charged with a class "A" felony who

arranges for pro bono representation by one attorney is not entitled to another attorney at the public's expense. *See id.* ("[A] person who is represented by a privately retained attorney or by an attorney who has agreed to represent the person *is not entitled to have an attorney appointed to represent the person based upon the indigence of the person*" (emphasis added)). Although Sallis was not charged with a class "A" felony, it is fair to say our legislature has determined a defendant may elect to rely upon appointed counsel or arrange for counsel to represent them independently, but not both.

Other states' experiences are informative as well. Texas courts have persuasively concluded the Sixth Amendment does not provide a right to simultaneous representation by both appointed and pro bono counsel. *See Whitney*, 396 S.W.3d at 701 ("[O]nce a defendant has been found indigent and has appointed counsel whose services are provided by the state or county, it would seem counter productive for him to then represent to the court that he has also managed to secure pro bono counsel."); *Trammell v. State*, 287 S.W.3d 336, 343 (Tex. App. 2009); *see also Martinez v. State*, No. 05-17-00817-CR, 2018 WL 2434409, at *5 (Tex. App. May 30, 2018); *State v. Shears*, 229 N.W.2d 103, 124 (Wis. 1975) (rejecting defendant Ford's claim he was

denied counsel of choice where he was unable to afford the services his out of state attorney and local counsel). And the Nebraska Supreme Court has found in a similar circumstance that an attorney's attempt to file a limited appearance was a nullity when the indigent defendant was already represented by appointed counsel. *See Dixon*, 835 N.W.2d at 648–49 ("This court has held that an indigent criminal defendant's Sixth Amendment right to counsel does not include the right to counsel of the indigent defendant's own choice" and that Dixon's "argument regarding her choice of counsel is without merit"). Considered together, these intra- and inter-jurisdictional authorities support affirming the district court's ruling.

The district court denied Montgomery's limited appearance because it correctly recognized that Sallis did not enjoy the right to appointed counsel *and* pro bono counsel of choice. *See* 4/19/2018 Ruling p.1, 2–3, 5 (distinguishing *Gonzalez-Lopez* and applying *Wheat*); App.215–17, 219. Because he was sought and received the appointment of counsel at public expense, Sallis did not enjoy the same right to counsel of choice that an individual retaining counsel does. *See Trammel*, 287 S.W.2d at 343. Each time Montgomery filed his limited appearance, Sallis was already represented by another

attorney appointed months earlier. 4/26/2016 Order Appointing Fisher; App.15–17; 12/19/2016 Limited Appearance; App.26–27; 8/25/2017 Order; App.88–89; 12/8/2017 Second Limited Appearance; App. 90–97. Because his rights were honored by the appointment of counsel, the district court did not violate his Sixth Amendment rights when it did not permit Montgomery to make a limited appearance in the case.

Nor was it an abuse of discretion. Addressed below, there is no authority for the sort of limited appearance Montgomery proposed within our rules of criminal procedure. *See generally* Iowa Rs. Crim.P. 2.80(1), 2.81(1), 2.82(1). The district court's well-reasoned opinion articulated several reasons why limited appearances invite controversy. With no clear limiting principle, courts could be required to honor a variety of unorthodox requests for pro bono counsel to intervene in a case—here, Montgomery's second limited appearance was for the stated purpose of *re*litigating a suppression order the court had already issued. *See* 4/19/2018 Ruling p.4; App.218; 12/20/2017 Hearing Tr. p.42 line 17–p.48 line 25. As the court noted, a limited appearance attorney whose sole involvement revolves around one portion of the case may ultimately work at cross-purposes

with appointed counsel tasked with steering the case to its conclusion. 4/19/2018 Ruling at 3–4; App.217–18. It is readily conceivable why an aggressive pre-trial litigation approach might be a rational strategy choice, but it can result in the counsel remaining in the case left with no choice but to proceed to trial on an unfavorable case and outcome for the client. The district court's offered reasoning was not untenable or clearly unreasonable. *See Vanover*, 559 N.W.2d at 627.

A few of Sallis arguments warrant specific discussion. Likening this case to *Krogmann v. State*, 914 N.W.2d 293 (Iowa 2018)[4], he

[4] *Krogmann v. State*, 914 N.W.2d 293 (Iowa 2018) does not apply here. *See* Appellant's Br.42–43, 54–55. There, the State had conducted an asset freeze on the defendant to prevent him from liquidating them to avoid his potential financial obligations to his victim. *Krogmann*, 914 N.W.2d at 296–98. Krogmann then sought a conservatorship to manage his assets, which required court approval prior to distributing funds. In preparation of trial, he sought to hire a jury consultant and requested the court approve a distribution. After the State resisted, the request was denied. *Id.* The Iowa Supreme Court found that the asset freeze was unlawful, as was the State's attempts to prevent Krogmann from utilizing his untainted funds. *Id.* at 307, 319–22, 321 ("The cumulative effect of the State's actions was to limit Krogmann's ability to spend his own assets on his own defense from almost the beginning of the criminal proceedings."). Reasoning that the State had impaired Krogmann's "right to be the master of his own defense" it reversed. *Id.* at 320–21. True, the court applied the "structural error" standard the United States Supreme Court did in *Gonzalez-Lopez*, yet there was no similar State overreach here. *Compare Id.* at 314, 317–18, 321 ("[W]here the defendant is deprived of his right to personally conduct his defense, structural error is present.") *with* 2/20/2017 Tr. p.3 line 18–p.5 line 5

claims the State "interfered with his defense by moving to have Robert Montgomery disqualified." Appellants' Br.43, 55. The State cannot agree. Sallis does not identify any statement or filing from the prosecutor for this proposition, relying instead the district court's February order and on Montgomery's own interpretation of the same. *Id.* The State's review of this voluminous record does not support Sallis's broad assertion.

The State's review has not located any motion filed by the prosecutor seeking Montgomery to be barred from appearing as Sallis's attorney. At the February 2017 hearing on Fisher's request to withdraw, the prosecutor conscientiously took no position on whom Sallis's attorney would be: "First of all, we don't have any objection to who the defendant wants to have as counsel, that's—that's his right to choose who his counsel is so whatever I say I'm not trying to infringe on that." 2/20/2017 Tr. p.3 line 18–p.5 line 5. But the prosecutor was reasonably concerned that the proposed arrangement would result with Sallis abandoned on the eve of trial and result in additional delays:

(emphasis added) *and* 8/25/2017 Tr. p.6 line 12–16 *and* 12/20/2017 Tr. p.62 line 20–22.

> [W]ith a limited appearance, that is for a limited purpose and if Mr. Fisher gets out based off the limited appearance, if the court follows that limited appearance and then allows Mr. Montgomery out, the defendant will then be without counsel and someone will have to be reappointed and get back up to speed on this case. And it doesn't make sense to have people in and out and in and out for bits and pieces of a case. So there has to be at some point a consistent attorney in the case and that's my concern. All it will do is delay the case because there's gonna be depositions, and as the court knows Mr. Montgomery takes long depositions. So we're talking about—At this point he's suggesting possibly two hours or more for every witness. An attorney is gonna have to read that which is gonna take weeks and weeks of just spending time reading depositions to try to get up to speed on what that discovery is after Mr. Montgomery is done doing the discovery. *So I think there has to be a consistent attorney that we expect them to proceed throughout this case. So I would either ask that Mr. Fisher remain in or the court allow Mr. Montgomery in but not for a limited appearance but for the duration of the case.*

2/20/2017 Tr. p.3 line 18–p.5 line 5 (emphasis added); *see also*

8/25/2017 Tr. p.6 line 12–16 (during Fisher's attempt to withdraw;

"Court: Does the State have any position concerning this matter?

Prosecutor: No, Your Honor. We will take no position."); 12/20/2017

Tr. p.62 line 20–22. Fairly stated, the prosecutor sought for Sallis to

have either Fisher *or* Montgomery, so long as the selected attorney shepherded the case all the way to trial.

Yet, the district court's written order following the hearing stated:

> Mr. Westendorf has requested that the limited appearance by Mr. Montgomery be terminated. The Court has reviewed the matter and finds that a limited appearance is inappropriate in the above-captioned matter. . . . That Mr. Montgomery shall enter a full appearance on behalf of the defendant by Monday, February 27, at the close of business or he will no longer be counsel of record, even on a limited basis, for the defendant. Should he fail to enter a general appearance, the State Public Defender shall continue to represent the defendant. . . . Should Mr. Montgomery enter a general appearance, the State Public Defender is hereby allowed to withdraw as counsel for the above-named defendant.

2/24/2017 Order p.1; App.56. In the later December 2017 hearing, Montgomery commented "I believe that this court entered [that] order because of an oral request by Jeremy Westendorf. I've read the provision of the court's order and that's what it said." 12/20/2017 Hearing Tr. p.36 line 1–17. Each were true in the sense that the prosecutor suggested there should be a single, full appearance by one counsel for the duration of the case. But it cannot fairly be said it was for the purpose of denying Sallis the attorney of his choice.

Next, Sallis asserts that Montgomery's attempts to intervene for a limited purpose—even though not authorized by our criminal rules of procedure—was approved by the civil rules. Appellant's Br.51–52. And relatedly, that the district court was without authorization to deny his appearances. *Id.* The State disagrees.

Our criminal rules of procedure do recognize limited appearances, just not for the purpose Montgomery proposed. Limited appearances are authorized for the specific purpose of expunging certain convictions. *See* Iowa Rs.Crim.P. 2.80(1), 2.81(1), 2.82(1). The fact that the rules of criminal procedure explicitly authorize limited appearances for this purpose supports the conclusion they are not intended for general criminal litigation. *See, e.g., Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995) (discussing the construction maxim "expression unius est exclusio alterius"—"the express mention of one thing implies the exclusion of others not so mentioned"). The rules' failure to mention limited appearances generally outside these limited instances supports the same conclusion. *Id.* ("[W]e are to be guided by what the [drafters] actually said, rather than what it should or could have said.").

Further, the rules of civil procedure do not generally apply in the absence of a criminal rule. Unless made applicable by a statute, the rules of civil procedure are inapplicable in a criminal case. *See Krogmann*, 914 N.W.2d at 307 (quoting *State v. Wise*, 697 N.W.2d 489, 492 (Iowa Ct. App. 2005)); *State v. Dist. Ct. In & For Delaware Cty.*, 114 N.W.2d 317, 318 (Iowa 1962), *overruled on other grounds by State v. Peterson*, 219 N.W.2d 665 (Iowa 1974) ("Rules of Civil Procedure have no application to criminal cases unless a statute makes them applicable."); *see also State v. Russell*, 897 N.W.2d 717, 725 (Iowa 2017) (recognizing civil rules were inapplicable but could "still be instructive"). The State's review shows that no such statutory authorization for "limited appearances" in criminal cases exists. The text of our civil and electronic rules on limited appearances do not suggest an intention they apply to criminal cases, nor do the published commentaries upon them. *See* Iowa R. Civ. P. 1.404(3), (4), Iowa R. Elec. P. 16.320; *see generally* § 44:1. Appearances generally, 8 Ia. Prac., Civil Litigation Handbook § 44:1; § 13:8. Appearance by counsel—Limited appearance, 9 Ia. Prac., Civil Practice Forms § 13:8; § 14:3. Appearance—Limited appearance, 11 Ia. Prac., Civil & Appellate Procedure § 14:3 (2021 ed.). To whatever extent Iowa's

indigent defense statute applies, Montgomery's appearance was not consistent with it. *See* Iowa Code § 815.10(1), (5).

Sallis also curiously urges "There is no provision allowing the court to remove an attorney appearing in a limited capacity, nor is there any provision allowing the district court to ban the practice of allowing attorneys to make limited appearances in criminal cases." Appellant's Br.52. True enough, but this is not remarkable. Again, there is no authorization for a limited appearance in a criminal case for Montgomery's intended purpose altogether. *Cf.* Iowa Rs.Crim.P. 2.80(1), 2.81(1), 2.82(1). There is no reason to expect a rule authorizing a district court to preclude a procedure the rules themselves do not contemplate.

And it is well established Iowa's district courts retain inherent power to regulate the cases before them; this naturally includes discretion over whether to permit Sallis's proposed arrangement. *See, e.g., Williams*, 285 N.W.2d at 254–55 ("[W]e hold that trial courts have broad discretion, both in the first instance, and in considering a motion for substitute counsel, in choosing the particular lawyer to represent an indigent defendant."); *see Davis v. Iowa Dist. Ct. for Scott Cnt'y*, 943 N.W.2d 58, 62 (Iowa 2020) (We have repeatedly

acknowledged that district courts have inherent authority to manage proceedings on their dockets and in their courtrooms."); *Hearity v. Iowa Dist. Ct.*, 440 N.W.2d 860, 863 (Iowa 1989) ("The district court has inherent power to exercise its jurisdiction, to maintain and regulate cases proceeding to final disposition within its jurisdiction"); *see also Vanover*, 559 N.W.2d at 626 ("There are times when an accused's right to counsel of choice must yield to a greater interest in maintain high standards of professional responsibility in the courtroom. A trial court may therefore disqualify counsel if necessary to preserve the integrity, fairness, and professionalism of trial court proceedings.") *and State v. McKinley*, 860 N.W.2d 874, 880 (Iowa 2015) (addressing whether a district court abused its discretion in removing appointed attorneys whose office had previously represented state witnesses, "The right to counsel of choice—either initially or continued representation—is not absolute . . . either for indigent or nonindigent defendants").

Vesting this sort of authority with the district court is sensible. Especially here, where the court was reasonably concerned with the unintended consequences of approving limited appearances:

> Strategy among two lawyers assigned to the same case is seldom without problems. Each

> experienced counsel has his or her own beliefs concerning strategy and appropriate procedures in the defense of any criminal case. To force court-appointed counsel to always converse with, confide in, and discuss strategy with counsel on a limited appearance would be inappropriate.
>
> . . . .
>
> It is certainly possible that pro bono limited appearance counsel may wish to proceed with issues that may not be in the defendant's best interests concerning his defense strategy as a whole. Counsel whose limited duty is to represent the defendant on a singular issue may not be able to provide the best advice to the defendant concerning his or her overall strategy. . . . Counsel entering a limited appearance and promoting his or her viewpoint concerning the limited issue, may not provide advice in the defendant's best interests. Conflict would ensue between counsel for no reason other than the interference of counsel on a limited appearance basis.

4/19/2018 Ruling p.4, 3–5; App. 217–19. Its concerns with inter-counsel conflict were well founded. *See* 6/30/2017 Fisher's Second Motion to Withdraw; App. 87; 12/20/2017 Email Exh. p.12–30; App.118–36; 8/25/2017 Tr. p.2 line 15–p.6 line 10 ("I don't know any other way to read that e-mail other than a threat to file a disciplinary complaint if I don't proceed with the case as Mr. Montgomery suggests I should. . . . In 15 years, I haven't experienced this type of

situation, Judge, and I don't believe I can effectively continue to represent Mr. Sallis because of this breakdown for which, you know, I think Robert Montgomery is in the mix here."). Nor did the district court abuse its discretion when it denied the later limited appearance request which was for the stated purpose of relitigating the motion to suppress—at this time the case was already almost two years past its initiation. *Compare* 4/24/2016 Complaint *with* 12/20/2017 Hearing Tr. p.39 line 17–p.40 line 11; p.44 line 10–22; p.45 line 8–p.47 line 4 *with* 4/19/2018 Ruling; App. 215–20; *see generally Morris v. Slappy*, 461 U.S. 1, 11–12 (1983) (recognizing that district courts "require a great deal of latitude in scheduling trials," and that "Not every restriction on counsel's time or . . . otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel"); *Vanover*, 559 N.W.2d at 626.

* * *

Sallis's right to counsel of choice was circumscribed because he required appointed counsel. Accordingly, the district court did not violate his right to counsel of choice when it required Montgomery to either withdraw or file a full appearance or when it denied his second attempt to intervene and reopen the suppression record. Likewise, it

did not abuse its inherent discretion to control the cases before it where our criminal rules and statutes do not authorize the manner of appearance Montgomery sought. Sallis is not entitled to relief, and this Court should affirm.

III. The district court correctly overruled Sallis's motion for mistrial.

Preservation of Error

The State contests error preservation in part. It agrees Sallis objected and moved for a mistrial based upon the prejudicial nature of Frein's testimony, at which time the district court overruled the objection. Trial Vol.II p.78 line 2–24; *see generally State v. Newell*, 710 N.W.2d 6, 32 (Iowa 2006) (reviewing claim a district court erred in failing to grant a mistrial "due to the prejudicial nature of the testimony"). Later, additional record on the issue was made. Defense counsel at that later conference again moved for a mistrial, believing the officer's testimony was "ringing all kinds of bells and ideas in this jury's head" and meant Sallis would not receive a fair trial. Trial Vol.II p.87 line 20–p.88 line 12, p.89 line 7–18. The State resisted and the district court denied the motion for a mistrial, preserving error. Trial Vol.II p.88 line 13–p.90 line 4; *cf. State v. Cornelius*, 293 N.W.2d 267, 269 (Iowa 1980) (finding error unpreserved where the defendant

failed to ask for a mistrial "when the allegedly prejudicial question was asked).

Standard of Review

A district court's ruling on a motion for mistrial is reviewed for abuse of discretion—the district court is present throughout trial and is in a superior position to assess the effect of the matter in question on the jury. *State v. Martin*, 877 N.W.2d 859, 865, 865 n.4 (Iowa 2016); *State v. Jirak*, 491 N.W.2d 794, 796 (Iowa 1992); *State v. Cage*, 218 N.W.2d 582, 586 (Iowa 1974). An abuse of discretion occurs only where there is no support in the record for the trial court's determination. *State v. Lewis*, 391 N.W.2d 726, 730 (Iowa Ct. App. 1986) (citing *State v. Brewer*, 247 N.W.2d 205, 211 (Iowa 1976)). This standard is stringent. An appellate court will not reverse the decision unless it is "so palpably and grossly violative of fact and law that it evidences not the exercise of will but perversity of will, not the exercise of judgment, but defiance thereof, not the exercise of reason but rather of passion or bias." *Brewer*, 247 N.W.2d at 211. A defendant can only be "entitled" to a new trial where "it is manifest that the prejudicial effect remained with the jury." *State v. Burrell*, 255 N.W.2d 119, 122 (Iowa 1977). A mistrial is an act of last resort,

not first. *See State v. Harrison*, 578 N.W.2d 234, 238 (Iowa 1998) ("Even when a high degree of necessity exists which would ordinarily justify a mistrial, the trial judge must make a further inquiry to determine if an alternative measure-less drastic than a mistrial-would alleviate the problem. If further inquiry could have been made, or alternatives taken to cure the prejudice, the trial court would abuse its discretion in finding manifest necessity.").

Merits

During Frein's testimony, the State exhibited his squad car video and then asked him a series of questions to explain and provide additional context. Trial Vol.II p.75 line 1–p.78 line 23. At the point the vehicle had stopped, the prosecutor asked Frein why he had Sallis step out of the vehicle immediately once he had stopped his vehicle:

> Q. When we see here, when we stop at one minute into the video, what are you doing?
>
> A. I'm getting Mr. Sallis out of the car.
>
> Q. Okay. Now, did you open that door?
>
> A. I did.
>
> Q. And why were you opening that door and getting him out immediately?
>
> A. He'd already discarded evidence out of the car and since I was out of my car, I didn't want to give him the opportunity to drive off.

Trial Vol.II p.77 line 24–p.78 line 8. This was not the ordinary procedure most people anticipate in a traffic stop. Trial Vol.II p.88 line 15–22. The prosecutor then asked a follow-up question:

> Q. What do you mean drive off?
>
> A. It's common that when -- if a subject is going to flee from the police in their car, that they'll wait for the officer to get out of the car to kind of give themselves a head start and then they'll take off from there.
>
> Q. And were you concerned about Mr. Sallis being a flight risk at that time?
>
> A. Yes.
>
> MR. STANDAFER: I object before the answer is in. I need to approach. I ask for a mistrial.

Trial Vol.II p.78 line 9–19. That request was denied. Trial Vol.II p.90 line 1–4. When the parties reconvened during a break for defense counsel to make any necessary additional record on the matter, Sallis again moved for mistrial. Trial Vol.II p.88 line 4–12; p.89 line 8–18. Again, the district court denied his request. Trial Vol.II p.89 line 19–p.90 line 4.

The district court's ruling should be affirmed. It declined to order a mistrial based upon the court's view of the evidence and the trial as a whole:

> I, having observed the testimony, concur with the State that the response was—or the response to the question asked was directly related to the reason for this stop in light of the defendant or in light of the officer observing something being thrown from the window and being concerned that the defendant might attempt to pull away as he approached the vehicle. So I do think at this point in time the motion by the defense should be overruled and there's no reason for a mistrial of this case at this time.

Trial Vol.II p.89 line 20–p.90 line 4. That is to say, it was a reasonable, discretionary decision based on its perception of the evidence and the state of the trial, rather than "the perversity of will" or the exercise "of passion or bias." *Brewer*, 247 N.W.2d at 211.

A mistrial was not manifestly necessary based on this limited testimony. *See State v. Brocks*, No. 20-0077, 2021 WL 3662312, at *2–*3 (Iowa Ct. App. Aug. 18, 2021) (witness's pair of statements the defendant made a telephone call once "he got out"—of prison—did not require a mistrial where they were "ambiguous and were an insignificant piece" of the witness's testimony); *State v. Lopez-Aguilar*, No. 17-0914, 2018 WL 391672, at *4 (Iowa Ct. App. Aug. 15, 2018); *Cf. State v. Brown*, No. 02-0086, 2003 WL 1967828, at *3–*4 (Iowa Ct. App. Apr. 30, 2003) (reversing where district court denied motion for mistrial where jury was presented prejudicial evidence

Brown was a member of the "Imperial Gangsters" and that the group was "a bunch of neighborhood friends that drink and party together and use drugs and sell drugs" and commit crimes). And other practical issues cautioned against an unnecessary mistrial. The trial in question was already taking place five years after the acts alleged. Sallis was represented by his seventh appointed attorney, Standafer. *See* 8/25/2017 Order; 1/27/2020 Order to Withdraw Smith; 3/10/2020 Order to Withdraw Lanigan; 5/21/2020 Order to Withdraw Mahoney; 5/22/2020 Order to Withdraw Forcier 5/22/2020 Order to Withdraw Walton. Standafer sought to withdraw *mid-trial*. Trial Vol.II p.122 line 1–p.p.124 line 1. Given the need to resolve the case, Sallis has not demonstrated that the district court abused its discretion.

For his part, Sallis likens Frein's testimony to generic flight evidence and urges the district court abused its discretion because Frein's testimony was "irrelevant and unduly prejudicial as the jury would concluded that someone predisposed to take flight is guilty." Appellant's Br.59, 60–61. He is mistaken.

His comparison to this testimony as evidence of flight in the presence of police is misplaced. Appellant's Br.59–60. The State does

not dispute the Iowa Supreme Court's past pronouncements about how evidence of avoidance or flight can be equivocal, nor why a chain of inferences must ordinarily be established to ensure that this evidence is in fact probative as to the defendant's knowledge of guilt. *See, e.g., State v. Wilson*, 878 N.W.2d 203, 212–14 (Iowa 2016). But the evidence Sallis challenges was not flight evidence.

Frein's testimony was not that Sallis actually fled, rather, it was the officer's explanation of his own conduct. Unlike a normal traffic stop interaction in which an officer requests driver's license, vehicle registration, and proof of insurance, instead Frein immediately ordered Sallis from the vehicle because of his concern the man might attempt a "drive off." Trial Vol.II p.78 line 9–19; Exh.E (Car) 00:55–01:15. That subjective concern faded when Sallis complied with his orders—which the jury had also observed within the video exhibit. Trial Vol.II p.73 line 4–p.78 line 20; Exh.E (Car) 00:55–01:28. Thus, with no evidence of Sallis avoiding or fleeing police, *Wilson* and the "avoidance" line of cases are inapposite and could not support ordering a mistrial.

Second, although Frein's explanation was of little value in determining Sallis's guilt in this prosecution, it also did not prejudice

him. Defense counsel in a sidebar on the topic certainly alleged "This jury is poisoned," and his client was "not going to get a fair trial from this point forward." Trial Vol.II p.89 line 8–18. But his explanations of the prejudice he was alleging were cursory:

> Well, there's no reason whatsoever in a case like this, and Mr. Prosecutor even admitted it, that he wasn't going to bring up his past record, but the question kind of goes to that. You know, did you think he'd be a flight risk? And that's ringing all kinds of bells and ideas in this jury's head. He talked about he knew him from before, prior to all that, said he was on this dangerous criminal apprehension team. That's not good stuff. I move for a mistrial.

Trial Vol.II p.88 line 4–12. At that point, the officer's testimony had not touched on any alleged prior criminal conduct by Sallis. *See* Trial Vol.II p.64 line 13–p.78 line 17. Again, Frein was explaining why he conducted the traffic stop in the manner he did. Because it was merely Frein's clarification of his actions, it was understandably not a pervasive theme in the case. *See Brocks*, 2021 WL 3662312, at *3 ("We consider whether the statements relate to the charges at issue and were isolated."). And later during cross-examination, defense counsel took up the court's offer and asked questions explicitly clarifying Frein had never arrested Sallis before. Trial Vol.II p.109 line 9–16. This reduced whatever minimal risk the jury would

speculate Frein's fear of flight was based on some prior encounter. His limited and ambiguous testimony did not prejudice Sallis, and the district court acted well within its discretion when it declined to grant a mistrial.

Any error from its admission was harmless and further justified the district court's mistrial ruling. Again, the relative effect of the evidence was minimal: a pair of questions during a two-day trial. And this impact was further diminished when compared to body of evidence the State offered. That evidence demonstrated Sallis was alone in the vehicle, possessed a significant amount of cocaine salt, attempted to expel that drug from his vehicle once Frein activated a signal to pull over, implausibly denied doing the same, had over $1,200 in cash on his person, and pleaded guilty mid-trial to operating the vehicle while under the influence of alcohol. Trial Vol.II p.24 line 5–p.26 line 22; p.56 line 9–13; p.68 line 21–p.71 line 2; p.73 line 17–p.75 line 16; p.76 line 3–21; p.80 line 23–p.82 line 16; p.84 line 5–p.85 line 9; p.86 line 3–9; p.92 line 8–p.95 line 20; Trial Vol.III p.45 line 22–p.46 line 2; p.53 line 15–p.57 line 10; p.58 line 7–13; p.62 line 19–p.63 line 25; p.68 line 4–p.70 line 6; Exhs. D, E (car and body), G. In light of this robust evidence against him, it is

difficult to understand how an officer's subjective concern would rile the jury's passions and cause them to disregard the jury instructions.

Finally, the State is uncertain how to address Sallis's remaining cursory assertion that the prosecutor committed error, and in doing so, violated his right to a fair trial. Appellant's Br.60–61. Although he refers this Court to *State v. Plain*, 898 N.W.2d 801 (Iowa 2017), Sallis offers this Court no analysis why the challenged question was so flagrantly prejudicial as to violate his right to a fair trial. *See Plain*, 898 N.W.2d at 818–21. The claim he presents requires *him* to prove both that the prosecutor violated "a duty to the defendant," whether the act was "intentional or reckless" and prejudice. *Id.* (noting that the prejudice inquiry examines "(1) the severity and pervasiveness of the misconduct; (2) the significance of the misconduct to the central issues in the case; (3) the strength of the State's evidence; (4) the use of cautionary instructions or other curative measures; and (5) the extent to which the defense invited the misconduct"). Because he does not articulate how either standard is met, neither the State nor this Court should complete the analysis on his behalf. This Court should treat the subclaim as waived. *See Soo Line R.R. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994) (stating "random mention

of [an] issue, without elaboration or supportive authority, is insufficient to raise the issue for [reviewing court's] consideration"); *State v. Lange*, 831 N.W.2d 844, 847 (Iowa Ct. App. 2013) (restating principle appellate courts will not "assume a partisan role and undertake a party's research and advocacy" (citing *Ingraham v. Dairyland Mut. Ins. Co.*, 215 N.W.2d 239, 240 (Iowa 1974))); *accord* Iowa R. App. P. 6.903(2)(g)(3).

CONCLUSION

The district court correctly denied the motion to suppress. Frein's seizure of Sallis was lawful, whether premised on his recognizing Sallis or Sallis's subsequent act of tossing an item prior to submitting to Frein's request for him to pull over. Sallis's right to counsel of choice was naturally circumscribed by the fact that he required appointed counsel, and the district court did not abuse its discretion in requiring attorney Montgomery to either file a full appearance or withdraw from the case. Finally, the district court was well within its discretion when it denied Sallis's motion for mistrial. The State asks this Court to affirm.

REQUEST FOR NONORAL SUBMISSION

The State does not request oral submission. In the event this Court orders argument, the State would be heard.

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:

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