EVIDENCE – FORFEITURE BY WRONGDOING: ADMITTING EVIDENCE IN A CRIMINAL PROCEEDING FOR THE PURPOSE OF EQUITY AND AS AN EXCEPTION TO THE SIXTH AMENDMENT CONFRONTATION CLAUSE

State v. Davis, 2022 ND 30, 970 N.W.2d 201.

ABSTRACT

In *State v. Davis*, the North Dakota Supreme Court addressed the doctrine of forfeiture by wrongdoing as an exception to the Sixth Amendment Confrontation Clause of the United States Constitution. In *Davis*, the court denied the defendant's appeal that his Sixth Amendment confrontation right was violated by the admission of testimonial hearsay which the district court had admitted based on the doctrine of forfeiture by wrongdoing. The defendant did not argue that forfeiture by wrongdoing was not a valid exception to the Confrontation Clause, but rather that the court's interpretation and application of the doctrine was invalid, and the court had failed to adequately support its findings. The North Dakota Supreme Court first *held*, as a matter of first impression, that the forfeiture doctrine as an exception to the Confrontation Clause was proper, and the court adopted a four-part test that was established in the Minnesota Supreme Court case *State v. Cox*. Second, the court *held*, as a matter of first impression, that the State does not bear a burden to show that the defendant's wrongful acts were intended to prevent the victim from testifying at a specific trial or proceeding. Instead, the element of intent refers to the defendant's state of mind only as it pertains to making a witness unavailable. As a result, the court *held*, based on the evidence presented, that the district court correctly applied the doctrine of forfeiture by wrongdoing and properly admitted the victim's testimonial statements. In determining this case, the court considered case law from the United States Supreme Court, multiple state supreme court opinions, and both the Federal and North Dakota rules of evidence as they pertain to the doctrine of forfeiture by wrongdoing. Additionally, the court made note of specific out of court statements which, based on prior opinions, would not be considered testimonial and thus would be considered beyond the reach of the Sixth Amendment Confrontation Clause. As a matter of first impression, *State v. Davis* establishes and defines the test for the doctrine of forfeiture by wrongdoing, it outlines for prosecutors the appropriate context and use of this doctrine, and it provides guidance on the role of evidence necessary to support this doctrine.

I. FACTS

In *State v. Davis*,[1] the State of North Dakota charged Sheldon Davis ("Davis" or "Defendant") with "intentional or knowing murder, endangering by fire, and arson."[2] Before trial, the State filed a motion in limine to admit statements made by the victim, Denise Anderson ("Witness" or "Victim"), to both the Fargo Police Department and a neighbor prior to her death.[3] These statements alleged that Defendant had "physically and sexually assault[ed]

1. 2022 ND 30, 970 N.W.2d 201.

2. *Davis*, 2022 ND 30, ¶ 1, 970 N.W.2d 201; N.D. CENT. CODE § 12.1-16-01(1)(a) (2021) ("A person is guilty of murder . . . if the person: [i]ntentionally or knowingly causes the death of another human being."); N.D. CENT. CODE § 12.1-21-02 (2021) ("Endangering by fire or explosion."); N.D. CENT. CODE § 12.1-21-01 (2021) ("A person is guilty of arson . . . if he starts or maintains a fire or causes an explosion with the intent to destroy an entire or any part of a building . . . .").

3. *Davis*, 2022 ND 30, ¶ 2, 970 N.W.2d 201.

her, stalk[ed] her, and vandaliz[ed] her car."[4] At the evidentiary hearing, the district court reserved ruling on these statements until trial.[5]

During the trial, which was held in March of 2021, witnesses testified that Defendant and Victim had been in a "'turbulent' relationship . . . for several months."[6] The State presented evidence and called witnesses to show that Defendant "believed he 'was in trouble with the police' because of his alleged assault on [Victim]" and that Victim had told Defendant she "was going to put him in jail this time."[7] Witnesses testified to seeing Defendant watching Victim's apartment, and they also testified that Victim wanted a restraining order against Defendant.[8] According to witnesses, Defendant appeared "concerned" when told that police wanted to speak with him about the alleged assault, and a witness described Defendant as "'agitated' and 'aggressive' in the weeks leading up to [Victim]'s murder."[9] Evidence showed that Defendant knew Victim reported the alleged assault to the police.[10] This evidence, which was taken from Defendant's phone, also included a recording in which Defendant confronted Victim about a note allegedly written by Victim stating Defendant was going to kill her; however, in the recording Victim denied writing this note.[11]

Outside the jury's presence, the court addressed the admissibility of statements in which Victim had told both Fargo Police Department and her neighbors that Defendant physically and sexually assaulted her, stalked her, and vandalized her car.[12] Defendant objected having already argued that it would violate his Sixth Amendment rights under the Confrontation Clause.[13] However, the district court held that Victim's statements were admissible under the doctrine of forfeiture by wrongdoing after the State showed by a preponderance of the evidence that Defendant had intentionally acted to prevent Victim from assisting the authorities with their investigation and further acted to prevent her from testifying in the event of a judicial proceeding.[14] "'[Defendant's] motive behind the homicide was to make [Victim] unavailable for any testimony [and] to stop the investigation into [Defendant's] alleged sexual assault and physical assault."[15] In further

4. *Id.*
5. *Id.*
6. *Id.* ¶ 3.
7. *Id.*
8. *Id.*
9. *Id.* ¶¶ 3-4.
10. *Id.* ¶ 4.
11. *Id.*
12. *Id.* ¶ 5.
13. *Id.* ¶¶ 2, 5.
14. *Id.* ¶¶ 5, 18.
15. *Id.* ¶ 5.

support of this argument, the State also introduced 911 calls under N.D.R.Ev. 404(b) to show Defendant's motive.[16] On May 10, 2021, the jury returned a guilty verdict on all three counts and sentenced Defendant to life in prison without parole.[17] Defendant appealed his conviction to the North Dakota Supreme Court, but upon review, the court held that the district court properly applied the doctrine of forfeiture by wrongdoing and affirmed the decision to admit Victim's statements.[18]

II. LEGAL BACKGROUND

In *Davis*, the North Dakota Supreme Court addressed, as a matter of first impression, whether the admission of statements made by a victim under the doctrine of forfeiture by wrongdoing violated a defendant's constitutional rights under the Sixth Amendment Confrontation Clause.[19] The court discussed and analyzed three concepts relating to the forfeiture doctrine: the history and purpose of the forfeiture doctrine; other jurisdiction's application of the forfeiture doctrine; and the State's burden of proving the defendant's intent.

A. THE HISTORY AND PURPOSE OF FORFEITURE BY WRONGDOING

When a defendant intentionally interferes by "undermin[ing] the judicial process by procuring or coercing silence from witnesses and victims . . ." the doctrine of forfeiture provides for a narrow exception to the Sixth Amendment Confrontation Clause and allows for the admission of otherwise inadmissible testimonial evidence.[20] The Confrontation Clause provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him" thereby protecting a defendant from out-of-court testimony when the defendant did not have the opportunity to question or cross-examine the declarant.[21] However, under the doctrine of forfeiture, the defendant "may forfeit both constitutional and hearsay objections if [the defendant's] conduct cause[d] the declarant's unavailability."[22]

The origins of both the Confrontation Clause and the forfeiture doctrine can be traced back to common law from the 1600s and treatises from the 1800s.[23] The United States Supreme Court case *Giles v. California* provides

16. *Id.*
17. *Id.* ¶ 6.
18. *Id.* ¶¶ 7, 18.
19. *Id.* ¶¶ 1, 12.
20. *Id.* ¶ 10 (quoting State v. Cox, 779 N.W.2d 844, 851 (Minn. 2010)).
21. *Id.* ¶ 9 (quoting U.S. CONST. amend. VI).
22. *Id.* ¶ 11.
23. Giles v. California, 554 U.S. 353, 359-61 (2008).

a detailed analysis of these origins and of the doctrine's history, while also serving as one of the primary precedent opinions on the matter.[24] In *Giles*, the Court found, based on period common law cases and treatises, that the original intent of the forfeiture doctrine was to allow for the admission of prior testimony when a witness was "kept away by the defendant's 'means and contrivance.'"[25] According to a 1858 treatise, "the forfeiture rule applied when a witness 'had been kept out of the way by the prisoner, or by some one of the prisoner's behalf, *in order to prevent him from giving evidence against him*.'"[26] The Court stated the language used clearly indicates the application of the forfeiture doctrine when a defendant has schemed or "contrived" to secure a witness' absence and prevent them from testifying.[27]

In the United States, the forfeiture doctrine has enjoyed a long-standing association with the Sixth Amendment Confrontation Clause and a place within United States constitutional studies. The issue was first addressed by the United States Supreme Court in 1878, in *Reynolds v. United States,*[28] where the Court held:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.[29]

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24. *Id*.

25. *Id*. (citing 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 81 (1816) ("kept away by the means and contrivance of the prisoner")); S. M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 165 (1814) ("kept out of the way by the means and contrivance of the prisoner"); Drayton v. Wells, 10 S.C.L. (1 Nott & McC.) 409, 411 (S.C. 1819) ("kept away by the contrivance of the opposite party").

26. *Id*. at 361 (quoting EDMUND POWELL, THE PRACTICE OF THE LAW OF EVIDENCE 166 (1858) (emphasis added by the Court in *Giles*).

27. *Id*.; *see* NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining "procure" as "to *contrive* and effect") (emphasis added) (also defining "procure" as "[t]o get; to gain; to obtain; as by request, loan, effort, labor or purchase"); J. A. Simpson, E. S. C. Weiner, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) (defining "procure" as "[t]o contrive or devise with care (an action or proceeding); to endeavour to cause or bring about (mostly something evil) *to* or *for* a person").

28. 98 U.S. 145 (1878).

29. *Reynolds,* 98 U.S. at 158.

The Court in *Giles* noted that the Constitution does not guarantee protection against "the legitimate consequences of his own wrongful acts," but instead recognizes that a defendant should not be allowed to take advantage of their wrongful actions.[30]

More recently, in 1997, the United States Supreme Court codified the forfeiture doctrine through the approval of Federal Rules of Evidence 804(b).[31] This rule, which remains the current federal law, denies defendants who "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" the opportunity to object to the unavailable declarant's statements based on hearsay.[32] North Dakota subsequently adopted the doctrine as an exception to hearsay under N.D.R.Ev. 804(b)(6).[33] This rule provides that if the declarant is unavailable, "a statement offered against a party that wrongfully caused, or acquiesced in wrongfully causing, the declarant's unavailability . . . and did so intending that result" may be admitted as an exception to the rule against hearsay.[34] However, like its federal counterpart, this rule of evidence is concerned with hearsay rather than a constitutional challenge like the one raised by Defendant in *Davis*.[35]

At this point, it is important to remember that the issue before the court in *Davis* solely concerned the implementation of the forfeiture doctrine and not whether the doctrine itself is a constitutional violation of Defendant's rights. In *Davis*, Defendant argued that the trial court's decision to admit testimonial evidence violated his constitutional rights under the Confrontation Clause.[36] Defendant did not argue that a specific witness or evidence caused this violation, but he instead alleged the trial court's general application of the doctrine was not supported by adequate findings.[37] Additionally, Defendant did not dispute the constitutionality of the doctrine or the test which the court eventually adopted, and as a result, the court's focus is solely directed towards the implementation of the doctrine and the adoption of a test in the State of North Dakota.[38]

30. *Giles*, 554 U.S. at 366 (quoting *Reynolds*, 98 U.S. at 158).
31. Fed. R. Evid. 804(b)(6).
32. State v. Davis, 2022 ND 30, ¶ 11, 970 N.W.2d 201 (quoting *Giles*, 554 U.S. at 367).
33. *Id.* ¶ 11; *see* N.D.R.Ev. 804(b)(6).
34. N.D.R.Ev. 804(b)(6).
35. *Davis*, 2022 ND 30, ¶ 11, 970 N.W.2d 201.
36. *Id.* ¶ 8.
37. *Id.*
38. *See id.* ¶¶ 13-14.

B. OTHER JURISDICTION'S APPLICATION OF FORFEITURE BY WRONGDOING

Since the North Dakota Supreme Court had not previously considered the doctrine of forfeiture by wrongdoing, the court's first task was to establish a test with elements.[39] The court considered three state supreme court opinions from Utah, Michigan, and Minnesota.[40] The tests which these courts provided are "substantially the same, although articulated differently."[41] However, considering the vast number of possible jurisdictions and cases the court could have chosen to consider, these three opinions warrant a closer examination as they provide a valuable frame of reference to understanding the forfeiture doctrine and the North Dakota test.[42]

The court in *Davis* began by looking at the Utah Supreme Court decision *State v. Poole*,[43] and the Michigan Supreme Court decision *People v. Burns*.[44] In *Poole*, the court adopted the three-prong federal law forfeiture test requiring "the state to show (1) the witness is unavailable at trial, (2) the witness's unavailability was caused by a wrongful act of the defendant, and (3) the defendant's act was done with an intent to make the witness unavailable."[45] The court in *Burns* adopted a similar standard which required the State to prove, by a preponderance of the evidence, "(1) that the defendant engaged in or encouraged wrongdoing; (2) that the wrongdoing was intended to procure the declarant's unavailability; and (3) that the wrongdoing did procure the unavailability."[46] While the elements for both tests are "substantially the same,"[47] these cases provide some additional guidance for practitioners. The court in *Poole* noted that the United States Supreme Court had "expressly" allowed the individual state to decide "what burden of proof must the state meet to show a defendant has forfeited the right to confrontation through misconduct . . . [and] what type of evidence may the district court consider in analyzing the defendant's wrongful conduct."[48] In response to these questions, the *Poole* court provided its own rules requiring the State prove all elements beyond a reasonable doubt; that all evidentiary issues should be decided by a preponderance of the evidence; and that hearsay and all other evidence which would be otherwise inadmissible under

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39. *Id.* ¶ 12.
40. *Id.*
41. *Id.*
42. *See id.*
43. 2010 UT 25, 232 P.3d 519.
44. 832 N.W.2d 738, 743-44 (Mich. 2013).
45. *Poole*, 2010 UT 25, ¶¶ 20, 24, 232 P.3d 519 (citing U.S. v. Houlihan, 92 F.3d 1271, 1280 (1st Cir. 1996)).
46. *Burns*, 832 N.W.2d at 743-44.
47. *Davis*, 2022 ND 30, ¶ 12, 970 N.W.2d 201.
48. *Poole*, 2010 UT 25, ¶ 21, 232 P.3d 519.

the state rules of evidence, must be precluded from influencing the district court's evaluation.[49] *Burns* reflects a similar standard for evidence and rejects the application of the forfeiture doctrine based on a finding of improperly admitted and outcome determinative hearsay.[50] In addition to determining that a preponderance burden applies, the *Burns* court also incorporated a "specific intent requirement."[51]

Finally, the North Dakota Supreme Court examined the Minnesota Supreme Court decision in *State v. Cox*.[52] *Cox* provides a four-part test, based on the principles of *Giles*, which "requires the State to prove: (1) that the declarant-witness is unavailable; (2) that the defendant engaged in wrongful conduct; (3) that the wrongful conduct procured the unavailability of the witness; and (4) that the defendant intended to procure the unavailability of the witness."[53] Additionally, under the *Cox* test, the State must meet its burden of proof by a preponderance of the evidence.[54]

As mentioned, the court in *Poole* identified two issues which the Supreme Court expressly left to the discretion of each state.[55] The second of these issues, which concerns the types of admissible evidence that could be considered in determining whether the defendant's conduct was wrongful for the purposes of the forfeiture doctrine, is not addressed by the *Cox* test[56] or by the North Dakota Supreme Court in *Davis*.[57] However, the issue of admissible evidence is still vitally important to North Dakota practitioners.

In *Poole*, the court held that the district court may not consider hearsay or other inadmissible forms of evidence when seeking to show a defendant's act of wrongdoing, and it should only consider "evidence [which is] admissible under the . . . Rules of Evidence."[58] Under the state rules of evidence, only matters of privilege prevent a court from applying its own discretion to decide preliminary questions like admitting evidence.[59] "Generally, the district court 'is not bound to the rules of evidence except those with respect to privilege,'" and as a result, may choose to disregard rules in matters like "analyzing the admissibility of evidence."[60] However, "this rule is not absolute" and it is within the state supreme court's authority

49. *Id.* ¶¶ 22, 24-26.
50. *Burns*, 832 N.W.2d at 747.
51. *Id.* at 744-45, 748.
52. 779 N.W.2d 844 (Minn. 2010); *Davis*, 2022 ND 30, ¶ 12, 970 N.W.2d 201.
53. *Davis*, 2022 ND 30, ¶ 12, 970 N.W.2d 201 (citing *Cox*, 779 N.W.2d at 851).
54. *Id.* ¶ 12.
55. State v. Poole, 2010 UT 25, ¶ 21, 232 P.3d 519.
56. *See id.*
57. *See Davis*, 2022 ND 30, ¶ 12, 970 N.W.2d 201.
58. *Poole*, 2010 UT 25, ¶¶ 26-27, 232 P.3d 519.
59. *Id.* ¶ 26.
60. *Id.* (citing Utah R. Evid. 104(a)).

to direct courts "to conduct its analysis within the confines of the . . . Rules of Evidence."[61] The *Poole* court demanded that, in the case of forfeiture, all evidentiary rules must be followed and a district court has no discretion to ignore rules that are set to protect a defendant's constitutional rights.[62]

> The application of forfeiture by wrongdoing acts to abrogate a significant constitutional protection. We do not believe that it should be easily forfeited and thus we require the district courts of this state to apply the rules of evidence, including the rules controlling the admission of hearsay evidence, when they consider whether a criminal defendant has forfeited the right to confrontation.[63]

North Dakota has not addressed the issue of what evidence may be admitted in order to prove wrongdoing and to justify the forfeiture of a defendant's confrontation rights.[64] This issue of admissible evidence is also unaddressed in *Cox*.[65] In *Davis*, the court acknowledged how some statements and evidence were introduced by the State to show forfeiture, but it did not mention how all the evidence was admitted nor provide guidance on what evidence could be considered.[66] North Dakota's Rules of Evidence do, however, provide courts with the same discretion afforded to the courts in *Poole*.[67] While the *Poole* opinion may offer some guidance, it is ultimately little more than a persuasive argument for attorneys facing these issues regarding the forfeiture doctrine.

C. THE STATE'S BURDEN OF PROVING THE DEFENDANT'S INTENT

The principal element of the forfeiture doctrine is intent. In *Davis*, the North Dakota Supreme Court considered case law to determine whether the State must prove that a defendant's intent was tied to a particular judicial proceeding, or if it was applied broadly to all instances and occasions where the witness could testify against the defendant.[68]

In *Giles*, the United States Supreme Court provided the foundation for understanding the intent element in the forfeiture doctrine by interpreting the differing historical meanings and the various historical understandings of this doctrine.[69] Based on common law cases and period treaties, the Court held

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61. *Id*.
62. *Id*.
63. *Id*.
64. *See* State v. Davis, 2022 ND 30, ¶ 12, 970 N.W.2d 201.
65. *See generally* State v. Cox, 779 N.W.2d 844 (Minn. 2010).
66. *Davis*, 2022 ND 30, ¶ 5, 970 N.W.2d 201.
67. N.D.R.Ev. 104(a); *Poole*, 2010 UT 25, ¶ 26, 232 P.3d 519.
68. *Davis*, 2022 ND 30, ¶ 15, 970 N.W.2d 201.
69. Giles v. California, 554 U.S. 353, 360 (2008).

that early application of the forfeiture doctrine makes it clear that "unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying."[70] In addition to common law cases and treaties, the Court cited to Federal Rules of Evidence 804(b)(6) which states that "the requirement of intent 'means that the [forfeiture] exception applies only if the defendant has in mind the particular purpose of making the witness unavailable'" but mentions nothing about a requirement to show the intent was linked to any judicial proceeding.[71]

III. ANALYSIS

A. THE MAJORITY OPINION

The majority opinion in *Davis*, written by Justice McEvers, resolved two main issues. First, the court held that the application of the forfeiture by wrongdoing doctrine is proper in North Dakota and adopted a test with elements to be used in conjunction with this doctrine.[72] Second, the court held that the State does not bear any additional burden to prove that the defendant's intent was directed towards a particular judicial proceeding.[73] Based on these findings, the court held that the trial court's application of the forfeiture doctrine was proper and affirmed the court's admission of testimonial evidence under this same doctrine.[74] Both issues, North Dakota's test for the forfeiture doctrine and the State's burden of showing a defendant's specific intent, were issues of first impression.[75] As such, the court relied heavily on case law from outside jurisdictions including other state supreme court opinions, U.S. Supreme Court cases, and both federal and state rules of evidence.[76]

1. North Dakota's Standard for Forfeiture by Wrongdoing

The court's first task in *Davis* was to establish a standard test with elements for the forfeiture doctrine in North Dakota.[77] The court considered three external state supreme court opinions to serve as the basis for establishing this test.[78] The first two cases, *State v. Poole* and *People v. Burns*, provide valuable insight into the forfeiture doctrine despite not

70. *Id.* at 361.
71. *Davis*, 2022 ND 30, ¶ 15, 970 N.W.2d 201 (quoting *Giles*, 554 U.S. at 367).
72. *Id.* ¶ 12.
73. *Id.* ¶¶ 16, 18.
74. *Id.* ¶ 18.
75. *Id.* ¶ 12.
76. *See id.* ¶¶ 12-16.
77. *Id.* ¶ 12.
78. *Id.*

garnering the same level of attention or analysis that the court afforded to other cases. As previously mentioned, *Poole* states that the State's burden to prove forfeiture is left to the discretion of the individual states, and it mandates that courts within its jurisdiction can only consider evidence which is admissible under the rules of evidence when determining if a defendant has committed a wrongdoing within the scope of the forfeiture doctrine.[79]

The court devoted most of its attention towards interpreting and ultimately adopting the Minnesota Supreme Court opinion *State v. Cox*.[80] For the courts to apply the doctrine of forfeiture by wrongdoing, the *Cox* test requires that the State prove "(1) that the declarant-witness is unavailable; (2) that the defendant engaged in wrongful conduct; (3) that the wrongful conduct procured the unavailability of the witness; and (4) that the defendant intended to procure the unavailability of the witness."[81] Each element of the test must be proven by a preponderance of the evidence.[82] This test, which is rooted in the principles established in *Giles*, was adopted by the court as the standard for the forfeiture doctrine in North Dakota.[83]

2. The State's Burden of Showing Defendant's Specific Intent

The second issue addressed by the court in *Davis* is whether the State is required to prove that the defendant's intent to prevent a witness from testifying was related to a particular judicial proceeding.[84] In *Davis*, Defendant did not deny "that [Witness] was unavailable, that he engaged in wrongful conduct, or that his wrongful conduct procured [Witness's] unavailability" but rather, Defendant argued the application of the forfeiture doctrine was improper because the State failed to show that any wrongful actions were committed with intent and purpose of preventing Victim from testifying at her own murder trial.[85] The court concluded, based on case law, that the State does not bear an additional burden to prove a defendant's intention was to prevent a witness from testifying at a particular judicial proceeding.[86]

In *Giles*, the Supreme Court held "that unconfronted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying."[87] This same concept is reiterated and addressed

79. *Id.* (citing State v. Poole, 2010 UT 25, ¶¶ 20-21, 232 P.3d 519).
80. *Id.*
81. *Id.* (citing State v. Cox, 779 N.W.2d 844, 851 (Minn. 2010)).
82. *Id.*
83. *Id.*
84. *Id.* ¶¶ 14-15.
85. *Id.* ¶¶ 13-14.
86. *Id.* ¶¶ 15-16.
87. Giles v. California, 554 U.S. 353, 361 (2008).

more directly in the Missouri Supreme Court opinion *State v. McLaughlin*,[88] where the court addressed a similar issue to the argument raised by Defendant in *Davis*.[89] In *McLaughlin*, the court rejected the argument that forfeiture by wrongdoing "cannot apply where the purpose of keeping the witness away was not related to the present case."[90] Instead, the court cited to *Giles* which held that, in instances of domestic violence and abuse, the surrounding circumstances could provide a sufficient basis to support forfeiture, as would current ongoing proceedings.[91] "Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution – rendering her prior statements admissible under the forfeiture doctrine."[92]

Based on *Giles*, the *McLaughlin* court held that if surrounding circumstances can be used to infer the necessary intent to satisfy the forfeiture doctrine, then the State does not need to prove that the defendant's intent was related to a specific judicial proceeding.[93] Although evidence of an ongoing criminal proceeding might be considered persuasive and "highly relevant to this inquiry" it is ultimately not required.[94] Instead, the court held that where admissible evidence shows that a defendant intended to keep a witness from testifying, it is sufficient to satisfy the forfeiture doctrine, and the State is not required to prove that the intent was related to judicial proceedings.[95]

The *McLaughlin* holding is also reflected in an Illinois Supreme Court opinion, *People v. Peterson*,[96] which is referenced in the *Davis* opinion.[97] In *Peterson*, the court held, based on its interpretation of *Giles* and the Illinois Rules of Evidence, that the forfeiture doctrine does not require the State to prove that intent was related to a criminal proceeding.[98] The court held that the forfeiture doctrine is not limited to instances where a defendant prevents a witness from testifying at trial, but it is equally applicable to a defendant attempting to prevent a witness from reporting conduct to the authorities.[99] Based on the opinion proffered in *Giles*, the court held that the absence of

88. 265 S.W.3d 257 (Mo. 2008).
89. *McLaughlin*, 265 S.W.2d at 272; *Davis*, 2022 ND 30, ¶ 16, 970 N.W.2d 201.
90. *McLaughlin*, 265 S.W.3d at 272.
91. *Id.*
92. *Id.* (quoting *Giles*, 554 U.S. at 377).
93. *Id.*
94. *See id.*
95. *Id.*; State v. Davis, 2022 ND 30, ¶ 16, 970 N.W.2d 201.
96. 2017 IL 120331, 106 N.E.3d 944.
97. *Davis*, 2022 ND 30, ¶ 15, 970 N.W.2d 201.
98. *Peterson*, 2017 IL 120331, ¶¶ 54-56, 106 N.E.3d 944.
99. *Id.* ¶¶ 52-54.

criminal proceedings does not prevent the application of the forfeiture doctrine.[100]

Additionally, the court in *Davis* referenced a 2005 Colorado Supreme Court case, *Vasquez v. People*,[101] which arguably provides a more direct and definitive answer to the issue of the State's burden as it relates to a defendant's intent.[102] In *Vasquez,* the court stated that "federal courts, in construing Rule 804(b)(6) of the Federal Rules of Evidence, have explicitly provided that the defendant's intent need not attach to any particular proceeding."[103] In support of this position, the court cited to a Fourth Circuit case, *United States v. Gray*,[104] which held that the plain language of Federal Rule of Evidence 804(b)(6) required "only that the defendant intend to render the declarant unavailable 'as a witness.'"[105]

> The text does not require that the declarant would otherwise be a witness at any *particular* trial, nor does it limit the subject matter of admissible statements to events distinct from the events at issue in the trial in which the statements are offered. Thus, we conclude that Rule 804(b)(6) applies *whenever* the defendant's wrongdoing was intended to, and did, render the declarant unavailable as a witness against the defendant, without regard to the nature of the charges at the trial in which the declarant's statements are offered.[106]

Based on the aforementioned opinions, the *Davis* court reiterated that "[o]ther courts that have considered the issue have noted, while the State must prove the defendant intended to prevent the victim's testimony, the majority rule does not require the defendant intend to prevent testimony in a particular trial or proceeding."[107] Based on the evidence presented to the district court, the court held that Defendant intended to prevent Witness from testifying and from assisting with the police investigation, thus satisfying the application of the forfeiture doctrine.[108]

3. The Final Holding

In *Davis*, the North Dakota Supreme Court reviewed an alleged violation of Defendant's constitutional rights under the Sixth Amendment's Confrontation Clause and applied a de novo standard of review to the district

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100. *Id.* ¶ 55.
101. 173 P.3d 1099 (Colo. 2007).
102. *Vasquez*, 173 P.3d at 1099.
103. *Id.* at 1104 (footnote omitted).
104. 405 F.3d 227 (4th Cir. 2005).
105. *Vasquez*, 173 P.3d at 1104 (quoting *Gray,* 405 F.3d at 241).
106. *Gray,* 405 F.3d at 241.
107. State v. Davis, 2022 ND 30, ¶ 15, 970 N.W.2d 201 (citing *Vasquez*, 173 P.3d at 1104).
108. *Id.* ¶ 18.

court's decision to admit Victim's testimonial statements into evidence under the doctrine of forfeiture by wrongdoing.[109] The court reviewed North Dakota Rules of Evidence 804(b)(6), which allows for the admission of a witness's testimonial statements as an exception to hearsay, and interpreted both state and federal supreme court opinions to establish a standard test for the forfeiture doctrine and to determine if the State was required to show that a defendant's intent was linked to particular trials or criminal proceedings.[110] Based on the court's adoption of the four-part *Cox* test, and its finding that the State did not have to show that a defendant's intent was associated with a particular judicial proceeding, the court held that the application of the forfeiture doctrine was proper, that Defendant's constitutional rights had not been violated, and affirmed the district court's decision.[111]

IV. IMPACT

Davis is the North Dakota Supreme Court's first decision concerning the doctrine of forfeiture by wrongdoing as an exception to the Sixth Amendment's Confrontation Clause.[112] Likewise, it is the court's first introduction to issues related to the forfeiture doctrine, including deciding what test to adopt and apply to the aforementioned doctrine, establishing the burden of proof associated with the forfeiture test, and determining whether the State must prove that a defendant's intentions to prevent a witness from testifying were associated with any particular trial or specific judicial proceedings.[113] The forfeiture doctrine is a vitally important subsection of the Sixth Amendment because it carries the power to abridge a defendant's constitutional right to confrontation "when defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims." [114] Due to the severity of this issue, courts do not consider this doctrine or its implications lightly.[115] Practitioners in North Dakota must be prepared when faced with a matter that bears the potential authority to void a defendant's right to confrontation, and to provide equity for witnesses and victims who have been unjustly silenced.

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109. *Id.* ¶ 9.
110. *Id.* ¶¶ 11-12, 15-16.
111. *Id.* ¶¶ 12, 15, 18.
112. *Id.* ¶ 12.
113. *Id.* ¶¶ 12, 14-15.
114. *Id.* ¶ 10 (quoting Davis v. Washington, 547 U.S. 813, 833 (2006)).
115. State v. Poole, 2010 UT 25, ¶ 23, 232 P.3d 519 (quoting State v. Mason, 162 P.3d 396, 404-05 (2007) ("[T]he right of confrontation should not be easily deemed forfeited by an accused.")).

A. OUT OF COURT STATEMENTS EXCLUDED FROM THE SIXTH AMENDMENT CONFRONTATION CLAUSE IN NORTH DAKOTA

The first matter of impact for North Dakota practitioners is one which the *Davis* court addressed itself and concerns the court's prior opinions. The court noted that, while it is not raised by either Defendant or the State in this particular case, a prior North Dakota Supreme Court opinion *State v. Aguero*,[116] suggests that the evidence in question might not be subject to the Sixth Amendment Confrontation Clause, thus rendering the question of forfeiture irrelevant.[117] "[T]his Court has previously stated statements made to friends and family generally are not testimonial statements and *Giles* did not extend the Sixth Amendment's confrontation right to all statements made by a deceased declarant."[118]

In *Aguero*, the defendant argued his Sixth Amendment right to confrontation had been violated by the district court's decision to admit out-of-court statements which placed the defendant at the time and location of the two murders for which he was on trial.[119] The court stated that the "United States Supreme Court has not specifically defined what a testimonial statement is" but acknowledged that "'[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.'" [120] Based on this, the court held that "statements made to friends or family generally are not testimonial statements, and the Confrontation Clause does not apply" but rather, such statements could only be excluded under the rules of hearsay.[121]

In *Davis*, the court does not discuss this matter further and does not proffer an opinion as to whether some, or all, of Victim's statement in this particular case, which had been made to neighbors, would fall outside the scope of the Confrontation Clause and Defendant's challenge.[122] However, because the court has made particular note of this issue, and because of the State's history and involvement in the matter, practitioners should take the matter of friendly testimonial statements and their possible admissibility into consideration when faced with a forfeiture doctrine challenge.

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116. 2010 ND 210, 791 N.W.2d 1.

117. *Aguero*, 2010 ND 210, ¶ 17, 791 N.W.2d 1; *Davis*, 2022 ND 30, ¶ 13, 970 N.W.2d 201.

118. *Davis*, 2022 ND 30, ¶ 13, 970 N.W.2d 201 (citing *Aguero*, 2010 ND 210, ¶ 17, 791 N.W.2d 1 (noting that the Confrontation Clause only excludes testimonial statements, so informal statements made to friends and neighbors do not trigger the Confrontation Clause)).

119. *Aguero*, 2010 ND 210, ¶ 15, 791 N.W.2d 1.

120. *Id.* ¶ 16 (quoting Crawford v. Washington, 541 U.S. 36, 51 (2004)).

121. *Id.* (citing State v. Sorenson, 2009 ND 147, ¶ 20, 770 N.W.2d 701).

122. *See Davis*, 2022 ND 30, ¶ 13, 970 N.W.2d 201.

B. IMPACT ON PRACTITIONERS OF PROVING A DEFENDANT'S SPECIFIC INTENT

Undoubtedly, the most significant impact of *Davis* is the court's holding that the State is not required to prove that a defendant who engages in wrongful conduct did so with the intent to prevent a witness from testifying at a particular criminal proceeding.[123] The application of Defendant's argument would mean that the forfeiture doctrine "cannot apply where the purpose of keeping the witness away was not related to the present case."[124] Following the court's rejection of this argument in *Davis*, practitioners in North Dakota seeking to introduce evidence under the forfeiture doctrine are required to prove the four elements of the *Cox* test and, by a preponderance of the evidence, that the defendant intended to prevent the witness from testifying in court or assisting the authorities with investigations against the defendant.[125] The result is a far less arduous task for practitioners than the alternative argument proposed by Defendant.

In *Davis*, the court did not delve into the application of Defendant's argument, but instead, relying on precedent and persuasive case law, swiftly rejected the argument.[126] The *McLaughlin* court, however, provided a practical example of this argument: if a defendant accused of burglary and abuse murdered a witness to prevent them from testifying about the aforementioned crimes, any statements or testimony by the deceased witness would not be admissible if the defendant was brought to trial for murder, and they could only be considered at trial for the burglary and abuse.[127] The basis for this argument is rooted in the same basic principles that the *Poole* court addressed when considering whether to adopt a more rigorous burden of proof. This theory that "when constitutional rights are at issue 'the stakes are simply too high . . . [and] [t]he right of confrontation should not be easily deemed forfeited'" is compelling.[128] However, the purpose of the forfeiture doctrine is to ensure equity, and while the *Davis* court was quick to acknowledge the necessary narrowness of this exception, it also reiterated "that '[w]hile defendants have no duty to assist the State in proving their guilt, they *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system.'"[129] Like the court in *Davis*, the

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123. *Id.* ¶ 16.

124. State v. McLaughlin, 265 S.W.3d 257, 272 (Mo. 2008).

125. *Davis*, 2022 ND 30, ¶ 18, 970 N.W.2d 201.

126. *Id.* ¶¶ 15-17.

127. *McLaughlin*, 265 S.W.3d at 272.

128. State v. Poole, 2010 UT 25, ¶ 23, 232 P.3d 519 (citing State v. Mason, 162 P.3d 396, 404-05 (2007)).

129. *Davis*, 2022 ND 30, ¶ 10, 970 N.W.2d 201 (quoting State v. Cox, 779 N.W.2d 844, 851 (Minn. 2010)).

McLaughlin court also rejected the argument by citing the precedence that *Giles* established.[130] However, this example provided in *Mclaughlin* does give some indication of the struggle that practitioners would have faced had the court found in favor of Defendant's argument and highlights the narrow limitations that would have been applied to the forfeiture doctrine.

V. CONCLUSION

In *State v. Davis*, the North Dakota Supreme Court addressed the issue of forfeiture by wrongdoing and provided two findings for practitioners. First, the court formally and officially recognized the forfeiture doctrine as an exception to the Sixth Amendment's Confrontation Clause and adopted a standard test for the State of North Dakota.[131] Second, the court held that the State did not bear the burden of proving that a defendant's intention to prevent a witness from testifying was related to a specific or particular judicial proceeding.[132] The court considered North Dakota Rules of Evidence and both state and federal supreme court opinions in reaching its decision.[133] *Davis* serves as a foundational case for North Dakota practitioners on this matter of the forfeiture doctrine.

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130. *Id.*
131. *Id.* ¶ 12.
132. *Id.* ¶¶ 15-16.
133. *Id.* ¶¶ 11-12, 15-16.

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