A Proposed Alteration to the Iowa Supreme Court's *Paredes* Test

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[*] Pottawattamie Assistant County Attorney. Opinions expressed in this Article belong exclusively to the Author. This Article is dedicated to Raymond "Pete" Wessels (1918–1999) and Hugh Tinley (1917–2006), both of whom served in World War II. Pete Wessels fought in Japan after leaving Pearl Harbor only three days before the infamous Japanese attack. Following World War II, Pete Wessels proudly returned to Buffalo Center, Iowa, where Pete farmed and operated a restaurant. Hugh Tinley served as a member of Supreme Allied Commander Dwight Eisenhower's staff. After World War II, Hugh returned to Omaha, Nebraska, where he eventually became President of Farmers National Company. In 2005, Hugh Tinley was interviewed as the only remaining eye witness to the Germany surrender.

"Small questions are by their nature less often asked and investigated, and maybe not at all. They are virgin territory for true learning."[1]

I. INTRODUCTION

A statement against interest is a recognized exception to the prohibition of hearsay testimony. In Iowa, the nature of the statement determines whether corroborating evidence is needed for admissibility.[2] When corroboration is required, the Iowa Supreme Court uses the *Paredes* test[3] and the only two Iowa Supreme Court cases applying this test and were reversed. This Article offers a narrow improvement to one of the factors of the *Paredes* test, proceeding under the theory that while sweeping reform is academically and optically appealing, incremental progress is judicially pragmatic. After a wide-reaching background on the statement against interest exception, two critical problems are identified and a pointed modification is offered. The Article concludes by hypothetically applying the proposal to the two Iowa Supreme Court cases using the *Paredes* test.

II. BACKGROUND ON THE STATEMENT AGAINST INTEREST EXCEPTION

A witness testifying to the observations and knowledge of another witness is the evidentiary lightening rod known as hearsay.[4] Hearsay[5] is considered untrustworthy because of testimonial dangers,[6] such as the statement not being under oath and the inability to cross-examine the witness.[7] Generally speaking, hearsay is inadmissible unless an exception is met.[8] There are several exceptions,[9] such as a present sense impression,[10] excited utterance,[11] statements made for obtaining a medical diagnosis,[12]

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1. STEVEN D. LEVITT & STEPHEN J. DUBNER, THINK LIKE A FREAK 90 (2014).

2. State v. Paredes, 775 N.W.2d 554, 564–68 (Iowa 2009) (examining the definition of "statement," the threshold requirement of adversity, and issues surrounding corroborating circumstances).

3. *Id.*

4. Ronald J. Allen, Commentary, *A Response to Professor Friedman: The Evolution of the Hearsay Rule to a Rule of Admission,* 76 MINN. L. REV. 797, 800 (1992).

5. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. FED. R. EVID. 801(c).

6. Donnelly v. United States, 228 U.S. 243, 277–78 (1913) (Holmes, J., dissenting); Douglas D. McFarland, *Present Sense Impressions Cannot Live in the Past*, 28 FLA. ST. U. L. REV. 907, 913 (2001).

7. Emily F. Duck, *The* Williamson *Standard for the Exception to the Rule Against Hearsay for Statements Against Penal Interest*, 85 J. CRIM. L. & CRIMINOLOGY 1084, 1085 (1995); McFarland, *supra* note 6, at 913–14.

8. IOWA R. EVID. 5.802.

9. *See, e.g.*, John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 207 (1999); David A. Sonenshein & Ben Fabens-Lassen, *Has the Residual Exception Swallowed the Hearsay Rule?*, 64 U. KAN. L. REV. 715, 716 (2016).

10. IOWA R. EVID. 5.803(1).

11. IOWA R. EVID. 5.803(2).

12. IOWA R. EVID. 5.803(4).

business recordings,[13] and, the topic of this Article, a statement against interest.[14] While the setup is sequentially formulaic, a statement against interest analysis is multilayered and requires several difficult, precise legal determinations. A declarant communicates to a witness a statement that is contrary to the interests of the declarant.[15] The declarant is unavailable for trial and the witness is called testify about the statement. The (criticized) [16] rationale being that a person typically does not make a self-inculpatory statement unless believing the statement to be true.[17] An admissible statement against interest has several potential requirements, such as corroboration, legal unavailability,[18] the existence of a "statement", the statement being contrary to the declarant's interests,[19] and adversity.[20]

Sussex Peerage is an 1844 English case which judicially set into motion the creation of the corroboration requirement. *Sussex Peerage* held that a declaration affecting the declarant's *pecuniary* or *proprietary* interest was admissible,[21] but not declarations against *penal* interest.[22] The distinction was based on trustworthiness. The Court's concern with statements against penal interest was that criminal defendants would advantageously wield unsubstantiated exculpatory statements at trial.[23] Meanwhile, a declaration against a pecuniary or propriety interest was more trustworthy because such a statement was less likely to be fabricated.[24] Therefore, statements against pecuniary or proprietary interest were deemed admissible, while statements against penal interest were deemed inadmissible. This common law dichotomy was followed by American courts for over 120 years until receiving criticism in 1913. In *Donnelly v. United States*,[25] the U.S. Supreme Court did not take advantage of an opportunity to extend the exception to include statements against

13. IOWA R. EVID. 5.803(6).

14. Chambers v. Mississippi, 410 U.S. 284, 298–99 (1973).

15. State v. Paredes, 775 N.W.2d 554, 565 (Iowa 2009).

16. *See, e.g.*, John P. Cronan, *Do Statements Against Interests Exist? A Critique of the Reliability of Federal Rule of Evidence 804(B)(3) and A Proposed Reformulation*, 33 SETON HALL L. REV. 1, 2 (2002) ("This Article explores one of these hearsay exceptions, namely Federal Rule of Evidence 804(b)(3)'s admission of statements against the declarant's interests, with a critical eye on the rule's underlying rationale.").

17. Williamson v. United States, 512 U.S. 594, 598 (1994).

18. Iowa v. Traywick, 468 N.W.2d 452, 454 (Iowa 1991).

19. Cronan, *supra* note 16, at 8 ("Perhaps the greatest challenge in applying Rule 804(b)(3) is assessing whether a statement truly stands contrary to the declarant's interests.").

20. *Paredes*, 775 N.W.2d at 565. For a federal case, see U.S. v. Awer, 770 F.3d 83, 93 (1st Cir. 2014) (quoting People v. Johnson, 482 N.Y.S.2d 188,189 (N.Y. App. Div. 1984).

21. Sussex Peerage Case (1844) 8 Eng. Rep. 1034, 1045 (HL) (1844) (appeal taken from Eng.); Duck, *supra* note 7, at 1086.

22. J. Donald Best, Note, *The Corroboration Requirement (or Lack Thereof) for Statements Against Penal Interest in Wisconsin:* State v. Anderson, 1989 WIS. L. REV. 403, 406 (1989).

23. *Id.* ("The declaration against penal interest is most commonly used by the criminal defendant who offers the hearsay statement for the purpose of establishing his innocence by showing that the declarant confessed to or implicated herself in the crime for which the defendant is charged.").

24. *Id.*

25. *Id.* at 406–08.

penal interest.[26] However, in a dissent Justice Oliver Wendell Holmes contended that disallowing statements against penal interest was diametrically opposed with allowing statements against pecuniary or proprietary interest.[27] Justice Holmes advocated including statements against penal interest, a position that received scholarly support and generated momentum for broadening the exception.[28] In 1975, Congress formally enacted the Federal Rules of Evidence and included rule 804(b)(3), governing the admission of statements against interest.[29]

The initial codification of a statement against interest made a critical distinction. Rule 804(b)(3) applied uniformly to all statements against pecuniary or proprietary interests,[30] but not all statements against penal interest.[31] Apparently, the *Sussex Peerage* distrust of exculpatory confessions still lingered because the rule added corroboration as an additional requirement for statements advantageous to the defendant.[32] Despite this, many federal courts began unilaterally reading in a corroboration requirement for both inculpatory and exculpatory statements.[33] In 2010, Congress formally acknowledged this judicial trend and amended 804(b)(3) to require corroboration for any statement against interest.[34]

III. IOWA'S FRAMEWORK FOR THE CORROBORATION ANALYSIS

Similar to the original federal statement against interest rule, Iowa's Rule 5.804 requires corroboration for only exculpatory statements.[35] This Part provides an overview of Iowa's corroboration requirement. While this Part is broken into two Sections, the purpose is threefold. First, establish when Iowa's statement against interest exception demands corroboration. Second, outline the Iowa Supreme Court's test for corroboration, with a particular focus on the relationship factor. Third, examine the Iowa Supreme Court case law on corroboration.

A. THE CONTOURS OF THE IOWA SUPREME COURT'S PAREDES *TEST*

In Iowa, a proper corroboration determination requires precisely labeling the impact the statement has on the declarant and defendant. This sounds misleadingly simple. The first step is determining whether the declarant's statement "tend[s] to

26. Donnelly v. United States, 228 U.S. 243, 273 (1913).

27. *Id.* at 277–78 (Holmes, J., dissenting); Duck, *supra* note 7, at 1087.

28. Best, *supra* note 22, at 407–08.

29. *Id.* at 408; Cronan, *supra* note 16, at 4.

30. Cronan, *supra* note 16, at 6.

31. FED. R. EVID. 804(b)(3)(B).

32. *Id.*

33. United States v. Alvarez, 584 F.2d 694, 701 (5th Cir. 1978). *Alvarez* is considered the first case to confront the question of whether the corroboration requirement for exculpatory statement also applies to inculpatory statements. United States v. Garcia, 897 F.2d 1413, 1420–21 (7th Cir. 1990); *see also* Michael Duffy, *Nontestimonial Declarations Against Penal Interest: Eschewing the Corroboration Requirement for Inculpatory Statements After* Crawford, 41 J. Marshall L. Rev. 969, 980–84 (2008).

34. FED. R. EVID. 804(b)(3).

35. IOWA R. EVID. 5.804(3).

expose the declarant to criminal liability."[36] In other words, the declarant's statement must be sufficiently self-inculpatory.[37] Next, the statement must be sufficiently exculpatory towards the defendant.[38] The correct identification of a statement's legal effect is deceitfully difficult because a statement can have two different effects. If the declarant's sufficiently self-inculpatory statement is inculpatory towards the defendant, while still potentially admissible, corroboration is unnecessary. Consequently, the jump from merely conceptually qualifying as a statement against interest to successfully triggering the corroboration requirement can be described as a brief, but thorny, two-part legal proposition: A sufficiently self-inculpatory statement by the *declarant* needs to also be sufficiently exculpatory towards the *defendant*.[39]

If the above prerequisites exist, a corroboration analysis comes with its own complexities. Unfortunately, the term "corroborating circumstances" has no standard definition.[40] In 2009, Iowa adopted a multifactor test to determine whether sufficient corroborating circumstances exist (the "*Paredes* test").[41] The *Paredes* test emphasizes flexibility, with each individual factor serving as non-dispositive evidence of trustworthiness.[42] The factors include the declarant's motives to misrepresent the matter, the character of the declarant, whether the declaration was made spontaneously, the relationship between the declarant and the witness, and whether others heard the statement.[43] While forming the analytical framework, the factors are not unduly confining.[44] Rather, the existence of circumstantial evidence connecting the declarant to the crime is a nearly dispositive consideration.[45] A statement by a declarant completely unconnected to the crime will be excluded, while strong evidence tying a declarant to the crime is highly persuasive corroborating evidence.[46]

The focus of this Article is the *Paredes* test's relationship factor. The relationship factor can technically be separated into two relationships—the declarant's relationship

36. State v. Huser, 894 N.W.2d 472, 505 (Iowa 2017).

37. State v. Paredes, 775 N.W.2d 554, 565 (Iowa 2009).

38. *Id.* at 568–70.

39. *Id.* at 570 ("Even though Millard's express statements are sufficiently inculpatory to qualify as admissions against interest under Iowa Rule of Evidence 5.804(*b*)(3), they are not admissible to exculpate Paredes unless corroborating circumstances indicate their trustworthiness.").

40. United States v. Lozado, 776 F.3d 1119, 1132 (10th Cir. 2015).

41. *Paredes*, 775 N.W.2d at 564–68.

42. *Id.* at 567.

43. *Id.* at 568.

44. *Id.* ("We do not adopt a hard and fast rule regarding corroboration. Instead, we conclude that each statement against interest must be evaluated in context.").

45. State v. Huser, 894 N.W.2d 472, 505–06 (Iowa 2017).

46. *Paredes*, 775 N.W.2d at 567 ("Some applications of the corroboration rule are easy. Over 200 persons confessed to killing the Lindbergh baby but had no connection whatsoever to the crime. While the confessions might have been unequivocal and obviously against penal interest, they were of no probative value due to the total lack of corroborating circumstances." (citation omitted)).

with the defendant[47] and the declarant's relationship with the witness.[48] While the Iowa Supreme Court case law has only analyzed the latter,[49] this Article contends the relationship factor should examine the former. The subtle distinction between the two warrants corresponding labels. The phrase "witness-based approach" is referring to the witness and declarant's relationship.[50] Alternatively, the phrase "declarant-based approach" references examining the declarant and defendant's relationship. These fictitious labels are the creation of this Author and meant only to simplify the juxtaposition of these two approaches.

A child endangerment hypothetical illustrates the moving parts involved in a statement against interest analysis. Other than what is addressed, assume all other requirements are met.[51] The example involves a father ("defendant"), mother ("declarant"), and a witness. The defendant and the declarant are the only two caregivers for their infant child, and the defendant is charged with child endangerment. During the investigation, the declarant makes statements to a witness and the declarant is then legally unavailable to testify for trial. If the declarant communicates to the witness that the declarant—and *only* the declarant—was responsible for the injuries, then these statements are likely sufficiently self-inculpatory by exposing the declarant to criminal liability.[52] The declarant's statements are also exculpating the defendant by taking responsibility for the crime.[53] Consequently, the declarant's exculpatory statements trigger the *Paredes* test[54] and a court then faces a choice of how to apply the relationship factor. For example, if the court considers that the defendant and declarant are co-parenting, living together, and in a romantic relationship, this illustrates a declarant-based approach. If the court instead scrutinizes how the declarant knew the witness, this illustrates a witness-based approach.

A declarant's statement implicating both the declarant and the defendant changes the analysis. Once again, the statements are likely to be sufficiently self-inculpatory because the declarant is exposing herself to criminal liability. This satisfies the first step, meaning that the statements potentially qualify as a statement against interest. Once again, the final question is whether corroboration is needed. Since the statements now implicate—rather than absolve—the defendant of child endangerment, the statements are inculpatory towards the defendant. Inculpatory statements, as

47. *Id.* (examining one consideration under the multifactor test as being the relationship between "the declarant and the defendant").

48. *Id.* at 567–68 (specifically listing a "number of factors" that are involved in a determination. The very last factor the court states is "the relationship between the speaker and the witness." (quoting United States v. Alvarez, 584 F.2d 694, 702 n. 10 (5th Cir.1978))).

49. *Id.* at 570; *Huser*, 894 N.W.2d at 505.

50. *Paredes*, 775 N.W.2d at 567.

51. *See id.* at 564–68 (providing a general overview of the requirements of a statement against interest).

52. The fact pattern of this hypothetical is loosely based on the facts and legal analysis from *Paredes*. *Id.* at 568–69.

53. *Id.*

54. *Id.* at 568–70.

opposed to exculpatory, do not need corroboration to be admissible.[55] Effectively, the *Sussex Peerage* distrust of exculpatory statements traversed over 150 years of legal terrain to remain influential in Iowa jurisprudence.

B. IOWA SUPREME COURT CASE LAW APPLYING THE PAREDES *TEST*

There are two Iowa Supreme Court cases applying the *Paredes* test.[56] In 2009, *State v. Paredes* established the *Paredes* test[57] and was validated by *State v. Huser* in 2017.[58] Together, these two cases illustrate the Iowa Supreme Court's application of the *Paredes* test. This Article now turns to the *Paredes* test, and, more specifically, how the relationship factor was used.

In *Paredes*, Edwin Paredes ("Paredes") and Cassidy Millard ("Millard") lived together as the primary caregivers of their two-month-old baby.[59] After initially being diagnosed with an ear infection, the baby's condition worsened and Millard called an ambulance.[60] The baby was eventually diagnosed as having shaken baby syndrome and the police investigation honed in on Millard and Paredes.[61] Paredes initially confessed to shaking the baby and later affirmed his confession, albeit with some equivocation.[62] After Paredes's admission, Millard called a social worker with whom she "had prior contact" to discuss the baby's condition.[63] During their conversation, Millard made several self-inculpatory statements that would potentially absolve Paredes.[64] Millard said she was afraid of prison, that Paredes was not responsible for the injuries,[65] that Paredes "is not that kind of guy, not violent," and that he "didn't even take care of the baby that much."[66] Nevertheless, Paredes was subsequently charged with child endangerment and a trial ensued.[67] Paredes wanted to use Millard's self-inculpatory statements and the State filed a motion in limine to exclude the conversation as hearsay.[68] The District Court determined that Millard and the social worker's conversation did not meet the statement against interest exception and, therefore, it

55. *Id.* at 570.

56. Corroboration was previously examined by the Iowa Supreme Court, but the court did not use a multifactor test. *See* State v. DeWitt, 597 N.W.2d 809, 811–12 (Iowa 1999).

57. *Paredes*, 775 N.W.2d at 564–68.

58. *State v. Huser*, 894 N.W.2d 472, 505–06 (Iowa 2017).

59. *Paredes*, 775 N.W.2d at 558.

60. *Id.*

61. *Id.*

62. *Id.* at 558–59; *see also* State v. Paredes, 752 N.W.2d 35, 1 (Iowa Ct. App. 2008).

63. *Paredes*, 775 N.W.2d at 559.

64. *Id.* at 558–60.

65. *Id.* at 559–60.

66. *Id.*

67. *Id.* at 559.

68. *Id.*

was inadmissible hearsay.[69] Paredes was ultimately convicted, the appeal was affirmed, and the case reached the Iowa Supreme Court in 2009.[70]

The Iowa Supreme Court first examined whether the conversation between Millard and the social worker was considered a "statement," whether the statement was sufficiently self-inculpatory, and whether the statements were exculpatory towards Paredes.[71] After finding that these requirements were met, the court then addressed the corroboration requirement.[72] The court identified several key issues other courts have struggled with, such as the amount of evidence required to prove corroboration.[73] The court settled on a sweeping multifactor test, which considers any and all evidence impacting the trustworthiness of the statement.[74] Several common factors that other jurisdictions considered were listed, including the relationship factor.[75] The relationship factor encompassed both the relationship between the declarant/defendant and between the declarant/witness.[76] While the court spent time examining the factors, the court noted that no single factor is determinative. Instead, the overarching proposition guiding the *Paredes* test is circumstantial evidence tying the declarant to the crime.[77]

The court ultimately concluded that the statement against interest should have been admitted because sufficient corroboration existed.[78] The relationship factor scrutinized the relationship of the declarant and the witness. The court reasoned that since Millard made the statements to someone "who was not directly involved in the case,"[79] and that Millard was seeking advice,[80] this demonstrated trustworthiness. In other words, the relationship factor supported corroboration. Notably, the court considered Millard and Paredes's romantic involvement under motive,[81] acknowledging that Millard might have been trying to "manipulate the system" in order to protect her boyfriend.[82] Regardless of this possibility, the court determined that the circumstances surrounding the statement indicated that the statements could

69. The District Court found that Millard's statements would not subject her to criminal liability, but were hypothetical statements if guilt were established. *Id.* at 560.

70. The initial appeal by Paredes to the Iowa Court of Appeals was regarding the declarant's unavailability at trial. The Iowa Court of Appeals decided in favor of the State on this ground. However, the State did not raise the issue in its appellate brief. At oral argument in front of the Iowa Supreme Court, counsel for the state conceded that the issue had been waived. The Iowa Supreme Court declined to preserve an issue which the State did not raise in brief. *Id.* at 560–61.

71. *Id.* at 564–66.

72. *Id.* at 566.

73. *Id.* at 564–68.

74. *Id.* at 567–68.

75. *Id.* at 568.

76. *Id.* at 567–68.

77. *Id.* at 568.

78. *Id.* at 568–70.

79. *Id.* at 570.

80. *Id.*

81. *Id.*

82. *Id.*

be true.[83] Therefore, sufficient corroboration existed, and excluding the hearsay statements was more than a harmless error warranting a reversal.[84]

The legal marathon of *State v. Huser* began when Lance Morningstar's ("Morningstar") body was discovered by hunters on February 6, 2005.[85] Morningstar was having an affair with the wife of Vernon Huser ("Huser").[86] However, the evidence led authorities to Louis Woolheater ("Woolheater"), who was subsequently convicted of murder for Morningstar's death.[87] Following this conviction, the State charged Huser with aiding and abetting Woolheater in the murder.[88] At Huser's trial, the State put on evidence that Huser was very upset with Morningstar because of the affair and had strong ties to Woolheater.[89] In October 2010 Huser was convicted, but the Iowa Court of Appeals reversed in December 2011 for the introduction of impermissible hearsay statements.[90] Huser's retrial raised a different hearsay issue that was not addressed in the first trial: whether Woolheater's comments to his girlfriend, Michelle Zwank ("Zwank"), were admissible.[91] Huser wanted Woolheater's statements to Zwank about the crime to be admitted as a statement against interest.[92] The statements Huser wanted admitted were exculpatory and therefore, beneficial for Huser's defense.[93] In these statements, Woolheater named other individuals as accomplices and even revealed Woolheater's own strong motives for murdering Morningstar.[94] Huser sought to offer Woolheater's statements as statements against interest, with Zwank as the witness. After the offer of proof,[95] the district court decided it would let Zwank's testimony in, but the State could then offer rebuttal hearsay testimony.[96] Based on this ruling, Huser did not offer Zwank's testimony and Huser was ultimately convicted.[97] A divided Iowa Court of Appeals upheld the conviction,[98] and the Iowa Supreme Court heard the case in 2017.[99]

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83. *Id.* ("The standard, however, is whether a statement *might* have been made in good faith and that it *could* be true. Under the record presented here, we conclude that a reasonable jury could find Millard's statements truthful.").

84. *Id.* at 571.

85. State v. Huser, No. 10-2067, slip op. at 2 (Iowa Ct. App. Dec. 7, 2011).

86. State v. Huser, 894 N.W.2d 472, 480 (Iowa 2017).

87. *Id.* at 477.

88. *Id.*

89. *Id.* at 480.

90. *Id.* at 477.

91. *Id.* at 503 ("Huser asserts that he was prejudiced by the exclusion of Zwank's testimony.").

92. *Id.* at 487.

93. *See id.*

94. *Id.* at 505 ("An important aspect of Woolheater's statement to Zwank was his declaration that Morningstar had something on him that might send him back to jail.").

95. *Id.* at 502–03.

96. *Id.* at 487–88.

97. *Id.*

98. *Id.* at 478.

99. *Id.*

The legal analysis in *Huser* differed from *Paredes*[100] by spending much less time on how the statements impacted the declarant and the defendant.[101] Instead, the court dove quickly into whether there was corroboration of the statements.[102] Once again, the relationship factor component of the multifactor test focused on the declarant and the witness's relationship.[103] After the multifactor test, the court then turned to the circumstantial evidence connecting Woolheater to the crime.[104] Woolheater's murder conviction of Morningstar was found to be highly persuasive, if not outright dispositive, of corroboration.[105] The underlying crime being tied that closely to Woolheater allowed the court to declare sufficient corroboration in a mere two sentences.[106] Once again, the declarant's connection to the crime proved to be the controlling feature of the *Paredes* test. Based on the exclusion of these statements by the District Court, the Iowa Supreme Court reversed and remanded.[107]

IV. TWO DISTINCT PROBLEMS WITH THE *PAREDES* TEST RELATIONSHIP FACTOR

This Part explores two problems with the relationship factor. First, the witness being involved in the relationship factor analysis causes several analytical problems when examining whether corroboration exists. Second, the relationship factor is not constructed broadly enough. This lack of flexibility will create numerous problems, notably when the relationship factor is applied to familial statements. Each of these problems will be examined in turn.

A. THE WITNESS CREATES PROBLEMS IN A CORROBORATION ANALYSIS

The witness's involvement in the relationship factor is counterproductive when trying to perform a corroboration analysis. The specific problems that are created will be discussed, as well as how this leads to an incorrect legal conclusion in *Paredes*. However, before diving into specifics, more detail about the witness-based approach and a potential explanation as to why the witness is involved in the relationship factor is helpful.

A court analyzing the declarant's relationship with the witness is a witness-based approach, while the declarant's relationship with the defendant is a declarant-based approach. *Paredes* and *Huser* both implicitly apply the former by focusing on how

100. State v. Paredes, 775 N.W.2d 554, 568–70 (Iowa 2009).

101. *Compare Huser*, 894 N.W.2d at 505 (focusing on Woolheater's statements "that Morningstar had something on him that might send him back to jail"), *with Paredes*, 775 N.W.2d at (568–70).

102. *Huser*, 894 N.W.2d at 505 ("In order to be admissible, statements against interest must be clearly supported by corroborating circumstances." (citing *Paredes*, 775 N.W.2d at 561)).

103. *Id.*

104. *Id.* at 505–06.

105. *See id.*

106. *Id.* at 506 ("This is not a case in which a remote party is seeking to divert blame under an attenuated theory of guilt. Although some jurisdictions have held that statements prior to the crime are not admissible because they do not expose the declarant to criminal liability—Woolheater made statements to Zwank after the crime that tend to expose him to criminal liability." (citations omitted)).

107. *Id.* at 510.

the defendant knew the witness. In *Paredes*, the declarant makes the exculpatory statements to the witness about the defendant, meaning the declarant had a relationship with both the witness and defendant.[108] *Paredes* focused on the declarant and witness's prior contact, who initiated the conversation, the witness not being directly involved in the case, and the declarant seeking advice from the witness.[109] Additionally, the court attached no analytical value to—nor even mentioned—how the relationship factor was impacted by the declarant's romantic relationship with the *defendant*.[110] Instead, this relationship was scrutinized under a separate factor.[111] Similarly, *Huser*'s relationship factor also focused on the declarant's relationship with the witness.[112] Simply put, the Iowa Supreme Court is employing a witness-based approach.

Interestingly, the reason the witness is involved in the relationship factor may be because of an analytical error immediately preceding, but entirely separate from, *Paredes*'s corroboration analysis. *Paredes* spent considerable time analyzing whether the declarant's statements were sufficiently self-inculpatory[113] by examining the witness's reaction and perception of the declarant's statements.[114] The court examined what the *witness* told the declarant, the *witness* preparing a memorandum, the *witness* forwarding the memorandum to her supervisors, the *witness* recognizing the potential implications of the conversation, the *witness's* language, and the *witness* considering the statements to be significant.[115] The emphasis on the witness was analytically incorrect. The critical question when approaching a potential statement against interest is whether a reasonable person in the *declarant's* place, not a reasonable person in the *witness's* place, would believe the statements to be true.[116] A witness considering statements to be "significant" does not influence whether the declarant's statements were self-inculpatory.[117] Problematically, *Paredes*'s incorrect self-inculpatory assessment transitioned seamlessly into the *Paredes* test and kept the witness at the forefront of the analysis. The potential origin of the witness-based approach underscores two points. First, the witness is being incorrectly inserted into other areas of a statement against interest analysis, not just corroboration. Second, the witness's involvement in the relationship factor was the product of a faulty analysis.

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108. State v. Paredes, 775 N.W.2d 554, 568–70 (Iowa 2009) (examining Millard's statements to the social worker).

109. *Id.* at 570 (examining specifically Millard's relationship with the social worker).

110. *Id.* The court does not mention the romantic relationship between Millard and the defendant until the following paragraph, in which the court scrutinizes other potential motives of Millard "exploring a plan to manipulate the system by falsely exonerating her *boyfriend*." *Id.* (emphasis added).

111. *Id.*

112. *Huser*, 894 N.W.2d at 505.

113. *Paredes*, 775 N.W.2d at 569–70.

114. *Id.* at 570. The court does not explicitly address corroboration until later on, when the court states that the declarant's statements "are not admissible to exculpate Paredes unless corroborating circumstances indicate their trustworthiness." *Id.*

115. *Id.* at 569.

116. IOWA R. EVID. 5.804(b)(3)(A).

117. *Paredes*, 775 N.W.2d at 569.

The witness's involvement in the relationship factor is problematic for a corroboration analysis. First, the most obvious issue is that the witness does little to connect the declarant to the crime.[118] This is the most important consideration of the *Paredes* test,[119] which is likely why five out of the six factors in the *Paredes* test either implicitly or explicitly reference the declarant.[120] In *Paredes*, the court labeled the witness as trustworthy for not being involved in the investigation.[121] This fact does not place the declarant closer to the crime, but places the witness farther away from the investigation. Second, the relationship of the witness and declarant does not bolster the trustworthiness of the *statement*.[122] The trustworthiness of the *statement* and the credibility of a *witness* are two separate determinations. The former is the inquiry of the *Paredes* test and the latter a factual determination. Additionally, assessing credibility provides little, if any, context. In *Paredes,* perhaps the witness believed she was doing investigative work, the declarant believed the witness to be an investigator, or the witness was only working informally with investigators. Third, the witness adds additional nuance to an already multilayered analysis requiring several precise decisions. A trial court may have to simultaneously decide whether the witness was sufficiently disconnected from the case, whether the declarant is sufficiently connected to the crime, and whether the declaration was made close enough to the crime.[123] The task of making three distinct proximity determinations, within the confines of one factor, is a complicated judicial endeavor which can easily spin an inconsistent analysis into an incorrect legal conclusion.

Unsurprisingly, the relationship factor was incorrectly analyzed in *Paredes*. In a non-familial setting, the relationship factor supports corroboration if the declaration was made to a friend or close associate.[124] Therefore, the facts of *Paredes* support corroboration if Millard and the social worker were friends or associates. Despite this clear legal proposition, *Paredes* found evidence of corroboration despite Millard and the social worker's relationship being glaringly weak.[125] The evidence showed that the witness was not involved in the defendant's investigation,[126] that the declarant sought

118. *See Huser*, 894 N.W.2d at 505–06 (noting that the most important consideration is whether there is "ample circumstantial evidence" connecting the declarant to the crime).

119. *Paredes*, 775 N.W.2d at 570.

120. *Huser*, 894 N.W.2d at 505 ("Among the factors to be considered are whether the *declarant* had any apparent motive to misrepresent the matter, the character of the *declarant*, the timing of the declaration, whether the declaration was made spontaneously, the relationship between the *declarant* and the party to whom the declaration was made, and whether other people heard the out-of-court statement." (emphases added) (citing *Paredes*, 775 N.W.2d at 505)).

121. *Paredes*, 775 N.W.2d at 570.

122. *Id.*

123. *See Huser*, 894 N.W.2d at 505 ("Closeness of the declaration to the crime and its spontaneity may be a corroborating circumstance." (citing People v. Wilcox, 941 N.E.2d 461, 476 (Ill. App. Ct. 2010); State v. Cazares-Mendez, 256 P.3d 104, 117 (Or. 2011) (en banc))).

124. *Id.* ("One of the factors often cited in the caselaw as tending to establish corroboration is when the declaration is made to a friend or close associate in a noncoercive setting." (citing Thomas v. United States, 978 A.2d 1211, 1231 (D.C. 2009); Maugeri v. State, 460 So.2d 975, 978 (Fla. Dist. Ct. App. 1984))).

125. *Paredes*, 775 N.W.2d at 559.

126. *Id.* at 570.

out the witness for advice,[127] and that the two had "prior contact."[128] There was no evidence of the nature or duration of their prior contact, the extent of their communication, social interactions,[129] how each party viewed their relationship,[130] and the relationship was not labeled a friendship.[131] These facts do not establish a close relationship,[132] let alone a trustworthy relationship.[133] The largely conclusory legal analysis centered around the social worker not being involved in the investigation,[134] meaning the critical strand of evidence was something the witness was *not* doing with another group of individuals. Ultimately, the court deemed the statements admissible based on the cumulative corroborating evidence. Regardless, the relationship factor should not have supported corroboration because, in a non-familial setting, Millard and the social worker's relationship was not close.[135]

B. THE RELATIONSHIP FACTOR IS NOT CONSTRUCTED TO HANDLE FAMILIAL STATEMENTS

Iowa courts will have difficulty applying the relationship factor to a familial statement based on the rule's current language. While the Paredes test has not factually faced a familial statement, Paredes stated that a familial statement may be admissible if "sufficient other circumstances" corroborate the statement.[136] *Paredes* synthesized two federal cases in two sentences when stating this,[137] which now represents the entire rule of corroborating a familial statement. The relationship factor's approach to a familial statement will prove to be an incomplete and unworkable rule for several reasons. First, the requirement of corroborating "other circumstances" is unclear.[138] Second, the standard of proof for corroboration might be unduly high. Third, "sufficient other circumstances" is used redundantly by overlapping with the legal standard of the *Paredes* test. Lastly, a familial statement needs a more distinguishable impact on the *Paredes* test. Each issue will be addressed in turn.

First, a familial statement's "other circumstances" requirement is inadequately delineated. There are no specific examples given, nor is there any distinction made between familial and non-familial circumstances. Incredibly, the term "other

127. *Id.*

128. *Id.* at 559 ("On May 1, Millard called a social worker, Susan Gail, with whom she had prior contact.").

129. *Huser*, 894 N.W.2d at 492 (noting how the defendant and declarant drank together).

130. *Paredes*, 775 N.W.2d at 568–70.

131. *Id.* at 570.

132. *Huser*, 894 N.W.2d at 505 (citing Thomas v. United States, 978 A.2d 1211, 1231 (D.C. 2009); Maugeri v. State, 460 So.2d 975, 978 (Fla. Dist. Ct. App. 1984)).

133. *Paredes*, 775 N.W.2d at 570.

134. *Id.* ("First, Millard chose to make these statements to someone she trusted, a person who was not directly involved in the case.").

135. *Huser*, 894 N.W.2d at 505 (citing *Thomas*, 978 A.2d at 1231; *Maugeri*, 460 So.2d at 978).

136. *Paredes*, 775 N.W.2d at 567.

137. *Id.*

138. *Id.* at 567–68.

circumstances" is used only once in the majority opinion.[139] Does the isolated reference to "other circumstances" legally overlap with the repeated references to "circumstances" that are made in the context of general admissibility? If the definition is clarified, the next issue is the type of evidence permissible to prove that the "other circumstances" exist. The *Paredes* test demands corroboration of the underlying statement,[140] not corroboration through *other circumstances*. This also begs the question of how extrinsic evidence factors into the 'other circumstances' requirement, which is important because perhaps extrinsic evidence is treated differently for familial and non-familial statements.[141] In other words, different evidentiary standards would apply based on the nature of the statement. Arguably, since a familial statement's "other circumstances" requirement seems to be the more penetrating examination, the heightened standard of requiring extrinsic evidence might be appropriate.

If the evidentiary requirements are clarified, the next issue becomes the *amount* of evidence required. The requisite evidentiary threshold for corroboration has been a major issue for courts[142] because requiring too much exculpatory evidence defeats the purpose of having a corroboration test. If the defendant can show an abundance of exculpatory evidence, arguably the defendant should never have been charged.[143] Essentially, Iowa's requirement of "sufficient other circumstances" in the familial context might be demanding too much exculpatory evidence. Once again, the lack of definitional clarity is central to the problem. One amusing possibility is that "sufficient" is synonymous with "additional" when it appears in a familial setting. This interpretation is a stretch and comes close to twisting a premise from the movie *Inception* around a judicially constructed riddle (i.e., the party bearing the burden must corroborate corroborating evidence for sufficient corroboration).[144] While likely not the interpretation, the "sufficient other circumstances" requirement appears more stringent because sufficient *additional circumstances* are not required for a non-

139. *Id.* at 567.

140. *Id.* ("[T]he best approach to determining whether a statement is adequately corroborated appears to be a multifactored test in which all evidence bearing on the trustworthiness of the underlying statement may be considered.").

141. *Id.* (discussing how some courts have required the presence of extrinsic evidence to show corroboration).

142. *Id.* at 568 ("A second major issue under the corroboration requirement is the amount or level of corroboration required. What amount of evidence is sufficient to provide corroboration clearly indicating trustworthiness?").

143. *Id.* ("As noted by one set of commentators, it makes no sense to set the corroboration standard so high that if a defendant can meet it, he would 'probably never have been charged or tried in the first place.'" (citing 4 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUEL § 804.02[9], 804–21 (9th ed. 2006))).

144. If the court must go another analytical layer to find corroboration, this could be compared to the science fiction movie Inception, starring Leonardo DiCaprio. INCEPTION (Legendary Pictures 2010). While the whole plot is not applicable, there is one item that is relevant for purely illustrative and entertainment purposes. In the movie, DiCaprio is a thief who can enter a person's dream and even enter different layers of a dream to potentially steal secrets. *Id.* Simply put, the more dream levels that DiCaprio goes down, the more complicated things become to get back to reality. *Id.* If a corroboration analysis has another entire layer of examining corroboration, it would become more difficult for the legal analysis to come back to the surface of establishing sufficient corroboration.

familial relationship.[145] At a minimum, the *Paredes* test treats a familial relationship with closer scrutiny than it does for a non-familial relationship.[146] Regardless, until the Iowa Supreme Court elaborates on the corresponding evidentiary threshold that should be attached to the 'other circumstances' requirement, this will potentially be problematic for Iowa's lower courts.

There are also troubling legal redundancies when the relationship factor is confronted with a familial statement. The *Paredes* test requires sufficient evidence of corroboration[147] and the relationship factor asks for sufficient other circumstances. If the underlying *Paredes* test requires *sufficient evidence*, and one factor requires *sufficient other circumstances*, are these two standards reconcilable?[148] First of all, if one factor in a circumstantial multifactor test merely points to other circumstances, it likely does not qualify as a factor on its own.[149] However, the redundancy of the term is more problematic. In order to achieve flexibility, the *Paredes* test examines the circumstances surrounding the statement.[150] This means the relationship factor requiring "sufficient other circumstances" is redundant. In other words, "sufficient other circumstances" might appear to satisfy the *Paredes* test. The practical effect of having such similar standards in a multifactor test is confusion. Simply put, the relationship factor will be confused with the *Paredes* test standard because they are either identical or the relationship factor has swallowed the Paredes test. Some Iowa courts may properly treat the relationship factor as just a non-dispositive factor within the *Paredes* test, some may treat the relationship factor as conclusively establishing corroboration, while others may not even realize there is a distinction and treat all statements as non-familial.

Lastly, the relationship factor is not attaching a corresponding effect to a familial statement. Fortunately, this problem is easily solved by having a familial relationship either assist or undermine corroboration.[151] The *Paredes* test factors must either support or undermine corroboration, not just inquire whether "sufficient other circumstances" exist.[152] Simplistically, the existence of a familial statement should

145. State v. Huser, 894 N.W.2d 472, 505 (Iowa 2017).

146. *Compare Paredes*, 775 N.W.2d at 567 *with Huser*, 894 N.W.2d at 505.

147. *Paredes*, 775 N.W.2d at 566–67.

148. *Id.* at 566–68.

149. *Id.* at 567.

150. *Id.* (citing United States v. Bumpass, 60 F.3d 1099, 1102 (4th Cir. 1995)).

151. United States v. Ocasio-Ruiz, 779 F.3d 43, 47 (1st Cir. 2015) ("While these cases do not hold that making a statement against interest to a close relation is a sufficient corroborating fact as a matter of law under Rule 804(b)(3), our affirmation of district court cases holding it *competent* evidence . . . ." (emphasis added)).

152. United States v. Lozado, 776 F.3d 1119, 1133 (10th Cir. 2015) (finding a close relationship "damage[d] the trustworthiness of a statement"); *Ocasio-Ruiz*, 779 F.3d at 46 ("The district court's finding that there were 'absolutely no corroborating circumstances' is incorrect as a matter of law, as shown by cases in which this court has repeatedly recognized that a close family relationship between a declarant and recipient of a statement against interest is an indication of truthfulness."); United States v. Debrew, No. CR 09-2054 MCA, 2010 WL 11523673, at *7 (D.N.M. Jan. 26, 2010) ("The father-son relationship . . . is such a relationship." (citing United States v. Jones, 124 F.3d 781, 786 (6th Cir. 1997))); *see also* United States v. Paguio, 114 F.3d 928, 933 (9th Cir. 1997).

objectively either help or hurt the trustworthiness of the statement. For example, an out-of-court statement between a brother and sister might by itself be evidence of corroboration.[153] This does not conclusively establish corroboration, but means a familial statement is competent evidence of corroboration. The federal courts are divided on how a familial relationship (or "close relationship") impacts corroboration.[154] The Sixth Circuit, Seventh Circuit, and Tenth Circuit have, at least at one point, taken the approach that either a close or familial relationship damages corroboration.[155] A similar, but slightly tempered approach is that familial statements should be "closely scrutinized."[156] The First Circuit has taken the opposite approach, even once holding that statements made in the familial context were not only competent evidence of truthfulness, but by themselves sufficient of corroboration.[157] In other words, that sweeping determination means a familial relationship is sufficient corroborating evidence.[158] A more common finding by the First Circuit is "that a close family relationship between a declarant and recipient of a statement against interest is an indication of truthfulness."[159] This moderate approach means that a familial relationship between the declarant and defendant is evidence of truthfulness and supports (but is not conclusive) corroboration.

V. CONCLUSION: THE RELATIONSHIP FACTOR SHOULD APPLY A DECLARANT-BASED APPROACH

This Article offers a narrow and pointed legal modification to the *Paredes* test. The statement against interest exception is one of several hearsay exceptions.[160] If conceptually qualifying under the exception, Iowa requires corroboration for an exculpatory statement in a criminal trial.[161] Sufficient corroboration is determined by the *Paredes* test and one factor is the relationship between the declarant and the defendant ("declarant-based approach") or the declarant and the witness ("witness-based approach").[162] This judicial decision implicitly dictates which approach is being

153. In *Huser*, the court stated that if "the declaration is made to a friend or close associate in a noncoercive setting," this indicates trustworthiness. State v. Huser, 894 N.W.2d 472, 505 (Iowa 2017). This takes a somewhat similar approach by being evidence of trustworthiness. If the declaration is made between family members, this familial relationship is evidence of trustworthiness. *Id.* at 505.

154. *See, e.g., Lozado*, 776 F.3d at 1133; United States v. Monserrate-Valentin, 729 F.3d 31, 53 (1st Cir. 2013) ("Additionally, the district court did not abuse its discretion in ruling that the statements were sufficiently corroborated as trustworthy because the statements were made to a close relative of Salas–Fernández.").

155. *Lozado*, 776 F.3d at 1133.

156. *Jones*, 124 F.3d at 786. However, do note that the court was examining a "close relationship" between the declarant and the defendant. *Id.* This is different than a familial relationship. *Id.*

157. *Monserrate-Valentin*, 729 F.3d at 53.

158. *Id.* at 53.

159. United States v. Ocasio-Ruiz, 779 F.3d 43, 46–47 (1st Cir. 2015).

160. IOWA R. EVID. 5.803(3).

161. IOWA R. EVID. 5.803(3)(B).

162. State v. Paredes, 775 N.W.2d 554, 564–70 (Iowa 2009).

taken. While the Iowa Supreme Court currently uses a witness-based approach, this Article advocates for a declarant-based approach.

One unaddressed question is how familial and non-familial statements should impact corroboration. Since a familial relationship arguably adds inherent trustworthiness to a statement, this should be prima facie evidence of corroboration. This eliminates the mysterious "sufficient other circumstances" requirement and attaches a corresponding legal effect for a familial relationship.[163] If the statement is non-familial, a court must then determine if there is a *clear connection* between the declarant and defendant. Advantageously, the term "clear" already has a working definition in the *Paredes* test as being a high, but attainable, level of proof.[164] This balances the competing interests of avoiding an unduly high standard, while still requiring a threshold of trustworthiness.[165] Additionally, the broad language of a clear connection is consistent with the Iowa Supreme Court's directive that the *Paredes* test be flexible and adaptable.[166] Therefore, if there is a clear connection between the declarant and defendant, this should be corroborating evidence.

The declarant-based approach applied to *Paredes* and *Huser* is encouraging. Since their relationship was a non-familial relationship, a clear connection is necessary. The two had a child together,[167] were romantically involved, lived in the same house together,[168] and were co-parenting around the time of the crime. These facts, consistent with the purpose of the *Paredes* test,[169] place the declarant very close to the crime, close to the victim, and close to the defendant. In other words, the declarant-based approach is unearthing highly relevant circumstantial and contextual facts showing the defendant's proximity (or lack thereof) to the crime. Effectively, a declarant-based approach weaves the most important consideration of the *Paredes* test (i.e., placing the declarant close to the crime) into the relationship factor. In *Huser*, the declarant-based approach again highlights facts placing the defendant near the crime. The two were introduced in 2004 because the declarant did gutter work for the defendant,[170] they spoke on the phone, the declarant used the defendant's cellphone immediately before the disappearance of the victim, the defendant supported the declarant's car racing,[171] they drank and socialized together,[172] and there was a note in in the defendant's handwriting in the declarant's home.[173] These facts, none of which were

163. *Id.* at 567.

164. *Id.* at 568.

165. *Id.* at 568 (examining how the term 'clearly' balances competing interests).

166. *Id.* at 567 ("Given the broad, general language of the last sentence of the rule, however, the best approach to determining whether a statement is adequately corroborated appears to be a multifactored test in which all evidence bearing on the trustworthiness of the underlying statement may be considered.").

167. *Id.* at 558 ("Paredes and Cassidy Millard are the parents of a young infant.").

168. *Id.* at 558 ("The family was living in the home of Paredes' sister, Wendy Jimenez, in Coralville, Iowa.").

169. *Id.* at 568.

170. State v. Huser, 894 N.W.2d 472, 481–82 (Iowa 2017).

171. *Id.* at 482.

172. *Id.* at 482.

173. *Id.* at 483.

addressed in the legal analysis, validates the statement's trustworthiness. Furthermore, these circumstantial facts tie the declarant to the crime, creating a logical attachment between the relationship factor and the goal of the *Paredes* test.

The relationship factor's primary problems are the inclusion of the witness and the vague rule governing familial statements. The subtle switch to a declarant-based approach can potentially solve both problems. First, the declarant-based approach is more likely to scrutinize a connection between the declarant and the crime. This eliminates a current disconnect between the relationship factor and the *Paredes* test's purpose. Second, consistent with the Iowa Supreme Court's directive,[174] the declarant-based approach allows for more adaptability by circumventing unnecessary facts and difficult legal distinctions. Increased flexibility will allow the judiciary to handle familial and non-familial statements similarly, avoiding confusion of how and why familial statements are treated differently. From a legal standpoint, the *Paredes* test becomes more schematically consistent and proactively resolves a peculiar internal dichotomy. From a practical standpoint, this modification is limited to a manageable iteration which does not require sweeping reversals or analytical overhaul. The judiciary would be able to breathe clarity into the *Paredes* test by merely reshaping one factor and leaving the substance of the test unscathed. Based on the legal and practical advantages, the Iowa Supreme Court should consider reframing the relationship factor's approach when the opportunity presents itself.

174. *Paredes*, 775 N.W.2d at 568.