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 IOWA DISTRICT COURT
FOR DICKINSON COUNTY
THE HON. DAVID C. LARSON, JUDGE

# APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

**LOUIS S. SLOVEN**
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov

AMY E. ZENOR
Dickenson County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Federal Cases



### State Cases

**Federal Statutes**



**State Statutes**



**State Rule**



**Other Authorities**

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

**I. Did the trial court err in rejecting Sewell's claim that section 804.20 entitles him to a confidential phone call with an attorney before deciding how to respond to a request for a chemical test under implied consent?**

Authorities

*Brewer-Strong v. HNI Corp.*, 913 N.W.2d 235 (Iowa 2018)
*Haun v. Crystal*, 462 N.W.2d 304 (Iowa Ct. App. 1990)
*Lamasters v. State*, 821 N.W.2d 856 (Iowa 2012)
*Staff Mgmt. v. Jimenez*, 839 N.W.2d 640 (Iowa 2013)
*State v. Craney*, 347 N.W.2d 668 (Iowa 1984)
*State v. Doe*, 927 N.W.2d 656 (Iowa 2019)
*State v. Fox*, 493 N.W.2d 829 (Iowa 1992)
*State v. Heffron*, No. 02–1827, 2003 WL 21543823 (Iowa Ct. App. July 10, 2003)
*State v. Hellstern*, 856 N.W.2d 355 (Iowa 2014)
*State v. Iowa Dist. Ct. for Jones County*, 902 N.W.2d 811 (Iowa 2017)
*State v. Pettengill*, No. 08–1735, 2009 WL 3086586 (Iowa Ct. App. Sept. 17, 2009)
*State v. Senn*, 882 N.W.2d 1 (Iowa 2016)
*State v. Vietor*, 261 N.W.2d 828 (Iowa 1978)
*State v. Walker*, 804 N.W.2d 284 (Iowa 2011)
18 U.S.C. § 2510(4)
18 U.S.C. § 2510(5)(a)(ii)
18 U.S.C. § 2511(1)
18 U.S.C. §§ 2510-20
Iowa Code § 4.7
Iowa Code § 727.8(3)(a)
Iowa Code § 804.20
Iowa Code § 808B.1(5)(a)(2)
Iowa Code § 808B.1(6)
Iowa Code § 808B.2(1)

## II. Did the trial court err in rejecting Sewell's claim that declining to provide a confidential phone call to an OWI arrestee is a violation of a right to counsel under Article I, Section 10 of the Iowa Constitution?

Authorities

*Escobedo v. Illinois*, 378 U.S. 478 (1964)
*Schmerber v. California*, 384 U.S. 757 (1966)
*South Dakota v. Neville*, 459 U.S. 553 (1983)
*Atwood v. Vilsack*, 725 N.W.2d 641 (Iowa 2006)
*Commonwealth v. Arroyo*, 723 A.2d 162 (Pa. 1999)
*Commonwealth v. Richman*, 320 A.2d 351 (Pa. 1976)
*Forte v. State*, 759 S.W.2d 128 (Tex. Ct. Crim. App. 1988)
*Gottschalk v. Sueppel*, 140 N.W.2d 866 (Iowa 1966)
*In re Johnson*, 257 N.W.2d 47 (Iowa 1977)
*Lamasters v. State*, 821 N.W.2d 856 (Iowa 2012)
*McCambridge v. State*, 778 S.W.2d 70 (Tex. Ct. Crim. App. 1989)
*Mogard v. City of Laramie*, 32 P.3d 313 (Wyo. 2001)
*Ruiz v. State*, 912 N.W.2d 435 (Iowa 2018)
*State v. Coffman*, 914 N.W.2d 240 (Iowa 2018)
*State v. Epperson*, 264 N.W.2d 753 (Iowa 1978)
*State v. Green*, 896 N.W.2d 770 (Iowa 2017)
*State v. Penn-Kennedy*, 862 N.W.2d 384 (Iowa 2015)
*State v. Penrod*, 892 P.2d 729 (Or. Ct. App. 1995)
*State v. Riddle*, 941 P.2d 1079 (Or. Ct. App. 1997)
*State v. Senn*, 882 N.W.2d 1 (Iowa 2016)
*State v. Short*, 851 N.W.2d 474 (Iowa 2014)
*State v. Spencer*, 750 P.2d 147 (Or. 1988)
*State v. Stroud*, 314 N.W.2d 437 (Iowa 1982)
*State v. Stump*, 119 N.W.2d 210 (Iowa 1963)
*State v. Vietor*, 261 N.W.2d 828 (Iowa 1978)
*State v. Williams*, 895 N.W.2d 856 (Iowa 2017)
*State v. Young*, 863 N.W.2d 249 (Iowa 2015)
*Swenumson v. Iowa Dept. of Public Safety*, 210 N.W.2d 660 (Iowa 1973)
IOWA CONST. ART. I, § 10
THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 736–37 (W. Blair Lord rep., 1857)

**III. Did the trial court err in rejecting Sewell's claim that declining to provide a confidential phone call to an OWI arrestee is a violation of his due process rights under Article I, Section 9 of the Iowa Constitution?**

Authorities

*Rochin v. Califonia*, 342 U.S. 165 (1952)
*United States v. Voigt*, 89 F.3d 1050 (3d Cir. 1996)
*Lamasters v. State*, 821 N.W.2d 856 (Iowa 2012)
*Behm v. City of Cedar Rapids*, 922 N.W.2d 524 (Iowa 2019)
*State v. Bruegger*, 773 N.W.2d 862 (Iowa 2009)
*State v. Coffman*, 914 N.W.2d 240 (Iowa 2018)
*State v. Craney*, 347 N.W.2d 668 (Iowa 1984)
*State v. Flaucher*, 223 N.W.2d 239 (Iowa 1974)
*State v. Oliver*, 812 N.W.2d 636 (Iowa 2012)
*State v. Young*, 863 N.W.2d 249 (Iowa 2015)
*Tyerman v. State*, No. 11–1694, 2012 WL 4900211 (Iowa Ct. App. Oct. 17, 2012)
Iowa Code § 804.20
Iowa R. Crim. P. 2.14(6)(a)

## IV. If any of Sewell's rights were violated, would dismissal be required? Or would it be harmless error, because the trial court found that the evidence had established Sewell's intoxication, beyond a reasonable doubt, on two independently sufficient alternative theories—and one of them involved the chemical breath test result?

Authorities

*Barber v. Municipal Court*, 598 P.2d 818 (Cal. 1979)
*Lamasters v. State*, 821 N.W.2d 856 (Iowa 2012)
*Litteral v. Commonwealth*, 282 S.W.3d 331 (Ky. Ct. App. 2008)
*State v. Breuer*, No. 03–0422, 2004 WL 2386824 (Iowa Ct. App. Oct. 27, 2004)
*State v. Coffman*, 914 N.W.2d 240 (Iowa 2018)
*State v. Cory*, 382 P.2d 1019 (Wash. 1963)
*State v. Deimerly*, No. 15–1304, 2016 WL 3275828 (Iowa Ct. App. June 15, 2016)
*State v. Everett*, 372 N.W.2d 235 (Iowa 1985)
*State v. Garrity*, 765 N.W.2d 592 (Iowa 2009)
*State v. Gobush*, No. 10–0321, 2011 WL 1136441 (Iowa Ct. App. Mar. 30, 2011)
*State v. Hellstern*, 856 N.W.2d 355 (Iowa 2014)
*State v. Holland*, 711 P.2d 592 (Ariz. 1985)
*State v. Pettijohn*, 899 N.W.2d 1 (Iowa 2017)
*State v. Poster*, No. 18–0217, 2019 WL 319846 (Iowa Ct. App. Jan. 23, 2019)
*State v. Sayre*, 566 N.W.2d 193 (Iowa 1997)
*State v. Ubben*, No. 18–0915, 2019 WL 3317866 (Iowa Ct. App. July 24, 2019)
*State v. Walker*, 804 N.W.2d 284 (Iowa 2011)
*State v. Young*, 863 N.W.2d 249 (Iowa 2015)

## ROUTING STATEMENT

Sewell requests retention. *See* Def's Br. at 22. But these are not issues of first impression. *See generally State v. Senn*, 882 N.W.2d 1 (Iowa 2016); *State v. Hellstern*, 856 N.W.2d 355 (Iowa 2014). There was a lingering constitutional issue, because of the 3-1-3 split in *Senn*; but that issue was subsequently resolved. *See State v. Green*, 896 N.W.2d 770, 776–79 (Iowa 2017) (holding that nothing in Article I, Section 10 "extends the right to counsel to an interview conducted just prior to the filing of a complaint and the issuance of an arrest warrant," because "[t]he adversarial process that gives rise to the right to counsel includes the accusatory stage, but excludes the investigatory stage"); *accord Ruiz v. State*, 912 N.W.2d 435, 439–41 (Iowa 2018). All of the challenges raised in Sewell's appeal can be resolved by applying those now-settled legal principles, so transfer to the Iowa Court of Appeals would be appropriate. *See* Iowa R. App. P. 6.1101(3)(a).

## STATEMENT OF THE CASE

### Nature of the Case

This is Matthew Robert Sewell's direct appeal from his conviction for OWI (first offense), a serious misdemeanor, in violation of Iowa Code section 321J.2 (2019). *See* Sentencing Order (3/5/20); App. 65.

Sewell moved to suppress evidence of his breath test result, alleging that his rights were violated when the arresting officer denied his request for a *confidential* phone conversation with an attorney. *See* MTS (4/10/19); App. 33. He also moved to dismiss the entire prosecution, for the same reason. *See* MTD (4/10/19); App. 29. The State resisted. After a hearing, the district court denied both motions. *See* Ruling (11/15/19); App. 40. Subsequently, Sewell stipulated to a trial on the minutes of testimony. The trial court found Sewell guilty on two alternative theories: "both being under the influence of alcohol and having an alcohol concentration of .08 or more." *See* Written Verdict (2/11/20) at 1–3; App. 61–63.

In this appeal, Sewell challenges the rejection of three claims from his motion to suppress, each alleging that police violated his rights by not allowing him to place a confidential phone call to an attorney before he made his implied-consent decision. Each claim alleges that this violated a different right: **(1)** a statutory right under section 804.20; **(2)** a right to counsel under Article I, Section 10; and **(3)** a substantive due process right under Article I, Section 9. Sewell's fourth and final claim demands outright dismissal of the prosecution, as a remedy for an "outrageous and shocking" due process violation.

**Statement of Facts**

Because this was a stipulated trial on the minutes of testimony, this Court may consider information from those minutes because they comprise the record at trial, and the record at trial may be considered in reviewing a ruling on the motion to suppress. *See State v. Andrews*, 705 N.W.2d 493, 496 (Iowa 2005).

At about 2:49 a.m. on January 15, 2019, dispatch received a call from a local resident, about "someone passed out in a truck in their driveway." *See* Minutes Att. (2/4/19) at 2; App. 8. Dickinson County Sheriff's Deputy Matt Grimmus arrived at about 3:00 a.m. and discovered "a silver Ford F-150 in the driveway with its lights on and running"—and there was "a male in the driver's seat sleeping."

> I knocked on the window several times to get the male's attention. He looked at me once and then closed his eyes. I knocked again on the window and the male looked at me and flipped me off.

*See id.*; App. 8. That driver was Sewell. Deputy Grimmus opened the door and asked Sewell if he was okay. Sewell said he was. Deputy Grimmus asked Sewell if he had identification. Sewell said that he did not. Deputy Grimmus asked if Sewell knew where he was. Sewell replied: "right here in Iowa." *See id.*; App. 8. Then, when Deputy Grimmus asked again if Sewell had a driver's license on him, Sewell

got out of the truck to reach into his pocket. Sewell pulled a money clip out of his pocket and put it on the rail of his truck bed (along with some eye drops). Deputy Grimmus asked Sewell if his driver's license was in that money clip, and Sewell said that it was. *See id.*; App. 8.

Deputy Grimmus noticed that Sewell's eyes were "very watery and bloodshot," and he could smell "a strong odor of an alcoholic beverage coming from Sewell." *See id.*; App. 8. Deputy Grimmus asked Sewell if he had been drinking, and Sewell answered "yes." *See id.*; App. 8. When Deputy Grimmus asked Sewell whether he knew what street he was on, "he did not know and began to look around confused." *See id.*; App. 8. Sewell also struggled to remember his own address, and initially answered that question with just: "Iowa." *See id.*; App. 8. Deputy Grimmus noticed that Sewell's speech was "very slurred." *See id.*; App. 8.

Deputy Grimmus administered field sobriety tests. Sewell failed all of them, with almost every conceivable clue and noticeable failure to remember and follow the instructions. *See id.* at 2–3; App. 8–9. When Deputy Grimmus requested a preliminary breath test, Sewell refused (but he did make another attempt at balancing on one foot). *See id.* at 3; App. 9. Deputy Grimmus placed Sewell under arrest for

OWI, and transported him to the Dickinson County Jail, after retrieving Sewell's keys, money clip, and cell phone from the truck and giving them to Sewell, at his request. *See id.*; App. 9.

Upon arriving at the Dickinson County Jail, Deputy Grimmus removed Sewell's handcuffs and guided Sewell to have a seat in a room with a DataMaster breath test machine. *See id.*; App. 9. Deputy Grimmus read Sewell the text of the implied consent advisory, and he requested a chemical breath test sample. *See id.*; App. 9. That request was made at about 3:53 a.m.

Deputy Grimmus asked Sewell "if he would like to contact an attorney or family member for advice." *See id.*; App. 9. Sewell made several calls, which were the focus of testimony at the hearing on the motion to suppress. At about 4:55 a.m., Sewell consented to the chemical breath test. That test showed his BAC was .206. *See id.*; App. 9. Sewell was subsequently booked into the county jail and charged with OWI (first offense). *See id.*; App. 9.

At the hearing on the motion to suppress, Deputy Grimmus testified about what happened after he asked Sewell if he would like to make phone calls before making his implied-consent decision. *See* MTS Tr. 8:25–9:19. Sewell said he wanted to make a phone call, so

Deputy Grimmus walked Sewell over to the "jail phone," which is a landline phone. Sewell used his cell phone to retrieve phone numbers, and then made some calls from the landline phone to get the number for a specific attorney: Matt Lindholm. *See* MTS Tr. 18:25–19:20. Then, Sewell called Lindholm, from that same landline phone. When Lindholm returned that call, it was routed to that landline phone for Sewell to receive it. *See* MTS Tr. 19:13–23. Deputy Grimmus stayed in the room with Sewell, as Sewell made those phone calls.

At some point during his phone call with Lindholm, Sewell asked Deputy Grimmus "if he could have a private conversation" with Lindholm "on his cell phone," instead of using the landline. *See* MTS Tr. 9:20–11:10. Deputy Grimmus denied that request; it was their standard policy that arrestees could not make calls from cell phones and needed to use the landline. *See* MTS Tr. 10:4–19. But he did tell Sewell that "he could have a private meeting in the jail," if an attorney arrived to speak with him. *See* MTS Tr. 11:7–16. If Sewell needed the name and phone number for a local attorney, a list was available. *See* MTS Tr. 10:25–11:6. But Sewell did not want that—he said that he "still just wanted a private phone call." *See* MTS Tr. 11:11–12:9.

All calls on that jail landline phone are recorded, and those recordings are saved and preserved by a law enforcement agency. *See* MTS Tr. 19:21–20:6; *accord* MTS Tr. 32:24–33:1; MTS Tr. 36:17–38:15; MTS Tr. 43:25–45:20. Sewell relayed Lindholm's inquiry about that, and then relayed Lindholm's request that they be permitted to speak on a non-recorded line. Deputy Grimmus denied that request. *See* MTS. 19:21–22:6. Sewell told Deputy Grimmus that Lindholm said he was not in the vicinity of Dickinson County and "there was no way he could get there in time." *See* MTS Tr. 22:7–18. When Sewell ended his call with Lindholm, Sewell informed Deputy Grimmus that Lindholm had told him that Lindholm "could not help him because there was no attorney-client privilege." *See* MTS Tr. 24:12–19.

Lindholm testified that he specializes in OWI defense, and that he often helps potential clients who call him "seeking advice about whether or not they should consent or refuse" when an officer has requested a chemical test under implied consent. *See* MTS Tr. 53:21–56:10. Lindholm said that, during those calls, he is "ultimately trying to gather as much information [as he] can about their given situation to render them advice on a multitude of things, but most importantly whether or not they should consent to or refuse the breath test." *See*

MTS Tr. 59:21–60:6. Lindholm described the information he would ask for, in deciding how to advise those OWI arrestees:

> [I]t depends on the situation. Generally I try to figure out what the charge is. I try to figure out if they believe there's been any injuries. I would want to know if the person has any prior OWIs or license suspensions due to, you know, operating while intoxicated. I would want to know what they recall about how the investigation has proceeded, including whether or not they recall submitting to field sobriety tests, how they thought they did on those, if they submitted to a preliminary breath test, what that result was. I would want to know patterns of drinking, including how much they drank, when the last time was they had something to drink, the quantity that they had to drink, food intake.
>
> [. . .]
>
> I want to know if there's anything that could be affecting their performance on the field sobriety tests. And I often want to inquire about illegal substances because there's situations where somebody will submit to a breath test, pass it, and then ultimately be asked to do some other type of chemical testing for illegal substances. And I want to know, you know, essentially how this arrest affects them in terms of the driver's license suspensions and/or a conviction. A lot of people have one or more that is — or one of those that is more important to them than the other.

*See* MTS Tr. 56:20–58:25. Lindholm stated that he "oftentimes" will ask "whether they think they can pass the test or to rate themselves" in terms of their level of sobriety or intoxication. *See* MTS Tr. 59:1–4. Lindholm said, without complete information, he would potentially "render bad advice." *See* MTS Tr. 60:7–19.

Lindholm testified that he "didn't get to" receive information from Sewell that he would need to offer advice, because calls on that landline were being recorded. After Sewell asked Deputy Grimmus if these calls were recorded (at Lindholm's request) and passed along the answer, Lindholm asked Sewell to request to call him back on his cell phone. *See* MTS Tr. 62:17–63:8. When asked why he was unable to gather information or give advice on a recorded line, Lindholm said:

> No. 1 is the Supreme Court has said that the attorney-client privilege can be destroyed when there is a third person or third party, so to speak, that is in a position to intercept or overhear that conversation. Second of all, is there's case law that says that anything Mr. Sewell says on the phone that is recorded and/or overheard can be used against him to incriminate him. Those — those are the primary concerns that I had is I didn't want to ask him that information I needed in order to render him the advice he was seeking and at the same time risk incriminating him.

*See* MTS Tr. 63:9–64:22. Lindholm went so far as to say he "would be potentially committing malpractice" if he had tried to advise Sewell, "knowing that the recording was there and asking him questions that [Lindholm] knew could likely incriminate him." *See* MTS Tr. 66:10–17.

Lindholm testified that, when advising arrestees who were calling on non-recorded phone lines, he could give advice over the phone by asking questions and instructing the caller to only respond with "yes" or "no" answers. But even then, "[t]here still are concerns":

> [M]y experience has been, doing a lot of these cases and watching a lot of these videos from recordings at the jail, that the phone systems, a lot of them, are loud. And the recording inside the jail oftentimes captures what the other line is — or the person on the other end of the line is saying even if that's not a recorded phone line. And so obviously there's concerns about an officer sitting close by and being able to overhear the questions that I'm asking.

*See* MTS Tr. 64:23–66:4. But Lindholm said he was aware of the text of section 804.20, requiring that calls "shall be made in the presence of the person having custody of the one arrested or restrained." *See* MTS Tr. 67:3–9; Iowa Code § 804.20.

Lindholm stated that he received Sewell's voicemail while he was at "a small family cabin right outside of Boone," which was too far away from the Dickinson County Jail for Lindholm to be able to drive there and have a confidential conversation with Sewell within the two-hour window for chemical testing. *See* MTS Tr. 61:14–62:3. Lindholm said that, when he told Sewell that he was "not comfortable" advising him, he also told Sewell that he "may want to see if there is somebody that can make it within the time constraints" to have a confidential meeting with him, at the jail. *See* MTS Tr. 67:21–68:10. But he said he did not specifically advise Sewell to do that, because "it's his choice as to who he wants as counsel." *See* MTS Tr. 68:4–18.

The district court rejected all of Sewell's challenges. It noted that section 804.20 "specifically states that if a call is made, it shall be made in the presence of the person having custody of the one arrested or restrained," which means that it "does not provide for a private and confidential telephone call." *See* Ruling (11/15/19) at 4–5; App. 43–44. Because section 804.20 affirmatively requires the officer's presence during the phone call, that "eliminates the attorney-client privilege." *See id.* at 5; App. 44 (quoting *State v. Craney*, 347 N.W.2d 668, 679 (Iowa 1984)). Thus, it held that Sewell could not establish a violation of any statutory right under section 804.20. *See id.* at 5–6; App. 44–45.

On Sewell's claim that this violated his right to counsel under Article I, Section 10, the district court noted that the plurality opinion in *State v. Senn* "concluded that the right to counsel does not attach until formal charges have been filed by the State in court." *See id.* at 10; App. 49 (citing *Senn*, 882 N.W.2d at 31). It adopted that analysis, which foreclosed Sewell's challenge.

Sewell also alleged that this violated his due process rights under Article I, Section 9, on the grounds that "he was forced to seek legal counsel in a manner and way that was not confidential and could have subjected himself to making incriminating statements."

*See id.* at 11; App. 50; Amended MTS (8/14/19) at 1–2; App. 37–38. The court found that Sewell "was told that he could meet with an attorney in private at the jail and under those circumstances, there would be no Fifth Amendment violation"—but Sewell "chose not to avail himself of that opportunity." *See* Ruling (11/15/19) at 11; App. 50. There was no self-incrimination because Sewell did not make any incriminating statements, and there was no due process violation because Sewell was given an opportunity to arrange for a private and confidential consultation with any attorney who came to see him—but Sewell made the choice to pass on that opportunity. *See id*; App. 50.

Finally, on Sewell's multi-part motion to dismiss for violating his substantive due process rights by fundamentally unfair conduct, the district court reiterated that section 804.20 requires an officer to be present during an arrestee's phone calls, and the officer's presence meant "there was no attorney-client privilege to violate." *See id.* at 12; App. 51. It also noted "no actual or substantive prejudice resulted from Deputy Grimmus being present and recording the telephone call since Sewell was offered the alternative of a private and confidential conference with an attorney at the jail." *See id.* at 13; App. 52.

Additional facts will be discussed when relevant.

## ARGUMENT

### I. Sewell cannot show any violation of section 804.20.

#### Preservation of Error

Sewell raised this challenge in his motion to suppress, and the district court rejected it. *See* MTS (4/10/19) at 2; App. 34; Ruling (11/15/19) at 4–6; App. 43–45. That ruling preserved error. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

#### Standard of Review

A ruling that interprets the requirements of section 804.20 is reviewed for errors at law. *See Hellstern*, 856 N.W.2d at 360 (quoting *State v. Walker*, 804 N.W.2d 284, 289 (Iowa 2011)).

#### Merits

Section 804.20 provides "a limited statutory right to counsel before making the important decision to take or refuse the chemical test under implied consent procedures." *See id.* at 361 (quoting *State v. Vietor*, 261 N.W.2d 828, 831 (Iowa 1978)). But "the telephone calls which section 804.20 assures to persons in custody are not intended to be confidential as is shown by the provision that they are to be made in the presence of the custodian." *See id.* (quoting *Walker*, 804 N.W.2d at 291 (quoting *Craney*, 347 N.W.2d at 678–79)). Sewell's challenge is already foreclosed by *Craney* and *Hellstern*.

In *Craney*, the Iowa Supreme Court rejected a similar argument:

> Shortly after his arrest defendant desired to consult with Attorney Ristvedt, and Ristvedt's office was contacted. When defendant was being booked, Ristvedt called back and talked with defendant, who was in the presence of Officer David Kuhn. . . .
>
> At trial, and over defendant's objection asserting the attorney-client privilege, Kuhn testified to defendant's quoted statement on the telephone. Defendant contends that the trial court erred in admitting this testimony.
>
> [. . .]
>
> . . . [T]he court did not err in admitting the evidence. Defendant made the statement in the presence of a third person, the officer, which eliminates the attorney-client privilege. . . . [T]he telephone calls which section 804.20 assures to persons in custody are not intended to be confidential as is shown by the provision that they are to be made in the presence of the custodian. They are for the purpose of enabling the person to arrange for a legal consultation and assistance.

*See Craney*, 347 N.W.2d at 678–79. *Hellstern* reiterated that "the attorney must come to the jail for a confidential conference," and it held "a private teleconference" was "something the statute did not require law enforcement to provide." *See Hellstern*, 856 N.W.2d at 364–65. By contrast, section 804.20 *does* require law enforcement to permit an attorney "to see and consult confidentially" with an arrestee "alone and in private at the jail or other place of custody." *See* Iowa Code § 804.20. The legislature could have used similar language to create an analogous right to private calls—but it chose not to do that,

and that deliberate choice must be given effect. *See, e.g.*, *State v. Doe*, 927 N.W.2d 656, 665 (Iowa 2019) (quoting *Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 649 (Iowa 2013)) ("[L]egislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned.").

Sewell says that *Hellstern* and *Walker* construed section 804.20 "without substantive analysis." *See* Def's Br. at 31. That is false, and it omits *Craney*. But even if it were true that the Iowa Supreme Court had leapt to conclusions, the Iowa legislature could have responded by amending the statute to clarify that phone converstions with attorneys were meant to be confidential—if that were what it originally intended. The legislature's acquiescence in this interpretation of section 804.20 bolsters it further. *See, e.g.*, *Brewer-Strong v. HNI Corp.*, 913 N.W.2d 235, 249 (Iowa 2018) (citing *State v. Iowa Dist. Ct. for Jones County*, 902 N.W.2d 811, 818 (Iowa 2017)) ("[W]hen the legislature does not respond to our cases interpreting a statute, we apply the doctrine of legislative acquiescence and assume the legislature has acquiesced in our interpretation."). Overcoming precedent and decades of legislative acquiescence would require an extremely compelling showing that the prior cases were wrongly decided. Sewell fails to clear that high bar.

### A. Phone calls are "made" for the duration of the conversation, not just when a number is dialed.

Sewell argues that the plain language of section 804.20 requires confidentiality in attorney-client conversations, because requiring that calls must be "made in the presence of the person having custody" only requires the officer to be present while the phone number is dialed. *See* Def's Br. at 32–33. Constraining the definition of what it means to "make" a phone call would have nonsensical results, when applied to the remainder of the statute. Officers must allow arrestees to "make a reasonable number of telephone calls as may be required to secure an attorney." *See* Iowa Code § 804.20. That surely envisions more than dialing a reasonable amount of phone numbers. If each phone call was terminated by the officer at the moment when it was answered, nobody would pretend that permitting that arrestee to dial all of those phone numbers meant that he had been allowed to "make" phone calls. *See, e.g.*, *Haun v. Crystal*, 462 N.W.2d 304, 306 (Iowa Ct. App. 1990) (noting that section 804.20 "is ordinarily satisfied if the arrestee is permitted to make a phone call to his or her attorney," but finding that section 804.20 was violated when the officer demanded that the arrestee make his implied-consent testing decision while he was still expecting his attorney to call back to continue their conversation);

*State v. Pettengill*, No. 08–1735, 2009 WL 3086586, at *3–4 (Iowa Ct. App. Sept. 17, 2009) (finding section 804.20 was violated because an officer "terminate[d] the defendant's middle-of-the-night phone call to her father involuntarily after fifteen minutes").

Sewell argues that interpreting section 804.20 to mean that officers should only remain present while the phone number is dialed (and then leave) solves the "practical problems" identified in *Senn*. *See* Def's Br. at 33 (citing *Senn*, 882 N.W.2d at 31). *Senn*'s discussion of "practical problems" is mostly about complications that would arise if Article I, Section 10 were interpreted to guarantee a right to counsel during the implied-consent stage (which will come up later). *See Senn*, 882 N.W.2d at 31. But it also noted that "section 804.20 applies to all detainees, not just motorists suspected of impaired driving"—and any statutory right to confidential phone calls would also be available in other contexts where arrestees might "inform confederates to flee or get rid of evidence." *See id.* Being in the room while the arrestee dials a phone number would not enable an officer to prevent that mischief (or respond to it), especially if the officer would have no real way to verify whether the person who answers the phone is an attorney (and even an attorney might facilitate a request for a three-way call).

Finally, if "made" meant "dialed," it would be absurd to specify that "[i]f [the arrestee] is intoxicated, or a person under eighteen years of age, the call may be made by the person having custody." *See* Iowa Code § 804.20. If that authorized the officer to do nothing more than dial the phone number, then any arrestees who are too intoxicated to communicate (or who face youth-related impediments) may be unable to arrange for a consultation. *See, e.g.*, *State v. Heffron*, No. 02–1827, 2003 WL 21543823, at *1–2 (Iowa Ct. App. July 10, 2003) (rejecting challenge to officer's decision to make calls on arrestee's behalf, and noting that the officer "used the speaker phone so that Heffron could hear the recorded message on [the attorney's] answering machines").

The language in section 804.20 that requires officers to be present while a phone call is "made" is not amenable to the reading that Sewell prefers, where officers would supervise dialing and then leave the room. The Iowa Supreme Court has interpreted it to require officers to remain present *during* those calls, which means that those conversations cannot be privileged or confidential. *See Hellstern*, 856 N.W.2d at 360; *Craney*, 347 N.W.2d at 678–79. Sewell's interpretation would render other parts of the statute meaningless or ineffectual, and it would create opportunities for malfeasance. It should be rejected.

### B. Section 804.20 unambiguously specifies that any in-person consultations should be confidential. Phone consultations receive no such protections.

Sewell argues that construing section 804.20 to create a right to a private phone call with an attorney would allow the contents of those conversations to be protected by attorney-client privilege. *See* Def's Br. at 34–37. Sewell is correct that communications that occur in the presence of a third party cannot be privileged—which is why the language of section 804.20 is such an unmistakable indication of legislative intent that discussions during these calls are not protected by attorney-client privilege. *See, e.g.*, *Craney*, 347 N.W.2d at 678–79 (explaining that phone calls under section 804.20 "are not intended to be confidential as is shown by the provision that they are to be made in the presence of the custodian"). Sewell's argument that protections for attorney-client privilege are well-established (at common law and in section 622.10) cannot overcome the straightforward language in section 804.20 that requires officers to take action that forecloses any expectation of confidentiality or privilege in post-arrest phone calls. The effect of that requirement on claims of privilege is so obvious that the legislature must have foreseen this result—and must have enacted this special provision with the intent to achieve it. *See* Iowa Code § 4.7.

Section 804.20 provides that post-arrest conversations with counsel are confidential (and may be privileged) if they are "at the jail or other place of custody"—but not if they occur over the phone. *See* Iowa Code § 804.20. Sewell argues that "state and federal statutory protections accompanying telephonic communications" criminalize recording these phone calls. *See* Def's Br. at 37–38. Even if that were true, it could not establish that Deputy Grimmus should have ignored his statutory duty to be present under section 804.20, which means that it could not establish that Sewell had a right to a confidential or privileged consultation over the phone. *See Craney*, 347 N.W.2d at 678–79. Moreover, as the district court noted, the provision of the Iowa Code that defines and criminalizes electronic eavesdropping "specifically exempts from the criminal penalty set out in that section a person who is openly present, listening to a communication and recording the communication." *See* Ruling (11/15/19) at 13; App. 52 (citing Iowa Code § 727.8(3)(a)). Deputy Grimmus could not have violated this statute because he was openly present during this call. Indeed, section 804.20 might be best understood as requiring officer presence for the purpose of making it clear to arrestees that they have no expectation of confidentiality or privilege during post-arrest calls.

Sewell also argues that recording these calls is a violation of chapter 808 and 18 U.S.C. § 2511—but *State v. Fox* considered and rejected identical arguments:

> Section 808B.1 defines the terms used in the chapter and tracks the language contained in 18 U.S.C. §§ 2510-20. Section 808B.1(4)(a) provides that no violation occurs when an electronic, mechanical or other device is "used ... by an investigative or law enforcement officer in the ordinary course of the officer's duties." This exception is applicable here. The deputy sheriff was a law enforcement officer acting in the ordinary course of his duties.

*State v. Fox*, 493 N.W.2d 829, 831 (Iowa 1992). Sewell argues that *Fox* is inapplicable because subsequent amendments to section 808B.2 abrogated the exception that previously allowed law enforcement to record communications "in the ordinary course of [their] duties." *See* Def's Br. at 38–39 (quoting *Fox*, 493 N.W.2d at 831). Sewell's claim is false. *Fox* was quoting section 808B.1(4)(a), which was renumbered—not abrogated. *See* Iowa Code § 808B.1(5)(a)(2) (excluding equipment that is being used "by an investigative or law enforcement officer in the ordinary course of the officer's duties" from the definition of an intercepting "device"). Section 808B.1(5) still excludes this system from its definition of a "device," which means that using it cannot qualify as "intercepting" a communication under section 808B.1(6), and it does not violate section 808B.2. *See* Iowa Code §§ 808B.1(6),

808B.2(1). These provisions of chapter 808B are modeled after the federal law that defines a similar crime, which still contains the same exception. *See* 18 U.S.C. § 2510(5)(a)(ii) (exempting any equipment that is "being used . . . by an investigative or law enforcement officer in the ordinary course of his duties" from the definition of "device"); *accord* 18 U.S.C. §§ 2510(4), 2511(1). The legislation that Sewell cites did not abrogate *Fox*—it does not even touch the operative language. *Compare* Def's Br. at 39, *with* 1999 Iowa Acts ch. 78, §§ 1–5.

Sewell's attempt to establish a violation of section 804.20 is foreclosed by Iowa precedent and subsequent legislative acquiescence. Deputy Grimmus was required to remain present while Sewell made his phone calls, which foreclosed any confidentiality or privilege. If Sewell had contacted a local attorney who came to the county jail, then he would have been entitled to a confidential consultation. But that did not happen, and the statute is very clear: there is no right to a confidential or privileged consultation over the phone. *See Hellstern*, 856 N.W.2d at 360; *Craney*, 347 N.W.2d at 678–79. No amount of "practical considerations" can usurp the legislature's role in defining the scope of the limited statutory right that it wrote into existence. Therefore, Sewell cannot establish any violation of section 804.20.

## II. During the implied-consent stage, Sewell did not have a right to counsel under Article I, Section 10.

### Preservation of Error

Sewell raised this challenge in his motion to suppress, and the district court rejected it. *See* MTS (4/10/19) at 3; App. 35; Ruling (11/15/19) at 10; App. 49. That ruling preserved error. *See Lamasters*, 821 N.W.2d at 864.

### Standard of Review

"Constitutional issues are reviewed de novo, but when there is no factual dispute, review is for correction of errors at law." *See State v. Young*, 863 N.W.2d 249, 252 (Iowa 2015). Iowa courts interpret the Iowa Constitution through "exercise of [their] best, independent judgment of the proper parameters of state constitutional commands." *See State v. Coffman*, 914 N.W.2d 240, 254 (Iowa 2018) (quoting *State v. Short*, 851 N.W.2d 474, 490 (Iowa 2014)).

### Merits

Sewell argues that refusing to allow him to make a confidential phone call to Lindholm violated his right to counsel under Article I, Section 10. *See* Def's Br. at 52–68. This is the same claim that divided the Iowa Supreme Court in *Senn*—but subsequent decisions in *Green* and *Ruiz* have made it clear that the *Senn* plurality was correct.

### A. An OWI investigation is not yet a "prosecution," nor is it a case involving life or liberty.

Sewell concedes that, under the Sixth Amendment, a right to counsel does not attach until the formal prosecution begins (which is also the point where the defendant becomes "the accused"). *See* Def's Br. at 54–55. Sewell argues that Article I, Section 10 has additional language that broadens its application beyond criminal prosecutions, to "cases involving life or liberty." *See* IOWA CONST. ART. I, § 10. But he glosses over the relevant historical record that establishes that this additional language was only included to extend these trial rights to anyone who was "accused" under the Fugitive Slave Act, which was considered a summary civil proceeding (not a criminal prosecution). *See Senn*, 882 N.W.2d at 12–16. There is neither any textual basis nor any historical support for extending this constitutional right to counsel under Article I, Section 10 to anything that precedes the initiation of formal proceedings. "The framers consistently and exclusively focused on the rights of persons who had already entered the court system. The historical record for article I, section 10 shows that the framers intended the right to counsel to apply only after pleadings have been filed in court to commence a case or criminal proceeding." *See id.* at 16. Other rights may apply before that point, but this is not one of them.

*Green* recognized that, whatever ambiguity might arise in determining whether a *different* type of dispute is a "case involving life or liberty" for the purposes of Article I, Section 10, that is not a problem in criminal cases. That is because, for criminal cases, the text of Article I, Section 10 imposes the same requirements that are found in the Sixth Amendment: the rights described are only applicable to a "criminal prosecution" and only vest in "the accused." *See Green*, 896 N.W.2d at 775 n.1 ("The State's 'case' against Green is a criminal one. There must be a prosecution before the Iowa Constitution will provide him a right to counsel."). Although Sewell was under arrest and was the subject of an OWI investigation, that is not equivalent to being *accused* and *prosecuted* in a way that triggers Article I, Section 10. "The adversarial process that gives rise to the right to counsel includes the accusatory stage, but excludes the investigatory stage." *See id.* at 779; *accord Ruiz*, 912 N.W.2d at 441 (noting "the person claiming the right to counsel must be an 'accused' in either a criminal prosecution or a case involving that person's life or liberty").

The *Senn* dissenters called this interpretation "crabbed" and said the plurality's recounting of the published records of the debates over the drafting of Article I, Section 10 was "factually inaccurate."

*See Senn*, 882 N.W.2d at 33 (Wiggins, J., dissenting). But the dissent catalogued the very same concerns that the plurality identified as the impetus for including that additional language in Article I, Section 10: the drafters wanted the same "criminal procedural protections" that applied in criminal prosecutions to be available to anyone accused of being a fugitive slave, whose life and liberty would be at stake in these "summary proceedings" that were notorious for "lack of due process" and "weak evidentiary standards." *See id.* at 36–40; *accord Senn*, 882 N.W.2d at 15 (plurality opinion) (quoting *In re Johnson*, 257 N.W.2d 47, 54 (Iowa 1977) (McCormick, J, concurring specially)) (explaining it was clear "from the convention record" that this specific clause was added to Article I, Section 10 "to nullify the Fugitive Slave Act by giving persons accused as escaped slaves the right to jury trial in Iowa"). The goal was not to broaden protections for criminal defendants—rather, the goal was to take *the same* constitutional protections that would be guaranteed under the Sixth Amendment, and make them available to anyone facing an analogous judicial or quasi-judicial proceeding (even if that proceeding could not be categorized as a criminal prosecution). This intention was not cloaked in subtext or allegory—it was expressly stated by the delegate who defended the addition of this clause:

> I hold that unless we have the right to make a constitution which will secure to me the right of jury trial, if I am claimed as a fugitive slave, without that right we are not a sovereign people. Without that right we cannot protect every individual member of society.

*See* THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF IOWA 736–37 (W. Blair Lord rep., 1857) [hereinafter THE DEBATES]. This additional language was about slavery, "contradistinguished from criminal law, and disconnected from any proceedings in the enforcement of the criminal law of the State." *See id.* at 653.

The *Senn* dissent took a different view of the historical record, but it was a view that the record did not support. That became clear when it asserted that "the framers acknowledged that cases in which individuals have been arrested implicate physical liberty interests sufficient to trigger rights under the 'cases' language of article I, section 10." *See Senn*, 882 N.W.2d at 45 (Wiggins, J., dissenting). While it is true that an *opponent* of adding this clause did mention concerns about the applicability of this clause to people who were "fugitives from justice" in their own state, that was not the thrust of his objection, nor the primary basis for it. His real concern was that "this provision is inserted for the purpose of providing" that anyone accused of being a slave "shall have his trial," and have it in Iowa. *See*

THE DEBATES at 736. In response, the delegate who defended the clause embraced that as its principal effect—and *rejected* the suggestion that the arrest of a "fugitive from justice" could ever implicate this clause. *See id.* at 737. He explained that such concerns were baseless because this additional clause "has no reference to [any person] being arrested in preparation for trial," nor would it ever interfere with arrests "for the purpose of examination, to ascertain whether there is proper cause for retaining them until they shall be put upon their final trial." *See id.* And indeed, upon raising those flimsy concerns about arrests, that objector was mocked derisively for "fetching his apprehensions from a great distance" to distract from the "real difficulty" that he had with language that impeded enforcement of the Fugitive Slave Act. *See id.*

The *Senn* dissent read that exchange and the subsequent pages of debate on this amendment (which pertained exclusively to the impact of this language on the Fugitive Slave Act) and characterized it like this: "the framers acknowledged that cases in which individuals have been arrested implicate physical liberty interests sufficient to trigger rights under the 'cases' language of article I, section 10." *See Senn*, 882 N.W.2d at 45 (Wiggins, J., dissenting). But that was only a bad-faith smokescreen, which the delegates saw through immediately.

*Green* and *Ruiz* adopted the *Senn* plurality's approach, which is consistent with the actual text of Article I, Section 10. *See Ruiz*, 912 N.W.2d at 441; *Green*, 896 N.W.2d at 775 n.1; *cf. Atwood v. Vilsack*, 725 N.W.2d 641, 650–51 (Iowa 2006) (holding Article I, Section 10 "protects only the rights of an 'accused,' not the rights of an individual facing potential civil commitment"). Now, Sewell wants this Court to change course and find a right to counsel under Article I, Section 10 that attaches during implied consent, which precedes the initiation of a prosecution and is properly viewed as part of an OWI investigation.

Sewell argues that he was already "the accused" during this OWI investigation because "[he] had been handcuffed and informed he was being arrested and charged with operating while intoxicated," and "[a]ll that was left was a decision one way or another regarding chemical testing and the formal filing of paperwork with the courts." *See* Def's Br. at 59–60. But arrest, custody, and notification of the grounds for the arrest (and probable charges) are not the same as a formal accusation that commits the State to a prosecution and begins adversarial proceedings. Implied consent is part of the investigation; the results of chemical testing may absolve the arrestee and dissuade the State from prosecuting at all. Vesting those rights in "the accused"

shows that "the framers intended to limit the rights therein to persons accused in formal criminal proceedings." *See Senn*, 882 N.W.2d at 9. Indeed, when implied consent only leads to an administrative license revocation proceeding, the right to counsel under Article I, Section 10 never attaches at all. *See Gottschalk v. Sueppel*, 140 N.W.2d 866, 869 (Iowa 1966); *accord Senn*, 882 N.W.2d at 10 & n.6. "It is only once a prosecution is commenced that the imbalance is corrected through the adversary process and through the right to counsel given by article I, section 10." *See Green*, 896 N.W.2d at 779. That right is not triggered by arrest, or by any effort "to investigate and gather evidence." *See id.* Rather, under Iowa law, "a criminal prosecution is commenced upon the filing of the first charging instrument." *See State v. Penn-Kennedy*, 862 N.W.2d 384, 387–88 (Iowa 2015); *accord State v. Williams*, 895 N.W.2d 856, 866–67 (Iowa 2017) (holding that a right to speedy trial under Article I, Section 10 does not attach when arrest is not followed by filing of criminal complaint or appearance before magistrate).

"The State had not filed criminal charges against [Sewell] at the time he was deciding whether to submit to the chemical breath test. Therefore, he was not entitled to counsel under article I, section 10." *See Senn*, 882 N.W.2d at 12; *accord Green*, 896 N.W.2d at 776–79.

### B. Without a constitutional right to counsel under Article I, Section 10, there is nothing to "invoke" to demand a confidential phone call, in violation of the plain language of section 804.20.

Sewell argues that "[e]ven if the constitutional right to counsel may not have attached under article I, section 10," he could demand a confidential phone call because "an arrestee may still invoke that right before formal charging paperwork being filed in the courts." *See* Def's Br. at 64–68. This argument is based on *Escobedo v. Illinois*, and on analogous Iowa cases that inferred the existence of a right to counsel that could be invoked by an arrestee during a custodial interrogation, before the landmark decision in *Miranda v. Arizona* established that the Fifth Amendment provides a right to counsel during interrogation. *See Escobedo v. Illinois*, 378 U.S. 478, 486–92 (1964); *State v. Stump*, 119 N.W.2d 210, 215–17 (Iowa 1963). Sewell would be correct that he could demand counsel before attachment of a right to counsel under the Sixth Amendment or under Article I, Section 10, if this had been a custodial interrogation—but it was not an interrogation. *See State v. Stroud*, 314 N.W.2d 437, 438–39 (Iowa 1982); *State v. Epperson*, 264 N.W.2d 753, 755–56 & n.1 (Iowa 1978); *Vietor*, 261 N.W.2d at 829–30; *Swenumson v. Iowa Dept. of Public Safety*, 210 N.W.2d 660, 662–63 (Iowa 1973). The implied consent procedure is not an interrogation—

it is an investigation. Evidence from a chemical test (or from refusal) would be "neither [the arrestee]'s testimony nor evidence relating to some communicative act or writing by the petitioner," so "the values behind the Fifth Amendment are not hindered when the state offers a suspect the choice of submitting to the blood-alcohol test or having his refusal used against him." *See Schmerber v. California*, 384 U.S. 757, 762–65 (1966); *South Dakota v. Neville*, 459 U.S. 553, 564 n.15 (1983) ("In the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*.").

Sewell could have invoked a right to counsel to put a stop to any custodial interrogation, but he could not invoke a right to counsel to suspend implied consent procedures—that would defeat the purpose of requiring OWI arrestees to make a chemical testing decision within the applicable two-hour timeframe, through "sabotage by delay." *See Vietor*, 261 N.W.2d at 831. This was one of the "practical problems" that *Senn* identified, undermining any constitutional right to counsel during implied consent: if there were a constitutional right to counsel at that stage, officers would need to provide counsel for each arrestee within the two-hour window, and it would be nearly impossible to get

either a chemical test result or test refusal within that timeframe in any of Iowa's rural counties. *See Senn*, 882 N.W.2d at 31 ("It simply is infeasible to assure indigent motorists statewide that lawyers will be available at government expense at any time of the day or night to advise them whether to submit to the breath test."). This would be especially susceptible to manipulation if the arrestee knew to select counsel who would need to drive from a far-flung corner of the State to make in-person observations of the arrestee's condition—just as Sewell selected Lindholm, and declined to consider local attorneys when he discovered that Lindholm was too far away to arrive in time. *See* MTS Tr. 10:25–11:16; MTS Tr. 67:21–68:18.

This is not a situation where an officer was asking questions, seeking testimonial answers—rather, this is a situation where Sewell faced a time-sensitive decision about whether to take the breath test and provide the chemical sample, or accept consequences of revoking his implied consent and refusing the test. Any right to counsel that Sewell could invoke to put a stop to interrogation was inapplicable, and the availability of such a right (no matter which constitutional provision it arises from) could not entitle him to a confidential call with Lindholm in violation of the plain language of section 804.20.

### C. Iowa follows the approach of most other states, which have declined to recognize a constitutional right to counsel in factually similar contexts.

Sewell discusses cases from other states, where courts have found a right to counsel in OWI investigations or in other contexts where a formal prosecution has not yet begun. *See* Def's Br. at 61–63. One of the states that he mentions is Pennsylvania. *See* Def's Br. at 63 (quoting *Commonwealth v. Richman*, 320 A.2d 351, 352 (Pa. 1976)). The Pennsylvania Supreme Court rejected an argument like Sewell's in *Commonwealth v. Arroyo*, 723 A.2d 162, 167 (Pa. 1999). It noted that an "overwhelming majority" of other states "have determined that their state constitutional right to counsel attaches at the same time the Sixth Amendment right to counsel attaches." *See id.* at 168–69 (collecting cases). Ultimately, *Arroyo* reached the same conclusion:

> . . . The plain language of Article I, § 9 limits the right to those situations where an "accused" is the subject of a "criminal prosecution". The terms "accused" and "all criminal prosecutions" are not mere verbiage with which we may summarily dispense. Rather, they are necessary terms which define the scope of this right. Were we to hold the attachment of the right to counsel is independent of the creation of an "accused" and the initiation of a "criminal prosecution," and is instead triggered by some earlier interaction between the police and the defendant, we would divorce this right from its constitutional basis.

*See id.* at 169; *accord Senn*, 882 N.W.2d at 23–24 & n.10, n.11.

The most favorable jurisdiction that Sewell can cite is Oregon. *See* Def's Br. at 61–62 (discussing both *State v. Riddle*, 941 P.2d 1079, 1082 (Or. Ct. App. 1997) and *State v. Penrod*, 892 P.2d 729, 731 (Or. Ct. App. 1995)). But Oregon's approach is unworkable, which is what Texas discovered after adopting it. *See McCambridge v. State*, 778 S.W.2d 70, 75–76 (Tex. Ct. Crim. App. 1989) (citing *State v. Spencer*, 750 P.2d 147 (Or. 1988)). In 1988, in *Forte v. State*, the Texas Court of Criminal Appeals joined the Oregon Supreme Court in rejecting the federal bright-line standard for the attachment of the right to counsel:

> [W]e agree with our brethren from Oregon that the right to counsel during the investigative stage of a criminal prosecution may at times be just as important as the right to counsel at trial or at a post-indictment lineup, and today join them in rejecting the fiction of *Kirby v. Illinois* . . . . Consequently, rather than state that under all circumstances the right to counsel vests at a certain point we will instead adopt a more flexible standard under Art. I, Sec. 10 of the Texas Constitution. Accordingly, each case must be judged on whether the pretrial confrontation presented necessitates counsel's presence so as to protect a known right or safeguard.

*See Forte v. State*, 759 S.W.2d 128, 137–38 (Tex. Ct. Crim. App. 1988), *overruled by McCambridge*, 778 S.W.2d 70. Following Oregon's lead, *Forte* adopted a case-by-case analysis, and it held the right to counsel under the Texas Constitution would attach at the first moment that qualified as a "critical stage" of the prosecution. *See id.*

But just a year later, *McCambridge* acknowledged that *Forte* had acted too hastily in adopting a case-by-case analysis that was "ambiguous, vague, and thus unworkable." *See McCambridge*, 778 S.W.2d at 75. It noted that recent U.S. Supreme Court decisions had clarified and applied bright-line standards for attachment, and it chose to discard *Forte* and return to the bright-line approach:

> [T]he creation of a bright line rule results in predictability. . . . [J]udicial review can be more precise, but, most important, it gives law enforcement authorities the parameters within which they can legally operate. At the present time law enforcement has to speculate whether a stage in the process is critical so as to compel the necessity of counsel. Speculation about one's legal right is a burden law enforcement should not have to carry.
>
> Therefore, we now hold in the context of this case that under Art. I, § 10 of the Texas Constitution, a critical stage in the criminal process does not occur until formal charges are brought against a suspect. The language in *Forte v. State*, *supra*, to the contrary is overruled.

*See id.* at 76. Thus, after temporarily adopting Oregon's approach, Texas retreated from its decision to abandon a bright-line standard for attachment of the right to counsel under the Texas Constitution. *See also Mogard v. City of Laramie*, 32 P.3d 313, 324–25 (Wyo. 2001) (rejecting similar challenge under the Wyoming Constitution because it "would destroy the 'bright line' rule" and leave police and courts "wondering on a case-by-case basis whether counsel is required.").

The biggest "practical problem" identified in *Senn* was outlined in an earlier portion of the opinion, where it discussed the takeaways from its analysis of other state court decisions on similar challenges:

> If we expand the right to counsel to include implied-consent chemical breath tests *before* any criminal case is filed, what is the limiting principle? Why stop there? Why not expand the right further to include noncustodial questioning by police or police requests for consent searches before any charges are filed? The text of our constitution provides a clear starting point for the attachment of the right to counsel—the court filing that commences the criminal proceeding or other case putting liberty at risk. We are unwilling to erase that bright line.

*Senn*, 882 N.W.2d at 26. Though *Senn* was a plurality opinion, this logic was adopted in *Green*, and it now applies with force. *See Green*, 896 N.W.2d at 776–79 (noting "the text of the constitution is at the core of our analysis and is our primary focus," and explaining that "[t]he text tells us that the right to counsel applies only to the accused and, for the purposes of this case, only to a criminal prosecution"); *accord Ruiz*, 912 N.W.2d at 440–41 (discussing and applying *Green*).

Sewell's brief fails to overcome the constitutional analysis in the *Senn* plurality opinion, which explains why the Iowa Supreme Court has adopted the familiar bright-line approach for attachment of the right to counsel under Article I, Section 10 of the Iowa Constitution. *See Senn*, 882 N.W.2d at 8–31. Therefore, Sewell's challenge fails.

## III. Monitoring and recording Sewell's phone calls to his attorney after his arrest for OWI and before he made his implied-consent testing decision did not violate his due process rights under Article I, Section 9.

### Preservation of Error

Sewell raised this challenge in his amended motion to suppress, and the district court rejected it. *See* Amended MTS (8/14/19) at 1–2; App. 37–38; Ruling (11/15/19) at 11–13; App. 50–52. That ruling preserved error. *See Lamasters*, 821 N.W.2d at 864.

### Standard of Review

Again, review of rulings on constitutional issues is de novo. *See Coffman*, 914 N.W.2d at 254; *Young*, 863 N.W.2d at 252.

### Merits

Sewell argues that he was deprived of his right to a confidential consultation with his attorney, and that this right is fundamental. *See* Def's Br. at 47–50. But as already established, Sewell did not have a constitutional right to counsel at that stage. Instead, he had a limited statutory right to access to counsel, with parameters that were drawn to exclude any right to a confidential or privileged phone call. *See* Iowa Code § 804.20; *Craney*, 347 N.W.2d at 678–79. Because he did not have any right to a confidential or privileged phone call, it would not violate Sewell's rights to monitor or record audio from those calls.

In another part of Sewell's brief, he argues that recording his phone calls violated a privacy right under the Fourth Amendment or Article I, Section 8. *See* Def's Br. at 40–43. But there can never be an expectation of privacy in the contents of a phone call when an officer is standing nearby and able to hear what Sewell says. That also forecloses Sewell's claim that his rights were violated by monitoring or recording: Sewell never had any reasonable expectation that his conversations on the phone could have been private, with Deputy Grimmus in the room. *See, e.g.*, *State v. Flaucher*, 223 N.W.2d 239, 241 (Iowa 1974) ("It is generally held that information given in the presence of third parties who are not within the scope of the privilege destroys the confidential nature of the disclosures and renders them admissible."). There is no way for Sewell to establish any violation of an actual privacy interest.

Sewell also uses a separate, free-standing framework for "outrageousness" in government conduct, with three elements:

> [I]n order to raise a colorable claim of outrageousness pertaining to alleged governmental intrusion into the attorney-client relationship, the defendant's submissions must demonstrate an issue of fact as to each of the following three elements: (1) the government's objective awareness of an ongoing, personal attorney-client relationship between its informant and the defendant; (2) deliberate intrusion into that relationship; and (3) actual and substantive prejudice.

*See Tyerman v. State*, No. 11–1694, 2012 WL 4900211, at *3–4 (Iowa Ct. App. Oct. 17, 2012) (quoting *United States v. Voigt*, 89 F.3d 1050, 1067 (3d Cir. 1996)); *accord* Def's Br. at 50–52. There are no cases from the Iowa Supreme Court that apply this test. Sewell presents this as a test for an alleged violation of privilege—but, in fact, it is used for claims that the government violated a defendant's due process rights by "recruiting his attorney as a government informant," and creating a conflict of interest and depriving him of representation by counsel with undivided loyalty. *See Voigt*, 89 F.3d at 1061. And even in those cases, the defendant must point to government conduct "that shocks the conscience" to establish a free-standing due process violation. *See id.* at 1064–65 (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)). An officer's presence in the room while an arrestee makes phone calls does not "shock the conscience"—it is required by statute, and thus it represents the collective judgment of Iowans through their legislators. *Cf. State v. Oliver*, 812 N.W.2d 636, 650 (Iowa 2012) (quoting *State v. Bruegger*, 773 N.W.2d 862, 872–73 (Iowa 2009)) (observing that "[l]egislative judgments are generally regarded as the most reliable objective indicators of community standards"). And operation of this recording system does not "shock the conscience"—it helps prevent

mischief and destruction of evidence, and it cannot invade a private or confidential phone call because the officer's presence means that none of those calls are private to begin with (and the recording also helps to substantiate the officer's recollection with hard evidence, if the defendant's statements should become relevant to a prosecution). And if there were any valid fact-specific claim that the State should not be permitted to listen to the audio recording, the defendant would be able to move for a protective order to prevent that production. *See* Iowa R. Crim. P. 2.14(6)(a). Sewell cannot show that the existence of this recording system "shocks the conscience" as this type of challenge would require, and there is no reason to apply his three-part test for inapposite claims about subverting the attorney-client relationship.

Even assuming that test was applicable, Sewell's claim would still fail, primarily on the second and third prongs. There was not a deliberate intrusion into an attorney-client relationship, because the State did not insert itself and attempt to subvert the duty of loyalty—rather, Deputy Grimmus was simply present during the phone calls, and recording equipment was operating on that line (which did not necessarily mean that anyone would request or listen to that audio). Lindholm's loyalties were never divided, so there was no "intrusion."

And Sewell cannot show "actual and substantive prejudice" because the State never discovered or used any information that it would not have obtained, otherwise. *See Voigt*, 89 F.3d at 1070–71. Sewell is arguing that he was prejudiced because Lindholm declined to advise him in any meaningful way, after discovering that Deputy Grimmus was in the room and that the phone audio was being recorded. *See* Def's Br. at 31–32. But Lindholm could have simply given Sewell a summary of relevant considerations that he should think about in making his testing decision—it was Lindholm's decision not to try to provide advice in a way that would not require Sewell to say things that would incriminate himself in Deputy Grimmus's presence. *See* MTS Tr. 64:23–67:9. It was also Lindholm's decision not to advise Sewell to seek a confidential in-person consultation with an attorney who was closer to the Dickinson County Sheriff's Office—and it was Sewell's decision not to call another attorney, after Lindholm refused to provide any advice. *See* MTS Tr. 10:25–12:9; MTS Tr. 67:21–68:18. The State's actions did not preclude Sewell from taking advantage of his statutory right to have a confidential in-person consultation, which Deputy Grimmus specifically told him about. *See* MTS Tr. 11:7–16. There is no way for Sewell to show actual and substantive prejudice.

Sewell cannot establish a due process violation. *See Behm v. City of Cedar Rapids*, 922 N.W.2d 524, 552–54 (Iowa 2019) (noting "the shocks-the-conscience test has become extremely difficult to meet" and explaining that "under substantive due process analysis, the state is given great leeway in achieving its legitimate goals, particularly those related to public safety"). All of these challenges must fail.

## IV. Dismissal would not be required for a violation of any constitutional right in this situation. Indeed, any error would be harmless.

### Preservation of Error

Sewell filed a motion to dismiss, and the district court ruled on those claims and denied his motion. *See* MTD (4/10/19); App. 29; Ruling (11/15/19) at 11–13; App. 50–52. That ruling preserved error. *See Lamasters*, 821 N.W.2d at 864. There is no error preservation requirement for arguments about harmless error.

### Standard of Review

Again, review of rulings on constitutional issues is de novo. *See Coffman*, 914 N.W.2d at 254; *Young*, 863 N.W.2d at 252.

### Merits

Sewell argues the remedy for a violation of his right to counsel or his attorney-client privilege is dismissal. *See* Def's Br. at 69–72. But the typical remedy would be suppression of the breath test result.

*See, e.g.*, *Hellstern*, 856 N.W.2d at 365. Especially here, where the government did not learn any new facts from whatever violation or intrusion allegedly occurred, there is no reasonable argument for a stronger remedy than suppression of the breath test result. That key difference makes most of the cases that Sewell cites distinguishable. *See* Def's Br. at 70–72 (citing *Barber v. Municipal Court*, 598 P.2d 818 (Cal. 1979); *State v. Cory*, 382 P.2d 1019, 1022 (Wash. 1963)). The exception is *State v. Holland*, 711 P.2d 592, 595 (Ariz. 1985), which was wrongly decided on multiple levels. *See, e.g.*, *Litteral v. Commonwealth*, 282 S.W.3d 331, 336 (Ky. Ct. App. 2008) (noting *Holland* held that "there was no justifiable reason for the officer to be present while the subject consulted his counsel," and distinguishing it because a statute in Kentucky required the officer to remain present). Iowa has never adopted an automatic dismissal rule for violations of constitutional or statutory rights that impact testing decisions. *See, e.g.*, *State v. Pettijohn*, 899 N.W.2d 1, 38–39 (Iowa 2017) (finding a violation of article I, section 8 of the Iowa Constitution and remanding for new trial); *accord Walker*, 804 N.W.2d at 296 (Iowa 2011); *State v. Garrity*, 765 N.W.2d 592, 597–98 (Iowa 2009). Even if Sewell had established a violation of his rights, dismissal would not be required.

Sewell needs dismissal to be the remedy because the record establishes that any error was harmless: even if a confidential or privileged phone call with Lindholm would have changed his decision from a consent into a refusal, the record already established his guilt on a separate alternative theory of intoxication, *without* a test result. Sewell stipulated to a bench trial on the minutes of testimony, and the trial court issued these findings:

> Based upon the Minutes of Testimony, the court makes the following findings: That on January 15, 2019, the Defendant, Matthew Robert Sewell, was in the driver's seat of a Ford F-150 parked in a driveway at 2479 190th Avenue in Dickinson County, Iowa; that the lights on the Ford F-150 were on and the engine was running; that Matthew Robert Sewell was operating the Ford F-150 within the meaning of section 321J.2(1), Code of Iowa; that Matthew Robert Sewell submitted to and failed field sobriety testing; *that Mr. Sewell's reason or mental ability was affected, his judgment was impaired and to some extent, he had lost control of bodily actions or motions*; that at the time Matthew Robert Sewell was under the influence, within the meaning of Iowa Criminal Jury Instruction 2500.5; that Matthew Robert Sewell consented to a breath test; and that within two hours of operating the motor vehicle, the test result on Mr. Sewell's breath was .206. Based upon the foregoing, the court finds that the State has proven beyond a reasonable doubt that on January 15, 2019, Matthew Robert Sewell operated a motor vehicle while intoxicated, in violation of section 321J.2, Code of Iowa, as charged in the Trial Information filed in this matter on February 4, 2019.

Verdict (2/11/20) at 1–2; App. 61–62 (emphasis added). Note that the finding that Sewell was "under the influence" came *before* discussion of the breath test result—it only depended on facts preceding the test. This means that suppressing evidence of the breath test would make no difference—the trial court still would have found Sewell guilty by an independently sufficient alternative theory for that second element of OWI, which means that any error would be harmless (even under a constitutional harmless error standard). *See* Verdict (2/11/20) at 3; App. 63 ("[T]he State has proven by proof beyond a reasonable doubt both elements of the offense of Operating While Intoxicated, with the second element based upon both being under the influence of alcohol and having an alcohol concentration of .08 or more.").

Iowa appellate courts have not hesitated to affirm convictions on similar facts, where reversing a suppression ruling would not have any effect on the ultimate outcome. *See, e.g.*, *Garrity*, 765 N.W.2d at 597–98 ("The judge who entered the verdict in this case specifically stated that she observed the recording taken at the police station and determined that Garrity was intoxicated based upon his body motions, judgment, slurred speech, and inability to communicate."); *State v. Poster*, No. 18–0217, 2019 WL 319846, at *3–4 (Iowa Ct. App. Jan.

23, 2019) ("Regardless of whether the district court should have suppressed the DataMaster result, we accept the State's argument that reversal is unwarranted. The district court specifically found the minutes contained proof beyond a reasonable doubt under two independent theories for OWI. . . . Any violation of Poster's rights under section 321J.11 was harmless error."); *State v. Deimerly*, No. 15–1304, 2016 WL 3275828, at *4 n.3 (Iowa Ct. App. June 15, 2016) (remarking that erroneous admission of breath test result would have likely been harmless because the court specifically found him guilty on the "under the influence" alternative, and "[w]hile the court also noted Deimerly's BAC level, it is clear here the evidence establishes the 'under the influence' alternative to operating while intoxicated even without breath test evidence"); *State v. Gobush*, No. 10–0321, 2011 WL 1136441, at *1 (Iowa Ct. App. Mar. 30, 2011) ("On appeal, Gobush challenges only the test failure basis for conviction. We need not address those issues because we affirm his conviction under the unchallenged 'under the influence' alternative."); *State v. Breuer*, No. 03–0422, 2004 WL 2386824, at *3–4 (Iowa Ct. App. Oct. 27, 2004) ("Other than the Intoxilyzer test result, Breuer does not dispute the evidentiary support for the trial court's findings of fact. Under these

circumstances, the trial court's ruling admitting the Intoxilyzer test result did not affect Breuer's substantial rights."). In this situation, any error in ruling on this motion to suppress would be harmless.

This is not a conditional guilty plea—Iowa does not have those. This was a stipulated bench trial, and the written verdict makes the same kind of factual findings that a court would make after a trial. *See State v. Sayre*, 566 N.W.2d 193, 196 (Iowa 1997) (explaining that a stipulated trial on the minutes still requires the court to "find the facts specially and on the record" under the rules of criminal procedure). One consequence of that difference between a stipulated bench trial and a guilty plea is that Sewell can still appeal. *See State v. Everett*, 372 N.W.2d 235, 237 (Iowa 1985) ("[T]he appellate consequences after a conviction based on a stipulation differ from what they would have been following a guilty plea."). But Iowa courts will not vacate a conviction based on an error in a ruling on a motion to suppress that is shown to be harmless, based on the trial court's written verdict. *See Garrity*, 765 N.W.2d at 597–98; *accord State v. Ubben*, No. 18–0915, 2019 WL 3317866, at *5 & n.10 (Iowa Ct. App. July 24, 2019). Sewell stipulated to a record that shows that excluding his breath test result could not have changed the outcome, and that is fatal to his challenge.

## CONCLUSION

The State respectfully requests that this Court reject Sewell's challenges and affirm his conviction.

## REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

**LOUIS S. SLOVEN**
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
louie.sloven@ag.iowa.gov

## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **11,224** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: November 16, 2020

**LOUIS S. SLOVEN**
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
louie.sloven@ag.iowa.gov