NO COMPRENDE, NO JUSTICE: AN ANALYSIS OF APPLYING HEARSAY EXCEPTIONS TO INTERPRETED STATEMENTS AND THE IMPACT ON IOWA'S INCREASINGLY DIVERSE RESIDENTS, WORKFORCE, AND JUSTICE SYSTEM

TABLE OF CONTENTS

I. INTRODUCTION

The State of Iowa has encountered diminishing, but nonetheless consistent, growth in its population over the last two decades, bringing the total population of the state to approximately three million people.[1] A substantial portion of the more recent population growth in Iowa is attributable to the arrival of non-English-speaking immigrants.[2] Many of these immigrants are undocumented[3]—referred to as illegal immigrants—and have traveled from California, Texas, or Mexico to Iowa in pursuit of employment, often in the form of laboring in poor conditions at Iowa meatpacking plants.[4] While the influx of non-English-speaking immigrants has a substantial impact on Iowa communities, it also creates a high probability for an interesting and complex legal issue to arise: the hearsay rule and its application to interpreters.[5] Hearsay is not admissible as evidence in a court proceeding,[6] and is defined as an out of court statement "offered in evidence to prove the truth of the matter asserted."[7] When an

1. *See* FEDERATION FOR AMERICAN IMMIGRATION REFORM (FAIR), IMMIGRATION IMPACT: IOWA, http://www.fairus.org/site/PageServer?pagename=research_researchefac (last visited Mar. 26, 2009) (relying on Census Bureau information in showing that Iowa's population increased by 5.5% between 1990 and 2000 and by 1.8% between 2000 and 2006, bringing Iowa's total population to approximately three million people).

2. *See id.* ("Approximately 60 percent of the total population increase between 2000 and 2006 in Iowa was directly attributable to immigrants.").

3. *See id.* ("FAIR estimates the illegal alien population [in Iowa] in 2007 at 55,000. This number is 129% above the U.S. government estimate of 24,000 in 2000, and 1000% above its 1990 estimate of 5,000.").

4. *Id.* (citing David Barboza, *Meatpackers' Profits Hinge on Pool of Immigrant Labor*, N.Y. TIMES, Dec. 21, 2001, at A26 (noting the propensity of meatpacking plants to hire large numbers of immigrant employees at low wages and bleak working conditions instead of employing unionized laborers); Laurie P. Cohen, *Free Ride: With Help from INS, U.S. Meatpacker Taps Mexican Work Force*, WALL ST. J., Oct. 15, 1998, at A1 (discussing recruiting techniques used by meatpacking plants focused on securing employees from Mexico, including radio advertising and providing transportation)); *see also* UNIV. EXTENSION, IOWA STATE UNIV., THE IMPACT OF IMMIGRATION ON SMALL- TO MID-SIZED IOWA COMMUNITIES: A CITIZENS' GUIDE FOR CHANGE 3–4 (2001), *available at* http://www.extension.iastate.edu/Publications/PM1879.pdf (indicating that Hispanic immigrants come to Iowa from states such as Texas and California, as well as from Mexico and Central America, and these immigrants predominantly speak Spanish and arrive as a result of the opening or expansion of meatpacking factories).

5. *See infra* Part II.

6. FED. R. EVID. 802; IOWA R. EVID. 5.802.

7. FED. R. EVID. 801(c). The Iowa definition of hearsay is identical to the

interpreter is used to serve as a communication bridge between an individual who speaks a foreign language and one who speaks English, hearsay issues will arise if the interpreted statements are later sought to be admitted in a legal proceeding. Exceptions to the hearsay rule exist, and a few have been applied in situations in which interpreted statements were offered as evidence in court.[8] A close analysis of these available exceptions and how various jurisdictions have applied them will help flush out the consequences resulting from the use of each exception. Ultimately, this analysis will determine the most fair, efficient, practical, and popular approach that should be used: the language conduit/agency approach.[9]

II. THE IMPACT OF IMMIGRATION ON IOWA COMMUNITIES AND THE PROBABILITY OF HEARSAY ISSUES OCCURRING

A. *The Arrival of Communication Barriers and Cultural Differences*

The arrival of a significant number of non-English-speaking Latino immigrants has a substantial impact on Iowa communities, especially in areas such as "housing, schools, . . . local government, merchandising, language, health, business recruitment, and cultural differences."[10] Some community members feel that the arrival of immigrant workers is beneficial to smaller Iowa towns because "the influx of the immigrant workforce had 'rescued' their town from significant financial downturns, empty classrooms, and business closures."[11] However, there are also a small

federal definition. *See* IOWA R. EVID. 5.801(c).

8. *See, e.g.*, People v. Gutierrez, 916 P.2d 598 (Colo. Ct. App. 1995) (applying the admission-by-party-opponent exception); State v. Rodriguez-Castillo, 151 P.3d 931 (Or. Ct. App. 2007) (using a residual, or catchall, exception to the hearsay rule).

9. The conduit/agency approach observes that an interpreter is only serving as a way for two people who do not speak the same language to communicate with each other. *See, e.g.*, United States v. Koskerides, 877 F.2d 1129, 1135 (2d Cir. 1989). This approach views the interpreter as simply a means of communication, thereby eliminating any additional level of hearsay. *Id.* While some courts apply a conduit theory and others an agency theory, this Note treats both theories as one concept based on their foundation in the admission-by-party-opponent exception to the hearsay rule. This judicial development is explored more fully later in this Note. *See infra* Parts III.B, IV.B.

10. UNIV. EXTENSION, IOWA STATE UNIV., *supra* note 4, at 6.

11. *Id.* A series of interviews of local city administrative personnel and community leaders was conducted in December of 2000 and January of 2001 in the Iowa cities of Lennox, Perry, Marshalltown, and Columbus Junction. *Id.* at 3. The results of the interviews in Columbus Junction showed many of the residents felt the

number of citizens in Iowa towns that are unwilling to tolerate the presence of Spanish-speaking immigrant workers and the cultural and language barriers they bring with them.[12] These members of the community choose to leave the town instead of attempting to live symbiotically with the immigrants.[13]

While the impact of the arrival of Spanish-speaking immigrants on Iowa community members is noteworthy, an issue that is just as important—if not more so—is *why* these immigrants have chosen to come to Iowa and the impact this choice has on the immigrants themselves. Many Spanish-speaking immigrants that choose to relocate to Iowa do so in order to gain employment that frequently takes the form of working at a large meatpacking plant or similar facility.[14] With the arrival of such a large number of Spanish-speaking individuals seeking employment, it is inevitable that communications will have to be made in the native language of these individuals—both in the community and in the workplace. Communication barriers create the most significant challenges between the immigrants and the community.[15] Obviously, in situations in which there is a large influx of non-English-speaking immigrants into a community that is English-speaking, the need for interpreters will always be present.[16] However, the availability of such interpreters is often extremely limited, and those interpreters that are available become overworked as a result of this shortage.[17] As the results of a survey of Iowa communities point out, "[t]he few community people, if any, who can speak the immigrants' language quickly get overwhelmed and burned out trying to meet the demand for interpreters. . . . Businesses and local governments need to

presence of Spanish-speaking immigrants saved the economic vitality of the community because new Hispanic businesses were created and its school system received substantial grants as a result of the large Hispanic population in the school system. *Id.* at 4.

12. *Id.* at 6.

13. *Id.*

14. *See, e.g.*, *id.* at 4–6. In all four of the Iowa communities studied, "one major employer hired nearly all of the immigrants." *Id.* at 6. In three of the communities, the employer was a meatpacking or processing plant. *Id.* at 4–5. In two of the communities, this meatpacking plant was Iowa Beef Processors, or IBP. *Id.* In the other, the employer was an egg-cracking facility. *Id.* at 4. The arrival of the immigrants coincided with the opening or expansion of such facilities. *Id.*

15. *Id.* at 11 (stating that "[l]anguage is the biggest barrier the immigrants and the community face").

16. *Id.* at 6 (stating that the need for interpreters is always great, but this need is especially strong when non-English-speaking immigrants first arrive).

17. *Id.*

address the issue of language early and hire and/or train bilingual people."[18] The need for both local community and government involvement to help bridge the language barrier in Iowa towns with a high immigration population is clearly demonstrated by this observation.

General communications between people serve an essential function in the day-to-day activities of life. Such communication also serves an extremely important role in the administration of justice and law enforcement. When the population of a town or community increases, the level of criminal activity and civil violations will also increase.[19] This fact is accepted by police officers, who "agree that the amount of crime will increase whenever a community has an increase in population."[20] This is an inescapable truism and does not reflect any propensity or characteristic of the immigrant population to commit criminal or civil violations more frequently than any other group of people.[21] In fact, "[i]mmigrants are law abiding once they know the laws, and they do not cause more crime than any other group of people. As in other public services, cultural sensitivity training and translators are needed."[22] Because non-English-speaking immigrants are inclined to follow the law in the same manner as any other community member, their available legal rights should not be hindered by their inability to speak the English language. However, the inability of these immigrants to speak English can and does create legal burdens on those immigrants.

When a community and work environment must rely on interpreters to facilitate communications between non-English-speaking immigrants and English-speaking individuals, the avenue for an interesting—and potentially prejudicial—legal issue arises: hearsay.

B. *Legal Consequences of Communication Issues*

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[23] If a statement is hearsay, it is not admissible as evidence in a court proceeding.[24] A few hypotheticals will

18. *Id.*
19. *See id.* at 10.
20. *Id.*
21. *Id.*
22. *Id.*
23. FED. R. EVID. 801(c); IOWA R. EVID. 5.801(c).
24. FED. R. EVID. 802; IOWA R. EVID. 5.802.

help to demonstrate how the hearsay issue becomes particularly troublesome in the context of interpreters and non-English-speaking individuals.

In the criminal context, the issue could arise when a police officer arrives at the scene of a crime in response to a 911 call. Suppose the person who allegedly committed the crime does not speak English, but only Spanish. However, the Spanish-speaking person's bilingual brother happens to be present. The brother interprets the accused's statements for the officer, and the statements clearly indicate that the Spanish-speaking person was guilty of committing the crime. When the person responsible for committing the crime comes before the court at trial, neither he nor his bilingual brother can remember what was said and translated at the time he spoke to the officer. The officer, however, does remember, and wishes to present to the court or jury what was interpreted. A hearsay objection would be made by the defense and, if no exception to the rule was determined to apply, the objection would be sustained.[25] If no language barrier existed and the suspect was able to speak to the officer directly without his brother serving as an interpreter, only one level of hearsay would exist and it would almost certainly be overcome by an exception.[26] However, because an interpreter was used, an additional level of hearsay arises along with additional levels of evidentiary problems.

In the civil context, hearsay statements can also be crucial to a fair trial. If a Spanish-speaking immigrant employee worked at a meatpacking plant in an Iowa town and had a supervisor who did not speak Spanish, directions and orders would need to be given by physical gestures and motions or through the use of an interpreter. If hazardous machinery needed to be cleaned at the plant at the end of the day, a supervisor at a meatpacking or processing facility may assign the dangerous task to low-paid, dispensable immigrant workers.[27] Because the supervisor does not

25. *See* Chao v. State, 478 So. 2d 30, 32 (Fla. 1985). In this case, a Spanish-speaking defendant used his uncle to interpret a confession of a crime to a police detective. *Id.* at 31. The uncle subsequently forgot what he had interpreted, but the detective remembered and attempted to testify about the confession at trial. *Id.* The Florida Supreme Court concluded such testimony was clearly hearsay, but ultimately decided that it should be admitted through an admission exception. *Id.* at 32.

26. *See, e.g.*, IOWA R. EVID. 5.801(d)(2) (admissions by a party–opponent are not hearsay and are therefore admissible); IOWA R. EVID. 5.804(b)(3) (statement-against-interest exception).

27. *See* FAIR, *supra* note 1 (stating that "Iowa meatpacking and processing plants that subsist on immigrant labor have created abusive workplaces," depressed wages, and have a remarkably high injury rate).

speak Spanish, the supervisor would likely use any available bilingual employee to assist in communicating the duty of cleaning a certain piece of dangerous machinery to a Spanish-speaking employee.

Now, suppose that the supervisor failed to take adequate safety measures to ensure that the machinery did not start operating while it was being cleaned. As a result, the dangerous machinery activated while the two employees (the Spanish-speaking employee and the bilingual employee) were cleaning it and the bilingual employee lost his life due to injuries he sustained while trying to escape from the running machinery. Suppose the two employees were the only ones in the area when the accident occurred.

The wife of the bilingual employee now wishes to sue the supervisor for gross negligence and wrongful death charges, in addition to any available workers' compensation benefits.[28] The supervisor claims he never told the two employees to clean the machinery, but only to sweep the floor. The Spanish-speaking employee wishes to testify that the supervisor did tell him and the deceased employee to clean the machine by using the now-deceased employee as an interpreter for the Spanish-speaking employee. This statement would be hearsay and inadmissible, leaving the wife of the deceased employee without adequate admissible evidence to obtain an otherwise available legal remedy for the wrong that was done to her. If no language barrier existed and the supervisor was able to communicate directly with the Spanish-speaking employee, the employee would have personal knowledge of the directions given. The employee would be able to testify in court as to what he heard because it would not be an out-of-court statement,[29] and the employee would be subject to cross-examination.

The above examples illustrate two ways in which the use of interpreters can lead to hearsay issues. Courts throughout the country have addressed this issue, though the manner and method in which they resolve such issues differ. Is one method of resolving the problem better than another? Yes. This issue is still relatively fresh in the Iowa court system. While Iowa seemingly has taken an important step in the right direction by demonstrating an intent to accept the conduit/agency

28. *See* IOWA CODE § 85.20(2) (2009) (indicating that under Iowa's workers' compensation laws, in order to recover damages from a fellow employee—and not the employer—for an injury that occurred while working, gross negligence on the part of the offending employee must be demonstrated).

29. *See* IOWA R. EVID. 5.801(c) (defining hearsay).

approach,[30] Iowa needs to fully decide and address the appropriate measures to be taken when considering whether a statement made by a non-English-speaking individual to an English-speaking person, through the use of an interpreter, should be allowed into court proceedings through an exception to the hearsay rule. A careful look at possibly applicable hearsay exceptions and what other states have done, what problems they have encountered, and what Iowa has done so far will lead to the best resolution of this unique interpreter–hearsay issue.

III. POSSIBLE EXCEPTIONS TO THE HEARSAY RULE THAT MAY APPLY WHEN AN INTERPRETER IS USED

A. *The Residual, or "Catchall," Exception*

Of the states that have addressed the issue of what exception to use when allowing an interpreted statement into court proceedings, some have relied on the residual, or "catchall," exception.[31] This exception states:

> A statement not specifically covered . . . but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these [hearsay] rules and the interests of justice will best be served by admission of the statement into evidence.[32]

Thus, in order for this exception to apply, one must show: (1) the statement is relevant; (2) the statement is more probative than any other reasonably available evidence; and (3) the purpose of the hearsay rules and the interests of justice will be served by admitting the statement.[33] However, the most significant requirement is that the statement must be

30. *See* State v. Venegas, No. 04-1249, 2005 WL 1397966, at *3–4 (Iowa Ct. App. June 15, 2005) (deciding an interpreter–hearsay issue by looking at Second Circuit and Ninth Circuit decisions that have adopted the conduit/agency approach).

31. *See, e.g.*, State v. Terrazas, 783 P.2d 803, 809 (Ariz. Ct. App. 1989); State v. Rodriguez-Castillo, 151 P.3d 931, 940 (Or. Ct. App. 2007). The residual exception in these states is identical or nearly identical to its federal counterpart in the Federal Rules of Evidence—as is the case in many states throughout the country.

32. FED. R. EVID. 807; *see also* IOWA R. EVID. 5.803(24), 5.804(b)(5). These Iowa Rules of Evidence are substantially identical to their federal counterparts.

33. *See* FED. R. EVID. 807; IOWA R. EVID. 5.803(24), 5.804(b)(5).

trustworthy.[34] When examined in light of all the available facts and circumstances, the offered statement must possess circumstantial guarantees of trustworthiness.[35] Factors that may be considered to determine trustworthiness include the person's propensity to tell the truth, whether the statement was under oath, assurance of the person's personal knowledge, time lapse between the event and the statement, and the motivations of the person to make the statement.[36]

While this exception certainly seems appropriate to use for the issue of interpreted statements—and in fact, some states have used this exception[37]—Iowa courts have determined that the residual exception should be used very sparingly and only in exceptional circumstances.[38] Proving that the use of an interpreter constitutes an exceptional circumstance is a hefty burden, and the decision of whether this exception to the hearsay rule applies would involve a great deal of case-specific facts and circumstances. A more uniform and accessible exception would better serve the administration of justice. Further, as will be seen later, a constitutional issue—the Confrontation Clause, existing in both state and federal jurisdictions—may arise and create complications when the residual exception is used.[39]

B. *Admission by Party–Opponent Exception*

The majority of state courts that have addressed the issue of admitting interpreted statements into judicial proceedings have adopted the concept that an admission exception to the hearsay rule should apply in situations when an interpreter is used[40]—essentially determining that such

34. *See generally* State v. Rojas, 524 N.W.2d 659 (Iowa 1994) (analyzing the admissibility of a videotape interview of a child sex abuse victim).

35. *Id.* at 663.

36. State v. Weaver, 554 N.W.2d 240, 248 (Iowa 1996).

37. *See, e.g.*, State v. Terrazas, 783 P.2d 803, 808–09 (Ariz. Ct. App. 1989); State v. Rodriguez-Castillo, 151 P.3d 931 (Or. Ct. App. 2007).

38. *Weaver*, 554 N.W.2d at 247 (citing State v. Brown, 341 N.W.2d 10, 14 (Iowa 1983)).

39. *See infra* Part V.B.

40. *See generally* Cruz-Reyes v. State, 74 P.3d 219 (Alaska Ct. App. 2003); Correa v. Superior Court, 40 P.3d 739 (Cal. 2002); People v. Gutierrez, 916 P.2d 598 (Colo. Ct. App. 1995); Chao v. State, 478 So. 2d 30 (Fla. 1985); State v. Spivey, 710 S.W.2d 295 (Mo. Ct. App. 1986); People v. Morel, 798 N.Y.S.2d 315 (N.Y. App. Term 2005); State v. Felton, 412 S.E.2d 344 (N.C. 1992); Gomez v. State, 49 S.W.3d 456 (Tex. Crim. App. 2001); State v. Robles, 458 N.W.2d 818 (Wis. Ct. App. 1990).

a statement is not hearsay to begin with.[41] Federal courts that have dealt with the interpreter–hearsay issue of defendants using an interpreter have used analogous reasoning.[42] This hearsay exception[43] establishes that certain statements made by a person are not hearsay when "offered against a party" and made "by a person authorized by the party to make a statement concerning the subject."[44] The rule may also apply in situations similar to the aforementioned civil-case hypothetical involving the meatpacking plant because it excludes "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship" from the definition of hearsay.[45]

When applying this exception, the statement must be made when the offering party has established expressed or implied authority to speak to the subject matter of the statement.[46] Further, statements by both an agent and employee are admissible if the statements relate to matters within the scope of employment.[47] In essence, the application of Rules 5.801(d)(2)(C)

41. Federal Rule of Evidence 801(d), which encompasses admissions of party–opponents in subsection 2, indicates that such statements are not hearsay. FED. R. EVID. 801(d)(2). Iowa Rule of Evidence 5.801(d) is identical to the Federal Rule. IOWA R. EVID. 5.801(d).

42. *See, e.g.*, United States v. Nazemian, 948 F.2d 522 (9th Cir. 1991) (holding that interpreter provided by confidential informant in drug deal between defendant and agent treated as an agency relationship so as not to create hearsay problems); United States v. Beltran, 761 F.2d 1 (1st Cir. 1985) (finding testimony of government agent based upon informal notes taken during interviews with defendants conducted through Spanish translator admitted over hearsay objection); United States v. Alvarez, 755 F.2d 830 (11th Cir. 1985) (holding evidence of translated statements admissible only if the government presents substantial, independent evidence demonstrating the existence of a conspiracy); United States v. Da Silva, 725 F.2d 828 (2d Cir. 1983) (reasoning that translator is no more than a language conduit and testimony between translator and defendant brings defendant's admissions within nonhearsay rule).

43. While applying the party–opponent admission rule to statements results in the legal determination that such statements are not hearsay under Iowa Rule of Evidence 5.801(d)(2) and Federal Rule of Evidence 801(d)(2), the party–opponent admission rule will nonetheless be referred to as an exception, because it is located within the hearsay rules of evidence and results in admission of the statement. *See* FED. R. EVID. 801(d)(2); IOWA R. EVID. 5.801(d)(2).

44. FED. R. EVID. 801(d)(2)(C); IOWA R. EVID. 5.801(d)(2)(C).

45. FED. R. EVID. 801(d)(2)(D); IOWA R. EVID. 5.801(d)(2)(D).

46. *See* Friedman v. Forest City, 30 N.W.2d 752, 759 (Iowa 1948).

47. *See* Landon v. Mapco, Inc., 405 N.W.2d 825, 828–29 (Iowa 1987) (admitting deposition testimony on the defendant's common practice by an employee of the defendant).

and (D) involve agency principles.[48] While this hearsay rule would certainly seem to apply in the hypothetical involving the meatpacking-facility employee, the question of whether the interpreter had expressed or implied authority to speak for the supervisor will arise, as well as other possible concerns of trustworthiness and accuracy of interpretation. These types of concerns will exist whenever an interpreter is used; without a record of such original statements and their interpretation, it is impossible to definitively determine whether the interpreter relayed spoken information with complete accuracy. To assist in the resolution of this issue, courts have considered the competency of the interpreter to correctly translate,[49] whether the interpreter was authorized to give statements,[50] and whether the person interpreting had any reason to fabricate what was stated.[51]

The residual exception and the admission exception to the hearsay rule are the two prevailing mechanisms used in courts when addressing whether to admit interpreted statements over hearsay objections.[52] The majority of jurisdictions seem to favor the admission exception over the residual exception.[53] While Iowa courts have not had the opportunity to address the interpreter–hearsay issue to any great extent, they have looked

48. *Friedman*, 30 N.W.2d at 759.

49. State v. Felton, 412 S.E.2d 344, 354–55 (N.C. 1992) (noting the importance of the fact that a duly-qualified interpreter was used).

50. Chao v. State, 478 So. 2d 30, 32 (Fla. 1985) (applying an admission exception to an interpreted statement and noting that "an admission specifically authorized to be given through a competent interpreter is like any other admission authorized to be given by an agent and may be testified to by the person to whom the agent gives the statement").

51. People v. Morel, 798 N.Y.S.2d 315, 317 (N.Y. App. Term 2005) (indicating that in deciding whether an interpreter's statement may be received as a party admission, one factor to be considered is whether the interpreter had any motive to mislead).

52. *See* People v. Gutierrez, 916 P.2d 598, 600 (Colo. Ct. App. 1995).

53. *See, e.g.*, Cruz-Reyes v. State, 74 P.3d 219, 223–25 (Alaska Ct. App. 2003); Correa v. Superior Court, 40 P.3d 739, 743–51 (Cal. 2002); *Gutierrez*, 916 P.2d at 600–01; *Chao*, 478 So. 2d at 31; State v. Spivey, 710 S.W.2d 295, 297 (Mo. Ct. App. 1986); *Morel*, 798 N.Y.S.2d at 317–19; *Felton*, 412 S.E.2d at 357; State v. Rivera-Carrillo, No. CA2001-03-054, 2002 WL 371950, at *17 (Ohio Ct. App. Mar. 11, 2002); Gomez v. State, 49 S.W.3d 456, 459 (Tex. Crim. App. 2001); State v. Robles, 458 N.W.2d 818, 821 (Wis. Ct. App. 1990); *see also* United States v. Sanchez-Godinez, 444 F.3d 957, 960–61 (8th Cir. 2006); United States v. Nazemian, 948 F.2d 522 (9th Cir. 1991); United States v. Alvarez, 755 F.2d 830 (11th Cir. 1985); United States v. Beltran, 761 F.2d 1 (1st Cir. 1985); United States v. Da Silva, 725 F.2d 828 (2d Cir. 1983).

to federal court holdings for guidance when considering the issue.[54] In doing so, an Iowa court noted that "some courts have determined 'an interpreter is "no more than a language conduit" and therefore, his translation [does] not create an additional level of hearsay.'"[55] The court then went on to observe that "[o]ther courts, however, consider the interpreter's biases and qualifications to determine whether the statements can fairly be considered those of the speaker."[56] Thus, in analyzing the interpreter–hearsay issue, Iowa courts distinguished the theory of an interpreter acting as a language conduit from an approach that involves an agency exception based on interpreter qualifications and honesty.[57]

Iowa courts have not been entirely clear about which approach they have chosen to adopt when dealing with the interpreter–hearsay issue and applying an admission exception. A closer look at the practical effects and differences—if any—of using a language conduit theory versus an approach based more on the qualifications and reliability of the interpreter when using an agency exception will help to determine the most appropriate and legally just method that should be used by Iowa courts when dealing with this tricky issue.

IV. ANALYSIS AND COMPARISON OF OTHER JURISDICTIONS' APPLICATIONS OF THE CATCHALL AND AGENCY HEARSAY EXCEPTIONS TO STATEMENTS INVOLVING INTERPRETERS

A. *States that Have Adopted the Catchall Hearsay Exception*

Of the states that have dealt with the interpreter–hearsay issue, two have not followed the federal circuits and have instead made the decision to use the catchall exception to the hearsay rule.[58] These two states are

54. *See* State v. Venegas, No. 04-1249, 2005 WL 1397966, at *3 (Iowa Ct. App. June 15, 2005) (looking to Second Circuit and Ninth Circuit decisions for guidance in passing judgment on an interpreter–hearsay issue).

55. *Id.* at *3 (quoting United States v. Koskerides, 877 F.2d 1129, 1135 (2d Cir. 1989)).

56. *Id.* (citing *Nazemian*, 948 F.2d at 527).

57. *Id.*

58. *See* State v. Terrazas, 783 P.2d 803, 806 (Ariz. Ct. App. 1989) (applying residual hearsay exception to interpreted statements); State v. Rodriguez-Castillo, 151 P.3d 931, 940 (Or. Ct. App. 2007) (same). The residual exceptions in these states and Iowa are similar, if not identical, to their federal counterparts in the Federal Rules of Evidence. *See* FED. R. EVID. 807; ARIZ. R. EVID. 803(24); IOWA R. EVID. 5.803(24); OR. REV. STAT. ANN. § 40.460(28) (West 2008).

Arizona and Oregon, with Oregon adopting this approach more recently.[59] Because the Oregon case was recently decided, involved a thorough opinion, and had analytical reasoning similar to the Arizona case, this Note considers the Oregon case to be representative of the jurisdictions electing to use this exception when dealing with interpreter–hearsay issues.

The Oregon catchall exception requires that the statement being offered is relevant, is "more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts," and that the "general purposes of the Oregon Evidence Code and the interests of justice will best be served by admission of the statement into evidence."[60] This is, for all practical purposes, identical to the catchall exception in Iowa and in the Federal Rules of Evidence.[61] Oregon has recently used this exception to allow statements into evidence that were made by a defendant to a police officer through the use of an interpreter.[62] Therefore, if the hypothetical scenario described earlier—statements made to an officer through an interpreter—were to occur in Oregon, the residual exception would almost certainly apply. Oregon did consider using the agency exception that is frequently adopted by other jurisdictions, but ultimately rejected it on grounds of existing precedent in the state.[63] Oregon therefore turned to the residual exception and, because the interpreter used was trustworthy and the evidence was more probative than any alternatives, determined that the residual exception applied.[64]

The Arizona courts had previously adopted reasoning similar to the Oregon courts. Arizona was faced with a slightly different case, however,

59. *See Terrazas*, 783 P.2d at 806; *Rodriguez-Castillo*, 151 P.3d at 940.

60. *Rodriguez-Castillo*, 151 P.3d at 938 (quoting OR. REV. STAT. ANN. § 40.460(28) (West 2008) (internal quotations omitted).

61. *See* FED. R. EVID. 807; IOWA R. EVID. 5.803(24), 5.804(b)(5) (explaining that the requirements for the residual exception to apply are: that the statement is relevant, is more probative than any other reasonably available evidence, and the purpose of the hearsay rules and the interests of justice will be served by admitting the statement).

62. *Rodriguez-Castillo*, 151 P.3d at 940.

63. *See id.* at 937–38. The court noted that several federal circuits have applied a "language conduit" theory to eliminate levels of hearsay when interpreters are used. *Id.* However, the court rejected such a theory based on its previous decision in *State v. Letterman*, even though that case instead proposed a common law exception to solve a hearsay problem and such exceptions are no longer applicable in Oregon. *See* State v. Letterman, 616 P.2d 505 (Or. Ct. App. 1980).

64. *Rodriguez-Castillo*, 151 P.3d at 939–40.

because the person who was serving as an interpreter for an investigating officer was also a police officer.[65] This fact served as a reason to reject the proposition that the interpreting officer was acting as any kind of agent for the Spanish-speaking defendant.[66] After rejecting the agency exception, Arizona applied and upheld the catchall exception to the hearsay rule to allow the interpreted statements into court.[67]

Both the Arizona and Oregon courts acknowledged that out-of-court interpreted statements could be and have been admitted through an agency theory.[68] However, Oregon followed its own precedents and ultimately rejected the application of this approach.[69] Arizona decided to use the residual exception as well, with the decision resulting from skepticism as to whether a police officer who serves as an interpreter for a defendant could be considered the defendant's agent.[70]

These states' justification for the use of the residual exception would likely not serve as strong precedent in Iowa. Iowa has no controlling previous case law as Oregon did.[71] Further, it is unlikely that Iowa will determine that police officers who serve as interpreters should not be considered agents of the defendant simply because they are officers;[72] however, depending on the circumstances, such a conclusion is certainly

65. State v. Terrazas, 783 P.2d 803, 804 (Ariz. Ct. App. 1989).

66. *See id.* at 806 n.3. The court noted that other jurisdictions apply an agency exception but rejected such an approach, stating "[w]e regard the attribution of an agency as an artifice, however, where the interpreter has been selected by prosecutorial forces investigating the defendant's participation in a crime . . . ." *Id.*

67. *Id.* at 808–09.

68. *See id.* at 806 n.3; *Rodriguez-Castillo*, 151 P.3d at 937.

69. *See Rodriguez-Castillo*, 151 P.3d at 937.

70. *See Terrazas*, 783 P.2d at 806 n.3.

71. There are two reported Iowa cases dealing with interpreters' statements; however, both are extremely outdated and neither is helpful in light of current evidence rules and the increasingly linguistically diverse environment that exists. *See* State v. Powers, 164 N.W. 856, 858–59 (Iowa 1917) (holding the taking of testimony through an interpreter at trial is not receiving hearsay testimony); McCormick v. Fuller & Williams, 8 N.W. 800, 801 (Iowa 1881) (holding the testimony of a witness to a conversation between himself and another through an interpreter, by which a contract was made, is competent evidence to establish the contract).

72. *See* United States v. Nazemian, 948 F.2d 522, 527 (9th Cir. 1991) ("Other circuits have not held that the fact that the interpreter is provided by the government, in and of itself, is dispositive of the agency question."); State v. Venegas, No. 04-1249, 2005 WL 1397966, at *3 (Iowa Ct. App. June 15, 2005) (showing Iowa's willingness to rely on federal circuit decisions to assist in guiding its approach to interpreter–hearsay issue).

possible. Given that the majority of jurisdictions that have considered this issue use an agency exception,[73] and given that Iowa itself has begun to accept this approach,[74] it is likely that Iowa will continue taking an agency approach to the interpreter–hearsay issue.

B. *The Majority Approach: Using the Party–Opponent Admission Rule and/or a Language Conduit Theory*

The majority of states that have encountered the interpreter–hearsay issue have approached the problem by applying the party–opponent admission rule.[75] In arriving at this approach, the states whose evidence rules closely mirror the Federal Rules of Evidence have relied on federal circuit court decisions and other state decisions to guide their analyses of the issue.[76] Some federal circuits that have considered the question have taken the view that the translator may sometimes be viewed as an agent of the speaker; therefore, the translation is attributable to that speaker as an admission.[77] Other federal circuits have concluded that an interpreter serves as a language conduit; therefore, no hearsay problem should exist.[78] Some of the more recent federal circuit decisions, including a decision by

73. *See, e.g.*, Cruz-Reyes v. State, 74 P.3d 219, 222–24 (Alaska Ct. App. 2003); Correa v. Superior Court, 40 P.3d 739, 746–47 (Cal. 2002); People v. Gutierrez, 916 P.2d 598, 600–01 (Colo. Ct. App. 1995); Chao v. State, 478 So. 2d 30, 32 (Fla. 1985); State v. Spivey, 710 S.W.2d 295, 297 (Mo. Ct. App. 1986); People v. Morel, 798 N.Y.S.2d 315, 317 (N.Y. App. Term 2005); State v. Felton, 412 S.E.2d 344, 354 (N.C. 1992); State v. Rivera-Carrillo, No. CA2001-03-054, 2002 WL 371950, at *18 (Ohio Ct. App. Mar. 11, 2002); Gomez v. State, 49 S.W.3d 456, 459 (Tex. Crim. App. 2001); State v. Robles, 458 N.W.2d 818, 821 (Wis. Ct. App. 1990).

74. *See Venegas*, 2005 WL 1397966, at *3 (relying on agency principles when dealing with an out-of-court interpreted statement).

75. *See, e.g.*, *Cruz-Reyes*, 74 P.3d 219; *Correa*, 40 P.3d 739; *Gutierrez*, 916 P.2d 598; *Chao*, 478 So. 2d 30; *Spivey*, 710 S.W.2d 295; *Morel*, 798 N.Y.S.2d 315; *Felton,* 412 S.E.2d 344; *Rivera-Carrillo*, 2002 WL 371950, at *17; *Gomez*, 49 S.W.3d 456; *Robles*, 458 N.W.2d 818.

76. *See, e.g.*, *Cruz-Reyes*, 74 P.3d at 223–24 (citing several federal court decisions and other state decisions in support of applying a majority approach that an agency or language-conduit theory should be used in considering hearsay and interpreted statements); *Rivera-Carrillo*, 2002 WL 371950, at *18 (relying on a Ninth Circuit decision in adopting a language-conduit theory to apply to out-of-court interpreted statements).

77. *See* United States v. Alvarez, 755 F.2d 830, 859–60 (11th Cir. 1985); United States v. Beltran, 761 F.2d 1, 9–10 (1st Cir. 1985); United States v. Da Silva, 725 F.2d 828, 831–32 (2d Cir. 1983).

78. *See* United States v. Koskerides, 877 F.2d 1129, 1135 (2d Cir. 1989); United States v. Ushakow, 474 F.2d 1244, 1245 (9th Cir. 1973).

the Eighth Circuit, acknowledge that the two approaches exist, but determine there is little difference between the two approaches and apply them simultaneously.[79]

Considering that an interpreter is "a person who provides an oral translation between speakers who speak different languages,"[80] it makes sense that a language conduit theory exists. Essentially, a person using a translator or interpreter is simply speaking through that person in a manner similar to how a person might speak through a telephone during conversation with another. On the other hand, an agency theory is just as applicable. A person who speaks through an interpreter usually does so with the understanding that the translator will relay the person's message to a third party in a different language. Therefore, an agency relationship between the person and the interpreter certainly exists.[81] Whether Iowa comes to adopt the language conduit theory or the agency theory in the future should make little practical difference. What is important is that Iowa seems to be following a vein similar to that of the federal circuits by choosing not to apply a residual exception to out-of-court statements made through the use of an interpreter.[82] While Iowa has not been clear in its determination of whether to apply an agency-based exception or a language conduit theory,[83] such a distinction is not likely to make any type of substantial difference.[84] Iowa seems to be taking the same approach as the Eighth Circuit, but Iowa courts are still hesitant to fully commit to one

79. *See* United States v. Sanchez-Godinez, 444 F.3d 957, 960 (8th Cir. 2006) (citing other federal circuits and acknowledging that an interpreter is an agent and also serves as a language conduit); United States v. Nazemian, 948 F.2d 522, 527–28 (9th Cir. 1991) (determining both approaches of considering an interpreter as an agent and as a language conduit were satisfied, but noting that each case should be examined to determine if the interpreter's statements should be considered as those of the defendant).

80. WEBSTER'S UNABRIDGED DICTIONARY 998 (2d ed. 2001).

81. Kanzmeier v. McCoppin, 398 N.W.2d 826, 830 (Iowa 1987) ("An agency may be proven not only by direct evidence of an agreement between the parties but also by circumstantial evidence, such as their words and conduct . . . ." (quoting Pay-N-Taket, Inc. v. Crooks, 145 N.W.2d 621, 624 (Iowa 1966))).

82. *See* State v. Venegas, No. 04-1249, 2005 WL 1397966, at *3 (Iowa App. June 15, 2005) (looking to Second Circuit and Ninth Circuit decisions for guidance in passing judgment on an interpreter–hearsay issue).

83. *Id.* (acknowledging that both the agency theory and language-conduit theory exist, but not distinguishing as to which it considered controlling).

84. *See Sanchez-Godinez*, 444 F.3d at 960 (citing federal cases that rely on agency and/or language-conduit theories in support of concluding that out-of-court interpreted statements are admissible).

approach and such a decision is not yet official.[85] What is important is that such statements are currently allowed to be admitted at trial. Additionally, the decision to follow the majority view prevents what could ultimately be devastating consequences at a criminal trial as a result of constitutional rights.

V. THE CONFRONTATION CLAUSE AND ITS IMPACT ON THE ADMISSION OF OUT-OF-COURT STATEMENTS MADE THROUGH AN INTERPRETER

A. *How Confrontation Clause Issues May Arise*

There are multiple reasons why Iowa's decision to follow the federal circuits' approach to the interpreter–hearsay issue is logical. An interpreter serves as a forum of communication and simply translates what is being said by one party into a different language so the other party can understand. Thus, applying either a conduit theory or agency theory makes logical sense. Further, a survey of Iowa case law illustrates the hesitancy of courts to apply the residual exception to hearsay evidence except in unique and exceptional cases.[86] While solid logical grounds exist for using the agency and conduit theories, the legal ramifications of taking such an approach are equally supportive. This primarily results from the existence of a well-established constitutional right rooted in the Confrontation Clause.

In the context of criminal cases, the interpreter–hearsay issue becomes more complicated. The Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."[87] The application of this Clause applies primarily to testimonial hearsay statements.[88] A driving principle behind this well-established constitutional right is that defendants should be afforded the right during trial to cross-examine the people who give statements that are being used against the defendant in order to determine

85. Although *State v. Venegas* is an unpublished decision and may be cited, it is not controlling legal authority in Iowa. *See* IOWA R. APP. P. 6.14(5).

86. *See* State v. Weaver, 554 N.W.2d 240, 247 (Iowa 1996) (stating that residual exceptions should be used "very rarely, and only in exceptional circumstances").

87. U.S. CONST. amend. VI; *accord* IOWA CONST. art. I, § 10 ("In all criminal prosecutions, . . . the accused shall have the right . . . to be confronted with the witnesses against him . . . .").

88. Crawford v. Washington, 541 U.S. 36, 54 (2004).

flaws in the declarant's testimony.[89] This is an obvious right—a crucial component of our adversarial justice system—and it allows for the best extrapolation of truth during trial.[90]

The absence at trial of an interpreter who was used by an undercover police officer in questioning a suspect may, in theory, bar any testimonial statements the suspect made through the interpreter from being introduced at trial.[91] Therefore, if such an interpreter is used in questioning a suspect and that interpreter later becomes unavailable or forgets what was said, a Confrontation Clause issue, as well as a hearsay issue, will arguably arise in regards to the undercover officer's testimony about what was said through the interpreter. This is one situation in which the distinction between the use of the majority conduit or agency theories and the minority residual exception approach becomes crucial.

B. *The Imperative Distinction Created by the Confrontation Clause's Application to the Residual Exception Approach and the Conduit/Agent Approach*

If the residual exception approach to the interpreter–hearsay issue is used, a Confrontation Clause problem may still render the interpreted statement inadmissible. The Confrontation Clause demands a showing of both the declarant's unavailability and the existence of a prior opportunity for cross-examination in order for testimonial hearsay statements to be admissible at trial.[92] Such testimonial statements include prior testimony at a preliminary hearing, before a grand jury, at a criminal trial, or statements given in response to police interrogations.[93] Therefore, if a residual exception approach is used, interpreted, testimonial out-of-court statements will not be admissible at trial unless the declarant is unavailable and there was a prior opportunity for cross-examination.[94]

89. *See id.*

90. *See* JON R. WALTZ & ROGER C. PARK, EVIDENCE: CASES AND MATERIALS 490 (10th ed., Found. Press 2005) ("Cross-examination is that phase of the trial which has potentialities of being the most spectacular.").

91. *See* U.S. CONST. amend. VI; IOWA CONST. art. I, § 10 (stating that a defendant has a right to be confronted with the witnesses being used against him in criminal trials).

92. *Crawford*, 541 U.S. at 68.

93. *Id.*

94. *See id.* It is worth noting that when non-testimonial statements of the defendant are offered into evidence at trial, they may be admitted without proof of the declarant's unavailability and a prior opportunity for cross-examination, so long as they

The Confrontation Clause problem does not exist if the conduit/agency approach is used. By applying a conduit/agency approach to the interpreter–hearsay issue, the problems arising from the Confrontation Clause are eliminated because the interpreted statements made by the translator are viewed as the statements of the defendant.[95] Thus, by using a conduit/agency approach to the interpreter–hearsay issue, complications that may arise through the Confrontation Clause are avoided.

C. *Remedying Legitimate Concerns of Reliability of Interpreted Statements*

Concerns about whether the interpreted statements actually are the statements given by the defendant are obvious and reasonable. However, the federal circuits applying a conduit or agency theory have addressed this concern by establishing factors that should be used in determining whether interpreted statements should be considered those of the defendant.[96] These factors include "which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated."[97]

In its sparse occasions dealing with the interpreter–hearsay issue thus far, Iowa courts have rightly chosen to follow the factors set out by the federal circuits to determine the trustworthiness and accuracy of interpreted statements.[98] In doing so, Iowa has also applied a primary factor for determining if hearsay statements are admissible under the residual exception to the hearsay rule.[99] By applying the factors set out by

fall within an exception to the hearsay rule. *Id.* ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts,* and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.").

95. *See* United States v. Nazemian, 948 F.2d 522, 528 (9th Cir. 1991) (finding that when an interpreter is considered a conduit or an agent for the defendant, the translator and defendant are treated as identical for testimonial purposes and no Confrontation Clause or hearsay problems exist).

96. *Id.* at 527.

97. *Id.* (citation omitted).

98. *See* State v. Venegas, No. 04-1249, 2005 WL 1397966, at *3–4 (Iowa Ct. App. June 15, 2005) (noting the importance of an interpreter's qualifications and trustworthiness in determining that the interpreter's statements should be considered those of the defendant).

99. *See Rojas*, 524 N.W.2d at 664 (stating that the most significant requirement in the residual exception is that the statement be trustworthy considering

the federal circuits, concerns about whether the statements were indeed accurately translated and whether they may be attributed to the defendant are put to rest. With factors requiring a sufficient showing of accuracy and trustworthiness, any remaining hearsay concerns should be neutralized.[100]

VI. CONCLUSION

Both logical reasoning and practical legal consequences support an adoption of the conduit/agency method in Iowa. The residual exception approach, while applicable, renders interpreted out-of-court statements open to inadmissibility on the ground that such statements violate the Confrontation Clause.[101] The conduit/agency approach taken by the federal circuits—and seemingly, for the moment, Iowa—avoids the problem the Confrontation Clause creates.[102] Remaining issues of the reliability, trustworthiness, and accuracy of the interpreted statements are sufficiently addressed if a court uses factors set out by the federal circuits to address these issues.[103] A conduit/agency approach makes logical sense because for practical purposes, the person translating is simply serving as a language conduit for another person. Any statements made through the use of an interpreter should therefore be attributed to the original speaker as long as the interpreter's trustworthiness and capability—and the absence of a sinister motive—are demonstrated.

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the totality of the circumstances).

100. *See* State v. Heuser, 661 N.W.2d 157, 163 (Iowa 2003) (stating that exceptions to hearsay exist to accommodate situations where it is not possible to present a witness, but "'the proffered necessary evidence is inherently trustworthy under the circumstances.'" (quoting 5 JOHN HENRY WIGMORE, EVIDENCE § 1420, at 251 (rev. ed. 1974))).

101. *See* Crawford v. Washington, 541 U.S. 36, 68 (2004) (holding the Confrontation Clause requires proof that a declarant is unavailable and that there was a previous opportunity for cross-examination in order for testimonial hearsay statements to be offered at trial, regardless of any hearsay exceptions that may apply to the statement).

102. *See Nazemian*, 948 F.2d at 528 (finding that when an interpreter is considered a conduit or an agent for the defendant, the translator and defendant are treated as identical for testimonial purposes and no Confrontation Clause or hearsay problems exist).

103. *Id.* at 527.

For the moment, there do not seem to be any significantly distinguishable differences between the agency approach taken by some federal circuits[104] and the language-conduit theory used by others.[105] Both approaches result in the out-of-court interpreted statement being admissible in court over hearsay and Confrontation Clause challenges.[106] However, there are jurisdictions that question the agency approach in situations when a defendant relies on an interpreter provided by police officials, or where the police or law enforcement official is the interpreter.[107] Such concerns should not fall on deaf ears, even in light of the factors imposed by the federal circuits to establish trustworthiness and reliability. Some bias on the part of an officer serving as an interpreter for a defendant will inevitably exist,[108] either at the conscious or subconscious level. However, the fact that an officer is used as an interpreter for a defendant does not automatically prevent the interpreted testimony from being considered reliable.[109] While no readily ascertainable legal distinction currently exists between the language-conduit theory and the agency theory, it is not beyond comprehension that if bilingual officers serve as interpreters, concerns will be raised about the officer's accuracy and honesty in translating.

Though Iowa has no official reported decision concerning the interpreter–hearsay issue, unpublished opinions have been entered that show Iowa is leaning towards the conduit/agency approach to the problem.[110] Based on the logical and practical implications of this

104. *See* United States v. Alvarez, 755 F.2d 830, 859–60 (11th Cir. 1985); United States v. Beltran, 761 F.2d 1, 9 (1st Cir. 1985); United States v. Da Silva, 725 F.2d 828, 831 (2d Cir. 1983).

105. *See* United States v. Koskerides, 877 F.2d 1129, 1135 (2d Cir. 1989); United States v. Ushakow, 474 F.2d 1244, 1245 (9th Cir. 1973).

106. *See Nazemian*, 948 F.2d at 528.

107. *See* State v. Terrazas, 783 P.2d 803, 806 n.3 (Ariz. Ct. App. 1989) (noting that other jurisdictions apply an agency exception, but reject such an approach in situations involving an officer used as an interpreter for a defendant, stating "[w]e regard the attribution of an agency as an artifice, however, where the interpreter has been selected by prosecutorial forces investigating the defendant's participation in a crime").

108 *See* Crawford v. Washington, 541 U.S. 36, 56 n.7 (2004) ("Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . . .").

109. *See Nazemian*, 948 F.2d at 527 ("Other circuits have not held that the fact that the interpreter is provided by the government, in and of itself, is dispositive of the agency question.").

110. *See* State v. Venegas, No. 04-1249 2005, WL 1397966, at *4 (Iowa Ct. App.

approach explained earlier, this is the correct approach to take. However, an outright conduit approach raises certain concerns. It is not feasible to automatically assume that an interpreter is perfectly translating, in context, every out-of-court statement made by a defendant. Room for error will certainly exist. The agency theory may also be subject to inaccuracies, and further carries with it the concern that in certain situations it may be inappropriate to assume a translator is the defendant's agent.[111] The concerns of inaccuracy in translation and assumption of agency are somewhat addressed in the factors considered by the federal circuits when dealing with the interpreter–hearsay issue.[112] Whether such factors render out-of-court interpreted statements as sufficiently trustworthy to be admissible in court will have to be determined on a case-by-case basis. However, given the growing number of non-English-speaking citizens and immigrants in the state of Iowa,[113] this approach is far superior than denying altogether the admission of out-of-court interpreted statements.

Until a more focused exception to the hearsay rule is created and adopted as codified law, Iowa courts should rely on an agency/conduit approach and apply the factors to determine sincerity and accuracy as recently outlined by the federal circuits.[114] This will avoid constitutional problems and provide protection against any blanket-type conduit approach or concerns of agency legitimacy. More importantly, such an approach will create a more evenhanded justice system to be applied to those Iowans who do not speak English. The presence of a language barrier must not be allowed to completely distort the judicial process through the occurrence of perceived evidentiary problems. A firm adoption and application of the conduit/agency approach—with the use of reliability factors—to out-of-court interpreted statements will achieve a level of equality that every justice system should demand. The sooner this approach is formally adopted by Iowa courts, the sooner Iowa will become

June 15, 2005).

111. *See Terrazas*, 783 P.2d at 806 n.3 (rejecting agency approach in a situation involving an officer used as an interpreter for a defendant).

112. *See Nazemian*, 948 F.2d at 527.

113. *See supra* Part I.

114. *See, e.g.*, *Nazemian*, 948 F.2d at 527 (establishing factors to consider when determining if statements of interpreter should be considered statements of defendant, such as "which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated").

a better place to live for everyone, non-English-speaking individuals included.

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