



January 8, 2026

Chair Martin LaLonde and Members of the House Committee on the Judiciary  
House Committee on the Judiciary  
115 State Street  
Montpelier, VT 05633-5301

Re: [H.5, An act relating to a hearsay exception for a child under 16 years of age](#)

Dear Chair LaLonde and Members of the House Committee on the Judiciary:

I am the founder of MadFreedom, Inc., a human and civil rights advocacy organization dedicated to securing political power and influence to end discrimination and oppression against individuals based on their perceived mental state.

I write (1) to express MadFreedom's opposition to the proposed expansion of the hearsay exception in Rule 804a of the Vermont Rules of Evidence, as outlined in H.5; and (2) to request that mental illness be removed from Rule 804a altogether.

### **Background**

Rule 804a is an exception to the traditional hearsay rule.

The traditional hearsay rule excludes from evidence a statement made out of court because it is usually less reliable than live testimony, because if it is not given under oath, the factfinder, usually a jury, cannot observe the declarant's demeanor when the statement was made, and most importantly, the statement cannot be tested through contemporaneous cross-examination.

There are exceptions to the traditional hearsay rule in the law. Those exceptions are justified by circumstances that supply a substitute guarantee of reliability, e.g., statements made under the stress of excitement, statements made for medical diagnosis or treatment, business records kept in the regular course or dying declarations or by necessity when a witness is truly unavailable.

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Rule 804a diverges from those traditional reasons. First, Rule 804a is based on the status of the declarant, such as children and individuals with certain disabilities. Second, the exception isn't justified by circumstances that offer a substitute guarantee of reliability. Third, it is not limited to situations where live testimony is unavailable.

Rather, Rule 804a is a status-based exception tied to the declarant's category (child, and, in Vermont, certain disability labels). Rule 804a allows the factfinder to hear an out-of-court statement in addition to the witness's in-court testimony, thereby increasing the amount of admissible evidence. In short, Rule 804a functions as a corroboration tool.

Rule 804a became law in 1985. At the time, it applied to statements by a child "ten years of age or under the time of trial" and "mentally retarded or mentally ill person" in certain criminal sexual offense cases and certain juvenile proceedings. In 1988, in *State v Gallagher*, the Vermont Supreme Court explained that the Reporter's Notes to Rule 804a reflect a legislative intent to "cur[e] the frequent problem of lack of corroboration" caused by traditional hearsay rules, and that the rule contemplates admitting both the out-of-court statement and the declarant's testimony.

To be clear, Rule 804a does not keep a child or disabled person from testifying. Under Rule 804a, a child or disabled person may be compelled to testify and undergo cross-examination.

### **The expansion to "under 16" is fundamentally unfair**

Rule 804a is best understood as an evidence-strengthening tool. It increases the amount of admissible evidence that supports the State's case.

Because defendants are not presumed guilty, expanding a corroboration-driven hearsay exception is a serious fairness choice. If the defendant is not guilty, i.e., innocent, the jury may hear multiple adults repeat an out-of-court statement that would ordinarily be excluded as hearsay or limited as cumulative.

Expanding a special hearsay exception in serious cases is not a neutral tweak. It increases the risk of error when the defendant is not guilty.

### **The expansion to "under 16" is arbitrary and unsupported by science or principle**

Expanding Rule 804a from "12 and under" to "under 16" is arbitrary because it swaps one bright-line cutoff for another without a principled evidentiary reason that fits what the rule actually does.

The bill does not turn on whether the teen can testify. The teen must still be available and can still be compelled to testify. Thus, the age change does not track a testimony-capacity or

necessity rationale; it simply broadens when hearsay can be used as corroboration. And if the justification is adolescent development, that logic has no clear stopping point at 16 rather than 17 or 18, which shows the line is a policy convenience, not a science-based or evidence-based principle.

Supporters have sought to justify expanding Rule 804a to “under 16” by invoking youth, development, and vulnerability. Those arguments should fail because Rule 804a does not relieve a child from testifying. The teenager can still be compelled to testify. Thus, the “brain science” rhetoric does not reduce burden; it increases evidence. That looks less like protection and more like a way to improve conviction odds.

In addition, Vermont’s approach to age is not consistent across the justice system. That matters because it demonstrates that this proposed expansion is not about science or principle. It’s about which direction the age line benefits the State in a given context.

Vermont uses age flexibly, depending on whether age helps the prosecution or harms the prosecution. When age is used to expand the State’s evidentiary tools, Vermont is willing to treat teenagers as “child-like.”

But when age would limit the State’s punitive power, Vermont is willing to treat teenagers as “adult-like,” e.g., authorizing adult prosecution and adult penalties for certain youth under 16 in serious cases.

This is not “following the science.” This is instrumentalizing age: treating adolescents as children when it strengthens the State’s case, and treating them as adults when it increases the State’s leverage to punish.

If Vermont is going to rely on age to justify major departures from ordinary evidentiary fairness, the Legislature should be able to articulate a principle that applies across contexts. For example:

- If under 16 means “child-like” enough to justify special hearsay evidence rules, then under 16 should also mean “child-like” enough to require heightened procedural protections and limits on adult punishment.
- Conversely, if Vermont’s system is comfortable treating youth under 16 as adults-like enough for adult court in some contexts, then the State should not simultaneously argue those same youth are so child-like that we must expand an extraordinary hearsay exception to help prosecutors corroborate their cases.

The State cannot have it both ways and call it principle.

In short, H.5 asks you to treat teens under 16 as children for purposes of expanding a prosecution-friendly evidence rule. But Vermont also treats some youth under 16 as adults when it comes to prosecution and punishment. That inconsistency shows the age line isn't grounded in development; it's grounded in convenience. Age becomes a lever pulled in whatever direction benefits the States.

H.5 uses age selectively and arbitrarily. It is not based on science, and it is not based on principle. It's convenience and that it not a compelling reason to expand hearsay.

### **Mental Illness does not belong in Rule 804a**

H.5 contains a status-based category – a person with a mental illness – inside a rule designed as a special hearsay carve-out for children. The message is unavoidable: adults with diagnoses of so-called serious mental illnesses are treated like and considered children.

Rule 804a defines mental illness as follows:

“... a substantial disorder of thought, mood, perception, orientation or memory, any of which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life, but shall not include intellectual.”

Among the diagnoses that would fall within the definition are depression, bipolar disorder, and schizophrenia. At one time or another, I have been diagnosed with each of these conditions. I am also an attorney licensed to practice law in New York, California and Massachusetts. I graduated from Harvard Business School with distinction, and worked as an international management consultant with McKinsey & Company. I was a name partner in a San Francisco law firm. I served as the inaugural director of the Center for Social Justice at UC Berkeley School of Law, my alma mater, and I was an assistant city editor at *The Miami Herald* during the time the paper won a Pulitzer Prize for Public Service.

I do not reference my background to brag. Rather, I do so to illustrate a point. The inclusion of individuals with mental illnesses in Rule 804a arises from a fundamental misunderstanding. Mental illnesses are not inherently disabling. Individuals with diagnoses of so-called serious mental illnesses possess cognitive and communicative abilities as varied as those of the general population. By deeming all individuals with mental illnesses as children, the rule reinforces outdated and stigmatizing narratives that have long marginalized our community.

The blanket inclusion of mental illness in this exception does more harm than good. It undermines our autonomy and perpetuates the misconception that we are no different than children in our reliability or capacity. These stereotypes not only harm individuals but also undermine efforts to promote equity and justice for those with lived experience of mental health challenges.

The rule's own history underscores how dated and stigmatizing this structure is. When Rule 804a was added in 1985, the caption and text used terminology widely recognized as offensive, explicitly grouping children with a "mentally retarded or mentally ill" person. The Vermont Supreme Court's 2020 promulgation notes that Rule 804a was amended "to reflect the Legislature's efforts to eliminate offensive language," while still maintaining "mental illness" as a status trigger.

Updating vocabulary is not enough. The underlying premise – that mental illness should place an adult into the same evidentiary category as children – should be removed.

Finally, Vermont's own administrative decisions show how shaky this "mental illness" carve-out is. In a [Vermont administrative decision applying Rule 804a](#), the hearing officer noted that even if other requirements of Rule 804a were met, it would be difficult to accept the testimony of a "mentally confused adult" through third-party statements unless competency had been well tested. (at p. 14, fn 3)

That illustrates the problem: this stigmatizing carve-out is written into law even when it may be narrow and hard to use in practice. Thus, we are carrying the civil and human rights harm – equating adults with mental illnesses with children – without a clear, consistent benefit.

## **Conclusion**

For all of these reasons, MadFreedom urges the Committee to reject H.5. The proposed expansion of Rule 804a to children under 16 is not a modest adjustment; it is an intentional evidence-strengthening measure that increases the amount of admissible corroboration in precisely the cases where the presumption of innocence and the reliability of evidence must be guarded most carefully. It does not relieve teenagers from testifying or from cross-examination. It simply increases the likelihood that a jury will hear the same allegation repeated through multiple adults—evidence that would ordinarily be excluded or limited as hearsay or as cumulative.

Separately and independently, the Committee should remove "mental illness" from Rule 804a altogether. It is an outdated, stigmatizing status category that equates adults with mental illness with children for evidentiary purposes, despite the wide variation in cognitive and communicative abilities among people with psychiatric histories. The rule's history underscores how dated this framework is: it originated with now-disavowed terminology and still carries forward the same underlying premise. Vermont should not codify that stereotype into its Rules of Evidence—especially where, as Vermont's own administrative decisions recognize, the "mental illness" carve-out may be narrow and difficult to apply in practice.

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I respectfully ask the Committee to vote **no** on H.5 and to take up the necessary corrective amendment to Rule 804a to remove “mental illness” from the rule.

Thank you for your consideration.

Respectfully submitted,



Wilda L. White  
Founder