IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-0445

STATE OF IOWA,
Plaintiff- Appellee
vs.

MATTHEW ROBERT SEWELL
Defendant- Appellant

APPEAL FROM THE DISTRICT ASSOCIATE COURT
FOR DICKINSON COUNTY
THE HONORABLE DAVID LARSON

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF FILING

I, Robert G. Rehkemper, hereby certify that I filed the attached brief with the Clerk of the Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, on November 16, 2020, by filing it with the Court's electronic document management system.

Robert G. Rehkemper

November 16, 2020
Date

CERTIFICATE OF SERVICE

I, Robert G. Rehkemper, hereby certify that on November 16, 2020, I served a copy of the attached brief on all other parties to this appeal by filing it with the Court's electronic document management system.

Robert G. Rehkemper

November 16, 2020
Date

CERTIFICATE OF SERVICE UPON THE DEFENDANT

I, Robert G. Rehkemper, hereby certify that on November 16, 2020, I served a copy of Defendant's Final Brief, upon the Defendant-Appellant via electronic mail pursuant to her previously provided written authorization to receive documents and/or court notifications via electronic mail.

Robert G. Rehkemper

November 16, 2020
Date

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STATEMENT OF THE CASE

Nature of the Case

Matthew Sewell appeals from the district associate court's denial of his motion to suppress evidence and motion to dismiss. The basis of Sewell's motions was law enforcement's interference with his attorney-client privilege as he sought counsel's advice regarding his pending decision to submit or refuse chemical testing following his arrest for operating while intoxicated. Law enforcement refused to allow a confidential telephone consultation with counsel and instead, required that the consultation be conducted via a recorded telephone line. As such, Sewell contends that law enforcement's refusal to respect the attorney-client privilege during his telephonic consultation violated Iowa Code section 804.20, and article I, sections 9 and 10 of the Iowa Constitution.

Course of Proceedings

Matthew Sewell ("Sewell") was charged by way of Trial Information filed on February 4, 2019, with Operating While Intoxicated, First Offense, in violation of Iowa Code section 321J.2, as a result of an incident taking place on January 15, 2019. Trial Information; App.A005-A007. Sewell filed a motion to suppress evidence and motion to dismiss on April 10, 2019, alleging that his right to confidential consultation with counsel was violated when law enforcement limited his telephonic attorney-client consultation, only permitting it to take place on a

recorded telephone line. Motion to Suppress; App. A033-A036 Motion to Dismiss; App.A029-A032. Hearing was held on August 15, 2019, with the district associate court denying said motion on November 15, 2019. Ruling on Motion to Suppress; App.A040-A054. Sewell waived his right to a jury trial, stipulated to a trial on the minutes of testimony on November 21, 2019. Other Event; App. A055-A060. Sewell was found guilty of Operating While Intoxicated, First Offense in violation of Iowa Code section 321J.2 on February 11, 2020. Other Order; App. A061-A064. Sentencing was held on March 5, 2020, and Notice of the Appeal was filed on March 11, 2020. Notice of Appeal; App. A071-A072.

Statement of Facts

At 3:09 a.m. on January 15, 2019, Deputy Grimmus ("Grimmus") of the Dickenson County Sheriff's Office contacted Sewell as he was sleeping in a parked vehicle in Dickinson County. Sup. Tr. 13. As a result of a brief investigation, Grimmus arrested Sewell for operating while intoxicated at 3:22 am. Sup. Tr. 8.

Immediately following his arrest, Sewell was transported to the Dickenson County Jail by Grimmus for further testing to satisfy the Implied Consent statutory requirements. Sup. Tr. 8. Grimmus and Sewell arrived at the Dickenson County Jail at 3:46 a.m. and shortly thereafter, Grimmus invoked Implied Consent. Sup. Tr. 14-15, 19. Following the invocation of Implied Consent, Grimmus gave

Sewell an opportunity to contact an attorney or a family member. Sup. Tr. 9, 19. Sewell took Grimmus up on that request and was permitted to place phone calls. Sup. Tr. 9.

Sewell had a specific attorney in mind that he wished to contact. Sup. Tr. 19. Using his personal cellphone, Sewell looked up phone numbers but was required to use the Sheriff's Office landline to place the calls. Sup. Tr. 11, 19. The phone line Sewell was required to use was recorded by the Sheriff's Office. Sup. Tr. 10 Grimmus did not advise Sewell that all incoming and outgoing phone calls would be recorded, preserved, and controlled by the Dickenson County Law Enforcement. Sup. Tr. 21. At approximately 4:25 a.m., Sewell contacted counsel of his choice, Attorney Matthew Lindholm ("Lindholm"). Sup. Tr. 62.

When Sewell's call to Lindholm was made, there was no indication to either the caller or recipient of the phone call that the conversation on the landline would be recorded. Sup. Tr. 24, 63-64. Regardless, Lindholm immediately inquired into the confidentiality of the phone call. Sup. Tr. 63. Sewell and Lindholm were advised that their phone conversation was being recorded. Sup. Tr. 10, 66. Upon learning that the phone call was being recorded, Sewell requested authorization to speak to Lindholm on his personal phone or in a non-recorded line. Sup. Tr. 10, 20-21. Sewell specifically told Grimmus that both he and his attorney were concerned about the attorney-client conversation's security. Sup. Tr. 24. This

request was denied and both Sewell and Lindholm were advised that the only way their phone conversation could occur was on the recorded phone line. Sup. Tr. 22, 66.

Grimmus advised Sewell that he only had the right to a confidential consultation with his attorney if his attorney personally came to the jail. Sup. Tr. 11. According to Grimmus, an attorney rarely appears at the Dickenson County Jail for a private meeting with a client when contacted by an OWI arrestee. Sup. Tr. 22. Lindholm was physically present in Boone, approximately a 2 ½ hour drive away from the Dickenson County Jail. Sup. Tr. 61. It was clear to Lindholm that his ability to arrive at the Dickenson County jail to meet with Sewell, in person, within the applicable time limitations, was impractical. Sup. Tr. 60.

Lindholm, an experienced operating while intoxicated defense attorney, being unable to travel to the Dickinson County Jail within the allotted time or to consult confidentially with Sewell telephonically, was left with no choice but to inform Sewell that he could not provide him with adequate legal advice or consult further with him. Sup. Tr. 62-63. As a result, the phone call was ended without substantive advice being given to Sewell, and Sewell consented to the DataMaster breath test at 4:55 a.m. Sup. Tr. 12.

Lindholm testified at the suppression hearing and explained his role as a defense attorney in an operating while intoxicated case where a client contacts him

after being arrested for operating while intoxicated, seeking advice regarding the pending chemical test decision. Sup. Tr. 56. To properly advise Sewell, Lindholm would need to obtain a vast variety of information including life drinking patterns, alcohol consumption on the night in question, the timeline of the events leading up to the investigation and arrest, food consumption, medical conditions, controlled substance usages, and other information relevant to a preliminary evaluation of the case. Sup. Tr. 56-59. All this information is necessary for counsel to adequately advise the individual regarding their decision on chemical testing. Sup. Tr. 56.

Hearing on Sewell's motions also revealed some important characteristics of the Dickenson County Jail and Sheriff's Office phone systems. All calls made on this system are recorded and preserved within the custody and control of law enforcement for five years. Sup. Tr. 32. A simple press of a single button however, allows for a call to be made on an unrecorded line. To avoid the recording of a specific phone call, the dialer simply needs to press "9" before dialing the phone number. Sup. Tr. 36.

According to Grimmus, he denied Sewell's request to use his own phone base upon an unwritten jail policy that was described as a "tradition" of the jail requiring all calls from arrestees to be made on recorded landlines. Sup. Tr. 24, 47. Grimmus suspected that the policy was put in place to promote security of the jail even though no OWI arrestee had ever attempted to escape nor had any other

prisoner ever escaped from the facility. Sup. Tr. 24. Grimmus conceded that Sewell presented no indication that he was a security threat. Sup. Tr. 24. Dickenson County officials have been successful in eliminating the risk of detainees escaping custody through various physical barriers, such as the presence of multiple layers of secured entrances and guards armed with tasers. Sup. Tr. 46. There were no indications from the behavior of Sewell that he presented any risks to the security of the jail. Sup. Tr. 24.

Importantly, Dickenson County Jail's "tradition," also provides the Dickenson County Attorney's office and law enforcement personnel with access to all incoming and outgoing phone call conversations made on the phone lines. Sup. Tr. 37. The recordings are preserved in a database controlled by Dickenson County officials and provide no indication about the content of the phone call captured by the recording system. Sup. Tr. 21. Likewise, there is no indication that the phone call may consist of a conversation between an arrestee and their attorney. Sup. Tr. 36. The only limitation to Dickenson County official's access to the phone records is the requirement that the requestor simply email or fill out a form to inform the Dickenson County Emergency Management Coordinator of the request. Sup. Tr. 38. The phone call recordings are then provided without any further questions or investigation. Sup. Tr. 37, 52.

Routing Statement

This case involves a substantial issue of first impression regarding an arrestee's right to a privileged telephonic consultation with an attorney pursuant to Iowa Code section 804.20. This case also raises substantial constitutional issues regarding the application of article 1, section 9 and the attachment of article 1 section 10, as they relate to confidential communication with counsel prior to formal charging paperwork being filed. As such, this case warrants retention by the Iowa Supreme Court. Iowa R. App. P. 6.1101(3)(a) and (c).

LEGAL ARGUMENT

A. Introduction.

Sewell sought the assistance of counsel after being arrested. Sewell contacted counsel. Both Sewell and counsel requested the attorney-client privilege be honored for his consultation with counsel. Law enforcement denied Sewell and his counsel's request, actively preventing the consultation from being privileged. Counsel could not advise Sewell under those conditions. Law enforcement, therefore, denied Sewell's right to counsel.

What legitimate governmental or societal purpose is furthered by denying a citizen a privileged telephonic consultation with an attorney? If the medical board was investigating a physician, it would be unconscionable to restrict the

physician's communication with legal counsel to only those that were monitored, recorded, and stored in possession of the investigating agency. If a police officer requested to speak to legal counsel prior to giving a statement to the Department of Criminal Investigation following an officer-involved shooting, we would not dare restrict that communication to only occurring in the presence of the investigating agency. If a corporate executive requested to speak to an attorney prior to providing a statement in an internal business investigation, no rational person would suggest that conversation with counsel be limited to a corporate land-line recorded and saved within the corporation's business files. Why then, should a citizen, who has been forcibly detained for suspicion of a criminal act, not be guaranteed a confidential consultation with counsel via telephone?

A person arrested and held in captivity at a county jail, but whose charging paperwork has not yet been filed and processed by the court system, does not yet have the Sixth Amendment right to counsel. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (5-4 plurality opinion). As it stands currently, article I, section 10 of the Iowa Constitution, has yet to be interpreted in a way that guarantees even a limited right to counsel without the formal charging paperwork first being filed. *State v. Senn*, 882 N.W.2d 1, 3 (Iowa 2016). The State now argues, and the district associate court concluded that Iowa Code § 804.20 does not permit an attorney to have privileged telephonic communication with an arrestee.

The days of sacrificing a detainee's rights due to a whimsical phobia of a John Dillinger[1] storybook prison break orchestrated by an officer of the court must come to an end. The sanctity of the attorney-client privilege easily outweighs any theoretical possibilities used to justify the current practice.

B. An OWI Arrestee's Predicament.

An individual arrested for the crime of operating while intoxicated is routinely transported to a law enforcement detention facility where a legally coercive process is undertaken to secure scientific evidence that is used against the individual in the subsequent criminal prosecution. The scientific evidence is in the form of a breath, blood, or urine test. If submitted to, this test presumptively establishes the individual's alcohol concentration; the only evidence necessary to secure a conviction for a *per se* violation of Iowa Code § 321J.2. Iowa Code §§ 321J.2(12)(a)-(b), 321J.15. This offense carries the harshest mandatory minimum penalties of any misdemeanor offense in the state of Iowa, including a minimum of 48 hours in jail and a mandatory minimum fine of $1,250. Iowa Code § 321J.2. The decision regarding chemical testing also results in immediate disqualification of the individual's driving privileges, a constitutionally protected liberty interest.

[1] https://www.fbi.gov/history/famous-cases/john-dillinger#:~:text=Authorities%20boasted%20that%20the%20jail,and%20several%20trustees%2C%20and%20fled.

See Iowa Code §§ 321J.9, 321J.12; *Bell v. Burson*, 402 U.S. 535, 539 (1971) (citizen has a constitutionally protected liberty interest in driver's license).

Before making the pivotal decision regarding chemical testing, the individual is informed of the "right" to refuse to provide this crucial evidence. Iowa Code § 321J.8. They are further advised that their refusal will result in their driving privileges being disqualified for twice as long as submitting to the test and failing. See Iowa Code §§ 321J.8, 321J.9. A decision to withhold consent to chemical testing is also used against the individual in the subsequent criminal prosecution. Iowa Code § 321J.16. This coercive process is commonly referred to as "Implied Consent."

Once Implied Consent is invoked, the formal request by a law enforcement officer for a chemical specimen is not an occasion for "debate, maneuver or negotiation, but rather for a simple 'yes' or 'no' to the officer's request." *Swenumson v. Iowa Dep't of Pub. Safety*, 210 N.W.2d 660, 662 (Iowa 1973). Once the decision is made, it cannot be changed, altered, or withdrawn. *Welch v. Iowa Dep't of Transp.*, 801 N.W.2d 590, 596 (Iowa 2011) (under implied consent statute, an initial refusal by a motorist arrested for operating while intoxicated to consent to a chemical test is binding). "[A]nything less than an unqualified, and unequivocal consent is a refusal." *Ferguson v. Iowa Dep't of Transp.*, 424 N.W.2d 464, 466 (Iowa 1988).

Additionally, the impact of this decision on the individual's life and liberty interests is immediate and enduring. The applicable suspension is executed by the Department of Transportation immediately upon the certification of the arresting officer that the test was either refused or consented to and failed. See Iowa Code §§ 321J.9, 321J.12.

The entirety of the Implied Consent process usually takes place post-arrest and always occurs pre-filing of the criminal complaint. Consequently, the federally guaranteed right to counsel under the Sixth Amendment to the United States Constitution has yet to attach. The individual is in a sort of prosecutorial purgatory. Held in captivity, but not yet to a point where the Sixth Amendment right to counsel has attached, the arrestee must make the single most crucial decision of the case.

A statutory right to call, consult, and see an attorney or family member prior to a decision regarding chemical testing has been recognized. *State v. Vietor*, 261 N.W.2d 828, 831 (Iowa 1978). The question now becomes, to what extent must the attorney-client privilege be protected during such consultations.

C. Sanctity of the Attorney-Client Privilege.

"[T]he attorney-client privilege is, perhaps, the most sacred of all legally recognized privileges…" *United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997). It is "the oldest recognized privileges for confidential communication

known to the common law…" *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981). The privilege is "of ancient origin. It is premised on a recognition of the inherent right of every person to consult with legal counsel and secure the benefit of his advice free from any fear of disclosure." *Bailey v. Chicago, Burlington & Quincy R.R.*, 179 N.W.2d 560, 563 (Iowa 1970). "It generally is acknowledged that the attorney-client privilege is so sacred and so compellingly important that the courts must, within their limits, guard it zealously." *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992), quoting *Chore-Time Equip., Inc. v. Big Dutchman, Inc.*, 225 F. Supp. 1020, 1021 (W.D. Mich. 1966).

The attorney-client privilege arises out of three primary considerations: (1) the need of ordinary citizens for attorneys given the complexity of the laws, (2) the need by the lawyer for the full knowledge of all the facts in order to render proper advice, and (3) the need to overcome the reluctance of disclosing all the facts over fear of disclosure to another. *Wenmark v. State*, 602 N.W.2d 810, 815 (Iowa 1999). "[T]he privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." *Upjohn Co.*, 449 U.S. at 389.

One court provided a synopsis of the doctrine that should not be ignored:

> The attorney-client privilege has been a hallmark of Anglo-American jurisprudence for almost 400 years. [internal citations omitted]. The privilege authorizes a client to refuse to disclose, and to prevent others from

> disclosing, confidential communications between attorney and client. Clearly, the fundamental purpose behind the privilege is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters. [internal citations omitted]. In other words, the public policy fostered by the privilege seeks to insure 'the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense.'

Mitchell v. Superior Ct., 691 P.2d 642, 645-46 (Cal. 1984); See also *Wemark v. State*, 602 N.W.2d 810, 815 (Iowa 1999), *citing* 8 John H. Wigmore, *Evidence S.* 2290, at 542 (McNaughton rev. 1961); *also citing The Attorney-Client Privilege: Fixed Rules, Bargaining & Constitutional Entitlement*, 91 Harv. L. Rev. 464 (1977). Once the privilege attaches, it "generally survives the client's death, termination of the relationship, or dismissal of a case in litigation." *Bailey*, 179 N.W.2d at 564.

With the sanctity of the attorney-client privilege in mind, considering the afore-described scenarios involving the physician, law enforcement officer, and business executive, both the client and the attorney, would be able to physically leave the hostile environment. They may also seek redress from the courts to preclude such offensive conduct and further prohibit any such future improprieties under threat of contempt of court sanctions. An arrestee, however, has no such options. How then, can a post-arrest but pre-paperwork filing arrestee be guaranteed privileged and protected communication with counsel?

The State will argue and the district associate court concluded that for the attorney-client privilege to apply, the arrestee must possess the persuasive abilities of Peitho[2], and successfully rouse an attorney from sleep, convincing the attorney to travel to the jail for a face-to-face conversation, all within the two hours of when the arrestee was last operating the vehicle. Sewell argues that when a phone call is permitted to an attorney, even telephonic consultations must be protected by the attorney-client relationship. Consequently, when requested, privacy and confidentiality must be assured. The simple solution urged by Sewell, is a fair and sensible application of Iowa Code § 804.20, which sensibly restricts the phrase "in the presence of" to exclude active monitoring and recording of a telephonic conversation with counsel. Alternatively, Sewell advocates for an application of article I, sections 9 and 10 of the Iowa Constitution guaranteeing an arrestee a limited constitutional right to a confidential telephonic consultation with counsel, when faced with a request by law enforcement, the decision to which has an immediate impact on a constitutionally protected liberty interest.

[2] https://greekgodsandgoddesses.net/goddesses/peitho/

I. IOWA CODE SECTION 804.20 GUARANTEES AN ARRESTEE CONFIDENTIAL TELEPHONIC CONSULTATION WITH COUNSEL.

Preservation of Error: Error was preserved by Sewell filing his motion to suppress evidence, receiving an adverse ruling, proceeding to a trial on the minutes of testimony, being found guilty of the charged offenses, and timely filing notice of appeal.

Standard of Review: The district court's interpretation of the Iowa Code § 804.20, the statute governing communications by arrested persons is reviewed for errors at law. *State v. Hellstern*, 856 N.W.2d 355, 360 (Iowa 2014).

Argument: Pursuant to Iowa Code § 804.20, an arrestee has the right to call, consult or see an attorney without unreasonable delay, upon arriving at the place of detention. *Vietor*, 261 N.W.2d at 832. This right includes a reasonable opportunity to consult with counsel before deciding on chemical testing in an operating while intoxicated investigation. *Id.*

Iowa Code § 804.20 provides in its entirety:

> Any peace officer or other person having custody of any person arrested or restrained of the person's liberty for any reason whatever, shall permit that person, without unnecessary delay after arrival at the place of detention, to *call, consult, and see* a member of the person's family or an attorney of the person's choice, or both. Such person shall be permitted to make a reasonable number of telephone calls as may be required to secure an attorney. *If a call is made, it shall be made in the presence of the person having custody of the one arrested or restrained.* If such person is intoxicated, or a person under eighteen years of age, the call may be made

> by the person having custody. An attorney shall be permitted to see and *consult confidentially* with such person alone and in private at the jail or other place of custody without unreasonable delay. A violation of this section shall constitute a simple misdemeanor.

(emphasis added) Iowa Code § 804.20. "When the statute's language is plain and unambiguous, we look no further." *State v. Snyder*, 634 N.W.2d 613, 615 (Iowa 2001).

The plain language of § 804.20 does not authorize law enforcement to actively monitor or record an arrestee's telephonic consultation with an attorney. While the Iowa Supreme Court, without substantive analysis, has previously stated that the legislatures use of the phrase "in the presence of the one having custody" indicated that such calls were not "confidential", *State v. Hellstern*, 856 N.W.2d 355, 361 (Iowa 2014); *State v. Walker*, 804 N.W.2d 284, 291 (Iowa 2011), the court has never gone so far as to authorize the active monitoring or recording of an arrestee's conversations with counsel at the place of detention. This is especially true in situations where both the attorney and arrestee request reasonable accommodations to protect attorney-client privilege.

A. Precluding confidential telephonic consultations with an attorney undermines the recognized purpose of section 804.20 thereby rendering the right to telephonic consultation with counsel illusory.

When the court sets out to interpret a statute, the goal "is to ascertain legislative intent in order, if possible, to give it effect." *State v. Conley*, 222

N.W.2d 501, 502 (Iowa 1974). The court seeks "a reasonable interpretation that will best affect the legislative purpose and avoid absurd results." *State v. Byers*, 456 N.W.2d 917, 919 (Iowa 1990). The recognized "legislative purpose of section 804.20 is to afford detained suspects the opportunity to communicate with a family member and attorney." *State v. Hicks*, 791 N.W.2d 89, 95 (Iowa 2010). In an operating while intoxicated investigation, this purpose is furthered by permitting "a limited statutory right to counsel before making the important decision to take or refuse the chemical test under implied consent procedures." *Vietor*, 261 N.W.2d at 831.

For the stated purpose of § 804.20 to be accomplished, the attorney-client privilege must attach to all consultations between an arrestee and an attorney, even those conducted telephonically. When a request for reasonable accommodations to protect privilege is made, law enforcement must honor that request. It may not force an arrestee to waive the attorney-client privilege to exercise the rights articulated in § 804.20.

As a starting point, the actual consultation with an attorney via telephone must be confidential. While the initial making of the call is required to be in the presence of the person having custody, there is no statutory authorization for the corresponding consultation to be in the presence of law enforcement or otherwise monitored or recorded. The operative portion of section 804.20 states: "If a call is

made, it shall be *made* in the presence of the person having custody of the one arrested or restrained. If such person is intoxicated, or a person under eighteen years of age, the call may be *made* by the person having custody." (emphasis added) Iowa Code § 804.20.

"Made" as used in the statute describes an action or occurrence which means it is a verb. The verb "made" indicates the "simple past tense and past participle of make." "Made." *Dictionary.com*. 2020. https://www.dictionary.com/browse/made (July 7, 2020). "Make" simply means "to produce; cause to exist or happen; bring about." "Make." *Dictionary.com*. 2020. https://www.dictionary.com/browse/make. Thus, the portion of the statute requiring the call to be "made in the presence of the person having custody" or "made by the person having custody" merely refers to the initial placement or creation of the call, not the subsequent telephonic consultation with an attorney.

This distinction corresponds with and facilitates the recognized purpose of a phone call to an attorney or family member related to the Implied Consent process in an operating while intoxicated investigation. This vital distinction also recognizes law enforcement's interest in documenting and ensuring the identity of who is being called and that the rights enumerated under the statute are being appropriately exercised. This interpretation alleviates Justice Waterman and the plurality's "practical concerns" voiced in *Senn*. 882 N.W.2d at 31.

Permitting law enforcement to be present during the initiation of the call but ensuring confidentiality in the subsequent consultation with an attorney also recognizes and protects the sanctity of the attorney-client privilege. It is well-established that for communications between attorney and a client to be protected, the communication "must have been made in confidence." *Bailey*, 179 N.W.2d at 564. Consequently, communications and consultations between an attorney and a client, knowingly conducted in the presence of a third party, are not protected by the privilege. "[E]ven where the requirements for the existence of the privilege are present, it may be lost if the confidential communications are conducted in the presence of a third person." *State v. Romeo*, 542 N.W.2d 543, 548 (Iowa 1996); see *State v. Craney*, 347 N.W.2d 668, 678-79 (Iowa 1984) (concluding that a statement to an attorney by the accused which was overheard by the jailer what the accused was talking to the attorney was admissible); see also *State v. Flaucher*, 223 N.W.2d 239, 241 (Iowa 1974) (statements made by defendant to his doctor in presence of police officers were not privileged); *State v. Tornquist*, 120 N.W.2d 483, 495 (1963) (statement to doctor, overheard by employee of hospital not assisting with medical care, not covered by physician-patient privilege).

In this same vein, knowingly permitting the disclosure of confidential communications to the State by a defense attorney, constitutes ineffective assistance of counsel and denies the accused of his right to counsel. *Wenmark*, 602

N.W.2d at 817. Because of the third-party waiver of the attorney-client privilege, any attorney who knowingly speaks to a client via law enforcement monitored or recorded phone line would waive any-and-all privilege that would otherwise attach to that conversation. If confidential communications transpired during that conversation, the attorney would be committing malpractice. See *United States v. Hatcher*, 323 F.3d 666, 674 (8th Cir. 2003) ("Because the inmates and lawyers were aware that their conversations were being recorded, they could not expect that their conversations would remain private. The presence of a recording device was the functional equivalent of a third party").

Given the third-party waiver doctrine applicable to the attorney-client privilege, the statutory right to obtain advice from counsel before deciding on chemical testing would be illusory if law enforcement were permitted to actively monitor and record the arrestee's consultation with counsel. The simple act of having a consultation with the arrestee on a recorded line, or while the arrestee's side of the consultation is actively monitored, would waive privilege and make providing competent legal advice impossible.

Statutes are to be interpreted in a manner that avoids absurd results or in a manner that renders any part thereof, superfluous. *State v. Williams*, 910 N.W.2d 586, 598 (Iowa 2018); quoting *Petition of Chapman*, 890 N.W.2d 853, 857 (Iowa 2017). For the recognized purpose of § 804.20 to be furthered, law enforcement

must be prohibited from actively monitoring and/or recording any consultations between the arrestee and legal counsel. This is especially true when a specific request for privacy or other arrangements that would facilitate confidential consultation with counsel is made.

B. Harmonizing section 804.20 with other statutes on related subjects, makes it clear that telephonic attorney-client consultations may not be actively monitored or recorded.

Statutes are never read in isolation. Instead, "we interpret a statute consistently with other statutes concerning the same or a related subject," *State v. Pickett*, 671 N.W.2d 866, 870 (Iowa 2003), "harmonizing them, if possible, with related statutes." *Forbes v. Hadenfeldt*, 648 N.W.2d 124, 126 (Iowa 2002). Following these directives, Iowa Code § 804.20, authorizing an arrestee to have telephonic communication with an attorney, must be harmonized with other statutes related to communications with counsel and telephonic communications in general.

1. Iowa Code Section 622.10 - Statutory Attorney-Client Privilege - The longest standing statutory protection in the state of Iowa.

Iowa Code § 622.10 codifies the attorney-client privilege. Since the admission of Iowa into statehood, laws have protected communications between attorneys and their clients. See *Pierson v. Steortz*, Morris 136, 1841 WL 3173 (Sup. Ct. Ter. Of Iowa, 1841); see also Iowa Code § 2393 (1851). These original

protections continue undisturbed to this day and were in place when Sewell attempted to consult with Lindholm via telephone. Iowa Code § 622.10 (2019).

Full and free communications between an arrestee and an attorney cannot occur when the phone consultation is being actively monitored and recorded by law enforcement. As explained previously, attorney-client communications conducted under such circumstances are not privileged. The protections of attorney-client privilege were in place when Iowa Code § 804.20 was enacted in its current form and original form in 1959. Iowa Code § 373 (1959). The purpose of § 622.10 is not furthered, nor can it be harmonized with an interpretation of § 804.20 that would grant an individual the right to seek legal counsel but restrict that consultation to a manner that would result in a waiver of the attending privilege. The only way to harmonize the protection of § 804.20 with § 622.10 is to interpret § 804.20 as providing the right to privileged telephonic consultations with counsel, free from monitoring and recording by law enforcement or any other third party.

2. State and federal protections prohibiting the interception of telephonic communications guarantee privacy for telephonic consultations absent a court order.

A conclusion that an arrestee must be permitted unmonitored and unrecorded telephone consultation with counsel is also supported by state and federal statutory protections accompanying telephonic communications. Federal law makes it a felony offense, punishable by up to five years in prison, for any

person who "intentionally intercept, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral or electronic communication." 18 U.S.C. § 2511(1)(a). A separate statutory civil remedy has also been created for violation of that statute, which authorizes damages, including punitive damages and reimbursement of attorney fees and litigation costs. 18 U.S.C. § 2520.

Similar to the federal statutory prohibition, Iowa Code § 808B.2(1)(a), makes it a state felony, also punishable by up to five years in prison, for any person to "willfully intercept, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, a wire, oral, or electronic communication." Iowa Code § 808B.2(1)(a). Just like its federal counterpart, chapter 808B of the Iowa Code also provides for statutory civil damages. Iowa Code § 808B.8.

Admittedly, both the federal and state statutory guarantees of privacy for telephonic communications have exceptions. However, any exception that could apply to the instant case first required an application and judicial order authorizing the monitoring and interception of any covered communication, or consent. 18 U.S.C. § 2511(2)(a)(ii)(A)-(B); Iowa Code § 808B.3-5. Neither judicial authorization nor consent to the recording of Sewell's telephone conversation with Lindholm existed.

The State will likely cite to the Iowa Supreme Court decision of *State v. Fox*, in support of law enforcement's authority to monitor and record communications made by arrestees "in the ordinary course of his duties." 493 N.W.2d. 829, 831 (Iowa 1992). However, *Fox* was decided in 1992 and was based upon a now amended version of Iowa Code § 808B.2, which explicitly authorized law enforcement to intercept such communications by any device operated "by an investigative or law enforcement officer in the ordinary course of his duties." *Id.* Chapter 808B was amended in 1999 to remove that exception. It replaced it with a requirement for law enforcement to make an affirmative application and secure a judicial order, specifically authorizing the interception of any such communications. Acts 1999 (78 G.A.) ch. 78 §§ 1-5.

When the legislature amends a statute after the courts have interpreted it, it is presumed that the legislature intended to change the original act "by creating a new right or withdrawing an existing one." *State ex rel. Palmer v. Board of Sup'rs of Polk County*, 365 N.W.2d 35, 37 (Iowa 1985); quoting 1A Sutherland: *Statutory Construction*, § 22.30 at 178 (4th Ed.C.Sands 1973). The legislature undoubtedly intended to preclude law enforcement from attempting to intercept, record, or otherwise monitor telephonic communications without first securing the necessary court approval. As such, the federal and state statutory protections attending telephonic communication further buttress the conclusion that Iowa Code § 804.20

permits confidential, unmonitored, and unrecorded telephonic consultations with counsel by an arrestee.

C. Constitutional principles also mandate an interpretation of Iowa Code section 804.20 that guarantees an arrestee confidential telephonic consultation with an attorney.

Constitutional principles and protections also compel the conclusion that an arrestee's telephonic consultations with an attorney, even pre-formal filing of the criminal complaint, must be confidential and protected by the attorney-client privilege. The Court must strive "to interpret a statute in such a way as to render it in harmony with the constitution, not in conflict with it [internal citations omitted], because where a conflict exists, the constitution must prevail." *Goodell v. Humboldt County*, 575 N.W.2d 486, 501 (Iowa 1998). Statutes are cloaked with a presumption of constitutionality and "if a statute may be construed in more than one way, one of which is constitutional, we will adopt such a construction." *State v. Gonzalez*, 718 N.W.2d 304, 307 (Iowa 2006).

1. The Fourth Amendment

The Fourth Amendment to the United States Constitution precludes the government's unreasonable intrusion upon a person's legitimate expectation of privacy. "The essential purpose of the proscriptions of the Fourth Amendment 'is to impose a standard of reasonableness upon the exercise of discretion by government officials, including law enforcement agents in order to safeguard the

privacy and security of individuals against arbitrary invasion.'" *State v. Loyd*, 530 N.W.2d 708, 711 (Iowa 1995) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979). "[T]he Fourth Amendment protects only against unreasonable government intrusions upon a person's legitimate expectation of privacy." *State v. Breuer*, 577 N.W.2d 41, 45 (Iowa 1998). Absent a search warrant or applicable exception to the warrant requirement, any government invasion into a citizen's expectation of privacy is presumed unreasonable. *Id.*

In determining whether or not an individual has a legitimate expectation of privacy, "[t]he correct test of legitimacy is not whether the individual has chosen to conceal some private activity but 'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.'" *State v. Flynn*, 360 N.W.2d 762, 765 (Iowa 1985); quoting *Oliver v. United States*, 466 U.S. 170, 182-83 (1984).

Over half-a-century ago, the United States Supreme Court held that "a conversation is within the Fourth Amendment's protections" and that "the use of electronic devices to capture it is a search within the meaning of the Amendment." *Berger v. New York*, 388 U.S. 41, 51 (1967). Regarding telephonic communication, the Court also made it clear that one who places a telephone call, even in a public telephone booth, "is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Katz v. United*

States, 389 U.S. 347, 352 (1967). "To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication." *Id.*

In addition to the constitutionally protected privacy interest that an individual has in a basic telephone conversation, a criminal suspect also has a reasonable expectation of privacy in consultations with counsel. As previously discussed, these consultations, even telephonically, are protected by legislation and centuries of common law rulings cloaking these conversations in privilege. For these reasons, courts faced with this question have consistently held that a suspect has a reasonable expectation of privacy in consultations with counsel, even before the formal Sixth Amendment right to counsel may attach. See *Gennusa v. Canova*, 748 F.3d 1103 (11th Cir. 2014).

A Fourth Amendment expectation of privacy in phone calls was well-established at the time § 804.20 was enacted as was the law surrounding attorney-client privilege. The *Katz* decision was over a decade old when § 804.20 was signed into law in 1978. Acts 1976 (66 G.A.) ch. 1245 (ch.2), § 421, eff., Jan. 1, 1978. The sanctity of the attorney-client privilege was likewise clearly defined and well-established since the formation of the state of Iowa over a century-and-a-half ago. "The legislature is presumed to know the state of the law, including case law, at the time it enacts a statute." *State v. Jones*, 298 N.W.2d 296, 298 (Iowa 1980).

Thus, knowing that an individual had a constitutionally protected privacy interest in a telephone call, even when made in public facilities, the legislature granted an arrestee the statutory right to place a phone call to an attorney, which they also knew was protected by attorney-client privilege. Through the application of the presumption and the lack of any qualifying language to the granting of the right such as "subject to monitoring", the rules of statutory construction, harmonized with well-established constitutional principles make it clear that confidential phone consultations with counsel are authorized under § 804.20.

2. Article I, sections 9 and 10.

For the reasons set forth in Sections II and III of this brief, interpreting § 804.20 to authorize law enforcement to actively monitor and record an arrestees telephone consultation with an attorney would be violative of article I, sections 9 and 10 of the Iowa Constitution.

D. Practical Considerations.

The 2020 COVID-19 Pandemic provides a relevant and timely example of the wisdom of interpreting § 804.20 in a manner that authorizes confidential telephonic consultations with an attorney. No qualifying language in § 804.20 creates an exception for exceptional circumstances or good cause. Thus, if the Court does not interpret the section to authorize confidential telephonic

consultations with an attorney, no such right exists, ever, unless deemed to arise out of constitutional principles argued below.

As a result of the COVID-19 pandemic, in-person court proceedings were suspended across the state of Iowa. Consistent with government recommendations, many law enforcement agencies and jails closed to the public, including attorneys, to combat the spread of the COVID-19 virus. This included the largest pre-trial holding facility in the state of Iowa, the Polk County Jail.[3] Thus, if the court interprets § 804.20 as urged by the state, to preclude confidential telephonic consultations with counsel, no confidential consultation with counsel would be possible, even as this brief is written. Such cannot be the case.

Law enforcement's interest in obtaining a chemical test, as soon as possible to the time that a suspect was operating the vehicle, is also furthered by permitting confidential telephonic consultations with counsel. This Court has recognized that the time for a consultation with an attorney is "effectively limited by law enforcement's interest in obtaining the test within two hours of the defendant's driving in order to preserve the presumption afforded under Iowa Code section 321J.2(8)(a)." *State v. Walker*, 804 N.W.2d 284, 290 (Iowa 2011). An arrestee's rights under § 804.20 are generally fulfilled with a sufficient opportunity to consult

[3] https://www.polkcountyiowa.gov/county-sheriff/covid-19/

fully with counsel within the appliable two-hour period. *Didonato v. Iowa Dep't of Transp.*, 456 N.W.2d 367, 371 (Iowa 1990) ("[w]hen the requested telephone call is permitted subsequent to signing the form, and the individual involved has an actual opportunity to consult with counsel or a family member before submitting to the chemical test, the purposes behind the statute are served"). If an arrestee is permitted to have a confidential consultation with counsel, the need for additional delay in the testing process to permit counsel to travel to the place of detention for a private consultation is reduced to only the most unusual circumstances. As such, Sewell's urged interpretation of § 804.20 also furthers the practical effect of facilitating a more efficient implied consent process.

Iowa would not be blazing its own trail in interpreting the statutory right to counsel as authorizing confidential telephone consultations with attorneys. Instead, it would be joining a host of well-reasoning states that have interpreted similar statutes to provide the very same protections. *Farrell v. Anchorage*, 682 P.2d 1128, 1130 (Alaska Ct. App., 1984) ("The statutory right to contact and consult with counsel requires reasonable efforts to assure that confidential communications will not be overheard…"); *Bickler v. North Dakota State Highway Comm'r*, 423 N.W.2d 146, 146 (N.D. 1988) ("When an arrestee consults with counsel, he must be allowed to do so in a meaningful way. A consultation would be meaningless if relevant information could not be communicated without being

overheard. There is a right to privacy inherent in the right to consult with counsel."); *State v. Carcieri*, 730 A.2d 11, 13 (R.I. 1999) (DUI arrestee must be afforded a reasonable opportunity to make a confidential telephone call); *Roesing v. Dir. of Revenue*, 573 S.W.3d 634, 639-40 (Mo. 2019) ("By listening to and recording Roesing's end of the conversation, law enforcement obstructed his opportunity to speak privately with his attorney to make an informed decision as to whether to refuse the chemical test…")

With all of these practical considerations in mind, combined with the historical and statutory protections of the attorney-client privilege, alongside state and federal statutes protecting telephonic communication from third party monitoring or recording, it is abundantly clear that Iowa Code § 804.20 guarantees an arrestee the right to a confidential telephonic consultation with an attorney. The district court erred in determining otherwise.

II. LAW ENFORCEMENT'S MONITORING AND RECORDING OF AN ARRESTEE'S CONSULTATION WITH COUNSEL, VIOLATES ARTICLE I, SECTION 9 OF THE IOWA CONSTITUTION.

Preservation of Error: Error was preserved by Sewell filing his motion to suppress evidence raising this specific issue, receiving an adverse ruling on this issue, proceeding to a trial on the minutes of testimony, being found guilty of the charged offenses, and timely filing notice of appeal.

Standard of Review: Sewell argues that the officer's conduct in refusing the provide a confidential consultation with counsel violated article I, section 9 of the Iowa Constitution. As such, the standard of review is de novo. *State v. Kurth*, 813 N.W.2d 270, 272 (Iowa 2012). "When *de novo* review is compelled, no form of appellate deference is acceptable." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

Argument: The limitations of the Due Process Clause of the Fifth Amendment upon government conduct are implicated when "the Government activity in question violates some protected right of the Defendant." *Hampton v. United States*, 425 U.S. 484, 490 (1976). Article I, section 9 of the Iowa Constitution is Iowa's Due Process Clause. *Planned Parenthood of the Heartland v. Reynolds ex rel. State*, 915 N.W.2d 206, 232 (Iowa 2018). "Substantive due process prevents the government 'from engaging in conduct that shocks the conscience or interferes with the rights implicit in the concept of ordered liberty.'" *King v. State*, 818 N.W.2d 1, 31 (Iowa 2010); quoting *Zaber v. City of Dubuque*, 789 N.W.2d 634, 640 (Iowa 2010).

"When Iowan's bring claims alleging a deprivation of substantive due process, we employ a two-stage inquiry." *Planned Parenthood of the Heartland*, 915 N.W.2d at 233. First, "determine the nature of the individual right involved." *Hensler v. City of Davenport*, 790 N.W.2d 569, 580 (Iowa 2010). Second, we

determine "the appropriate level of scrutiny to apply." *Id.* "If government action implicates a fundamental right, we apply strict scrutiny' and determine whether the disputed action is 'narrowly tailored to serve a compelling government interest.'" *Planned Parenthood of the Heartland*, 915 N.W.2d at 233; quoting *Hensler*, 790 N.W.2d at 580. "Conversely, if the right at stake is not fundamental, we apply the 'rational-basis test,' which considers whether there is a 'reasonable fit between the government interest and the means utilized to advance that interest.'" *Id.* quoting *State v. Hernandez-Lopez*, 639 N.W.2d 226, 238 (Iowa 2002).

"No clear test exists for determining whether a claimed right is fundamental." *Planned Parenthood of the Heartland*, 915 N.W.2d at 233. "Generally, only those rights and liberties which are 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty qualify as fundamental.'" *Id.* quoting *State v. Seering*, 701 N.W.2d 655, 664 (Iowa 2005). As outlined in Division I, the right to privileged and confidential communications with counsel is as profoundly rooted right and liberty interest as exists in Iowa. It is well-recognized, jealously protected, and has been at the very foundation of the American judicial system since the Colonies were founded.

To say that the attorney-client privilege is not deeply rooted in this Nation's and State's history would be to rewrite history altogether. While strict scrutiny is undoubtedly applicable, even under the looser rational basis test, no legitimate

government interest is furthered by law enforcement's active interference with the attorney-client relationship. It would render a right that the legislative branch has bestowed on its citizens entirely illusory. Any interest that the government may have during an arrestee's pre-testing consultation with counsel is just as effectively furthered by "reasonable monitoring of a detainee, via soundproof window viewing, silent video monitoring, or other means of observance..." *Carcieri*, 730 A.2d at 14.

As a result of the long-standing history and judicially recognized sanctity of the attorney-client relationship, courts across the country have not hesitated to recognize that governmental interference with the attorney-client relationship violates substantive due process. *United States v. Stringer*, 535 F.3d 929, 941 (9th Cir. 2008); *Roberts v. State*, 48 F.3d 1287, 1292-93 (1st Cir. 1995) (defendants due process rights violated by refusing to allow him to contact counsel after he was given misleading information on consequences of refusal to take blood/alcohol test): *People v. McAuley*, 645 N.E.2d 923, 926 (Ill. 1994) (Law enforcement misleading attorney that defendant was not present at the station when defendant was being interrogated violated substantive due process); *State v. Ferrell*, 463 A.2d 573, 575 (Conn. 1983) (Eavesdropping on telephone call with attorney after feigning privacy violated substantive due process); *State v. Sugar*, 417 A.2d 474, 476 (N.J. 1980)(law enforcement's eavesdropping on suspect conversation with

attorney violated substantive due process). As Justice Stevens has recognized, "[i]n my judgment, police interference in the attorney-client relationship is the type of governmental misconduct on a matter of central importance to the administration to justice that the Due Process Clause prohibits." *Moran v. Burbine*, 475 U.S. 412, 468 (1986) (Stevens, J., dissenting).

The recognition that governmental interference with the attorney-client relationship implicates substantive due process concerns has resulted in an easy to apply legal test to establish such a claim. "A claim for government interference with the attorney-client relationship has three elements: (1) the government was objectively aware of an ongoing, personal attorney-client relationship; (2) the government deliberately intruded into that relationship; and (3) as a result, the defendant suffered actual and substantial prejudice." *Id.* citing *United States v. Voigt*, 89 F.3d 1050, 1067 (3d Cir. 1996); See also *Tyerman v. State*, 2012 WL 4900211 (Iowa App. Unpublished).

Sewell has little difficulty meeting the elements of government interference with the attorney-client relationship and consequently, a substantive due process violation. First, the government, specifically the arresting law enforcement, was objectively aware of an ongoing attorney-client relationship. Sewell informed the officer that he wished to call his attorney. Sup. Tr. 18-19. Sewell specifically provided the name of his attorney as being Lindholm. Sup. Tr. 19. Lindholm,

speaking to Sewell in an attorney-client capacity, instructed Sewell to request privacy to protect the attorney-client relationship. Sup. Tr. 20. There is no doubt that the government was objectively aware of an ongoing attorney-client relationship as they were specifically advised of the same.

Second, the government deliberately intruded upon the attorney-client relationship. The Dickenson County Jail and Sheriff's Office intentionally recorded all conversations between arrestees and their attorneys. Sup. Tr. 19. They were aware that those conversations were recorded and, in fact, set up a system to record, store, and access those recordings upon a request. Sup. Tr. 20. Furthermore, Dickenson County Sheriff's Department had a policy that all calls into and out of the facility by arrested individuals must be conducted on the recorded line despite the availability of an alternative, unrecorded option. Sup. Tr. 23-24. Just as important, Sewell's request to speak to his attorney via his cellular telephone to protect the attorney-client relationship was denied. There is no doubt that the government deliberately intruded on Sewell's attorney-client relationship.

Finally, Sewell suffered actual and substantial prejudice resulting from the governmental interference with his attorney-client relationship. Lindholm explained what information he needed from Sewell to competently advise and counsel him at that moment. Sup. Tr. 24. As a result of the known governmental interference with the attorney-client relationship, Lindholm was unable to ask the

necessary questions or obtain the information he needed to advise Sewell adequately. Sup. Tr. 63. Most importantly, because Lindholm was aware that his conversation with Sewell was being recorded, he could not provide any substantive advise to Sewell without committing malpractice. Sup. Tr. 66. Consequently, Sewell was unable to receive the legal advice he was entitled to receive before deciding on chemical testing.

Given the peculiar nature of the Implied Consent process and the decision facing Sewell at that time, he suffered actual and substantial prejudice due to governmental interference with his attorney-client relationship. As such, Sewell's substantive due process rights to fundamental fairness and his fundamental right of attorney-client privilege were violated by the government's conduct.

III. LAW ENFORCEMENT'S MONITORING AND RECORDING OF AN ARRESTEE'S TELEPHONIC CONSULTATION WITH COUNSEL VIOLATES ARTICLE 1 SECTION 10 OF THE IOWA CONSTITUTION.

Preservation of Error: Error was preserved by Sewell filing his motion to suppress evidence raising this specific issue, receiving an adverse ruling on this issue, proceeding to a trial on the minutes of testimony, being found guilty of the charged offenses, and timely filing notice of appeal.

Standard of Review: Sewell argues that the officer's conduct in refusing the provide a confidential consultation with counsel violated article I, section 10 of

the Iowa Constitution. As such, the standard of review is de novo. *Kurth*, 813 N.W.2d at 272.

Argument: One of the most fundamental rights embodied in the Bill of Rights and the Iowa Constitution is the right to counsel. "Every citizen has learned at an early age that whenever one is in trouble, the first resort should be to contact one's attorney and seek advice." *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). Where the accused is constitutionally entitled to counsel, he is also entitled to effective assistance of counsel. See *In Interest of D.W.*, 385 N.W.2d 570 (Iowa 1986) (individual constitutionally entitled to counsel under the Iowa Constitution is entitled to effective representation of counsel); See also *Strickland v. Washington*, 466 U.S. 668 (1984); *Sallis v. Rhoads*, 325 N.W.2d 121 (Iowa 1982). Effective assistance of counsel cannot occur without at least minimal communication of pertinent facts from the accused to counsel. "If a criminal defendant is to receive the full benefits of the right to counsel, the confidence and privacy of communications with counsel must be assured." *Wemark*, 602 N.W.2d at 816.

Iowan's right to counsel derives from two separate constitutional sources, the Sixth Amendment to the United States Constitution and article I, section 10 of the Iowa Constitution. While past decisions have viewed and interpreted these two

provisions as being "substantially similar" *Doerflein v. Bennett*, 145 N.W.2d 15, 18 (1966), the text of both provisions are indisputably distinct.

The Sixth Amendment states:

> In all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the States and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for *his defence."*

(emphasis added). U.S. Const., VI Amend.

In contrast, article I, section 10 of the Iowa Constitution guarantees:

> In all criminal prosecutions, *and in cases involving the life, or liberty of an individual* the accused shall have a right to a speedy and public trial by an impartial jury; to be informed of the accusations against him, to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and, to *have the assistance of counsel.*

(emphasis added) article I, section 10, Iowa Constitution.

A. The right to counsel attaches under article I, section 10 of the Iowa Constitution at the time the time Implied Consent is invoked.

"The Sixth Amendment right of the 'accused' to assistance of counsel in 'all criminal prosecutions' is limited by its terms: 'it does not attach until a prosecution is commenced.'" *Rothgery v. Gillespie County.*, 554 U.S. 191, 198 (2008); quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). The United States Supreme Court has, "for purposes of the right to counsel, pegged commencement to 'the initiation

of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Rothgery*, 554 U.S. at 198; quoting *United States v. Gouveia*, 467 U.S. 180, 188 (1984). The justification for this limitation is that the Sixth Amendment, by its explicit terms, limits the accused right to "council for his defence" specifically and only to "criminal prosecutions." *Id*. The Court has consequently concluded that the filing of the initial charging documentation is what triggers the "prosecution" under the Sixth Amendment. *Id.*

While certainly worthy of "respectful consideration," the United States Supreme Court's decisions interpreting the Sixth Amendment are not binding on the Iowa Supreme Court's interpretation of the separate and distinctively worded provision of the Iowa Constitution. *State v. Ochoa*, 792 N.W.2d 260, 267 (Iowa 2010). This Court has already recognized that "the 'cases' language of article I, section 10 reflects that the right to counsel can exist even without the filing of formal or informal charges." *State v. Green*, 896 N.W.2d 770, 777 (Iowa 2017); citing *State v. Young*, 863 N.W.2d 249, 279 (Iowa 2015).

The specific issue of whether the right to counsel guaranteed by article I, section 10 of the Iowa Constitution attaches following the invocation of implied consent, was squarely raised in *Senn*. 882 N.W.2d 1, 7 (2016). In *Senn*, the plurality of the Iowa Supreme Court concluded that based upon the specific record

available for appellate review in that case, the right to counsel did not attach under article I, section 10 of the Iowa Constitution. *Id*. at 31. The court was equally divided on the issue of attachment with Justice Cady taking no position on that issue, instead opting to specially concur as to the result only. *Id.* at 32 (Cady, C.J., concurring specially).

Justice Cady concurred in the result "but not because the right to counsel under the Iowa Constitution did not attach at the time the State initiated the implied-consent process." *Id.* Instead, he found that because Senn consulted with an attorney for twenty-eight minutes before deciding on chemical testing, no violation of the right to counsel could be demonstrated. *Id.* Justice Cady concluded: "[w]ithout evidence that effective counsel could not be provided by the type of phone call permitted in this case, I cannot conclude that the constitutional right to counsel would require any more legal assistance than Senn was provided in this case." *Id.*

As both sides in *Senn* recognized, the framers of the Iowa Constitution undoubtedly intended the rights enumerated in section 10 to apply to more than just post-paperwork filing, formal criminal prosecutions. Justice Waterman, writing for the plurality conceded: "There can be 'no doubt from the convention record that the disputed language was added to Art I, section 10 in an effort to nullify the Fugitive Slave Act by giving persons accused as escaped slaves the

right to jury trial in Iowa.'" *Id*. at 15; quoting *In re Johnson*, 257 N.W.2d 47, 54 (Iowa 1977) (McCormick, J., concurring specially). Justices Wiggins and Appel, joined by the Justice Hecht also set forth very thorough and compelling arguments as to why the right to counsel under Article I, section 10 of the Iowa Constitution, must attach following the invocation of Implied Consent.

Whether it be the Fugitive Slave Act or other issues impacting an individual's liberty interest is really of no consequence. The fact of the matter remains that the Iowa Constitution's drafters envisioned situations where article I, section 10 would be applicable short of the formal filing of the charging paperwork with the courts. Indeed, unlike its federal counterpart, the drafters of article I, section 10, specifically omitted the limiting language related to the assistance of counsel merely for "his defense." The framers of the Iowa Constitution intended to expand its applicability based upon the adverse position that the accused would be in if those rights were not guaranteed. *The Debates of the Constitutional Convention of the State of Iowa*, p. 738 (W. Blair Lord rep., 1857). As has been the historical approach of Iowa as it relates to constitutional guarantees and freedoms, the framers of the Iowa Constitution focused on substance over form and "rights over mechanics." *State v. Baldon*, 829 N.W.2d 785, 809-10 (Iowa 2013); citing *The Iowa Constitution: Rights Over Mechanics, in the Constitutionalism of*

American States, p. 479, (George E. Connor & Christopher W. Hammons eds., 2008).

With the instant record now available, and the recognition that the Iowa Constitution must be "construed to have the 'capacity of adaptation to a changing world'", Cady, H. Mark, *A Pioneer's Constitution: How Iowa's Constitutional History Uniquely Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties*, 60 DRAKE L. REV. 1134, 1142 (2012) (citing *Olmstead v. United States*, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting)), there is little justification in holding that the right to counsel does not attach under article I, section 10, at the time Implied Consent is invoked.

We start with the recognition that when Implied Consent is invoked, the arrestee's constitutionally liberty interest in his driving privileges is immediately implicated. *Bell*, 402 U.S. at 539. At that stage, counsel's role is to advise the accused of the various consequences and just as important, gather as much information as possible from the detained individual to render advice on a multitude of things, most importantly of which is to provide their professional opinion as to whether or not the individual should consent or refuse evidentiary breath testing. Sup. Tr. 59-60. To effectively carry out their professional role, an attorney must acquire information regarding the events leading up to their client's arrest, any injuries or deaths that may exacerbate charges, the client's history in the

criminal justice system that may increase their penalties, the client's perception of their current level of intoxication, and other personal information about the client including patterns of drinking, consumption of food, medications, or other illegal substances. Sup. Tr. 56-58.

Free communication is vital to avoid placing an attorney in a position where they must either leave an individual to make the decision on their own or render inadequate guidance due to the shortage of information about the individual's unique situation. Sup. Tr. 60. This is precisely the predicament that Lindholm was placed in on the morning that Sewell contacted him. As Lindholm testified, the importance of the confidential relationship between an attorney and their client is drilled into every law student throughout their legal studies. Sup. Tr. 64. Attorneys are trained to take extreme precautions to shield their communications with their clients and ensure that the client's confidences in their relationship do not cause irreparable harm. Sup. Tr. 64. Allowing a client to divulge potentially incriminating information with knowledge that a third-party is recording or listening to their conversation would not only destroy the privilege that is meant to protect their sacred relationship but also may subject an attorney to adverse legal consequences. Sup. Tr. 64.

Just as important, the specific facts of this case also establish that the Sewell was "the accused" in a criminal prosecution when he sought legal counsel for

advice regarding chemical testing. See *Green*, 896 N.W.2d at 777-78. Unlike in *Green*, Sewell had been handcuffed and informed he was being arrested and charged with operating while intoxicated. Sup. Tr. 14. He was detained, restrained, and transported against his will to the County Jail. Sup. Tr. 14. Sewell was then held within a secure law enforcement facility from which no one had ever escaped. Sup. Tr. 24. All that was left was a decision one way or another regarding chemical testing and the formal filing of paperwork with the courts. There is no factual basis to conclude that the prosecution was dependent upon chemical testing results especially considering that an individual cannot be "un-arrested" on a criminal charge. See *State v. Davis*, 525 N.W.2d 837 (Iowa 1994) (Overruled by *State v. Williams*, 895 N.W.2d 896 (Iowa 2017), as to the definition of "arrest" for purposes of speedy indictment).

As the United States Supreme Court recognized in *Escobedo v. Illionois*, the decision regarding chemical testing places the arrestee in a situation that has the potential to "make the trial no more than an appeal from the interrogation; and the right to counsel at the formal trial would be a very hollow thing if, for all practical purposes, the conviction is already assured by pretrial examination. *** One can imagine a cynical prosecutor saying: 'Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing that counsel can do for them at trial." 378 U.S. 478, 487-88 (1964).

Whether it be under the Sixth Amendment or article 1, section 10 of the Iowa Constitution, it is beyond dispute that the constitutional guarantee to have the assistance of counsel "is designed to provide for the fair administration of our adversarial system of criminal justice by equalizing the imbalance between the government's power and the average defendant's lack of professional legal skill." *State v. Newsom*, 414 N.W.2d 354, 357 (Iowa 1987); citing *Main v. Moulton*, 474 U.S. 159 (1985) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938)). Ensuring an arrestee, faced with a decision that has an immediate impact on a liberty interest, the right to a confidential and protected consultation with an attorney, furthers the purpose of article I, section 10 of the Iowa Constitution.

Other well-reasoning states have concluded that an individual seeking counsel following the invocation of implied consent is constitutionally entitled to an unmonitored and private phone conversation with counsel. Oregon leads the way in this regard. In *State v. Penrod*, the Oregon Court of Appeals noted that "in the context of a driver arrested for DUI, the Supreme Court had held that the Oregon right to counsel clause…entitles the arrestee to a reasonable opportunity to obtain legal advice before deciding whether to submit to a breath test….[and] the confidentiality is inherent in the right to consult with counsel; to hold otherwise would effectively render the right meaningless." *State v. Penrod*, 892 P.2d 729, 731 (Or. Ct. App. 1995). While acknowledging that "valid security concerns may

justify according less than absolute privacy to an arrestee who is seeking legal advice regarding a breath test," the court further explained that "it is not necessarily enough for the state to show that "some" limitation on a defendant's right to a private consultation with counsel was necessary, rather, it must justify the extent to which that right was limited…. confidentiality is inherent in the right to consult with counsel." *Id.* at 729.

Oregon further enunciated the right to a private phone consultation in *State v. Riddle*, 941 P.2d 1079, 1082 (Or. Ct. App. 1997). Just as in this case, the defendant's phone conversation with her attorney was automatically recorded at the police station, and she argued that "regardless of whether anyone listened to the tape, the act of recording her conversation denied her the ability to confidentially communicate with counsel." *Id*. The Oregon Court of Appeals agreed:

> The State, in the case, has committed serious infringement on defendant's right to a private consultation: tape recording the conversation between defendant and her attorney. As we stated in *Penrod*, "confidentiality is inherent in the right to consult with counsel" and we cannot condone such an intrusion without justification….Defendant is entitled to a reasonable opportunity to consult privately with her attorney, and the chilling effect of tape recording the communication occurs at the time of the conversation. The violation cannot be cured later simply because no one listened to the tape….because defendant was denied a reasonable opportunity to consult privately with her attorney we conclude that the trial court properly suppressed the Intoxilyzer results; "to hold otherwise would effectively render the right meaningless."

Id. at 1083; quoting *Penrod*, 892 P.2d at 729.

Other states have also reached the same conclusion, specifically as to operating while intoxicated cases. See *State v. Fitzsimmons*, 610 P.2d 893, 895 (Wash. 1980); see also *State v. Holland*, 711 P.2d 592 (Ariz. 1985). Others, while not specific to operating while intoxicated investigations, have as a matter of state constitutional interpretation, abandoned the federal requirement that the right to counsel only attach upon the filing of the formal paperwork. *Commonwealth v. Richman*, 320 A.2d 351, 352 (Pa. 1976), (neither a "committed to prosecution" nor the "balancing test" of *Kirby* justified a distinction between the right to counsel for arrests with warrants and warrantless arrests.); *State v. Lathan*, 282 N.E.2d 574, 576 (Ohio 1972) (in the context of lineups, "the fact that this confrontation occurred prior to indictment in no way lessens the fact that the results might well determine his fate, and that 'counsel's absence might derogate from the accused's right to a fair trial.'"); *State v. Thomas*, 406 So.2d 1325, 1328 (La. 1981) (under the Louisiana Constitution, a defendant has the right to procure and confer with counsel "from the moment of arrest"); *People v. Kurylczyk*, 505 N.W.2d 528, 532 (Mich. 1993) ("Where there is a legitimate reason to use photographs for identification of an in-custody accused, he has the right to counsel as much as he would for corporeal identification procedures."); *United States v. Wilson*, 719 F.Supp.2d 1260, 1266–68 (D. Or. 2010) (right to counsel attached during pre-indictment plea negotiations).

The plain, expansive language, as well as the history and purpose of the constitutional right to counsel under article I, section 10 of the Iowa Constitution compel the conclusion that when a person's liberty interest is placed in jeopardy by the invocation of implied consent proceedings, the right to counsel must attach. Any countervailing interest that the State may have against its attachment would only attend the need to protect the statutory two-hour presumption, just as is the case with an individual exercising his rights under Iowa Code § 804.20. See *Vietor*, 261 N.W.2d at 828. The time-sensitive limitations previously articulated by this court *Vietor*, would sufficiently protect the State's interests while ensuring an arrestee a sufficient opportunity to meaningfully exercise his constitutional right to counsel. *Id.* at 832 (arrestees right to consultation with an attorney is limited to circumstances when that course will not materially interfere with the taking of the time within the statutorily specified time). Such a limited right to counsel for implied consent proceedings is most consistent with the rights of the accused to be protected from prejudicial procedures. As such, it is that which is most consistent with the principles elicited by the Iowa Constitution.

B. An arrestee may invoke the constitutional right to counsel under article I, section 10, prior to formal charging paperwork being filed with the courts.

Even if the constitutional right to counsel may not have attached under article I, section 10 of the Iowa Constitution at the time Implied Consent was

invoked; an arrestee may still invoke that right before formal charging paperwork being filed in the courts. Under the Sixth Amendment to the United States Constitution, a criminal investigation target has the constitutional right to counsel of his choosing. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006); see also *State v. Vanover*, 559 N.W.2d 618, 626 (Iowa 1997) ("The accused has a presumptive right to counsel of choice."). The Sixth Amendment right to counsel of one's choice has been "regarded as the root meaning of the constitutional guarantee." *Gonzalez-Lopez*, 548 U.S. at 147-48. So much, so that "[w]here the right to be assisted by counsel of one's choice is wrongly denied, therefore, it is unnecessary to conduct an ineffectiveness or prejudice inquiry to establish a Sixth Amendment violation." *Id*. "Deprivation of the right is complete when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received." *Id.* at 148. "To argue otherwise is to confuse the right to counsel of choice – which is the right to a particular lawyer regardless of comparative effectiveness – with the right to effective counsel – which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed." *Id.*

What was not raised, argued, or resolved in *Senn*, was whether or not an individual arrested, but whose formal charging paperwork had not yet been filed or processed in the courts, could ***invoke*** his right to counsel to guarantee the

protections of the attorney-client privilege for those conversations. Under the Sixth Amendment, and consequently, article I, section 10 of the Iowa Constitution, an individual arrested, detained, or restrained of his/her liberty, but not yet formally charged with a criminal offense may invoke his/her right to counsel. *Escobedo*, 378 U.S. at 478. This invocation requires an "unambiguous" request on the part of the suspect. *Davis v. United States*, 512 U.S. 452, 459 (1994); *State v. Effler*, 769 N.W.2d 880 (Iowa 2009).

In *Miranda v. Arizona*, the Court took *Escobedo* a step further explaining "there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." 384 U.S. at 467. The Court then explained, "the right to have counsel present in the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today." *Id* at 469. "Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today." *Id.* at 471. "If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request…" *Id.* at 472.

Once a suspect's right to counsel is invoked, it must be respected by law enforcement. *Edwards v. Arizona*, 451 U.S. 477, 483 (1981). This is one of the few bright-line rules in the criminal procedure arena. *Id.* at 484-85. While the government is not required to appoint counsel at that point in time, their investigatory efforts arising out of decisions requested to be made of the suspect must cease unless counsel is provided. *Id.* see also *State v. Lowe*, 812 N.W.2d 554, 580 (Iowa 2012) ("Once a suspect requests an attorney, all interrogation must cease.")

Even before the United States Supreme Court announced the rules in *Escobedo* and *Miranda*, the Iowa Supreme Court recognized a pre-indictment suspects constitutional right to the assistance of counsel during any questioning by law enforcement. According to the Iowa Supreme Court, those rights derived from the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and importantly, also pursuant to article I, sections 9 and 10 of the Constitution of the State of Iowa. *State v. Fox*, 131 N.W.2d 684, 686 (Iowa 1964). "That one accused of crime may refuse to answer questions and that he is *entitled to the aid of counsel* is so firmly ingrained in our law as to be axiomatic." (emphasis added) *State v. Stump*, 119 N.W.2d 210, 216 (Iowa 1963). The Iowa constitutional source of those rights was identified as article I, section 9 and section 10. *Id.*

In *State v. Kyseth*, the Iowa Supreme Court concluded that the defendant's Sixth Amendment rights were violated when the prosecution elicited testimony from a detective regarding the defendant's invocation of his right to counsel. 240 N.W.2d 671, 673 (Iowa 1976). The defendant was lying in a hospital bed following a traffic accident, had not been formally arrested and most certainly had yet to have the state formally commit to his prosecution through the formal filing of the charging paperwork. *Id*. at 672. The Iowa Supreme Court did not even discuss an issue of attachment, instead concluding that the defendant's Sixth Amendment rights were violated by the prosecution's use of his invocation of counsel against him at trial. *Id*. at 674.

In the instant case, Sewell clearly and unambiguously invoked his right to counsel. As such, law enforcement was required to respect that invocation. When communication with counsel was permitted, it was required to honor the confidentiality and privilege that attaches to the attorney-client relationship. Law enforcement's refusal to honor Sewell's request for the attorney-client privilege to be respected, precluded his effective representation by counsel of his choice and therefore violated article I, section 10 of the Iowa Constitution.

IV. DISMISSAL IS THE ONLY APPRORIATE REMEDY TO VINDICATE THE BLATANT VIOLATION OF SEWELL'S RIGHT TO PRIVILEGED CONSULTATION WITH COUNSEL.

Preservation of Error: Error was preserved by Sewell filing his motion to dismiss the prosecution, receiving an adverse ruling on this issue, proceeding to a trial on the minutes of testimony, being found guilty of the charged offenses, and timely filing notice of appeal.

Standard of Review: Generally, the question of whether dismissal of a prosecution is "in the furtherance of justice" is reviewed for an abuse of discretion, however, to the extent that the court reviews constitutional claims within a motion to dismiss the court's review is de novo. *State v. Taeger*, 781 N.W.2d 560, 564 (Iowa 2010).

Argument: The violation of Sewell's right to privileged telephonic consultation with counsel being established, the next step in the analysis is determining the appropriate remedy. The court is authorized to exercise its discretion "to implement a remedy for violation of recognized rights … to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury … and finally, as a remedy designed to deter illegal conduct." *United States v. Hasting*, 461 U.S. 499, 505 (1983). Iowa has recognized that the court's remedy for a constitutional violation should encompass three distinct considerations. First, the need for the remedy to deter future

misconduct. *State v. Cline*, 617 N.W.2d 277, 289 (Iowa 200). Second, the extent to which the remedy adequately restores the rights and positions possessed by the individual before the deprivation of the constitutional right. *State v. Sheridan*, 96 N.W. 730, 731 (1903); citing *State v. Height*, 91 N.W. 935, 940 (1902). Third, the extent to which the remedy adequately serves to protect the integrity of the courts. *Cline*, 617 N.W.2d at 289.

As it pertains specifically to a right to counsel, court's addressing similar factual scenarios have concluded, "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *State v. Cory*, 382 P.2d 1019, 1022 (Wash. 1963) (cited with approval in *State v. Coburn*, 315 N.W.2d 742, 748 (Iowa 1982)); quoting *Glasser v. United States*, 315 U.S. 60, 76 (1942); see also *Barber v. Municipal Court*, 598 P.2d 818 (Cal. 1979) (FBI agents posing as co-defendants sitting in on joint defense strategy sessions mandated dismissal). This is because Government conduct which is "so outrageous and shocking that it exceeds the bounds of fundamental fairness" *United States v. Johnson*, 767 F.2d 1259, 1275 (8th Cir. 1985), may violate the Due Process clause and bar a subsequent prosecution." *United States v. Hunt*, 171 F.3d 1192, 1195 (8th Cir. 1999).

The Arizona Supreme Court faced with a less egregious violation where the arresting officer simply refused to move out of "ear-shot" of the defendant during a consultation with counsel concluded that the only appropriate remedy was an outright dismissal of the operating while intoxicated offense. The Court explained: "Because we value the right to counsel so highly, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), when the right to counsel is violated, then the conviction obtained as a direct result must be set aside." *Holland*, 711 P.2d at 595. The court explained: "This is the rule because it is impossible to foresee what advice would have been given defendant had he been able to confer privately with counsel… denial of his right to counsel affected the ability of defendant to prepare his defense … therefore, we agree with the trial court and the majority of the court of appeals that suppression of the breath test alone is an inadequate remedy and dismissal of both charges is required." *Id.*

Iowa should follow suit making a very clear statement that intentional governmental interference with the bedrock of our legal system will not and cannot be tolerated. Misconduct that is left ineffectively remedied will continue. Rebukes have little effect but consequences change behavior. To not dismiss the charges would be to sanction the egregious and outrageous government conduct and cause the court to be complicit in a systematic violation of defendant's constitutional rights. As the *Cory* court concluded: "It is our conclusion that the defendant is

correct when he says that the shocking and unpardonable conduct of the sheriff's officers, in eavesdropping upon the private consultations between the defendant and his attorney, and thus depriving him of its right to effective counsel, vitiates the whole proceeding. The judgment and sentence must be set aside, and the charges dismissed." *Cory*, 382 P.2d at 1022.

CONCLUSION

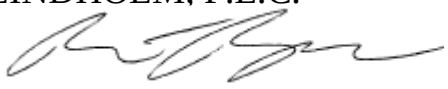
For the reasons set forth above, Appellant respectfully requests that this court reverse the district associate court's decision denying his motion to suppress evidence and dismiss and remand the case for entry of a dismissal.

REQUEST FOR ORAL ARGUMENT

Request is hereby made that upon submission of this case, counsel for Appellant requests to be heard in oral argument.

Respectfully Submitted,

GOURLEY, REHKEMPER &
LINDHOLM, P.L.C.



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Robert G. Rehkemper — November 16, 2020 Date

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