2021 SENATE JUDICIARY

SB 2182

2021 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

SB 2182
1/19/2021
AM

A BILL for an Act to amend and reenact section 29-05-20 of the North Dakota Century Code, relating to attorney visitation.

Chairwoman Larson Calls committee work to order [10:30]
Senators Heitkamp, Fors, Myrdal, Luick, Dwyer, Bakke and Larson were present.

Discussion Topics:

- Counsel visitation requests

Senator Hogue [10:30] introduces the bill in favor #1535

Travis Finck, [10:38] Executive Director for the North Dakota Commission on Legal Counsel in favor #1340.

Jesse Walstad, [10:41] ND Association of Criminal Defense Lawyers in favor #1249.

Chairwoman Larson Adjourns hearing [10:49]

Senator Myrdal [10:49] moves DO PASS
Senator Luick second

Roll Call Vote	Vote
Senator Diane Larson	Y
Senator Michael Dwyer	Y
Senator JoNell A. Bakke	Y
Senator Robert O. Fors	Y
Senator Jason G. Heitkamp	Y
Senator Larry Luick	Y
Senator Janne Myrdal	Y

Motion carries 7-0-0
Senator Myrdal carries.

Chairwoman Larson adjourns meeting [10:50]

Jamal Omar, Committee Clerk

REPORT OF STANDING COMMITTEE

SB 2182: Judiciary Committee (Sen. Larson, Chairman) recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2182 was placed on the Eleventh order on the calendar.

TESTIMONY OF DAVID HOGUE IN SUPPORT OF SB 2182

SENATE JUDICIARY COMMITTEE

JANUARY 19, 2021; 10:30 AM

Good afternoon Madam Chair Larson and members of the Senate Judiciary Committee. My name is David Hogue. I am a North Dakota state senator representing District 38, which includes northwest Minot and the city of Burlington. I appear before your committee to seek support for Senate Bill 2182.

SB 2182 seeks to clarify the case of a dangling pronoun that was found in section 29-05-20 of the North Dakota Century Code. It was not clear to one member of the North Dakota Supreme Court whether an attorney or a person under arrest had the right to request a meeting with an attorney as the statute contemplates. In a case of *City of Jamestown v. Schultz*, 2020 ND 154, the concurring opinion of Justice Jerod Tufte argued that the statute was ambiguous as to whether the attorney or the accused had the right to request a meeting with an attorney:

> As presently codified, section 29-05-20, N.D.C.C., plainly grants an "attorney at law," "at the attorney's request," the right to "visit such person [the "accused"] after that person's arrest." If the accused has a right to call an attorney when deciding whether to take a chemical test, it is nowhere to be found in section 29-05-20, N.D.C.C. Here, we do not know with certainty who changed this section or under what authority it was changed, but we do have a statutory presumption that "[t]he law as published must be presumed valid until determined otherwise by an appropriate court." N.D.C.C. § 1-02- 06.1. I have previously explained why the pronouns that have been changed are material because the result in Kuntz turned on the interpretation of those pronouns. Jesser, 2019 ND 287, ¶¶ 20-21, 936 N.W.2d 102 (Tufte, J., concurring specially).

In addition, Justice McEvers concurring opinion in *Schultz* also explained the confusing history of the Legislative Assembly's previous amendment to this section of the North Dakota Century Code. She suggests the statute's meaning may have been changed inadvertently by our code revisor. Let's look at her language together.

SB 2182 seeks to remove any doubt by choosing both. On line 8 of the bill, you may observe deletion of the word "attorney's" request. In its place the bill grants **either** the attorney or the accused the right to request a meeting with counsel after an arrest.

Madam Chair Larson and members of the Committee, I'm happy to stand for your questions.

Filed 7/22/20 by Clerk of Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2020 ND 154

City of Jamestown, Plaintiff and Appellee

v.

Carlin Dean Schultz, Defendant and Appellant

No. 20190359

Appeal from the District Court of Stutsman County, Southeast Judicial District, the Honorable Cherie L. Clark, Judge.

AFFIRMED.

Opinion of the Court by Jensen, Chief Justice, in which Justices VandeWalle, Crothers, and McEvers joined. Justice Tufte filed a specially concurring opinion, in which Chief Justice Jensen joined. Justice McEvers filed a concurring opinion, in which Justice VandeWalle joined.

Abbagail C. Geroux, Assistant City Attorney, Jamestown, ND, for plaintiff and appellee.

Chad R. McCabe, Bismarck, ND, for defendant and appellant.

City of Jamestown v. Schultz
No. 20190359

Jensen, Chief Justice.

[¶1] Carlin Schultz appeals from a criminal judgment entered following his conditional guilty plea to the charge of driving under the influence. Schultz entered a conditional guilty plea preserving his right to challenge the denial of his motion to suppress evidence. Schultz argues he did not receive a reasonable opportunity to consult with counsel before deciding to take a chemical test and the subsequent test results should be excluded from evidence. We affirm.

I

[¶2] Schultz was arrested for driving under the influence and transported to the law enforcement center. The arresting officer read Schultz the implied consent advisory. Schultz acknowledged that he understood the request and asked to first speak to his attorney before agreeing to take the test. Schultz was permitted to call an attorney and they spoke for about a minute before Schultz agreed to take the test. The officer tried to administer the test on the Intoxilyzer 8000, discovered his credentials were invalid, and he could not administer the test.

[¶3] The officer had the option to administer the test on another machine or have another officer administer the test on the original machine. The officer explained the situation to Schultz. Schultz indicated he did not understand the situation and asked the officer for advice as to whether he should call his attorney again. The officer testified Schultz did not make a specific request to initiate a second call to an attorney while Schultz contends he specifically asked to make a second call to his attorney. Another officer subsequently administered the test on the original machine without Schultz having a second opportunity to speak to an attorney.

[¶4] Schultz moved to suppress the chemical test result arguing, in part, he was denied his statutory right to a reasonable opportunity to consult with counsel in a meaningful way before deciding whether to submit to chemical testing. The district court concluded that Schultz was provided a reasonable opportunity to consult an attorney prior to deciding whether to submit to a chemical test. The court found Schultz made an affirmative request for an attorney prior to deciding to submit to the chemical breath test, and that the arresting officer provided Schultz a reasonable opportunity to consult with his attorney. The court further found the second request to be ambiguous, but found that regardless of whether the second request had been made or not made, Schultz had already been given a reasonable opportunity to speak with an attorney.

[¶5] Following the denial of his motion to suppress, Schultz entered a conditional guilty plea to the charge of driving under the influence of intoxicating liquor, a class B misdemeanor, in violation of Jamestown Municipal Ordinance § 21-04-06. Schultz's conditional plea of guilty preserved for appeal the issue of whether or not the denial of his second request to consult with an attorney deprived him of his statutory right to counsel.

II

[¶6] The initial articulation of a driver's limited statutory right to counsel before deciding to submit to a chemical test occurred in this Court's decision in *Kuntz v. State Highway Comm'r*, 405 N.W.2d 285 (N.D. 1987). The State argues Schultz had been provided with a reasonable opportunity to consult with counsel in a meaningful way and, if there was a second request made by Schultz to consult with counsel, the right to counsel established in *Kuntz* had been satisfied.

[¶7] This Court's precedent defining the limited right to attorney established by our decision in *Kuntz* is well-established:

> An arrested person who asks to speak with an attorney before taking a chemical test must be given a reasonable opportunity to do so if it does not materially interfere with the test administration. *Kuntz v. State Highway Comm'r*, 405 N.W.2d 285, 290 (N.D. 1987). The reasonableness of the opportunity objectively depends on the totality of the circumstances, rather than the subjective beliefs of the accused or police. *City of Mandan v. Jewett*, 517 N.W.2d 640, 642 (N.D. 1994). The accused person's right of consultation with an attorney before submitting to a chemical test is a statutory right, not a constitutional right. *Kuntz[,]* at 289; *see also* N.D.C.C. § 29-05-20 (providing that an attorney who requests to visit with the arrested person may have such visitation). This limited right of consultation must be balanced against the need for an accurate and timely chemical test. *State v. Sadek*, 552 N.W.2d 71, 73 (N.D. 1996).

State v. Ruden, 2017 ND 185, ¶ 14, 900 N.W.2d 58 (quoting *Schank*, 2017 ND 81, ¶ 7, 892 N.W.2d 593). "The appropriate inquiry is whether the police afforded [an arrestee] a reasonable opportunity to consult with counsel in a meaningful way." *Id.* "This Court also has held that when an arrestee's statutory right to consult with counsel before submitting to a chemical test has been infringed or denied, the appropriate remedy in a criminal case is suppression of the chemical test results." *State v. Lee*, 2012 ND 97, ¶ 11, 816 N.W.2d 782 (citing *In re R.P.*, 2008 ND 39, ¶ 11, 745 N.W.2d 642).

[¶8] The district court concluded that Schultz was provided a reasonable opportunity to consult an attorney prior to deciding whether to submit to a chemical test and Schultz had no right to a second opportunity. "Determining whether a person was given a reasonable opportunity to speak with an attorney is a mixed question of law and fact that is subject to a de novo standard of review." *City of Gwinner v. Vincent*, 2017 ND 82, ¶ 10, 892 N.W.2d 598 (citing *Lies v. Dir., N.D. DOT*, 2008 ND 30, ¶ 9, 744 N.W.2d 783). "There are no bright line rules for determining whether a 'reasonable opportunity' to consult with an attorney has been afforded; rather, the determination of whether a reasonable opportunity has been provided turns on an objective review of the totality of the circumstances." *Id.*

[¶9] Schultz was provided with an opportunity to consult with an attorney. After consulting with an attorney, Schultz made a decision to take the chemical test. In *Kuntz*, a majority of this Court recognized "that if an arrested person asks to consult with an attorney before deciding to take a chemical test, he must be given a reasonable opportunity to do so if it does not materially interfere with the administration of the test." *Kuntz*, 405 N.W.2d at 290. Schultz consulted with an attorney, made a decision regarding the requested testing, and his limited right to consult with an attorney prior to taking the test as established in *Kuntz* had been satisfied.

III

[¶10] Schultz was provided with an opportunity to consult with an attorney before he decided whether to submit to chemical testing. Schultz was not required to be provided with a second chance to consult with an attorney subsequent to making a decision to take the chemical test. The judgment of the district court is affirmed.

[¶11] Jon J. Jensen, C.J.
Daniel J. Crothers
Lisa Fair McEvers
Gerald W. VandeWalle

Tufte, Justice, concurring specially.

[¶12] Once again, the Court is asked to expand on the "statutory right" of a person arrested for DUI to call an attorney before taking a chemical test that a majority of this Court first described in *Kuntz v. State Highway Comm'r*, 405 N.W.2d 285, 287 (N.D. 1987). The Court has properly rejected that request, and I concur in the result.

[¶13] I write separately because I maintain that this "statutory right," a strained but possible interpretation of N.D.C.C. § 29-05-20 when *Kuntz* was decided, cannot be reconciled with the statute as it is now codified. *Jesser v. N.D. Dep't of Transp.*, 2019 ND 287, ¶¶ 19-22, 936 N.W.2d 102 (Tufte, J., concurring specially). This Court appropriately gives significant weight under

principles of stare decisis to its previous decisions interpreting statutes. When the statute has changed in material respects, however, the Court is required to apply the amended law as written. The Court's interpretation of the previous statute may provide little or no guidance. Whether or not the parties and the district court have identified all applicable law, we retain authority to identify and apply the correct law. *See D.G.L. Trading Corp. v. Reis*, 2007 ND 88, ¶ 7, 732 N.W.2d 393. As presently codified, section 29-05-20, N.D.C.C., plainly grants an "attorney at law," "at the attorney's request," the right to "visit such person [the "accused"] after that person's arrest." If the accused has a right to call an attorney when deciding whether to take a chemical test, it is nowhere to be found in section 29-05-20, N.D.C.C. Here, we do not know with certainty who changed this section or under what authority it was changed, but we do have a statutory presumption that "[t]he law as published must be presumed valid until determined otherwise by an appropriate court." N.D.C.C. § 1-02-06.1. I have previously explained why the pronouns that have been changed are material because the result in *Kuntz* turned on the interpretation of those pronouns. *Jesser*, 2019 ND 287, ¶¶ 20-21, 936 N.W.2d 102 (Tufte, J., concurring specially). They are only immaterial if they are not in fact valid law. In this case, the City did not question whether the statute as now codified provides a "statutory right" to counsel prior to submitting to testing, and the majority opinion properly refrains from addressing an issue not raised by the parties.

[¶14] I acknowledge that if time and other circumstances permit, an officer may allow a driver to consult with an attorney one or more times in the interest of obtaining informed consent to a chemical test. But I would conclude that Schultz had no right to call an attorney a second time because, properly interpreted, both the first and second calls were a matter of officer discretion and not of statutory right under N.D.C.C. § 29-05-20.

[¶15] Jerod E. Tufte
Jon J. Jensen, C.J.

McEvers, Justice, concurring.

[¶16] I agree with and have signed with the majority. I write separately to address Justice Tufte's special concurrence. Justice Tufte is correct the language of N.D.C.C. § 29-05-20 has changed since this Court's interpretation in *Kuntz v. State Highway Comm'r*, 405 N.W.2d 285 (N.D. 1987). Justice Tufte suggests the changes have been made to remove ambiguity. *Jesser v. N.D. Dep't of Transp.*, 2019 ND 287, ¶ 21, 936 N.W.2d 102 (Tufte, Justice, concurring specially). Justice Tufte notes:

> We do not lightly revisit settled issues of statutory interpretation because the Legislative Assembly has ample opportunity to correct our work if it does not comport with its intended meaning. Here, it appears the Legislative Assembly may have tried to correct our work, but without effect.

Id. at ¶ 22 (citation omitted). I respectfully disagree we should assume any intent by the legislature to "remove ambiguity," or "correct our work," because there is no record the Legislative Assembly had a role in the change to the statute.

[¶17] In 2003, N.D.C.C. § 29-05-20 read as follows: "The accused in all cases must be taken before a magistrate without unnecessary delay, and any attorney at law entitled to practice in the courts of record of this state, at *his* request, may visit such person after *his arrest.*" (Emphasis added.) In 2005, N.D.C.C. § 29-05-20 was revised to read: "The accused in all cases must be taken before a magistrate without unnecessary delay, and any attorney at law entitled to practice in the courts of record of this state, at *the attorney's* request, may visit such person after *that person's arrest.*" (Emphasis added.)

[¶18] If the Legislative Assembly had intended to correct this Court's interpretation of N.D.C.C. § 29-05-20 it would have done so in the form of a bill to amend and reenact the statute. Even when a statute is amended for a technical correction, this type of change is generally made as sections of law are amended for other purposes. *See H.B. 1045*, 56th N.D. Legis. Sess. (1999), stating:

> Section 29-12-05 of the North Dakota Century Code is amended and reenacted as follows:
>
> 29-12-05. Bench warrant, misdemeanor, infraction, or bailable felony. If an offense is a misdemeanor, an infraction, or a bailable felony, the bench warrant issued must be in a form similar to form ~~10~~ 12 as contained in the appendix to the North Dakota Rules of Criminal Procedure, but must add to the body thereof a direction to the following effect, "or if ~~he~~ the person requires it, that you take ~~him~~ the person before any magistrate of that county or in the county in which you arrest ~~him~~ the person, that ~~he~~ the person may give bail to answer the information (or indictment)".

[¶19] There is no explanation from the Legislative Assembly why the statute was revised. Presumably it was changed by the Code Revisor. *See* N.D.C.C. § 46-03-10 (allowing legislative council to "make such corrections in orthography, grammatical construction, and punctuation of the same as in its judgment are proper"). However, the Code Revisor is not authorized to change the meaning of the law.

[¶20] I agree with Justice Tufte this Court should give significant weight under the principle of *stare decisis* to its previous decisions interpreting statutes. Tufte, Justice, concurring specially at ¶ 13. However, I cannot agree the changes to the statute are material, when we have no idea why the statute was revised. This Court has consistently applied the holding in *Kuntz* since the statute was revised in 2005, with no action by the Legislative Assembly. *Neutman v. N.D. Dep't*, 2019 ND 288, 935 N.W.2d 788; *Jesser v. N.D. Dep't of Transp.*, 2019 ND 287, 936 N.W.2d 102; *City of Bismarck v. King*, 2019 ND 74, 924 N.W.2d 137; *State v. Von Ruden*, 2017 ND 185, 900 N.W.2d 58; *City of Dickinson v. Schank*, 2017 ND 81, 892 N.W.2d 593; *Koehly v. Levi*, 2016 ND 202, 886 N.W.2d 689; *Cudmore v. N.D. Dep't of Transp.*, 2016 ND 64, 877 N.W.2d 52; *State v. Keller*, 2016 ND 63, 876 N.W.2d 724; *Washburn v. Levi*, 2015 ND 299, 872 N.W.2d 605; *Schlittenhart v. N.D. Dep't of Transp.*, 2015 ND 179, 865 N.W.2d 825; *Herrman v. N.D. Dep't of Transp.*, 2014 ND 129, 847 N.W.2d 768; *Gardner v. N.D. Dep't of Transp.*, 2012 ND 223, 822 N.W.2d 55; *Bell v. N.D. Dep't of Transp.*, 2012 ND 102, 816 N.W.2d 786; *Kasowski v. N.D. Dep't of Transp.*, 2011 ND 92, 797 N.W.2d 40; *Interest of R.P.*, 2008 ND 39, 745

N.W.2d 642; *Lies v. N.D. Dep't of Transp.*, 2008 ND 30, 744 N.W.2d 783; *State v. Pace*, 2006 ND 98, 713 N.W.2d 535; *Eriksmoen v. N.D. Dep't of Transp.*, 2005 ND 206, 706 N.W.2d 610.

[¶21] As this Court noted in *Olson v. Job Serv. N.D.*, 2013 ND 24, ¶ 50, 827 N.W.2d 36 (Sandstrom, Justice, dissenting):

> The legislature is presumed to know how the courts have interpreted a statute. *See Lamb v. State Bd. of Law Examiners*, 2010 ND 11, ¶ 10, 777 N.W.2d 343 ("'Where courts of this State have construed [a] statute and such construction is supported by the long acquiescence on the part of the legislative assembly and by the failure of the assembly to amend the law, it will be presumed that such interpretation of the statute is in accordance with legislative intent.'") (quoting *City of Bismarck v. Uhden*, 513 N.W.2d 373, 376 (N.D. 1994)).

[¶22] The Legislative Assembly has had over thirty years to "remove ambiguity or correct" this Court's interpretation of N.D.C.C. § 29-05-20 in *Kuntz* if they disagreed, and another fifteen years since the statute was mysteriously revised. Its silence speaks volumes.

[¶23] Lisa Fair McEvers
Gerald W. VandeWalle

#1340

SB 2182
Senate Judiciary Committee
January 19, 2021
Testimony of Travis W. Finck, Executive Director, NDCLCI

Madam Chair Larson, members of the Senate Judiciary Committee, my name is Travis Finck and I am the executive director for the North Dakota Commission on Legal Counsel for Indigents. The Commission is the state agency responsible for the delivery of indigent defense services in North Dakota. I rise today to provide testimony in support of SB 2182.

The right to consult with counsel when charged with a crime is a fundamental right enjoyed by all in our great country. The Commission on Legal Counsel for indigents supports the rights of the accused, including the right to counsel. The Commission's support for this legislation is simple, let the accused have the same access to consult with an attorney as an attorney has to consult with the accused.

Madam Chair, on behalf of the Commission on Legal Counsel for Indigents, we urge a do pass recommendation.

Respectfully Submitted:

Travis W. Finck
Executive Director, NDCLCI

#1249

January 18, 2021
Testimony to the **Senate Judiciary Committee**
Submitted By: Jesse Walstad on behalf of the ND Association of Criminal Defense Lawyers
Testimony **In Support** of S.B. 2182

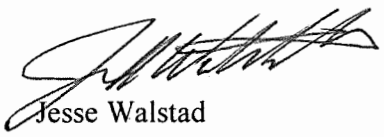
Chairmen and Members of the Senate Judiciary Committee:

My name is Jesse Walstad and I represent the ND Association of Criminal Defense Lawyers. The NDACDL is made up of lawyers throughout our state who dedicate a portion of their practice to criminal defense. The mission of the NDACDL is "to promote justice and due process" and to "promote the proper and fair administration of criminal justice within the State of North Dakota." With that mission in mind, the NDACDL **supports** S.B. 2182 and recommends a **DO PASS** from the Senate Judiciary Committee.

The antiquated language of Section 29–05–20, N.D.C.C., does not embrace decades of Sixth Amendment jurisprudence. S.B. 2182 is a common sense amendment designed to bring the statute into harmony with firmly established State and Federal case law. Section 29–05–20, N.D.C.C., originates from the Code of Criminal Procedure of 1877.[1] It was last amended in 1943.[2] Twenty years after the most recent amendment the U.S. Supreme Court unanimously held the Sixth Amendment's guarantee of a right to counsel applies to criminal defendants in State prosecutions by virtue of the Fourteenth Amendment.[3] Three years later, the U.S. Supreme Court crystalized the requirement that criminal suspects be notified of their right to an attorney during custodial interrogations prior to arrest.[4] The North Dakota Supreme Court has long recognized the import of these landmark cases and that a right to counsel is also enshrined in our State Constitution.[5]

On its face, Section 29–05–20, N.D.C.C., codifies that an individual may visit with their attorney at the attorney's request. The arbitrary limitation fails to recognize the fundamental concept that the accused, not the attorney, holds the right to request assistance of counsel. As a practical matter, the attorney rarely knows what is happening behind the jail house doors. Officers may attempt to interview the client without the attorney's knowledge or actively prevent the lawyer and client from speaking until after the interrogation.[6] In Gideon, the U.S. Supreme Court recognized that the accused's right to counsel is necessary to insure the fundamental human rights of life and liberty and held that justice cannot exist where a meaningful right to counsel is absent. In Miranda, the U.S. Supreme Court discussed at great length the heavy toll to individual liberty caused by allowing an accused to be isolated while "the police [...] persuade, trick, or cajole him out of exercising his constitutional rights." To safeguard against such abuses, the accused's right to request the assistance of counsel must be statutorily vested in the accused. S.B. 2182 would do so by bringing the statute into harmony with decades of jurisprudence. For these reasons, the NDACDL urges a **DO PASS** on S.B. 2182.

Respectfully,



Jesse Walstad

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[1] C. Crim. P. 1877.

[2] R.C. 1943, § 29–0520.

[3] *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963).

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

5 *John v. State*, 160 N.W.2d 37, 44 (N.D. 1968); see also N.D. Const. Art. I, § 12.

[6] *Escobedo v. State of Illinois*, 378 U.S. 478, 84 S.Ct. 1758 (1964).

2021 HOUSE JUDICIARY

SB 2182

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary
Room JW327B, State Capitol

SB 2182
3/16/2021

Relating to attorney visitation.

Chairman Klemin called the hearing at 9:30 AM

Present: Representatives Klemin, Karls, Becker, Buffalo, Christensen, Cory, K Hanson, Jones, Magrum, Paulson, Paur, Roers Jones, Satrom, and Vetter.

Discussion Topics:

- Attorney's rights
- Clarification of statue
- Accused rights

Senator Hogue: Introduced the bill. Testimony #9480 9:31

Travis Fink, Executive Director, ND Counsel on Legal Counsel for Indigents: Testimony # 9386 9:46

Chairman Klemin closed the hearing at 9:50

Rep. Satrom: Do Pass Motion
Rep. Christensen: Seconded

Representatives	Vote
Chairman Klemin	Y
Vice Chairman Karls	Y
Rep Becker	Y
Rep. Christensen	Y
Rep. Cory	Y
Rep T. Jones	Y
Rep Magrum	Y
Rep Paulson	Y
Rep Paur	Y
Rep Roers Jones	Y
Rep B. Satrom	Y
Rep Vetter	Y
Rep Buffalo	Y
Rep K. Hanson	Y

14-0-0 Motion carried

Carrier: Rep. Christensen

Additional written testimony: #9372

Stopped 9:50

DeLores D. Shimek
Committee Clerk

REPORT OF STANDING COMMITTEE

SB 2182: Judiciary Committee (Rep. Klemin, Chairman) recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2182 was placed on the Fourteenth order on the calendar.

TESTIMONY OF DAVID HOGUE IN SUPPORT OF SB 2182

HOUSE JUDICIARY COMMITTEE

MARCH 16, 2021; 9:30 AM

Good Morning, Chairman Klemin and members of the House Judiciary Committee. My name is David Hogue. I am a North Dakota state senator representing District 38, which includes northwest Minot and the city of Burlington. I appear before your committee to seek support for Senate Bill 2182.

SB 2182 seeks to clarify the case of a dangling pronoun that was found in section 29-05-20 of the North Dakota Century Code. It was not clear to one member of the North Dakota Supreme Court whether an attorney or a person under arrest had the right to request a meeting with an attorney as the statute contemplates. In a case of *City of Jamestown v. Schultz*, 2020 ND 154, the concurring opinion of Justice Jerod Tufte argued that the statute was ambiguous as to whether the attorney or the accused had the right to request a meeting with an attorney:

> As presently codified, section 29-05-20, N.D.C.C., plainly grants an "attorney at law," "at the attorney's request," the right to "visit such person [the "accused"] after that person's arrest." If the accused has a right to call an attorney when deciding whether to take a chemical test, it is nowhere to be found in section 29-05-20, N.D.C.C. Here, we do not know with certainty who changed this section or under what authority it was changed, but we do have a statutory presumption that "[t]he law as published must be presumed valid until determined otherwise by an appropriate court." N.D.C.C. § 1-02- 06.1. I have previously explained why the pronouns that have been changed are material because the result in Kuntz turned on the interpretation of those pronouns. Jesser, 2019 ND 287, ¶¶ 20-21, 936 N.W.2d 102 (Tufte, J., concurring specially).

In addition, Justice McEvers concurring opinion in *Schultz* also explained the confusing history of the Legislative Assembly's previous amendment to this section of the North Dakota Century Code. She suggests the statute's meaning may have been changed inadvertently by our code revisor. Let's look at her language together.

SB 2182 seeks to remove any doubt by choosing both. On line 8 of the bill, you may observe deletion of the word "attorney's" request. In its place the bill grants **either** the attorney or the accused the right to request a meeting with counsel after an arrest.

Mr. Chairman Klemin and members of the Committee, I'm happy to stand for your questions.

29-05-20. Unnecessary delay after arrest prohibited - Attorney visitation.

The accused in all cases must be taken before a magistrate without unnecessary delay, and any attorney at law entitled to practice in the courts of record of this state, at the attorney's request, may visit such person after that person's arrest.

29-05-21. Officer not liable to arrest while in charge of a person arrested.

While having in charge any person arrested in a criminal action or proceeding, neither the officer, nor any of the officer's assistants, is liable to arrest on civil process, and such officer is authorized to require any citizen to aid in securing the accused and to retake the accused, if the accused escapes, in any part of the state, as if the officer were within the officer's own county. A refusal or neglect to render such aid is an offense in the same manner as if the arresting officer were an officer of the county where such aid is required.

29-05-22. Giving bail deemed waiver of examination.

Repealed by S.L. 1973, ch. 252, § 1.

29-05-23. Warrant transmitted by telegraph.

Whenever a warrant for the arrest of a person accused of a crime or public offense is issued by a magistrate, the delivery of the warrant by telegraph may be authorized by a judge of the supreme or district court by an endorsement authorizing telegraphic delivery, at any place within this state, upon the warrant of arrest under the hand of the judge, directed generally to any peace officer in the state. After endorsement, a copy of the warrant may be sent by telegraph to any peace officer within the state, and the copy is as effectual in the hands of any peace officer, who shall serve the same and in all regards proceed thereunder, as though the peace officer held an original warrant issued by the magistrate making the endorsement thereon.

29-05-24. Duty of officer transmitting warrant.

Every officer causing telegraphic copies of a warrant to be sent shall certify as correct, and file in the telegraph office from which such copies are sent, a copy of the warrant and the endorsement thereon, and shall return the original with a statement of the officer's action thereunder signed by the officer.

29-05-25. Warrant returnable in county where issued - Telegraphic copy deemed original - Misdemeanor or infraction.

Every person arrested by warrant for any offense, when no other provision is made for that person's examination, must be taken before some magistrate of the county in which the warrant was issued, and the warrant with the proper return thereon, signed by the person who made the arrest, must be delivered to such magistrate. Any telegraphic copy of a warrant under which an officer has acted in making an arrest must be deemed the original warrant. If the offense charged in the warrant is a misdemeanor or infraction within the jurisdiction of a magistrate to try and upon conviction to punish, a trial must be had as is provided by law.

29-05-26. Arrest directed by telegraph.

In all cases in which by law a peace officer of this state may arrest a person without a warrant, or having a warrant for the arrest of a person accused of a crime or public offense when the person otherwise may escape from this state, the peace officer may direct any other peace officer in this state, by telegraph, to arrest the person, who must be designated by name or description or both.

29-05-27. How an order by wire executed - Procedure.

An order by a police officer directing other peace officers in the state to make an arrest may be directed generally to any of such officers and executed by the officer receiving it. The officer executing any such order shall take into the officer's custody the person designated therein and shall detain that person upon such order for such length of time as is necessary for the officer

Filed 7/22/20 by Clerk of Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2020 ND 154

City of Jamestown, Plaintiff and Appellee

v.

Carlin Dean Schultz, Defendant and Appellant

No. 20190359

Appeal from the District Court of Stutsman County, Southeast Judicial District, the Honorable Cherie L. Clark, Judge.

AFFIRMED.

Opinion of the Court by Jensen, Chief Justice, in which Justices VandeWalle, Crothers, and McEvers joined. Justice Tufte filed a specially concurring opinion, in which Chief Justice Jensen joined. Justice McEvers filed a concurring opinion, in which Justice VandeWalle joined.

Abbagail C. Geroux, Assistant City Attorney, Jamestown, ND, for plaintiff and appellee.

Chad R. McCabe, Bismarck, ND, for defendant and appellant.

[¶9] Schultz was provided with an opportunity to consult with an attorney. After consulting with an attorney, Schultz made a decision to take the chemical test. In *Kuntz*, a majority of this Court recognized "that if an arrested person asks to consult with an attorney before deciding to take a chemical test, he must be given a reasonable opportunity to do so if it does not materially interfere with the administration of the test." *Kuntz*, 405 N.W.2d at 290. Schultz consulted with an attorney, made a decision regarding the requested testing, and his limited right to consult with an attorney prior to taking the test as established in *Kuntz* had been satisfied.

III

[¶10] Schultz was provided with an opportunity to consult with an attorney before he decided whether to submit to chemical testing. Schultz was not required to be provided with a second chance to consult with an attorney subsequent to making a decision to take the chemical test. The judgment of the district court is affirmed.

[¶11] Jon J. Jensen, C.J.
Daniel J. Crothers
Lisa Fair McEvers
Gerald W. VandeWalle

Tufte, Justice, concurring specially.

[¶12] Once again, the Court is asked to expand on the "statutory right" of a person arrested for DUI to call an attorney before taking a chemical test that a majority of this Court first described in *Kuntz v. State Highway Comm'r*, 405 N.W.2d 285, 287 (N.D. 1987). The Court has properly rejected that request, and I concur in the result.

[¶13] I write separately because I maintain that this "statutory right," a strained but possible interpretation of N.D.C.C. § 29-05-20 when *Kuntz* was decided, cannot be reconciled with the statute as it is now codified. *Jesser v. N.D. Dep't of Transp.*, 2019 ND 287, ¶¶ 19-22, 936 N.W.2d 102 (Tufte, J., concurring specially). This Court appropriately gives significant weight under

principles of stare decisis to its previous decisions interpreting statutes. When the statute has changed in material respects, however, the Court is required to apply the amended law as written. The Court's interpretation of the previous statute may provide little or no guidance. Whether or not the parties and the district court have identified all applicable law, we retain authority to identify and apply the correct law. *See D.G.L. Trading Corp. v. Reis*, 2007 ND 88, ¶ 7, 732 N.W.2d 393. As presently codified, section 29-05-20, N.D.C.C., plainly grants an "attorney at law," "at the attorney's request," the right to "visit such person [the "accused"] after that person's arrest." If the accused has a right to call an attorney when deciding whether to take a chemical test, it is nowhere to be found in section 29-05-20, N.D.C.C. Here, we do not know with certainty who changed this section or under what authority it was changed, but we do have a statutory presumption that "[t]he law as published must be presumed valid until determined otherwise by an appropriate court." N.D.C.C. § 1-02-06.1. I have previously explained why the pronouns that have been changed are material because the result in *Kuntz* turned on the interpretation of those pronouns. *Jesser*, 2019 ND 287, ¶¶ 20-21, 936 N.W.2d 102 (Tufte, J., concurring specially). They are only immaterial if they are not in fact valid law. In this case, the City did not question whether the statute as now codified provides a "statutory right" to counsel prior to submitting to testing, and the majority opinion properly refrains from addressing an issue not raised by the parties.

[¶14] I acknowledge that if time and other circumstances permit, an officer may allow a driver to consult with an attorney one or more times in the interest of obtaining informed consent to a chemical test. But I would conclude that Schultz had no right to call an attorney a second time because, properly interpreted, both the first and second calls were a matter of officer discretion and not of statutory right under N.D.C.C. § 29-05-20.

[¶15] Jerod E. Tufte
Jon J. Jensen, C.J.

McEvers, Justice, concurring.

[¶16] I agree with and have signed with the majority. I write separately to address Justice Tufte's special concurrence. Justice Tufte is correct the language of N.D.C.C. § 29-05-20 has changed since this Court's interpretation in *Kuntz v. State Highway Comm'r*, 405 N.W.2d 285 (N.D. 1987). Justice Tufte suggests the changes have been made to remove ambiguity. *Jesser v. N.D. Dep't of Transp.*, 2019 ND 287, ¶ 21, 936 N.W.2d 102 (Tufte, Justice, concurring specially). Justice Tufte notes:

> We do not lightly revisit settled issues of statutory interpretation because the Legislative Assembly has ample opportunity to correct our work if it does not comport with its intended meaning. Here, it appears the Legislative Assembly may have tried to correct our work, but without effect.

Id. at ¶ 22 (citation omitted). I respectfully disagree we should assume any intent by the legislature to "remove ambiguity," or "correct our work," because there is no record the Legislative Assembly had a role in the change to the statute.

[¶17] In 2003, N.D.C.C. § 29-05-20 read as follows: "The accused in all cases must be taken before a magistrate without unnecessary delay, and any attorney at law entitled to practice in the courts of record of this state, at *his* request, may visit such person after *his arrest*." (Emphasis added.) In 2005, N.D.C.C. § 29-05-20 was revised to read: "The accused in all cases must be taken before a magistrate without unnecessary delay, and any attorney at law entitled to practice in the courts of record of this state, at *the attorney's* request, may visit such person after *that person's arrest*." (Emphasis added.)

[¶18] If the Legislative Assembly had intended to correct this Court's interpretation of N.D.C.C. § 29-05-20 it would have done so in the form of a bill to amend and reenact the statute. Even when a statute is amended for a technical correction, this type of change is generally made as sections of law are amended for other purposes. *See H.B. 1045*, 56th N.D. Legis. Sess. (1999), stating:

> Section 29-12-05 of the North Dakota Century Code is amended and reenacted as follows:
>
> 29-12-05. Bench warrant, misdemeanor, infraction, or bailable felony. If an offense is a misdemeanor, an infraction, or a bailable felony, the bench warrant issued must be in a form similar to form ~~10~~ 12 as contained in the appendix to the North Dakota Rules of Criminal Procedure, but must add to the body thereof a direction to the following effect, "or if ~~he~~ the person requires it, that you take ~~him~~ the person before any magistrate of that county or in the county in which you arrest ~~him~~ the person, that ~~he~~ the person may give bail to answer the information (or indictment)".

[¶19] There is no explanation from the Legislative Assembly why the statute was revised. Presumably it was changed by the Code Revisor. *See* N.D.C.C. § 46-03-10 (allowing legislative council to "make such corrections in orthography, grammatical construction, and punctuation of the same as in its judgment are proper"). However, the Code Revisor is not authorized to change the meaning of the law.

[¶20] I agree with Justice Tufte this Court should give significant weight under the principle of *stare decisis* to its previous decisions interpreting statutes. Tufte, Justice, concurring specially at ¶ 13. However, I cannot agree the changes to the statute are material, when we have no idea why the statute was revised. This Court has consistently applied the holding in *Kuntz* since the statute was revised in 2005, with no action by the Legislative Assembly. *Neutman v. N.D. Dep't*, 2019 ND 288, 935 N.W.2d 788; *Jesser v. N.D. Dep't of Transp.*, 2019 ND 287, 936 N.W.2d 102; *City of Bismarck v. King*, 2019 ND 74, 924 N.W.2d 137; *State v. Von Ruden*, 2017 ND 185, 900 N.W.2d 58; *City of Dickinson v. Schank*, 2017 ND 81, 892 N.W.2d 593; *Koehly v. Levi*, 2016 ND 202, 886 N.W.2d 689; *Cudmore v. N.D. Dep't of Transp.*, 2016 ND 64, 877 N.W.2d 52; *State v. Keller*, 2016 ND 63, 876 N.W.2d 724; *Washburn v. Levi*, 2015 ND 299, 872 N.W.2d 605; *Schlittenhart v. N.D. Dep't of Transp.*, 2015 ND 179, 865 N.W.2d 825; *Herrman v. N.D. Dep't of Transp.*, 2014 ND 129, 847 N.W.2d 768; *Gardner v. N.D. Dep't of Transp.*, 2012 ND 223, 822 N.W.2d 55; *Bell v. N.D. Dep't of Transp.*, 2012 ND 102, 816 N.W.2d 786; *Kasowski v. N.D. Dep't of Transp.*, 2011 ND 92, 797 N.W.2d 40; *Interest of R.P.*, 2008 ND 39, 745

N.W.2d 642; *Lies v. N.D. Dep't of Transp.*, 2008 ND 30, 744 N.W.2d 783; *State v. Pace*, 2006 ND 98, 713 N.W.2d 535; *Eriksmoen v. N.D. Dep't of Transp.*, 2005 ND 206, 706 N.W.2d 610.

[¶21] As this Court noted in *Olson v. Job Serv. N.D.*, 2013 ND 24, ¶ 50, 827 N.W.2d 36 (Sandstrom, Justice, dissenting):

> The legislature is presumed to know how the courts have interpreted a statute. *See Lamb v. State Bd. of Law Examiners*, 2010 ND 11, ¶ 10, 777 N.W.2d 343 ("'Where courts of this State have construed [a] statute and such construction is supported by the long acquiescence on the part of the legislative assembly and by the failure of the assembly to amend the law, it will be presumed that such interpretation of the statute is in accordance with legislative intent.'") (quoting *City of Bismarck v. Uhden*, 513 N.W.2d 373, 376 (N.D. 1994)).

[¶22] The Legislative Assembly has had over thirty years to "remove ambiguity or correct" this Court's interpretation of N.D.C.C. § 29-05-20 in *Kuntz* if they disagreed, and another fifteen years since the statute was mysteriously revised. Its silence speaks volumes.

[¶23] Lisa Fair McEvers
Gerald W. VandeWalle

SB 2182
House Judiciary Committee
March 16, 2021
Testimony of Travis W. Finck, Executive Director, NDCLCI

Chairman Klemin, members of the Judiciary Committee, my name is Travis Finck and I am the executive director for the North Dakota Commission on Legal Counsel for Indigents. The Commission is the state agency responsible for the delivery of indigent defense services in North Dakota. I rise today on behalf of the Commission to provide testimony in support of SB 2182.

The right to consult with counsel when charged with a crime is a fundamental right enjoyed by all in our great country. The Commission on Legal Counsel for indigents supports the rights of the accused, including the right to counsel. The Commission's support for this legislation is simple, let the accused have the same access to consult with an attorney as an attorney has to consult with the accused.

Mr. Chairman, members of the Committee, on behalf of the Commission on Legal Counsel for Indigents, we urge a do pass recommendation.

Respectfully Submitted:

Travis W. Finck
Executive Director, NDCLCI

House Member,

No attorney or accused should ever be denied an attorney visit in a free democracy!

I find it sad that this must even be put on the books, but it must be needed.

Thank you,

Mr. Mitchell S. Sanderson