

11-1-2018

What Will It Take? Examining the Use of Preliminary Hearing Testimony Where Victims are Unavailable Due to Mental Illness Stemming from Domestic Violence and Sexual Assault

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Suggested Citation

Kristin Grossman, Comment, What Will It Take? Examining the Use of Preliminary Hearing Testimony Where Victims are Unavailable Due to Mental Illness Stemming from Domestic Violence and Sexual Assault, 39 N. Ill. U. L. Rev. 140 (2018).

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What Will It Take? Examining the Use of Preliminary Hearing Testimony Where Victims are Unavailable Due to Mental Illness Stemming from Domestic Violence and Sexual Assault

KRISTIN GROSSMAN*

A particular problem exists that domestic violence and sexual assault victims face when bringing their abusers to court. This is whether the use of preliminary hearing testimony can be utilized where a victim is unavailable to testify at trial due to mental illness, namely Post-traumatic Stress Disorder. This article examines the manner in which various states have combatted the issue of unavailability due to mental health and what role that unavailability has in a domestic violence or sexual assault case. By closely looking at the case State v. Anderson, 402 P.3d 1063 (Idaho 2017), this article seeks to justify the use of preliminary hearing testimony where there can be a trustworthy means for mental health determinations to establish a victim's unavailability, and where the previous testimony has an indicia of reliability.

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* Juris Doctor Candidate, May 2019, and Editor-in-Chief of the *Northern Illinois University Law Review*, Volume 39. First, I would like to thank Professor David Taylor, my Evidence professor and faculty advisor, for his vital guidance throughout the research and writing process of this article. Along with Professor Taylor, I would like to thank Tara Ramljak, my Notes and Comments Editor, for her willingness to help and thoughtful remarks throughout the editing process. Next, I would like to thank my fiancée, Thomas Redmon, for his continued support and love, especially during the most difficult times when writing this article. I also would like to thank my parents, Reid and Allison, and grandmother, Jacquelyn, for their support not only when writing this article, but throughout all of law school and for continuing to inspire me in all that they do to support our family. Lastly, I would like to dedicate this article to my late grandfather, Frank Newton Grossman, who had such a passion for the written word with his degree in Journalism and who I know would be so proud to see the Grossman name in print.

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I. INTRODUCTION

Take a woman, twenty-five-years-old, and in an endless cycle of abuse. She has been with her partner for five years, and is constantly bullied, both physically and emotionally. She is mentally trapped in a systematic pattern of abuse but cannot leave the relationship for fear of economic instability, stalking, or revenge behavior from her partner. After a particularly violent episode, she decides to call the police and finally make her partner accountable for the traumatic events he has placed on her for years. She realizes she has been less motivated to venture into public, effectively missing days of work and school; has become more likely to dissociate herself with anything that reminds her of her partner for fear of re-traumatizing herself with memories of the abuse; and has been in constant fear for her safety. After giving testimony at a preliminary hearing, she falls into a dangerous mental state, and doctors formally diagnose her with post-traumatic stress disorder (“PTSD”). For fear of mental instability during trial, the prosecutors seek to declare her unavailable for trial according to the appropriate evidentiary rules due to her mental illness. Although the prosecutors have testimony and statements from mental health professionals treating the victim, the court finds no basis to declare her unavailable for PTSD because this has not been discussed by the Supreme Court. Thus, requiring the victim to suffer more mental abuse when testifying squarely in front of the person who caused this mental and physical trauma.¹

Similarly, Chief Justice Roger S. Burdick of the Supreme Court of Idaho finds no basis to permit a domestic violence victim unavailable due to mental illness because “[T]he United States Supreme Court has not issued any opinions establishing a standard for unavailability due to mental illness.”² This ruling came from a 2014 domestic battery conviction in which the defendant, Darol Anderson, allegedly choked, punched, and struck his wife with a metal pipe.³ After the attack, Anderson’s wife checked herself into Kootenai

1. The encounter described is hypothetical and not based on any one scenario. However, many of the facts described are based on a similar case that was decided in the Supreme Court of Idaho in 2017. *State v. Anderson*, 402 P.3d 1063 (Idaho 2017).

2. *Anderson*, 402 P.3d at 1069.

3. Ralph Bartholdt, *High Court Overturns Battery Conviction*, COEUR D’ALENE/POST FALLS PRESS (July 12, 2017, 5:00 AM), <http://www.cdapress.com/article/20170712/ARTICLE/170719953> [<https://perma.cc/8GEH-JR45>].

Behavioral Health where she was diagnosed with PTSD.⁴ She had such a poor prognosis that the physician's report recommended that she should forgo testifying at trial, effectively utilizing her preliminary hearing testimony, because requiring her to testify would assuredly deteriorate her mental state even further.⁵ The court rejected this finding of unavailability and required the victim to testify citing the defendant's Sixth Amendment right to confrontation as the main authority behind this finding.⁶

The role of PTSD in victims of distressing events poses a difficult question as to whether these victims should be able to be considered unavailable according to Rule 804 of the Federal Rules of Evidence ("FRE") and the Rule Against Hearsay or whether that unavailability would violate the defendant's right to confrontation.

The Rule Against Hearsay has been described as "one of the most important exclusionary rules in the law of evidence."⁷ Others have deemed this rule to be one of the greatest contributions to the legal profession and world of procedure.⁸ Because this is such a complex legal problem, it is difficult to ascertain a specific definition of the Rule Against Hearsay.⁹ However, hearsay is believed to have two major components.¹⁰ First, as noted in Rule 801(a), "[A] '[s]tatement' means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion."¹¹ Within Rule 801(c)(1)-(2), "'Hearsay' means a statement that the declarant does not make while testifying at the current trial or hearing; and a party offers in evidence to prove the truth of the matter asserted in the statement."¹²

Although these definitions do not carry with them the nuances of the rule, this basic formulation goes to the true goal of disallowing hearsay.¹³ This goal contains eight essential factors, which are: (1) accurate perception of the witness offering the statement; (2) whether the witness had an accurate memory of that perception; (3) whether the witness can convey the correct

4. *Id.*

5. *Id.*

6. *Id.*; "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend VI. There is a real and definite relationship between the hearsay rule and a defendant's right to confrontation because "[t]he hearsay rule operates to preserve the ability of a party to confront adverse witnesses in open court, and the Confrontation Clause does the same for an accused in a criminal case." 2 MCCORMICK ON EVIDENCE §252, at 157 (Kenneth S. Broun et al. eds., 6th ed. 2006).

7. Prince, Richardson on Evidence § 8-101 (11th ed.).

8. 1 MCCORMICK ON EVIDENCE §244, at 420 (Kenneth S. Broun et al. eds., 6th ed. 2006).

9. *Id.* at 423.

10. *Id.*

11. FED. R. EVID. 801(a).

12. FED. R. EVID. 801(b)(1)-(2).

13. See 1 MCCORMICK ON EVIDENCE §244, at 421.

narration in language to portray the statement accurately; (4) whether the witness can convey sincerity of the intention of the statement; (5) the idea that the declarant was not under oath when the statement in question was made; (6) the inability to see and hear the demeanor of the declarant when the statements are being made, and their lack of physical presence at trial; (7) the inability to cross-examine the declarant; and (8) the inherent nature of these statements not being credible.¹⁴

Turning to look specifically at FRE 804, this further discusses hearsay and when situations arise, such as privilege, death, or mere refusal to testify.¹⁵ Where a declarant is unavailable as a witness, the FRE dictates two basic situations where a declarant is truly unavailable.¹⁶ These two situations are: (1) where the declarant can be located and produced, but cannot be compelled to testify; or (2) where the declarant cannot be made to come to court, either physically or mentally.¹⁷ Although mental illness qualifies as a basis for unavailability, sources mainly discuss incapacity due to disease, accident, or senility.¹⁸ Even the Advisory Committee Notes purely discuss death and infirmity when expanding upon this rule.¹⁹

Many studies now exist to discuss this idea of mental illness in particular scenarios, like those who are victims of domestic violence and sexual assault.²⁰ PTSD is a common mental health issue after a victim experiences domestic violence or a sexual assault.²¹ For instance, the Centers for Disease Control (“CDC”) stated in a 2010 report on the mental health of victims in sexual assaults and domestic violence:

Men and women who experience rape . . . or physical violence by an intimate partner in their lifetime were more likely to report frequent headaches, chronic pain, difficulty sleeping, activity limitations, poor physical health and poor mental health than men and women who did not experience these forms of violence. Women who had experienced these forms of violence were also more likely to report having

14. *Id.* at 412-23.

15. *Id.* at 440.

16. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 4 FEDERAL EVIDENCE § 8:108 (4th ed. 2017).

17. *Id.* at 4-5.

18. 1 MCCORMICK ON EVIDENCE §253, at 440.

19. FED. R. EVID. 804(b)(4) advisory committee’s note to 804(b)(4).

20. NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL OF THE CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2010-2012 STATE REPORT (Nov. 2011).

21. *Id.* at 10.

asthma, irritable bowel syndrome, and diabetes than women who did not experience these forms of violence.²²

However, the courts are split to recognize this form of mental health in the context of unavailability for trial.²³ Some courts have not explicitly dictated what needs to be done in order to have a showing of mental illness but have determined a showing of PTSD through testimony of a psychiatrist was not enough to render this victim and witness unavailable to testify.²⁴

When determining unavailability of a victim and witness, this inherently begs the question: if a witness accusing a person of domestic violence or sexual assault is deemed to be unavailable, where does that leave the defendant's Constitutional right to confrontation?²⁵ "In all criminal prosecutions, the accused shall enjoy . . . to be confronted with the witnesses against him."²⁶ The defendant having a face-to-face confrontation with those who have accused them is essential to the right to confrontation offered by the Sixth Amendment.²⁷ This face-to-face confrontation is essential to another core value of confrontation: cross-examination.²⁸ "Most descriptions of the confrontation right are functional, and they stress cross-examination as the primary purpose of confrontation."²⁹

This balancing between the declarant's unavailability due to mental illness and the defendant's right to confrontation is not an act that has been performed uniformly throughout the courts. For instance, some courts consider an approach of evaluating the witness's symptoms and what they are capable of as well as stating that mental illness in itself cannot automatically make a witness unavailable.³⁰ Other courts, as stated previously, have no clear indication of what it would take for a showing of unavailability of mental illness for domestic violence or sexual assault victims.³¹

There is a need to recognize trauma victims in domestic violence and sexual assault situations as being unavailable to testify in some instances if it is done so on a consistent basis. As it stands now, the courts have been unclear and inconsistent on what is needed to recognize these victims suffering

22. *Id.* at 3.

23. *See Anderson*, 402 P.3d at 1063; *see also Burns v. Clusen*, 798 F.2d 931 (7th Cir. 1986); *Warren v. United States*, 436 A.2d 821 (D.C. Cir. 1981).

24. *Anderson*, 402 P.3d at 1071.

25. *See generally* FED. R. EVID. 804(b) (discussing the exceptions to the Rule Against Hearsay, as well as what statements may be utilized where a witness is unavailable to testify). *See also*, U.S. CONST. amend VI.

26. U.S. CONST. amend VI.

27. MUELLER, *supra* note 17, at § 8:26.

28. *Id.*

29. *Id.*

30. *Burns*, 798 F.2d at 938.

31. *Anderson*, 402 P.3d at 1071.

from PTSD to be deemed unavailable to testify based on mental illness. Where there is previous testimony in a preliminary hearing that gives the defendant a chance to confront any witnesses, this should be universally recognized as not violating the defendant's right to confrontation where the victim is declared unavailable due to mental illness.

Part II will examine the lasting psychological impacts of domestic violence and sexual assault on the victims that have negative impacts on their physical and mental health.³² Sometimes these impacts can only make themselves apparent through high stress and traumatic events, such as giving testimony or throughout the trial process.³³

Part III will show how courts have either declined to decide on the issues of unavailability and PTSD in these assault victims or have made recognizing this nearly impossible for the victim seeking to be made unavailable to testify.³⁴

Part IV will examine the solutions offered by the States to recognize a path to unavailability due to trauma and shed a light on the need for other States to follow suit.

Part V will discuss the right to confrontation being essential in terms of a defendant's right at trial, and how States who have outlined the path to unavailability have created a previous testimony exception that ensures, after the burden to prove unavailability has been met, the use of previous statements of the witness against the defendant at trial. Without such a limitation on the use of previous statements by the witness, this would assuredly violate the defendant's confrontation rights.

Part VI will draw the conclusion that recognizing PTSD in the victims of sexual assault and domestic violence in the context of unavailability will not impede on a defendant's confrontation rights if there is an opportunity for the use of preliminary hearing testimony that has an *indicia of reliability*.

II. THE PSYCHOLOGICAL IMPACT OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT ON THE VICTIM

The United States Department of Justice and Office on Violence Against Women defines domestic violence as, "a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and

32. See generally NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL OF THE CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2010-2012 STATE REPORT, 128 (Nov. 2011).

33. See *id.*

34. See *Anderson*, 402 P.3d 1063; see also *Burns*, 798 F.2d 931; *Warren*, 436 A.2d 821.

control over another intimate partner.”³⁵ The Department states five different ways a partner can inflict this violence on their partners.³⁶ These include: physical, sexual, emotional, economic, and psychological abuse.³⁷ The Department and Office on Violence Against Women defines sexual assault as, “any type of sexual contact or behavior that occurs without the explicit consent of the recipient. Falling under the definition of sexual assault are sexual activities as forced sexual intercourse, forcible sodomy, child molestation, incest, fondling, and attempted rape.”³⁸

To study and monitor this vicious societal issue, the CDC and National Institute of Justice (“NIJ”) co-sponsored the National Violence Against Women (“NVAW”) Survey.³⁹ This survey interviewed 8,000 women and 8,005 men eighteen-years and over from November 1995 to May 1996.⁴⁰ This study was performed because there was a lack of trustworthy empirical data on victimization in this area.⁴¹ Because this was the first empirical survey of its kind, the data covered a wide range of topics regarding physical assault, including assault experienced as children by adult caretakers, and assault experienced as adults by any type of assailant.⁴² This information uncovered the shocking statistic that one in six U.S. women and one in thirty-three U.S. men have been victims of a completed or attempted rape.⁴³ When this study was published in November 2000, the NVAW Survey estimated 876,064 women were raped annually, and 111,298 men were raped annually.⁴⁴ This was in stark contrast to the Bureau of Justice Statistics National Crime Victimization Survey (“NCVS”) from 1994 that estimated only 32,900 rapes or sexual assault of males twelve-years old and older per year, and only 432,100 rapes or sexual assaults of women twelve-years and older per year.⁴⁵

35. *What is Domestic Violence*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/ovw/domestic-violence> (last visited Nov. 25, 2017) [<https://perma.cc/QQR7-UJ6K>].

36. *Id.*

37. *Id.*

38. *Sexual Assault*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/ovw/sexual-assault> (last visited Nov. 25, 2017) [<https://perma.cc/U3JE-VN3C>].

39. NATIONAL INSTITUTE OF JUSTICE AND CONTROL OF THE CENTERS FOR DISEASE CONTROL AND PREVENTION, FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 1 (Nov. 2000).

40. *Id.* at 3.

41. *Id.* at 1.

42. *Id.*

43. *Id.* at 13.

44. NATIONAL INSTITUTE OF JUSTICE AND CONTROL OF THE CENTERS FOR DISEASE CONTROL AND PREVENTION, FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 15 (Nov. 2000).

45. *Id.*

Unfortunately, since the NVAW Survey published in November 2000, the prevalence of these assaults has only risen in the United States.⁴⁶ For instance, between 2010 and 2012, there were an estimated 44,981,000 victims of any contact sexual violence, physical violence, and/or stalking by an intimate partner in all fifty states.⁴⁷ This roughly equates to one in four women in the United States who experience this type of violence.⁴⁸ Of this figure 19,743,000 women were victims of sexual violence, and 39,111,000 were victims of physical violence.⁴⁹ In Illinois alone, there were 2,080,000 women victims of any contact sexual violence, physical violence, and/or stalking by an intimate partner.⁵⁰ Of these victims in Illinois, 922,000 were victims of sexual violence, and 1,698,000 were victims of physical violence.⁵¹ Between 2010 and 2012, there were 35,236,000 men in the United States who were victims of any contact sexual violence, physical violence, and/or stalking by an intimate partner.⁵² Of these victims, 8,006,000 were victims of sexual violence alone.⁵³

The psychological repercussions of these acts on the victims are inevitable. Intimate partner violence, in particular, “refers to physical or sexual violence or the threat of such violence, or psychological/emotional abuse and/or coercive tactics when there has been prior physical and/or sexual violence between persons who are partners or former partners.”⁵⁴ It has been shown that an estimated 40-50% of those who experience intimate partner violence experience chronic pain, depressive symptoms, and PTSD.⁵⁵ Specifically, between 2010 and 2012, 51.8% of women and 16.7% of men experience symptoms of PTSD after experiencing this kind of violence.⁵⁶ These symptoms include: having nightmares; trying hard not to think about the attack or attacks, or avoiding being reminded of it; feeling constantly on guard,

46. *See generally*, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL OF THE CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2010-2012 STATE REPORT (Nov. 2011).

47. *Id.* at 128.

48. *Id.* at 126.

49. *Id.* at 128.

50. *Id.*

51. NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL OF THE CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2010-2012 STATE REPORT 128 (Nov. 2011).

52. *Id.* at 144.

53. *Id.*

54. Janice Humphreys, Bruce A. Cooper, & Christine Miaskowski, *Differences in Depression, Post-traumatic Stress Disorder, and Lifetime Trauma Exposure in Formerly Abused Women with Mild Versus Moderate to Severe Chronic Pain*, 2316, 2317 (2010).

55. *Id.*

56. NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL OF THE CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 2010-2012 STATE REPORT 3 (November 2011).

watchful, or easily startled; feeling numb or detached from others, activities, or surroundings.⁵⁷ The daily impact of this group of victims experiencing PTSD includes: 18.2% being concerned for their safety, 14.3% missing at least one day of work or school, 13.4% being injured, and 6.2% needing medical care.⁵⁸ In 2012 alone, 39.3% of these victims experience symptoms of PTSD within the first twelve months of the attack and 36.8% experience PTSD throughout their lifetime.⁵⁹

A. PTSD, CHARGING THE ABUSER, AND SYMPTOMS EXPERIENCED THROUGHOUT TRIAL

PTSD symptoms sometimes find their way in when it comes time to reporting and bringing charges against their perpetrators. Speaking just to fear stemming from their attack, the National Domestic Violence Hotline (“NDVH”) found that 80% of those who had not previously called the police after their experience were somewhat or extremely afraid to call them in the future.⁶⁰ In fact, 70% were afraid to call the police fearing this would make things worse, the offender would only get a slap on the wrist, or calling the police would have negative consequences for them.⁶¹ One of the women surveyed described, “Because he is [in the military] and several convictions about abuse [have] been brought against him in the past, nothing is going to happen now except more anger towards me.”⁶²

These emotions can carry themselves with the victims, and sometimes are only revealed, during the process of bringing charges and within the courtroom. Seeing their abusers could potentially have victims re-experience the event, and the natural reaction is to avoid stimuli that brings this on.⁶³ “When a human being experiences an intensely threatening, terrifying event, there are really dramatic changes to the brain and how the brain functions.”⁶⁴

57. *Id.* at 125.

58. *Id.* at 127.

59. *Id.* at 235.

60. NATIONAL DOMESTIC VIOLENCE HOTLINE, WHO WILL HELP ME? DOMESTIC VIOLENCE SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES 4 (2015) (conducting the survey was Professor TK Logan and Vice President of Policy for the NDVH Roberta Valente who surveyed 637 women with experiences of partner abuse which included 56% white women, 15% Hispanic women, and 11% African-American women).

61. *Id.*

62. *Id.* at 5.

63. ROGER J. R. LEVESQUE., THE PSYCHOLOGY OF CRIMINAL JUSTICE PROCESSES 409 (Nova Science Publishers, Inc., 2006) (explaining that these symptoms must reach a clinical level to be diagnosed, and that PTSD is an especially common diagnosis for those who have been sexually maltreated).

64. Shea Rhodes & Gina Dietz, *Trauma and the Trafficking Victim: A Barrier to Assistance*, 34 DEL. LAW 18, 19 (2016) (focusing on the sexual, physical, and mental maltreatment of trafficking victims who experience sexual and violent physical abuse, these victims

This is especially traumatic in trial where the attacker, trafficker, rapist, or other type of abuser is in the room and the victim is being asked to recall memory in order to seem credible.⁶⁵ This lack of memory or inability to respond to cross-examination in a traditional sense is difficult because:

When the brain functions normally, it enables us to encode experiences sequentially and contextually – “how most people think of memory.” As someone undergoes a traumatizing experience, their brain releases neurotransmitters that begin to “handicap” the frontal lobes of the brain, which “fundamentally alters how the brain processes what is going on so we no longer encode experience in the same way.” Instead, “experience is encoded as intense [...] sensory fragments” – sights, feelings, sounds, smells, and tastes – “the kernels of [...] flashbacks and nightmares.”⁶⁶

Bringing these sensory perceptions to the forefront of this victim’s mind can shatter their mental health and cause their PTSD from this event or from multiple events to appear, and give the appearance that the victim is unconvincing, hysterical, or can have long-lasting mental trauma on their psyches. PTSD is classified as an anxiety disorder which causes symptoms that “occur without warning and make simple life routines nearly unbearably discomforting.”⁶⁷

For instance, a rape victim suffering from bipolar disorder had her mental illness aggravated to the point of being, controversially, jailed for her in-court behavior.⁶⁸ Although this victim suffered from bipolar disorder, not

have a uniquely terrifying relationship with their abusers where their abusers teach their victims to self-blame and think of their traffickers as their protectors).

65. *Id.*

66. *Id.*; see also CNN, *Kavanaugh Accuser Blasey Ford Describes Attack*, YOUTUBE (Sept. 27 2018), https://www.youtube.com/watch?v=mrSuhuGV_Nk. Dr. Ford’s testimony at the Brett Kavanaugh Supreme Court Confirmation Hearing is an example of such sensory experiences showing themselves within testimony. *Id.* Dr. Ford describes a narrow staircase, the feeling of her inability to breathe, the sounds of the men leaving down the hallway, and the feeling as though she may die. *Id.* All of these sensory feelings paint the way she recalls the event. *Id.*; see also Michelle Mark, *Christine Blasey Ford says the strongest memory she has of Kavanaugh’s alleged sexual assault was the ‘uproarious laughter’*, BUS. INSIDER, <https://www.businessinsider.com/christine-blasey-ford-brett-kavanaugh-uproarious-laughter-memory-2018-9> [<https://perma.cc/K5EM-9VU9>] (last visited Nov. 6, 2018) (“Asked by Sen. Leahy to describe detail she ‘cannot forget,’ Ford recalled how she felt she was the object of the boys laughter. ‘Indelible in the hippocampus is the laughter. The uproarious laughter between the two, and they’re having fun at my expense,’ she said, ‘I was underneath one of them, while the two laughed. Two friends having a really good time with one another.’”).

67. LEVESQUE, *supra* note 63, at 687.

68. Travis M. Andrews, *Bipolar Rape Victim Jailed After Having a Mental Breakdown While Testifying Against Rapist*, WASHINGTON POST (July 21, 2016),

PTSD, this shows how mental illness can become exacerbated when facing an abuser.⁶⁹ An article for the Washington Post describes:

For this 25-year-old bipolar woman . . . recounting the harrowing details of being violently choked and raped was too much. . . . [T]he victim became disoriented and became babbling incoherently. She started crying, stood up from the witness stand and ran through the court to the outside world, screaming behind her that she'd never come back.⁷⁰

This woman, known as Jane Doe, became so distraught and disoriented that her physical safety was at risk when she wandered out into traffic.⁷¹ Jane Doe's particular experience is especially troubling in this context because there was no telling that this behavior would arise, yet she was diagnosed *before* trial.⁷² "Her mind was already fragile as an egg," and the district attorney supported jailing the victim because "there were no apparent alternatives that would ensure the victim's . . . appearance at trial."⁷³ This abuser was described by the district attorney as a serial rapist, yet they needed this victim's testimony so desperately that this victim needed to be jailed, suffer more physical assaults by fellow inmates, and have her mental state suffer even further.⁷⁴

There is a simpler way to handle these cases of mental illness in the courtroom where the victim would not risk violent, emotional, and overall uncontrollable behavior due to their particular mental states. This would be to allow previous testimony in the form of preliminary hearing testimony to ensure a chance for cross-examination, and not interfere with the defendant's right to confrontation.

III. PRELIMINARY HEARING TESTIMONY AND MENTAL HEALTH DETERMINATIONS OF UNAVAILABILITY

When discussing mental illness in the context of unavailability and rule 804(a)(4), the circuits have been split regarding what to recognize as a mental

https://www.washingtonpost.com/news/morning-mix/wp/2016/07/21/bipolar-rape-victim-jailed-after-having-a-mental-breakdown-while-testifying-against-her-rapist/?utm_term=.1a5b0fc87b61 [<https://perma.cc/DJV3-LG3R>].

69. *See, id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. Andrews, *supra* note 68.

74. *Id.* (Not only did the victim have manic episodes while in custody, causing guards to use physical force to subdue her, she was also purposefully attacked by another inmate who "repeatedly slammed her head into the concrete floor.") *Id.*

illness, and what would be acceptable to determine unavailability due to mental illness.⁷⁵ For instance, the Eleventh Circuit affirmed a trial court's decision to allow deposition transcripts as hearsay into evidence when the only witness to the event was found to be unavailable due to dementia.⁷⁶ They made this determination through the testimony of one doctor who did not have any personal knowledge as to how the declarant came to be mentally ill.⁷⁷ Whereas, the Idaho Supreme Court specifically states that an affidavit of a doctor with personal knowledge along with testimony of another expert are not satisfactory to support a claim of unavailability due to mental illness because the victim of domestic violence, suffering from PTSD, was capable "with breaks" to testify at the preliminary hearing against her abuser.⁷⁸

In *Parrott v. Wilson*, 707 F.2d 1262 (11th Cir. 1983), the court evaluated the use of unavailability in the case of dementia and the use of a deposition as former testimony according to FRE 804 (b)(1).⁷⁹ Here, the only witness to the shooting of which the original trial was regarding was Deputy Marshal Max Wilson.⁸⁰ After his deposition, Deputy Marshal was found to be suffering from grand mal seizures, absence seizures, and dementia or some other form of serious depression.⁸¹ Dr. Elmer H. Harden, Jr. advised both parties that the seizures could be controlled through medication, but the dementia could not be prevented or treated with any type of medication.⁸²

Absent the ability for the trier of fact to witness Deputy Marshal give sworn testimony, the Eleventh Circuit still considered the admission of Deputy Marshal's deposition into evidence in the event that he was considered unavailable for trial.⁸³ The court stated, "Our examination of Dr. Harden's depiction convinces us, however, that the trial court did not abuse its discretion in declaring Wilson unavailable: 'The duration of the illness' was 'in probability long enough so that, with proper regard to the importance of that testimony the trial [could not] be postponed.'"⁸⁴ Essentially the court made a logical decision in a fact-dependent situation. This being that Deputy Marshal was the *only* witness to the shooting, his memory and mental faculties

75. See *Parrott v. Wilson*, 707 F.2d 1262 (11th Cir. 1983); see also *Burns v. Clusen*, 798 F.2d 931 (7th Cir 1986); see also *State v. Anderson*, 402 P.3d 1063, 1064 (Idaho 2017).

76. *Parrott*, 707 F.2d at 1268.

77. *Id.*

78. *Anderson*, 402 P.3d at 1071.

79. *Parrott*, 707 F.2d at 1269; see also, FED. R. EVID. 804(b)(1) (The Former Testimony exception detailing what is allowable former testimony if a declarant is deemed unavailable).

80. *Parrott*, 707 F.2d at 1268.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 1269 (citing *United States v. Amaya*, 533 F.2d 188, 191 (5th Cir. 1976)).

were failing, and this was not a mental illness the court could wait out until he was well enough to testify in person.⁸⁵

In contrast, the Seventh Circuit tackled the issue of rule 804 and the requirements to be deemed unavailable due to mental illness in *Burns v. Clusen*, 798 F.2d 931 (7th Cir. 1986).⁸⁶ In *Burns*, the court looked at unavailability in a victim with acute schizophreniform disorder, more commonly referred to as schizophrenia.⁸⁷ The victim, known throughout the case as L.L., was walking through a parking lot when she was forced into a car at gunpoint, and made to drive to a secluded area.⁸⁸ After arrival to the area, the assailant pointed a gun to her head, pulled the trigger, sexually assaulted her, and attempted, but ultimately failed, to choke her with a wire.⁸⁹ After exhaustive preliminary hearing testimony, prosecutors labeled L.L. as a material witness, but were unsuccessful in persuading L.L. to testify.⁹⁰ Before having L.L. arrested and extradited from Illinois in order to have her testify, the prosecutor learned of the victim's hospitalization.⁹¹ L.L.'s psychiatrist at a psychiatric ward in Niles, Illinois, Dr. Busby, described her as, "almost like a basket case . . . catatonic stupor with hallucinations and delusions . . . would stand in one spot and talk to the wall, refuse to eat."⁹² Dr. Busby then testified when the State sought to declare L.L. unavailable.⁹³ The doctor testified that although he had no direct contact with the victim for almost two months, it was his opinion that "there was a 'high probability that it would cause anywhere from a moderate to substantial relapse and return of symptoms."⁹⁴ The trial court ruled that L.L. was unavailable to testify within the meaning of Wisconsin Rule of Evidence § 908.04(1)(d).⁹⁵ This statute is nearly the mirror image of FRE 804(a)(4) stating that unavailability as a witness occurs where a declarant, "is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity."⁹⁶

85. See generally *Parrott*, 707 F.2d at 1268-69.

86. See *Burns v. Clusen*, 798 F.2d 931 (7th Cir. 1986).

87. *Id.* at 938.

88. *Id.* at 934.

89. *Id.*

90. *Id.*

91. *Burns*, 798 F.2d at 934.

92. *Id.*

93. *Id.* at 935.

94. *Id.*

95. *Id.*

96. WIS. STAT. ANN. § 908.04 (West 1974); see also FED. R. EVID. 801(a)(4) ("A declarant is considered to be unavailable as a witness if the declarant: cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness.").

On appeal, the Seventh Circuit considered this problem by examining the Confrontation Clause and the hearsay rule.⁹⁷ “The Supreme Court has never had occasion to consider the precise question before us: When is a witness unavailable because of mental illness so as to make admissible her preliminary hearing testimony?”⁹⁸ The court developed a two-part approach to balance the Confrontation Clause against the hearsay issue that was particularly unique in this case.⁹⁹ First, the prosecution must clearly demonstrate the unavailability of the declarant whom they are trying to declare as unavailable, and must show that their efforts to make the declarant available were stringent.¹⁰⁰ Second, the hearsay statements that a party is seeking to use must be marked by adequate *indicia of reliability* that can be showed through particularized guarantees of trustworthiness.¹⁰¹ The court then declared that preliminary hearings have “certain guarantees of reliability that other hearsay statements lack.”¹⁰² Citing the ability of the trier of fact’s ability to observe the demeanor of the declarant as the key factor that makes preliminary hearing testimony more reliable than statements being made under oath, in writing, or other circumstances, or any other statements that lack cross-examination.¹⁰³ Although the State had reliable former testimony where the defense had the ability to cross examine the victim and reliable testimony of the victim’s psychiatrist, the Seventh Circuit ultimately held that this defendant’s right to confrontation was violated because the State had the burden to prove unavailability. This court states:

A declaration that a witness is ‘unavailable’ because of mental disability cannot be a ‘back-door’ acknowledgment that a witness is simply reluctant or likely to refuse to testify. Rather, the prosecution has the burden to prove that the witness has a ‘then-existing mental illness.’ . . . If a prosecutor secures an early ruling of unavailability, and there is a delay until the start of trial so as to make the earlier information ‘stale,’ the obligation remains upon the prosecutor to offer current information proving the status of the witness’ illness has not changed.¹⁰⁴

Relying upon the language within the Wisconsin statute, as well as the FRE, stating a “then-existing” mental illness must cause the unavailability, the

97. *Burns*, 798 F.2d at 936.

98. *Id.*

99. *Id.*

100. *Id.* at 936-37.

101. *Id.* at 937.

102. *Burns*, 798 F.2d at 937.

103. *Id.*

104. *Id.* at 942-43.

court called Dr. Busby's testimony of L.L.'s condition as stale after continuances kept the trial from proceeding after the declaration of unavailability.¹⁰⁵

In *State v. Anderson*, 402 P.3d 1063 (Idaho 2017), the Supreme Court of Idaho examined an appeal of a felony and misdemeanor domestic battery case where the lower district court admitted preliminary hearing testimony of the victim after she was found unavailable to testify due to mental illness.¹⁰⁶ On September 6, 2014, the victim, Erica Messerly, found explicit photographs of another woman on the phone of her husband, Darol Keith Anderson.¹⁰⁷ After kicking Anderson in the back, Messerly was then attacked by her husband as he "squeezed her trachea until she was unable to breathe."¹⁰⁸ This choking lasted approximately five minutes before Anderson stopped and left the room.¹⁰⁹ Messerly followed Anderson, grabbed his cell phone, and threw the phone into the toilet.¹¹⁰ Anderson then proceeded to punch Messerly in the face with his right hand.¹¹¹ The attack went on for some time with Messerly suffering through: being punched in the back of the head and neck, being threatened and then jabbed with a metal pipe, having her hair pulled so hard that she is dragged in the direction of Anderson, being knocked unconscious, bites to the neck and shoulder, and being threatened with a steak knife.¹¹²

After the attack, the victim was diagnosed with PTSD and substance abuse disorder.¹¹³ The State argued that forcing the victim to testify and face the defendant in court would have had severe harm on her mental health, and offered testimony and an affidavit of two doctors who had expert and personal knowledge of the victim's mental health after the attack from the defendant.¹¹⁴ The Idaho court took on this case as a case of first impression, even though the court states that there have been many cases decided by the Idaho Supreme Court relating to preliminary hearing testimony where it was found to be admissible where the declarant became unavailable before trial.¹¹⁵ The court makes a distinction that unavailability due to mental illness, specifically, was the area in which the court had not discussed in previous cases discussing unavailability and previous testimony.¹¹⁶

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105. *Id.* at 940.
106. *Anderson*, 402 P.3d at 1064.
107. *Id.* at 1064-65.
108. *Id.* at 1064.
109. *Id.* at 1065.
110. *Id.*
111. *Anderson*, 402 P.3d at 1065.
112. *Id.*
113. *Id.* at 1068.
114. *Id.* at 1066.
115. *Id.* at 1070.
116. *Anderson*, 402 P.3d at 1070.

Dr. Erich Heidenreich, M.D., was the first to submit an affidavit detailing his professional opinion of Messerly's mental state.¹¹⁷ The affidavit mainly discussed her emotional state, and odds of relapsing upon testifying for trial.¹¹⁸ Dr. Heidenreich states, "Ms. Messerly presents as tearful and emotionally labile."¹¹⁹ He further states that Messerly would have an increased risk to relapse and use controlled substances again because having to testify would deteriorate her already fragile condition.¹²⁰ Dr. Heidenreich ended the affidavit by stating, "I emphatically recommend that Ms. Messerly not testify at this time or any in the near future."¹²¹

The State went one step further with calling Lisa Bunker, the clinical manager of a chemical dependency unit at the facility Messerly was seeking treatment.¹²² Bunker testified to corroborating Dr. Heidenreich's affidavit and diagnoses of substance use disorder and PTSD.¹²³ Bunker stated in her testimony, "She has a very fragile, if you will, mental state, and it is our belief that it would re-traumatize her at this point in time. . . . So I wouldn't go near any kind of revisiting of this in the next 90 days."¹²⁴

The district court decided that Messerly was unavailable for the purposes of testifying. However, in its decision of the motion in limine, the court stated that one of the main determining factors in declaring Messerly unavailable due to mental illness was that she had been previously cross examined at the preliminary hearing. "The judge must consider the symptoms, what tasks a witness is then capable of. Indeed, Messerly was able to provide testimony, albeit with breaks, at the preliminary hearing."¹²⁵ On appeal, the Supreme Court of Idaho ultimately concluded that the affidavit and testimony of the two experts was not sufficient evidence to prove the victim's mental illness made her unavailable to testify.¹²⁶

Although the court discusses how the admission of the preliminary hearing testimony was not harmless and would not affect the burden the State carries to convict the defendant, this sets an unfortunate standard in the State of Idaho where victims will henceforth be forced to testify even if they are able to obtain an affidavit and testimony from two different experts with personal knowledge of their particular illnesses and concluding that the deterioration of their mental health would be imminent if they are forced to testify.¹²⁷

117. *Id.* at 1066.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Anderson*, 402 P.3d at 1066.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1071.

126. *Anderson*, 402 P.3d at 1071.

127. *Id.*

IV. UNAVAILABILITY AND THE STATE SOLUTION

In order to help victims suffering residual mental health problems from their attacks, such as PTSD, rule 804(a)(4) of the FRE must be utilized to declare these victims as unavailable. However, this introduction of hearsay evidence in order to overcome the absence of in-person testimony must be met with an analysis of the defendant's right to confrontation in this context. Some states have specialized exceptions to fit within their evidence rules' counterpart of FRE 804.¹²⁸ This includes the ability to be declared unavailable by refusing to testify specifically in domestic violence cases,¹²⁹ while other states have acknowledged mental illness in unavailability in relation to trauma experienced by the victim.¹³⁰

Rule 804 is known as a restricted hearsay exception that requires a proponent to first *make a showing* that the declarant is unavailable.¹³¹ This is in contrast to an unrestricted exception from Rule 803 that allows hearsay because "such exceptions bear sufficient *indicia of reliability* that they can be admitted without regard to whether the person who made the statement is able and willing to testify in court."¹³² In *Williams v. United Dairy Farmers*, 188 F.R.D. 266, 271 (S.D. Ohio 1999), the Ohio court stated, "A declarant is unavailable when he testifies, *inter alia*, to a lack of memory of the subject matter of the declarant's statement or is absent and the proponent of the statement has been unable to procure the declarant's attendance by process."¹³³ The court further discusses that mere absence from a hearing or trial is not enough to establish unavailability, and the proponent must make a showing that reasonable efforts were taken to ascertain the declarant for trial by use of subpoena, an attempt to depose the declarant, or some other good faith effort to procure the declarant.¹³⁴

Although there is a mechanism by which to prove unavailability through mental illness, court opinions throughout the state and federal courts are sparse as to this particular issue. However, there are some states who have recognized this issue in order to combat the exacerbation of emotional trauma in the courtroom where alternative previous testimony is available that has a guaranteed nature of trustworthiness.¹³⁵

128. *People v. Burnett*, 46 N.E. 1171, 1188 (Ill. App. Ct. 2015), *appeal denied*, 48 N.E.3d 1094 (Ill. 2016); CAL. EVID. CODE § 240 (c) (West 1963); OR. REV. STAT. ANN. § 40.460 (18a)(b) (West 1999).

129. *Burnett*, 46 N.E. at 1188; 725 ILL. COMP. STAT. ANN. 5/115-10.2(a) (West 2003).

130. CAL. EVID. CODE § 240 (c) (West 1963).

131. PETER NICHOLAS, EVIDENCE: A PROBLEM-BASED COMPARATIVE APPROACH 571 (3rd ed., 2014) (emphasis added).

132. *Id.*

133. *Williams v. United Dairy Farmers*, 188 F.R.D. 266, 271 (S.D. Ohio 1999).

134. *Id.* at 272.

135. *Burns supra*, note 86.

A. SOLUTIONS OFFERED BY THE STATES

The need for victims of domestic violence and sexual assault, or other traumatic crimes, to be declared unavailable for their own mental health is not an issue that has been lost on some states.¹³⁶

The California legislature has developed a broad unavailability model in their Evidence Code that provides, not only an avenue for victims of traumatic events to be declared unavailable, but a way in which to do so.¹³⁷ Section 240 of the Evidence Code provides, “Expert testimony that establishes that physical or mental trauma resulting from an alleged crime has caused harm to a witness of sufficient severity that the witness is physically unable to testify without suffering substantial trauma may constitute a sufficient showing of unavailability.”¹³⁸

The statute was later discussed in *People v. Winslow*, 19 Cal. Rptr. 3d 872, 877-78 (Cal. Ct. App. 2004), in which the California appellate court indicated the burden to establish this substantial trauma to constitute unavailability.¹³⁹ “The People have the burden of proving by competent evidence that the witness is unavailable before a witness’s preliminary hearing testimony may be admitted at trial. This burden of proof is met by showing the unavailability of the witness through a preponderance of the evidence.”¹⁴⁰ The court in *Winslow* made an important distinction in the type of expert testimony offered to meet this burden.¹⁴¹ The doctor that offered testimony to show the victim’s tendency towards substantial trauma if allowed to testify “was not simply a forensic psychiatrist offering expert trial testimony. He was [the victim’s] treating physician and had treated [the victim] for a year.”¹⁴² The decision further discussed the intimate familiarity he had with the victim in order to give confident and trustworthy testimony to meet this burden by the preponderance of the evidence.¹⁴³

Illinois handles the situation of unavailability in a narrower fashion. Instead of making the path to unavailability open to any trauma victim, as in California, the Illinois statute specifically addresses this issue within the context of domestic violence.¹⁴⁴ However, while California makes this a showing of possible trauma to be sustained by the victim testifying, Illinois uniquely

136. See *infra*, notes 137-49.

137. CAL. EVID. CODE § 240 (c) (West 1963).

138. *Id.*

139. *People v. Winslow*, 19 Cal. Rptr. 3d 872, 877-78 (Cal. Ct. App. 2004).

140. *Id.* at 877 (citing *People v. Stritzinger*, 668 P.2d 738, 746 (Cal. 1983); *People v. Williams*, 115 Cal. Rptr. 414, 419 (Cal. Ct. App. 1979)).

141. *Id.* at 878.

142. *Id.*

143. *Id.*

144. 725 ILL. COMP. STAT. ANN. 5/115-10.2(b) (West 2003).

remedied this issue by allowing these victims who fall within the context of domestic violence, to refuse to testify. The statute states:

In a domestic violence prosecution, a statement, made by an individual identified in Section 201 of the Illinois Domestic Violence Act of 1986 as a person protected by that Act . . . is not excluded by the hearsay rule if the declarant is identified as unavailable as defined in subsection (c).¹⁴⁵

The statute later determines that this unavailability could occur where the witness “persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so.”¹⁴⁶

In *People v. Burnett*, 46 N.E.3d 1171, 1178-79 (Ill. App. Ct. 2015), the Illinois court examined the use of prior testimony where a victim became so obstinate at the second trial, the defense counsel and prosecutor could no longer find her useful or available to testify.¹⁴⁷ This was a form of refusal according to the court with the trial court agreeing with the prosecutor saying her refusal to recall became so difficult that “it’s like saying I’m not going to testify.”¹⁴⁸ Although refusal is theoretically not the only way in which a domestic violence victim could be deemed unavailable to testify in Illinois, this is seemingly the least invasive and easiest way in which to allow previous testimony as to not cause any further trauma to these victims.¹⁴⁹ In fact, 725 ILCS 5.115-10.2(c) discusses the clearest path to unavailability for domestic violence victims by stating, “Unavailability as a witness is limited to the situation in which the declarant persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so.”¹⁵⁰

With Illinois and California having both a narrow and broad solution to this dilemma, respectfully, Oregon seems to meld the two in order to form a hybrid rule that is both narrowly tailored to sexual and physical abuse victims, but also provides a clearer path as to proving this unavailability through expert testimony. The relevant Oregon evidence rule states:

For purposes of this paragraph, in addition to those situations described in ORS 40.465 (1), the declarant shall be considered “unavailable” if the declarant has a substantial lack of memory of the subject matter of the statement, is presently

145. *Id.*

146. 725 ILL. COMP. STAT. ANN. 5/115-10.2(c)(2) (West 2003).

147. *Burnett*, 46 N.E.3d at 1178-79.

148. *Id.*

149. *Id.*; 725 ILL. COMP. STAT. ANN. 5/115-10.2(a) (West 2003).

150. 725 ILL. COMP. STAT. ANN. 5/115-10.2(c) (West 2003).

incompetent to testify, is unable to communicate about the abuse or sexual conduct because of fear or other similar reason or is substantially likely, as established by expert testimony, to suffer lasting severe emotional trauma from testifying.¹⁵¹

In *State v. Lobo*, 322 P.3d 573, 575-76 (Or. Ct. App. 2014), the Oregon court examined this within the context of children claiming unavailability due to residual mental trauma stemming from sexual assaults.¹⁵² Here, the court utilized forensic experts employed by both the defense and the prosecution to determine whether the children would “suffer lasting severe emotional trauma from testifying.”¹⁵³ Although case law is within the context of child victims, this statute opens up the ability for those who are substantially likely, as proven by an expert, to suffer lasting emotional trauma from being forced to testify against their abusers.¹⁵⁴

Although these states have discovered a way in which these victims can assert their mental traumas and illnesses, such as PTSD, in order to avoid severe emotional and mental trauma by giving testimony, many states have not followed suit, and have left this issue up to the courts to grapple.¹⁵⁵ However, these statutes tend to always consider the right to confrontation and the use of previous testimony either within the language of the statutes themselves or within subsequent court opinions analyzing this relationship between unavailability and the right to confrontation.

V. A DEFENDANT’S RIGHT TO CONFRONTATION AND THE TRUSTWORTHINESS OF PRELIMINARY HEARING TESTIMONY

The notion of using hearsay is not generally preferred, hence the adoption of the Rule Against Hearsay and its essential purpose. However, the Advisory Committee explained in the position of a witness being unavailable, “The rule expresses preferences: testimony given on the stand is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant.”¹⁵⁶

The Court in *Pointer v. Texas*, 380 U.S. 400 (1965), held that the Sixth Amendment right to confront witnesses is a fundamental right as guaranteed by the Fourteenth Amendment.¹⁵⁷ The Court stated:

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151. OR. REV. STAT. ANN. § 40.460 (18a)(b) (West 1999).
 152. *State v. Lobo*, 322 P.3d 573, 575-76 (Or. Ct. App. 2014).
 153. *Id.*; see also, OR. REV. STAT. ANN. § 40.460 (18a)(b).
 154. OR. REV. STAT. ANN. § 40.460 (18a)(b).
 155. See *State v. Anderson*, 402 P.3d 1063, 1064 (Idaho 2017).
 156. NICHOLAS, *supra* note 131 at 572.
 157. *Pointer v. Texas*, 380 U.S. 400, 404 (1965).

The fact that [the Right to Confrontation] appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution. Moreover, the decisions of this Court and other courts throughout the years have constantly emphasized this necessity for cross-examination as a protection for defendants in criminal cases.¹⁵⁸

The Court makes specific mention of the unique role cross-examination plays in the context of a criminal trial stating that there is no person, experienced in this field, that would deny the use of cross-examination for finding the truth and exposing any falsehood that may lie within the testimony of a witness.¹⁵⁹ Hence this is the reason hearsay, unavailability, former testimony, and the Right to Confrontation must be spoken as if they were one unit.¹⁶⁰ However, there has always been some debate as to whether “witnesses against” should be viewed in a narrow interpretation, as in only live witnesses against the defendant, or in a broad interpretation, meaning any person whose statements can be used against the defendant.¹⁶¹ According to Supreme Court jurisprudence, it appears that the Court has neither forbidden nor permitted all the instances in which hearsay can be used.¹⁶² “A literal interpretation of the clause would require that no hearsay, even if it falls within an exception, be admitted against an accused unless the declarant is able to testify.”¹⁶³

Once a showing of unavailability has been made, the court must decide the issue of previous testimony as defined by rule 804(b)(1).¹⁶⁴ Rule 804(b)(1) states that testimony given as a witness at a trial, hearing or lawful deposition, and “is now offered against a party who had . . . an opportunity and similar motive to develop it by direct, cross-, or redirect examination,” shows suitable reliability for the previous testimony of the witness.¹⁶⁵

158. *Id.*

159. *Id.*

160. See Evan Y. Semerjian, *The Right of Confrontation*, 55 A.B.A. 152 (1969).

161. NICHOLAS, *supra* note 131 at 631.

162. *Id.*; see also *Ohio v. Roberts*, 448 U.S. 56, 67 (1980) *overruled by Crawford v. Washington*, 541 U.S. 36 (2004) (“In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate ‘indicia of reliability.’”); see also *Crawford v. Washington*, 541 U.S. 36, 68 (2004) (“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.”).

163. 3 JACK B. WEINSTEIN & MARGARET A. BERGER., WEINSTEIN’S FED. EVIDENCE § 802.05 (Mark S. Broden, ed., 1997).

164. See FED. R. EVID. 804(b)(1).

165. *Id.*

In *United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993), the Second Circuit analyzed what *similar motive* meant under rule 804(b)(1).¹⁶⁶ More specifically, the court examined whether the prosecution in this case had a similar motive to develop the testimony of two grand jury witnesses who were subsequently unavailable to testify at trial.¹⁶⁷ The court stated:

Where both proceedings are trials and the same matter is seriously disputed at both trials, it will normally be the case that the side opposing the version of a witness at the first trial had a motive to develop that witness's testimony similar to the motive at the second trial.¹⁶⁸

The court determines that the inquiry into *similar motive* must be fact specific, and sometimes the prosecutor is faced with a lack of *similar motive*. The prosecutor in the grand jury context sometimes displays this lack of similar motive. "If a prosecutor is using the grand jury to investigate possible crimes and identify possible criminals, it may be quite unrealistic to characterize the prosecutor as the 'opponent' of a witness's version."¹⁶⁹ Essentially, the Court determined that there must be similar interest in asserting a specific side of the issue at hand in any given case.¹⁷⁰ The degree of interest will be inherently dependent on the nature of the proceedings, but the Court went on to further explain:

The proper approach, therefore, in assessing similarity of motive . . . must consider whether the party resisting the offered testimony at a pending proceedings had at the prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue. The nature of the two proceedings – both what is at stake and the applicable burden of proof – and, to a lesser extent, the cross-examination at the prior proceeding . . . will be relevant though not conclusive on the ultimate issue of similarity of motive.¹⁷¹

166. *United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993); *see also* *United States v. Salerno*, 505 U.S. 317 (1992) (holding that similar motive must be shown in order to enter former testimony where a declarant is unavailable to testify).

167. *Id.*

168. *Id.* at 911.

169. *Id.* at 913.

170. *Id.* at 912.

171. *DiNapoli*, 8 F.3d at 914-15.

The Court has held that the party looking to use the previous testimony must be on the same side of the issue as well as having a similar interest as the party in the previous proceedings where the previous testimony was given.

In *U.S. v. Johnson*, 108 F.3d 919 (8th Cir. 1997), the Eighth Circuit examined the role of good faith in terms of making a reasonable effort to bring a declarant into court before using former testimony.¹⁷² In *Johnson*, undercover officers arranged to purchase crack cocaine from two individuals, Yancey and Freeman.¹⁷³ After arresting these two, the officers knocked on Yancey's daughter's door to find her mother. Officers then witnessed the defendant, Reginald Johnson, sitting at the kitchen table.¹⁷⁴ After consenting to a search of Johnson's car, a drug detecting dog indicated that there was drug residue in the back of Johnson's car.¹⁷⁵ Johnson was subsequently found guilty of conspiring to distribute crack cocaine and using and carrying a firearm during that drug offense during a second trial, after the jury was unable to reach a verdict in the first trial.¹⁷⁶ Johnson appealed his conviction challenging the district court's decision to admit previous testimony of the officer who conducted the search of his car after it was determined that this officer was unavailable for trial.¹⁷⁷ The court determined, "the availability inquiry under Rule 804(a)(5) turns on whether the proponent of the former testimony acted in *good faith* and made a *reasonable* effort to bring the declarant to court."¹⁷⁸ Here the court utilized a balance after the government found that the officer was on vacation in Florida and moved for a continuance.¹⁷⁹ "The question of reasonable means cannot be divorced from the significance of the witness to the proceeding at hand, the reliability of the former testimony, and whether there is reason to believe that the opposing party's prior exam was inadequate."¹⁸⁰ *Johnson* proves that the idea of utilizing former testimony truly turns on the totality of the circumstances in determining whether the party made a good faith effort to procure the declarant, and whether there was similar motive and opportunity for examination for the other party.¹⁸¹

172. *United States v. Johnson*, 108 F.3d 919, 922 (8th Cir. 1997).

173. *Id.* at 920-21.

174. *Id.* at 921.

175. *Id.*

176. *Id.*

177. *Johnson*, 108 F.3d at 921-22.

178. *Id.* (emphasis added).

179. *Id.*

180. *Id.*

181. *See generally Johnson*, 108 F.3d at 919; *see also* *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) ("[I]f there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation."); *see also* *California v. Green*, 399 U.S. 149, 189 n.22 (1970) ("The lengths to which the prosecution must go to produce a witness before it may offer evidence of an extra-judicial declaration is a question of reasonableness.").

Further, in *Romero v. State*, 173 S.W.3d 502, 505 (Tex. Crim. App. 2005), the Texas Criminal Appeals Court found that there are four essential elements in determining whether former testimony is, in fact, reliable.¹⁸² These four elements being: oath, physical presence, cross-examination, and observation of demeanor by the trier of fact.¹⁸³ Applying these factors, the Texas court cites *Maryland v. Craig*, 487 U.S. 836 (1990), where the Court held child witnesses testifying in front of a one-way closed-circuit monitor was reliable although the defendant was denied physical presence.¹⁸⁴

Turning to the models set by Illinois, Oregon, and California, these states have struck the appropriate balance between unavailability and the defendant's confrontation rights.¹⁸⁵ Additionally, the subsequent court decisions have indicated the same importance as the Supreme Court and various circuit opinions by relying on the circumstance to indicate a particularized degree of trustworthiness, or an *indicia of reliability*, surrounding the statements to be admitted of the unavailable witness.¹⁸⁶

For instance, in California, the statute merely indicates the ability for a defendant to be declared unavailable if such requirement to testify would result in substantial trauma as indicated by expert testimony.¹⁸⁷ The following committee notes are of no assistance when examining the stance of California's particular rule concerning unavailability and the use of previous testimony either.¹⁸⁸ However, when examining subsequent decisions by California courts, they have indicated the same level of importance on the nature and timing of such previous testimony and hearsay that may be admitted in lieu of the victim's testimony.¹⁸⁹ In *People v. Cromer*, 15 P.3d 243, 248 (Cal. 2001), the Supreme Court of California echoed the same ideals when weighing the notion of using previous testimony of a witness who was declared unavailable.¹⁹⁰ This court examined the Supreme Court decision in *Lilly v. Virginia*, 527 U.S. 116, 118 (1999), stating that the Court, in a plurality

182. *Romero v. State*, 173 S.W.3d 502, 505 (Tex. Crim. App. 2005).

183. *Id.*

184. *Id.* (citing *Maryland v. Craig*, 487 U.S. 836 (1990) (being called into question by a variety of courts including *United States v. DeLeon*, No. CR 15-4268 JB, 0217 U.S. Dist. LEXIS 101792, at *269 (D. N.M. June 30, 2017) (discussing the ability to confront witnesses face-to-face being essential to the Confrontation Clause, and only being circumvented in the rarest cases))).

185. *See supra*, notes 138-50.

186. *See People v. Cromer*, 15 P.3d 243, 248 (Cal. 2001); *see also People v. Burnett*, 46 N.E.3d 1171, 1181 (Ill. App. Ct. 2015); *see also State v. Moore*, 49 P.3d 785, 789-91 (Or. 2002).

187. CAL. EVID. CODE § 240(c) (West 1963).

188. CAL. EVID. CODE § 240 (West 1963) advisory committee notes.

189. *See Cromer*, 15 P.3d at 2148; *see also People v. Foy*, 199 Cal. Rptr. 3d 208, 215 (Cal. Ct. App. 2016).

190. *Cromer*, 15 P.3d at 248.

opinion, indicated that any hearsay statements admitted must have particularized guarantees of trustworthiness as determined through an independent review of the statement or statements at issue.¹⁹¹ The opinion further discusses California's own confrontation right, citing section 1291 of the California Evidence Code, stating:

Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: . . . (2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.

In sum, the Supreme Court of California adheres to the belief of the United States Supreme Court that previous testimony making the witness available to cross-examination, such as a preliminary hearing, is the highest form of trustworthiness.¹⁹² However, as long as the testimony has the particularized guarantees of trustworthiness through an independent review of the statements and circumstances, this California court seemingly keeps the doors open to other forms of previous statements said by the unavailable witness.¹⁹³

The Appellate Court in Illinois had a similar, but shortened discussion of the same ideals indicated in *Cromer*.¹⁹⁴ The previous testimony at issue in *Burnett* was given in an initial trial in a domestic violence case, but the victim became unavailable pursuant to the domestic violence exception to the Illinois unavailability rule.¹⁹⁵ Because the statements for the second trial were given when the victim was under oath, where the opposing party had similar motive and opportunity to cross examine her, and the questions she received were directly in relation to the case at issue in the second trial, the court found these statements had particularized guarantees of trustworthiness.¹⁹⁶

Lastly, the Oregon Supreme Court discussed a witness's unavailability balanced with the defendant's right to confrontation in *State v. Moore*, 49 P.3d 785, 789 (Or. 2002). This court seems to take previous statements offered by the unavailable witness to a new level where the court states, "Given the choice between excluding sufficiently reliable evidence or admitting that evidence despite the defendant's inability to confront the witness, the court

191. *Id.* (citing *Lilly v. Virginia*, 527 U.S. 116, 119 (1999)).

192. *Id.*

193. *Id.*

194. *Burnett*, 46 N.E.3d at 683.

195. *Id.* at 684-85.

196. *Id.* at 686-88.

chose the latter.”¹⁹⁷ Although seemingly extreme, the court sets motivating factors that must drive future courts making these decisions.¹⁹⁸ “Necessity, practicality, and public policy concerns motivated the court’s decisions.”¹⁹⁹ These factors motivated the court to find particularized guarantees of trustworthiness within the previous statements the State was offering for the unavailable witness.²⁰⁰ However, when examining the basic language of the statute provided in the Oregon evidence rules, the language itself indicates the significance of the defendant’s right to confrontation and the influence of trustworthiness in the inception of this rule.²⁰¹ The rule states, “[T]he statement may be admitted in evidence *only* if the proponent establishes that the time, content and circumstances of the statement provide an *indicia of reliability*.”²⁰² This shows the legislature’s active participation in defendants’ right to confrontation, and importance to indicate that unavailability of witnesses in this context is not so easily shown.

By keeping the notion that former testimony must meet a minimum test of “particularized guarantees of trustworthiness,”²⁰³ these State courts have successfully guaranteed avenues in which PTSD victims can be declared unavailable through a proper showing, without violating the defendant’s right to confrontation. This is to provide them the ability to utilize their preliminary hearing statements because they have an *indicia of reliability*, and the ability to utilize some form of cross-examination to ensure that each side had the same motive and opportunity to question the witness prior to formal trial testimony.

VI. CONCLUSION

The need to recognize mental illness in some standard or measurable way is not only valuable in the world of Evidence within the context of unavailability and hearsay, but on a much larger scale of the justice system as a whole. For instance, according to the Florida Coalition Against Domestic Violence, “Over 50% of women who live with a mental illness have previously experienced some sort of trauma such as physical or sexual abuse (either during childhood or adulthood).”²⁰⁴ The prevalence of mental illness in the

197. *Moore*, 48 P.3d at 791 (citing *State v. Campbell*, 705 P.2d 694 (Or. 1985)).

198. *Id.*

199. *Id.*

200. *Id.*

201. *See* OR. REV. STAT. ANN. § 40.460 (18a)(b).

202. *Id.* (emphasis added).

203. *Roberts*, 448 U.S. at 65.

204. *Trauma, Mental Health, and Domestic Violence*, FLORIDA COALITION AGAINST DOMESTIC VIOLENCE, <https://www.fcadv.org/projects-programs/trauma-mental-health-and-domestic-violence> (last visited January 26, 2018) [<https://perma.cc/G49Q-RGHB>].

victims of those who suffer from these violent crimes proves the need for more uniformity and recognition for the victims of these ailments.

“Harvey Weinstein was a passionate cinephile, a risk taker, a patron of talent in film, a loving father and a monster. For years, he was my monster.”²⁰⁵ Salma Hayek recounts her experience with Weinstein two months after Rose McGowan brought to light her abuse allegedly perpetrated by the same man years prior.²⁰⁶ Hayek’s particular experience came from filming the movie *Frida*, which debuted in 2002.²⁰⁷ Thus, this recitation came fifteen years after her alleged abuse from her “monster.”²⁰⁸ The abuse consisted of physical, emotional, and potential economic hardship after Hayek describes him dangling this Oscar-worthy role in front of her like the proverbial carrot on a stick in exchange for sexual demands.²⁰⁹ According to Hayek, these demands consisted of: watching her as she showered, letting him give her a massage, letting a naked friend of his give her a massage, and her getting naked with another woman, among other demands.²¹⁰ Hayek met these requests with what she describes as Weinstein’s least favorite word, “no.”²¹¹ This led to an infuriated Weinstein, as Hayek describes, “. . . in an attack of fury, he said the terrifying words, ‘I will kill you, don’t think I can’t.’”²¹²

These acts can cause a victim to experience symptoms of post-traumatic stress disorder.²¹³ Hayek discusses these feelings in her story without diagnosing these as symptoms of PTSD.²¹⁴ She describes the long, arduous process of trying to bring her passion film, *Frida*, to life while side stepping Weinstein’s many sexual demands and rage-filled behavior.²¹⁵ Hayek grew to realize that the only way to actualize this film was to consent to a love scene between her and another actress, Ashley Judd.²¹⁶ She describes, “[F]or the first and last time in my career, I had a nervous breakdown: My body began to shake uncontrollably, my breath was short and I began to cry and

205. Salma Hayek, *Harvey Weinstein Is My Monster Too*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/interactive/2017/12/13/opinion/contributors/salma-hayek-harvey-weinstein.html> [https://perma.cc/F7D7-FQTS].

206. Susan Dominus, *Refusing Weinstein’s Hush Money, Rose McGowan Calls Out Hollywood*, N.Y. TIMES (Oct. 28, 2017), <https://www.nytimes.com/2017/10/28/us/rose-mcgowan-harvey-weinstein.html> [https://perma.cc/7UZ9-Y5X6].

207. Hayek, *Harvey Weinstein Is My Monster Too*, N.Y. TIMES, Dec. 2017.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. Hayek, *Harvey Weinstein Is My Monster Too*, N.Y. TIMES, Dec. 2017.

213. See generally *Symptoms of PTSD*, ANXIETY AND DEPRESSION ASSOCIATION OF AMERICA, <https://adaa.org/understanding-anxiety/posttraumatic-stress-disorder-ptsd> (last visited Aug. 23, 2018) [https://perma.cc/QT5K-XEFT].

214. See Hayek, *Harvey Weinstein Is My Monster Too*, N.Y. TIMES, Dec. 2017.

215. *Id.*

216. *Id.*

cry, unable to stop, as if I were throwing up tears.”²¹⁷ She went on to discuss, “By the time the filming of the movie was over, I was so emotionally distraught that I had to distance myself during the postproduction.”²¹⁸ This is not uncommon among domestic violence and sexual assault victims. The Anxiety and Depression Association of America describes a symptom of PTSD being avoidance of those who would remind the victim of their trauma.²¹⁹

If anything, the experiences suffered and penned by Salma Hayek are not isolated occurrences after experiencing sexual violence, assault, or domestic violence. For instance, in the sentencing of Dr. Larry Nassar,²²⁰ 156 accusers came forward to give statements detailing the abuse they suffered for almost two decades at the hand of this man.²²¹ McKayla Maroney penned particularly powerful words spoken by the prosecutor at Dr. Nassar’s sentencing, stating, “He abused my trust, he abused my body and he left scars on my psyche that may never go away.” She further describes a trip to Tokyo, “He’d given me a sleeping pill for the flight, and the next thing I know, I was all alone with him in his hotel room getting a ‘treatment.’ I thought I was going to die that night.”²²² Maroney’s statement was read aloud by Angela Povilaitis, a Michigan Assistant Attorney General, after Maroney sent the impact statement in lieu of her presence.²²³

State legislatures must tackle this issue by creating evidentiary rules similar to Oregon, California, and Illinois to allow these victims experiencing

217. *Id.*

218. *Id.*

219. *Symptoms of PTSD*, ANXIETY AND DEPRESSION ASSOCIATION OF AMERICA, (last visited Jan. 2, 2018).

220. Jen Kirby, *The Sex Abuse Scandal Surrounding USA Gymnastics Team Doctor Larry Nassar, Explained*, VOX (Jan. 26, 2018, 6:07 PM), <https://www.vox.com/identities/2018/1/19/16897722/sexual-abuse-usa-gymnastics-larry-nassar-explained> [<https://perma.cc/X2JA-8A38>] (discussing Dr. Larry Nassar guilty plea to charges stemming from over 100 women accused him of sexual assault, including members of the U.S. Olympic Gymnastics’ team).

221. Jason Hanna, *The Fallout from Larry Nassar’s Sexual Abuse is just the Beginning*, CNN (Jan. 27, 2018, 2:49 PM), <https://www.cnn.com/2018/01/26/us/larry-nassar-investigation-fallout-march/index.html> [<https://perma.cc/WP4J-NDKP>].

222. Abigail Abrams, *‘I Thought I Was Going to Die’: Read Makayla Maroney’s Full Victim Impact Statement in Larry Nassar Trial*, TIME (Jan. 19, 2018), <http://time.com/5109011/mckayla-maroney-larry-nassar-victim-impact-statement/> [<https://perma.cc/YH4/BWZG>].

223. *Id.*; see also Matt Bonesteel, *‘I Thought I was Going to Die’: In Statement, McKayla Maroney Recalls Sexual Abuse by Larry Nassar*, THE WASHINGTON POST (Jan. 18, 2018), https://www.washingtonpost.com/news/early-lead/wp/2018/01/18/i-thought-i-was-going-to-die-in-statement-mckayla-maroney-recalls-sexual-abuse-by-larry-nassar/?utm_term=.94fc163572e8 [<https://perma.cc/M6XT-9552>]; see also WXYZ-TV Detroit, *McKayla Maroney Impact Statement*, YOUTUBE (Jan. 18, 2018), <https://www.youtube.com/watch?v=j0i9uR-Kn30>.

trauma from their attacks an avenue in which to be declared unavailable.²²⁴ As seen in *Anderson*, where this decision is left in the hands of courts, this could delay the process and cause substantial damage to the victims who have worked up the courage to bring charges against their abusers.²²⁵ Where legislatures have effectively taken this issue out of the courts' hands, the courts merely have to grapple with the confrontation clause issue and which and in what context previous statements may be offered in the case of unavailability.²²⁶ This will effectively recognize this residual mental illness stemming from sexual abuse and domestic violence with the victim's specific potential emotional trauma in mind.²²⁷

However, on the most basic level, there is a need to recognize the use of preliminary hearing testimony in cases of unavailability due to mental illness in a uniform fashion to limit decisions like that of *Anderson*. As stated in numerous opinions, preliminary hearing testimony has a guaranteed nature of trustworthiness and is ideal when considering whether to admit previous testimony.²²⁸ Preliminary hearing testimony meets every criterion for reliability because there is a similar motive and opportunity to cross examine the witness, the statements are made under oath, and it is made in front of the trier of fact so as to examine the witness's demeanor during testimony.²²⁹ There is no recognizable reason to change this standard for those who experience extreme mental health ailments in stressful situations, like trial. Recognizing the defendant's right to confrontation is essential in any criminal prosecution. However, there should not be a separate standard for the admission of previous testimony because the unavailability is due to mental illness.

Even further, this may result in victims feeling more comfortable to bring charges against their attackers. If there is an avenue for them to bring expert testimony to speak to their fragile mental states, sometimes after suffering years of abuse, this may make women and men feel comfortable to bring statements and charges against their abusers knowing they may not have to suffer this trauma in the courtroom. According to the Rape, Abuse & Incest National Network (RAINN), about two out of three sexual assaults go unreported.²³⁰ This leaves only 301 of every 1,000 sexual assaults to be reported to police.²³¹ Following and building upon the models provided by California, Illinois, and Oregon with unavailability will allow states to recognize

224. *See supra*, notes 138-50.

225. *Anderson*, 402 P.3d at 1066.

226. 725 ILL. COMP. STAT. ANN. 5/115-10.2(c).

227. OR. REV. STAT. ANN. § 40.460 (18a)(b).

228. *See Burns*, 798 F.2d at 938; *see also DiNapoli*, 8 F.3d at 914-15.

229. MCCORMICK *supra*, note 8.

230. *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Jan. 27, 2018) [<https://perma.cc/RT94-QHJN>] (citing JENNIFER TRUMAN, PH.D. & RACHEL E. MORGAN, PH.D., NATIONAL CRIME VICTIMIZATION SURVEY 7 (Bureau of Justice Statistics, 2015)).

231. *Id.*

this faction of victims in their communities while maintaining the basic foundation of disallowing hearsay to maintain the trustworthiness and integrity of the statements being offered against defendants.