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Federal Rule of Evidence 804(b)(1)'s "Similar Motive" Test and the Admissibility of Grand Jury Testimony Against the Government

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NOTES

FEDERAL RULE OF EVIDENCE 804(b)(1)'S "SIMILAR MOTIVE" TEST AND THE ADMISSIBILITY OF GRAND JURY TESTIMONY AGAINST THE GOVERNMENT

*Brandon Berkowski**

This Note examines the "similar motive" test of Federal Rule of Evidence 804(b)(1) as applied to grand jury testimony offered against the government. Rule 804(b)(1) admits an unavailable witness's prior testimony hearsay when its opponent had a "motive" to develop it at the previous proceeding that was "similar" to the motive its opponent would have at trial. However, the U.S. Courts of Appeals have differed in their interpretation of the rule's "similar motive" language with respect to the factors that judges should consider in the admissibility analysis for grand jury testimony offered against the government. This Note examines the development and purpose of the prior testimony hearsay exception as well as recent circuit court cases that have applied Rule 804(b)(1) to grand jury testimony offered against the government. It argues that certain factors commonly considered by courts—primarily prosecutors' strategic use of grand jury questioning—are beyond the scope of Rule 804(b)(1) and should not influence the "similar motive" inquiry. This Note proposes an admissibility test for exculpatory grand jury testimony that avoids consideration of these factors.

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INTRODUCTION

Federal Rule of Evidence 804(b)(1) is a hearsay exception governing the admissibility of an unavailable witness's testimony from a prior proceeding.[1] The reliability of prior testimony and the fairness of introducing it against a party depend primarily on whether the opposing party had a chance at the prior proceeding to question the witness about the issues now relevant at trial.[2] According to the rule, prior testimony is not admissible unless the party against whom it is offered had "an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."[3] Although this language clearly expresses the root purpose of the exception—to protect a party from the admission of a witness's past testimony unless the party had a meaningful chance to question the witness at the prior proceeding[4]—it has proved to be a challenging test for courts to apply.[5]

Since the enactment of the Federal Rules of Evidence, the U.S. Courts of Appeals have split in their application of Rule 804(b)(1) to grand jury testimony that the defendant offers against the government in a criminal trial.[6] The factual circumstances underlying the split typically arise under

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

2. *See id.* advisory committee's note (equating direct and redirect examination with cross-examination for the purpose of this exception and explaining that fairness prohibits the introduction of prior testimony against a party who did not examine the declarant); California v. Green, 399 U.S. 149, 165 (1970) (reasoning that prior testimony that was subject to cross-examination was sufficiently reliable to be admitted at trial); JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL ¶ 14.01[01][c] (1987) (explaining the importance of adversarial examination in assuring the credibility of a witness's testimony).

3. FED. R. EVID. 804(b)(1).

4. *See* 4 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 804.02[4] (9th ed. 2006) ("The similar motive inquiry is essentially a hypothetical one: is the motive to develop the testimony at the prior time similar to the motive that would exist if the declarant were produced (which of course he is not) at the current trial or hearing?"); Michael M. Martin, *The Former-Testimony Exception in the Proposed Federal Rules of Evidence*, 57 IOWA L. REV. 547, 557 (1972) ("In determining whether the prior examination was adequate to protect the interest of the opponent in the present case, the only question . . . is whether the examiner had 'motive and interest [for developing the testimony] similar to those of the party against whom now offered.'" (alteration in original) (quoting Rule 804(b)(1) as originally promulgated by the U.S. Supreme Court, discussed *infra* at note 100 and accompanying text)).

5. *See* 2 MCCORMICK ON EVIDENCE § 304, at 355–56 (Kenneth S. Broun ed., 6th ed. 2006) (explaining that "the Circuits appear divided as to whether in typical grand jury situations exculpatory testimony meets this ['similar motive'] requirement of the Rule"); Martin, *supra* note 4, at 557 (explaining that the common law formulation of the exception was easier to apply than the Federal Rule, in part because the Rules' drafters provided no criteria to guide judges in its application).

6. *See* 2 MCCORMICK, *supra* note 5, § 304, at 355 (describing this split); *see also infra* Part II.

similar circumstances.[7] The government conducts a grand jury investigation seeking the indictment of one or more suspects.[8] At some point during the investigation, either before or after an indictment is returned, the prosecution calls a witness who offers testimony favorable to a suspect.[9] At trial, the defense subpoenas this grand jury witness, but the witness invokes the Fifth Amendment privilege against self-incrimination and refuses to testify.[10] The government, which may have obtained the witness's prior testimony by granting the witness immunity at the grand jury proceeding, refuses to grant immunity at trial.[11] The defense then seeks to introduce the witness's exculpatory grand jury testimony pursuant to Rule 804(b)(1), and the court must decide whether the prosecution's motive for challenging the testimony at the grand jury was similar to the motive it would have if the witness appeared at trial.[12]

The U.S. Courts of Appeals for the Second and First Circuits have construed the rule's "similar motive" requirement narrowly in the grand jury context and issued decisions suggesting that exculpatory grand jury testimony would rarely be admissible against the government.[13] By contrast, the U.S. Courts of Appeals for the District of Columbia, Sixth, and Ninth Circuits have compared the prosecution's respective motives "at a high level of generality"[14] and issued decisions suggesting that exculpatory grand jury testimony is almost always admissible against the government because the prosecution's "motive" at both proceedings is simply to challenge any testimony adverse to its theory of the case.[15]

In evidentiary terms, Rule 804(b)(1) balances fairness to litigants with the fact-finders' need for information by admitting prior testimony hearsay that meets a certain standard of reliability.[16] The rule does not promote a general policy favoring either the government or the defendant in criminal proceedings; and, this Note argues, courts' admissibility analyses under the rule's "similar motive" test should not consider the strategic use of questioning common to grand jury examinations.[17] In each decision contributing to the circuit split that is the subject of this Note, the court reached its conclusion based on analysis of a common set of factors.[18] This

7. The facts of *United States v. DiNapoli*, a case against several defendants accused of participating in a construction bid-rigging scheme, are illustrative. 8 F.3d 909, 910 (2d Cir. 1993). *See also infra* Part II.A.1.

8. *See, e.g.*, *DiNapoli*, 8 F.3d at 910.

9. *See, e.g.*, *id.* at 910–11 (describing the grand jury proceeding of two witnesses who testified favorably to the defendants after indictments were returned).

10. *See, e.g.*, *id.* at 911.

11. *See, e.g.*, United States v. Salerno, 937 F.2d 797, 804 (2d Cir. 1991), *rev'd*, 505 U.S. 317 (1992).

12. *See, e.g.*, *DiNapoli*, 8 F.3d at 911–12; *see also* FED. R. EVID. 804(b)(1).

13. *See* United States v. Omar, 104 F.3d 519, 523 (1st Cir. 1997); *DiNapoli*, 8 F.3d at 914–15.

14. *See* United States v. McFall, 558 F.3d 951, 962 (9th Cir. 2009).

15. *See id.* at 963; United States v. Foster, 128 F.3d 949, 955–56 (6th Cir. 1997); United States v. Miller, 904 F.2d 65, 68 (D.C. Cir. 1990).

16. *See infra* Part I.C.1.

17. *See infra* Part III.B; *see also infra* note 225 and accompanying text.

18. *See infra* Part III.A.3.

Note examines the circuit court cases, paying special attention to the factors on which the courts based their decisions, and argues that some of those factors are beyond the scope of Rule 804(b)(1) and should not be considered in the "similar motive" analysis. This Note then proposes an admissibility test for grand jury testimony offered against the government that avoids the impermissible factors.

Part I.A–C examines the development of the prior testimony hearsay exception from the common law through its codification in the Federal Rules of Evidence, paying special attention to the purposes the rule is meant to serve in contemporary evidence law. Part I.D examines the application of Rule 804(b)(1) to grand jury testimony offered against the government. This part highlights the difficulty courts face in interpreting the rule's "similar motive" language by showing how its application to the same factors—in different contexts—has led to opposing admissibility holdings. Part II discusses the principal cases where courts have applied Rule 804(b)(1)'s "similar motive" test to grand jury testimony offered against the government, emphasizing the particular factors that influenced each court's decision. Part III analyzes the two groups of cases contributing to the circuit split, as well as the factors upon which the courts based their admissibility decisions, in light of Rule 804(b)(1)'s evidentiary purposes. This Part argues that certain factors the courts considered do not affect the motive to develop testimony and thus have no legitimate place in the Rule 804(b)(1) analysis. Finally, Part III.B proposes an objective "similar motive" test designed to meet the evidentiary purposes of Rule 804(b)(1) while avoiding the impermissible factors.

This Note concludes that courts should find "similar motive" and admit grand jury testimony against the government only where a reasonable prosecutor, proceeding as if the witness were testifying at trial, would have had a motive to discredit the witness's grand jury testimony. In other words, considering the scope of the investigation and the information available to the prosecution at the time of questioning, the court should admit exculpatory grand jury testimony if a reasonable prosecutor would have had a motive to challenge the testimony on the issues now relevant at trial, regardless of whether the prosecution failed to raise such a challenge for strategic reasons or otherwise.

I. THE PRIOR TESTIMONY HEARSAY EXCEPTION AND GRAND JURY PROCEEDINGS

The hearsay exception for prior testimony has a long history in the common law prior to its codification as Federal Rule of Evidence 804(b)(1).[19] Part I.A discusses the general prohibition against hearsay evidence and places the exception for prior testimony in context with the other hearsay exceptions. Part I.B explains the historical justification for admitting prior testimony and discusses the requirements for admissibility. Part I.C discusses the competing evidentiary concerns that are balanced by

19. *See infra* Part I.C.

the prior testimony hearsay exception and how that balance has shifted from the common law to the exception's codification in the Federal Rules of Evidence. Finally, Part I.D explains the "opportunity" and "similar motive" elements of Rule 804(b)(1) and compares the application of the rule to grand jury and preliminary hearing testimony. This comparison highlights the manipulability of the rule's "similar motive" language and lays the foundation for Part II's examination of the circuit split in grand jury testimony admissibility decisions.

A. The Hearsay Prohibition and Its Exceptions

The reliability of any witness's testimony depends on the quality of the witness's perception, memory, and narration, and the degree to which the witness testifies with sincerity.[20] The American legal system enables evaluation of these characteristics of witness testimony by requiring that testimony be (1) delivered under oath, (2) delivered in the presence of the fact-finder, and (3) subject to examination by its proponent and immediate cross-examination by its opponent.[21] When a statement is made without the benefit of any one of these conditions, its reliability is subject to question and it is inadmissible hearsay.[22] Hearsay statements that are not covered by an exception to the general prohibition are also inadmissible out of concern for fairness to litigants.[23] The American legal system relies on the principle that evidence should not be admitted against a party unless that party has—or, in the case of prior testimony, has had—a chance to rebut it.[24] Because most hearsay was not subject to examination by the party against whom it is offered at trial, fairness dictates that it should be inadmissible.[25] Formalistic guarantees of reliability and fairness aside, the law of evidence generally seeks to admit evidence that is potentially probative, especially when exclusion might result in injustice.[26] This is especially true when the evidence under consideration offers other assurances that it is trustworthy[27] or that it would be fair to admit it against a litigant.[28] Hence, there exist

20. *See* FED. R. EVID. art. VIII advisory committee's note.

21. *See id.*

22. *See* Martin, *supra* note 4, at 550.

23. *See* Glen Weissenberger, *The Former Testimony Hearsay Exception: A Study in Rulemaking, Judicial Revisionism, and the Separation of Powers*, 67 N.C. L. REV. 295, 301 (1989).

24. *See id.*

25. *See id.*

26. *See* FED. R. EVID. art. VIII advisory committee's note ("Common sense tells that much evidence which is not given under the three conditions may be inherently superior to much that is. Moreover, when the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without. The problem thus resolves itself into effecting a sensible accommodation between these considerations and the desirability of giving testimony under the ideal conditions."); 2 SPENCER A. GARD, JONES ON EVIDENCE: CIVIL AND CRIMINAL § 8:9, at 179 (6th ed. 1972); Martin, *supra* note 4, at 550.

27. *See* Martin, *supra* note 4, at 550.

28. *See* FED. R. EVID. 804(b)(1) advisory committee's note (explaining that fairness concerns are not implicated in the admission of prior testimony that has been sufficiently cross-examined by the party opposing it).

many exceptions to the general prohibition against the admission of hearsay for various classes of evidence;[29] and some types of evidence that would otherwise be considered hearsay are entirely omitted from the definition.[30] The Federal Rules of Evidence have divided admissible hearsay into two broad categories, "one dealing with situations where availability [at trial] of the declarant is regarded as immaterial and the other with those where unavailability is made a condition to the admission of the hearsay statement."[31]

The exceptions codified in Federal Rule of Evidence 803, where availability of the declarant is immaterial, admit classes of hearsay with the shared characteristic that the circumstances surrounding the statements guarantee their trustworthiness sufficiently to overcome concerns about lack of oath, personal presence, or immediate cross-examination.[32] In other words, the hearsay evidence admissible under this rule may be the best evidence available, and there is a perceived need for it at trial, so it is admissible without regard for whether the declarant could be produced to testify on the same subject under the three conditions for reliability.[33] The exceptions codified in Rule 804, however, govern evidence that is not the best that could ideally be obtained.[34] Nonetheless, it is admissible because (1) the declarant is no longer available and (2) the conditions under which the hearsay was obtained generated enough circumstantial guarantees of its trustworthiness that its probative value is not outweighed by its lack of

29. *See* FED. R. EVID. art. VIII advisory committee's note ("The solution evolved by the common law has been a general rule excluding hearsay but subject to numerous exceptions under circumstances supposed to furnish guarantees of trustworthiness."). For the types of hearsay evidence admissible because they offer other circumstantial guarantees of reliability, see FED. R. EVID. 803, 804.

30. *See* FED. R. EVID. 801(d) ("Statements Which Are Not Hearsay"). One example of a type of evidence excluded from the hearsay definition is a statement by a party-opponent that is admissible against that party as its own statement, despite its having been made under circumstances lacking the guarantees of reliability. Such a statement is clearly hearsay under the definition in FED. R. EVID. 801(a)–(c), but, according to FED. R. EVID. 801(d)(2), it is excluded from the definition.

31. FED. R. EVID. art. VIII advisory committee's note (referring to FED. R. EVID. 803 ("Availability of Declarant Immaterial"), 804 ("Declarant Unavailable")).

32. *See* FED. R. EVID. 803 advisory committee's note ("The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available.").

33. *See id.* An example of this type of evidence is the "excited utterance," which is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." FED. R. EVID. 803(2). Hearsay statements of this type are admissible on the theory that the circumstances of their utterance "may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." FED. R. EVID. 803 advisory committee's note. They are spontaneous and therefore do not implicate the testimonial capacities of perception, memory, narration, and sincerity to the same degree as non-spontaneous types of hearsay. The reliability of these statements would thus not be improved by delivery under the conditions of oath, personal presence, or immediate cross-examination. *See id.*

34. *See* FED. R. EVID. 804(b) advisory committee's note.

conformity with the three conditions for reliability.[35] According to the advisory committee, "[Rule 804] expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant."[36] Prior testimony is among the types of hearsay classified under Rule 804.[37]

B. The Admissibility of Prior Testimony Hearsay

Prior testimony hearsay is a second-best type of evidence that would not be admissible if the witness were available to testify in person.[38] Of the three guarantees of testimonial reliability, prior testimony hearsay only lacks the second: it was not delivered in open court in the presence of the fact-finder and the adversary.[39] The declarant was under oath at the prior proceeding, however, and was subject to immediate cross-examination or its equivalent.[40] Historically, delivering testimony in the personal presence

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35. *See, e.g.*, Glen Weissenberger, *Federal Rule of Evidence 804: Admissible Hearsay from an Unavailable Declarant*, 55 U. CIN. L. REV. 1079, 1106–07 (1987). Explaining the rationale behind Rule 804(b)(2)'s admission of "dying declarations," Professor Weissenberger states:

> The exception for deathbed statements . . . originally derived its assumed guarantee of trustworthiness from the religious belief that a dying person would not meet his maker with a lie on his lips. In the more secular world, however, this rationale for the exception has largely been supplanted by the theory that the powerful psychological forces bearing on the declarant at the moment of death engender a compulsion to speak truthfully.

Id. (footnotes and internal quotation marks omitted). There is thus no need for such testimony to have been delivered under oath, in the personal presence of the fact-finder, and subject to immediate cross-examination. If the deathbed declarant were still "available" to testify, however, the declarant's live testimony on the same matter would be preferred. *See* FED. R. EVID. 804(b) advisory committee's note; *see also* Jack R. Jelsema et al., Comment, *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, 15 WAYNE L. REV. 1077, 1102 (1969) ("The theory underlying the . . . category of exceptions, which requires the declarant to be unavailable as a witness, is that although it would be preferable to have the declarant testify as a witness, if he is unavailable there is sufficient circumstantial assurance of accuracy so that it is better to receive the statement in evidence than to do completely without it.").

36. FED. R. EVID. 804(b) advisory committee's note.

37. FED. R. EVID. 804(b)(1).

38. United States v. Inadi, 475 U.S. 387, 394–95 (1986) ("[F]ormer testimony often is only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony. If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version. When two versions of the same evidence are available, longstanding principles of the law of hearsay . . . favor the better evidence. But if the declarant is unavailable, no 'better' version of the evidence exists, and the former testimony may be admitted as a substitute for live testimony on the same point." (citation omitted)).

39. Martin, *supra* note 4, at 550–51.

40. *See id.*; 2 H. C. UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE § 420 (Philip F. Herrick ed., 5th ed. 1973); *see also* FED. R. EVID. 804(b)(1) advisory committee's note (explaining that direct and redirect examination of one's own witness are the equivalent of cross-examination for the purposes of the rule). Whether the questioning that took place at the prior proceeding actually satisfies the reliability requirement of cross-examination is

of the fact-finder has been important because the demeanor of the witness, in addition to the recorded evidence of what the witness says, offers "valuable clues" to the fact-finder.[41] Also, "the solemnity of the occasion and the possibility of public disgrace" created a disincentive for witnesses to offer false testimony.[42] Today, however, the importance of these guarantees of testimonial trustworthiness is eclipsed by cross-examination's role in ensuring reliability.[43] Dean John Henry Wigmore has called cross-examination "the greatest legal engine ever invented for the discovery of truth."[44] Given that prior testimony has theoretically been subject to cross-examination (or to direct or redirect examination)[45] by a party with interests similar to those of the party against whom it is admitted, it has been argued that "former testimony is the strongest hearsay" and that it should be admissible regardless of whether the declarant is available.[46] Some commentators have even argued that prior testimony is not hearsay at all.[47] The drafters of the Federal Rules of Evidence did not endorse this position but nevertheless accepted the common law understanding that prior testimony satisfies the primary evidentiary concerns of fairness and reliability and should therefore be admissible under an exception to the Rules' general prohibition against hearsay.[48]

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central to this Note's discussion. But, for general purposes, and as distinguished from other types of admissible hearsay, prior testimony that is admitted has met the reliability requirement of immediate cross-examination. FED. R. EVID. 804(b)(1) advisory committee's note.

41. FED. R. EVID. art. VIII advisory committee's note (citing Universal Camera Corp. v. NLRB, 340 U.S. 474, 495–96 (1951)).

42. *Id.* In the case of prior testimony, this last function of impressing the witness with solemnity is still met because, even though the witness is not present at trial, the witness nonetheless delivered testimony in the course of a formal proceeding. *See* FED. R. EVID. 804(b)(1) (admitting prior testimony only when "given as a witness at another hearing . . . or in a deposition taken in compliance with law in the course of . . . [a] proceeding").

43. *See* 2 GARD, *supra* note 26, § 9:25; Martin, *supra* note 4, at 553–54 ("Given the faith which the Anglo-American adversary system places in the efficacy of cross-examination, it is not surprising that the most important feature of the former-testimony exception is that which requires such testimony to have been given in a situation where an opportunity existed to utilize that truth-testing device."); Weissenberger, *supra* note 23, at 301 n.30 ("'[T]he [Anglo-American] belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement . . . should be used as testimony until it has been probed and sublimated by that test' forms the basis for the norm that probative evidence should be rejected if it cannot be rebutted by the adverse party." (quoting 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (Chadbourn rev. 1974))).

44. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (Chadbourn rev. 1974).

45. *See* FED. R. EVID. 804(b)(1).

46. *Id.* advisory committee's note.

47. *See, e.g.*, 5 WIGMORE, *supra* note 44, § 1370; Weissenberger, *supra* note 23, at 296 n.6 (listing commentators who disagree whether prior testimony should be characterized as hearsay).

48. *See* FED. R. EVID. art. VIII advisory committee's note (explaining the common law basis for the hearsay exceptions codified in the Federal Rules of Evidence); 5 WIGMORE, *supra* note 44, § 1422 (explaining that certain hearsay evidence may be accepted untested because its trustworthiness is circumstantially guaranteed); Weissenberger, *supra* note 35, at 1095 (noting that "[t]he common law exception to the hearsay rule codified in Rule

Unavailability of the witness is also an important requirement for statements to be admissible under the prior testimony hearsay exception.[49] "Unavailability" includes situations in which the declarant (1) is exempted from testifying on the ground of privilege, (2) refuses to testify despite being ordered by the court to do so, (3) testifies to a lack of memory concerning the prior testimony, (4) is unable to testify because of physical or mental illness or death, or (5) is absent and unable to be procured by the party seeking to offer the testimony.[50] A declarant is not "unavailable" if the proponent of the testimony in any way procured the declarant's unavailability.[51] Under certain circumstances, as discussed below, a witness's unavailability in criminal cases is due to the witness's claim of the privilege against self-incrimination and the prosecution's refusal to grant immunity.[52] The government's refusal to immunize a witness under these circumstances is not considered "procurement" of the witness's unavailability under Rule 804(b)(1).[53]

C. The Development of the Prior Testimony Hearsay Exception from the Common Law to Federal Rule of Evidence 804(b)(1)

The prior testimony hearsay exception balances the competing evidentiary concerns of fairness to litigants and the necessity of information for fact-finders.[54] Although the purpose of the exception has remained consistent throughout its history, the balance between these concerns has not.[55] This section explains that the exception is rooted in a desire to promote strict fairness to litigants. Over time, however, the exception's requirements were relaxed to allow more prior testimony to be admitted; when the exception was codified as part of the Federal Rules of Evidence, the drafters were conscious to write a rule that more evenly balanced concerns for fairness with concerns for necessity.

1. Fairness, Necessity, and the Adversarial System

A tension exists in the law of evidence between the desire to provide fact-finders with the greatest amount of information available—to increase the accuracy of decisions rendered—and the desire to exclude otherwise

804(b)(1) is justified by the traditional policies of necessity and trustworthiness," and that trustworthiness, like adversarial fairness, is a function of cross-examination).

49. *See* United States v. Inadi, 475 U.S. 387, 394–95 (1986).

50. FED. R. EVID. 804(a)(1)–(5).

51. FED. R. EVID. 804(a).

52. *See, e.g.*, United States v. Salerno, 937 F.2d 797, 804 (2d Cir. 1991), *rev'd*, 505 U.S. 317 (1992).

53. *See, e.g.*, United States v. Lang, 589 F.2d 92, 95–96 (2d Cir. 1978) ("[T]he law appears to be well settled that the power of the Executive Branch to grant immunity to a witness is discretionary and no obligation exists on the part of the United States Attorney to seek such immunity."); *see also* Daniel J. Capra, *'Salerno,' Plain Meaning and the Supreme Court*, N.Y. L.J., July 17, 1992, at 3.

54. *See infra* Part I.C.1.

55. *See infra* Part I.C.2.

relevant information when its admission would be unfair to litigants.[56] In the United States, evidence law generally developed with an emphasis on fairness to litigants.[57] This development could be expected, given the adversarial character of America's legal system.[58] Truth is said to emerge from the contest between parties, each advocating strenuously for its own cause, with the advocacy of each kept in check by a neutral judge who interprets the law and enforces procedural rules to ensure that the contest is fair.[59] The hearsay exception admitting prior testimony, as part of this larger body of evidence law, also developed with an early emphasis on fairness to litigants.[60]

2. Prior Testimony Hearsay at Common Law

The admissibility inquiry for prior testimony at common law was concerned with "whether the examination of the witness at the prior proceeding was substantially similar to that which would have occurred at the current proceeding if the witness had testified."[61] No prior testimony would be admitted against a party unless the development of that testimony at the previous proceeding could be fairly attributed to the party opposing it.[62] To determine whether this standard had been met, common law courts examined the "identity of parties" and the "identity of issues" at the two proceedings.[63]

Initially, prior testimony was not admissible unless the parties and issues were exactly the same at both proceedings.[64] This early approach guaranteed a high degree of fairness to litigants,[65] but it often proved too

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56. *See* Lloyd v. Am. Exp. Lines, Inc., 580 F.2d 1179, 1185 (3d Cir. 1978) ("[FED. R. EVID. 804(b)] was originally designed by the Advisory Committee . . . to strike a proper balance between the recognized risk of introducing testimony of one not physically present on a witness stand and the equally recognized risk of denying to the fact-finder important relevant evidence."); Weissenberger, *supra* note 23, at 297–98 (discussing "fairness" versus "accuracy" in the context of different policy approaches to the admission of evidence and explaining the connection between availability of information to fact-finders and their ability to render decisions).

57. *See* Weissenberger, *supra* note 23, at 302.

58. *See id.* at 297 n.13.

59. *See id.* By contrast, in civil law countries that use an inquisitorial system, truth can be said to emerge from an authority's independent investigation into the facts of the case, and accuracy—rather than fairness—is a more pressing concern of evidentiary law. *See id.* at nn.12–13, 300–03.

60. *See id.* at 302 (noting that "the earliest evidentiary rules developed in response to concerns for adversarial fairness" and also citing *United States v. Inadi*, 475 U.S. 387, 394–95 (1986)).

61. Weissenberger, *supra* note 35, at 1099.

62. *See* FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 239 (New York, I. Riley & Co. 1806) ("[I]t is against natural justice that a man should be concluded by proofs in a cause to which he was not a party."); 5 WIGMORE, *supra* note 44, § 1386; Weissenberger, *supra* note 23, at 307–08.

63. FED. R. EVID. 804(b)(1) advisory committee's note; Weissenberger, *supra* note 35, at 1099.

64. Weissenberger, *supra* note 23, at 306–07.

65. The "mutuality" requirement respecting both parties, for instance, ensured that no party could benefit by offering testimony against the other which could not also be offered

restrictive for fact-finders because it excluded a great deal of evidence that became inadmissible as a result of the declarants' unavailability.[66] To address this "necessity" concern and allow a greater balance of prior testimony to be admitted, common law courts developed qualifications to the same-parties requirement and less restrictive standards concerning the similarity of issues.[67]

The first qualification loosened the identity of parties requirement to allow prior testimony to be admitted against the party that developed it, regardless of the identity of the other party at the two proceedings.[68] The requirement was then further relaxed to admit testimony against a party that was developed not by that party, but by its predecessor.[69] Courts engrafted privity requirements from property law onto the "identity of parties" inquiry and required privity in "blood, law, or estate"[70] to ensure some basis for binding a party to testimony it did not itself develop.[71]

Over time, common law courts also shifted to demand not precise but merely "substantial" "identity of issues" between prior and subsequent proceedings.[72] As one leading treatise explains, insistence upon the issues being precisely identical is more fitting if the question is one of estoppel or res judicata—in other words, of the fairness of binding a party.[73] But where necessity concerns take precedence, and "the question is not of binding anyone but merely of salvaging the testimony," insistence upon precise identity of issues is out of place.[74]

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against itself. 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 804.04[5], at 804-47 (1997).

66. *See* 5 WIGMORE, *supra* note 44, §§ 1420–21 (explaining, generally, the relationship between the principle of "necessity" and the admissibility of hearsay evidence); Martin, *supra* note 4, at 555.

67. *See* Martin, *supra* note 4, at 555; *see also* 2 MCCORMICK, *supra* note 5, § 304, at 354 ("The requirement has become, not a mechanical one of identity or even of substantial identity of issues, but rather that the issues in the first proceeding, and hence the purpose for which the testimony was offered, must have been such as to produce an adequate motive for testing on cross-examination the credibility of the testimony.").

68. Weissenberger, *supra* note 23, at 307. This relaxation of the original requirement that both parties be the same at both proceedings was justified on the simple theory that "it appeared fair to estop . . . a party from objecting to evidence developed by that party." *Id.*

69. *Id.*

70. Martin, *supra* note 4, at 555.

71. *See* Weissenberger, *supra* note 23, at 308. This expansion was justified on the theory that "[i]t did not appear unfair to hold a party responsible for a previous litigant's examination or cross-examination of a witness when the party against whom the prior testimony was offered had succeeded to the position of the predecessor litigant conducting the examination or cross-examination in the prior action," and, as the party's successor, "stood in the place of the predecessor and succeeded to all of the benefits and liabilities of that interest." *Id.*

72. *See* 2 MCCORMICK, *supra* note 5, § 304, at 353 (citing several cases); 3 CHARLES E. TORCIA, WHARTON'S CRIMINAL EVIDENCE § 650, at 375–76 (13th ed. 1973) (citing several cases).

73. 2 MCCORMICK, *supra* note 5, § 304, at 353.

74. *Id.*; *see also In re* White's Will, 141 N.E.2d 416, 418 (N.Y. 1957) (admitting prior testimony concerning capacity to manage affairs in a later proceeding concerning competency to make a will).

In the nineteenth and twentieth centuries, the focus of evidence law, as reflected in evidentiary rules, shifted from ensuring fairness to litigants to encouraging accuracy of information.[75] The formalistic "identity of parties" inquiry—engrafted with property-law concepts of privity—was criticized, and it was recognized that prior testimony could meet fairness requirements and provide necessary information to fact-finders without adhering to the restrictive "identity of parties" test.[76] Dean Wigmore ensured that courts would eventually adopt a more liberal version of the rule when he famously explained how a concern with the parties' "interests" could justify a departure from strict privity requirements.[77] In 1899, he wrote:

> [A]ll that is essential is that the present opponent should have had a fair opportunity of cross-examination; consequently, a change of parties which does not effect such a loss does not prevent the use of the testimony . . . and the principle also admits the testimony where the parties, though not the same, *are so privy in interest . . . that the same motive and need for cross-examination existed*.[78]

Rather than rely on a privity relationship between parties, Dean Wigmore recognized the importance of inquiring into each party's "interest" in developing prior testimony through cross-examination as the key to ensuring testimonial reliability and adversarial fairness.[79] Thus, Dean Wigmore articulated the general shift in evidence law from fairness to necessity and refocused attention from the identity of parties and issues to the underlying "motive" for developing testimony, which encompasses both.[80] Since then, according to McCormick's treatise, the inquiry has

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75. *See* Weissenberger, *supra* note 23, at 309; *see also supra* note 56 and accompanying text.

76. *See* Martin, *supra* note 4, at 555–56; Weissenberger, *supra* note 23, at 309–10. Employing a hypothetical where two parties individually sue an airline after an accident that injured them both, Professor Judson F. Falknor demonstrates how a fairness argument based on concern for privity of relationship between the parties would exclude one party from using otherwise relevant testimony developed in the other's trial. *See* Judson F. Falknor, *Former Testimony and the Uniform Rules: A Comment*, 38 N.Y.U. L. Rev. 651, 654–55 (1963). But, Professor Falknor argues, if the concern was not with privity but strictly with the "interest and motive" that the two parties might individually have had to examine the witness, then the "social interest in achieving a just and correct result" would favor a rule that admits the testimony because the two parties, from the perspective of the testimony itself, had the same "interest and motive" to develop it. *See id.* at 655.

77. *See* Martin, *supra* note 4, at 556; Weissenberger, *supra* note 23, at 309–10.

78. 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 163a, at 278–79 (John Henry Wigmore rev., 16th ed., Boston, Little, Brown, & Co. 1899) (emphasis added).

79. *See* Martin, *supra* note 4, at 555–56.

80. *See id.* at 556 ("While old ways died hard, the courts gradually progressed away from the requirement of literal identity of parties and issues toward a consideration of the reliability of the testimony in light of the circumstances. Accordingly, increasing attention was given to two related issues: (1) Whether the opponent's interest was represented in the first hearing, rather than whether there was identity of parties or privies on both sides, and (2) whether the issues in the two hearings were similar to the extent that the opponent in the first examination had a motive and interest to develop the testimony similar to those which the present opponent would have if he were cross-examining." (footnotes omitted)); *see also* FED. R. EVID. 804(b)(1) advisory committee's note (explaining the connection between

become whether "the issues in the first proceeding, and hence the purpose for which the testimony was offered, [were] such as to produce an adequate motive for testing on cross-examination the credibility of the testimony."[81]

Notably, the common law admissibility inquiry for prior testimony, while concerned with the parties involved in proceedings and the issues adjudicated at those proceedings, did not consider the *type* of proceeding at which the prior testimony was developed as part of the inquiry.[82] The focus was first on the identity of parties and issues and later on the parties' "interests" or "motivations."[83] But the prior proceeding's type provided nothing independently to the admissibility inquiry.[84]

3. The Codification of the Prior Testimony Hearsay Exception

a. The Federal Rules of Evidence

The Federal Rules of Evidence grew out of an effort initiated by U.S. Supreme Court Chief Justice Earl Warren, who, in 1965, appointed an advisory committee to draft uniform rules of evidence for use in the federal courts.[85] This committee, composed of judges, practitioners, and academics, drew from the common law of evidence as well as the Model Code of Evidence (promulgated in 1942) and the Uniform Rules of Evidence (promulgated in 1953).[86] In 1972, the advisory committee delivered its completed rules to the Supreme Court, which transmitted them to the Congress the following year under the Rules Enabling Act.[87] The Rules would have become effective on July 1, 1973, but for a bill requiring Congress to affirmatively approve them.[88] Both the House and Senate Judiciary Committees scrutinized the proposed rules, and, after many amendments, Congress finally enacted them in 1975.[89]

In their treatment of hearsay, the Federal Rules of Evidence incorporate the liberalizations in admissibility that developed over time at the common law.[90] When confronting the problem of how to handle hearsay under the

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motive and interest to cross-examine at prior and current proceedings and "identity of issues").

81. 2 MCCORMICK, *supra* note 5, § 304, at 354.

82. *See* 2 BURR W. JONES, THE LAW OF EVIDENCE: CIVIL AND CRIMINAL § 311 (Spencer A. Gard rev., 5th ed. 1958); 2 MCCORMICK, *supra* note 5, § 304, at 354.

83. *See supra* notes 64–81 and accompanying text.

84. *See* 2 JONES, *supra* note 82, § 311; 2 MCCORMICK, *supra* note 5, § 304, at 354; *see also* Martin, *supra* note 4, at 552 ("Federal Rule [804(b)(1)] places emphasis on the testimony itself, with the nature of the prior hearing being unimportant except to the extent that any such prior hearing did not present an opportunity for cross-examination equivalent to cross-examination in the present proceeding.").

85. GEORGE FISHER, EVIDENCE 3 (2d ed. 2008).

86. *Id.*

87. *Id.*; Weissenberger, *supra* note 23, at 312.

88. Act of Mar. 30, 1973, Pub. L. No. 93-12, 87 Stat. 9; Weissenberger, *supra* note 23, at 312.

89. *See* Weissenberger, *supra* note 23, at 295, 312–16.

90. *See* David Robinson, Jr., *From Fat Tony and Matty the Horse to the Sad Case of A.T.: Defensive and Offensive Use of Hearsay Evidence in Criminal Cases*, 32 HOUS. L. REV. 895, 897–99 (1995); *see also supra* Part I.C.2.

Federal Rules, the advisory committee noted the three conditions that historically guaranteed the reliability of testimony—oath, presence before the fact-finder, and immediate cross-examination—but also recognized:

> Common sense tells that much evidence which is not given under the three conditions may be inherently superior to much that is. Moreover, when the choice is between evidence which is less than best and no evidence at all, only clear folly would dictate an across-the-board policy of doing without. The problem thus resolves itself into effecting a sensible accommodation between these considerations and the desirability of giving testimony under the ideal conditions.[91]

The advisory committee recognized the fundamental conflict between the desire to exclude hearsay out of concern for fairness to litigants and the desire to admit all relevant evidence as an aid to accurate decision making.[92] The common law's solution to this problem was a general rule excluding hearsay, but subject to many exceptions for particular classes of hearsay that were deemed especially trustworthy.[93] That scheme was subject to criticism, and the advisory committee evaluated other systems for determining hearsay admissibility before ultimately deciding that the Federal Rules would employ a class-exception system similar to the one in use at common law.[94] Importantly, the advisory committee considered a proposal by Judge Jack B. Weinstein, himself a member of the committee, that would have done away with the class-exception system and instead left the hearsay admissibility determination to the discretion of the trial judge, who would weigh the hearsay's probative force against its possibility of prejudice in each case.[95] Rejecting that proposal, the committee remarked: "For a judge to exclude evidence because he does not believe it has been described as 'altogether atypical, extraordinary.'"[96] The fact that the advisory committee explicitly rejected judicial discretion when structuring the hearsay admissibility rules will be important to consider in the context of certain circuit court decisions, discussed in Part II, that reject exculpatory grand jury testimony.[97]

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91. FED. R. EVID. art. VIII advisory committee's note.

92. *See id.*; *see also supra* Part I.C.1.

93. *See* FED. R. EVID. art. VIII advisory committee's note.

94. *See id.*; *see also supra* Part I.A. For the class-exception system employed in the Federal Rules, see Federal Rule of Evidence 802 and the exceptions specified in Rules 803 and 804.

95. *See* FED. R. EVID. art. VIII advisory committee's note ("The Advisory Committee has rejected [Judge Jack B. Weinstein's] approach to hearsay as involving too great a measure of judicial discretion, minimizing the predictability of rulings, enhancing the difficulties of preparation for trial, adding a further element to the already over-complicated congeries of pretrial procedures, and requiring substantially different rules for civil and criminal cases."); *see also* Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 338 (1961).

96. FED. R. EVID. art. VIII advisory committee's note (quoting James H. Chadbourn, *Bentham and the Hearsay Rule—A Benthamic View of Rule 63(4)(c) of the Uniform Rules of Evidence*, 75 HARV. L. REV. 932, 947 (1962)).

97. *See* Randolph N. Jonakait, *The Subversion of the Hearsay Rule: The Residual Hearsay Exceptions, Circumstantial Guarantees of Trustworthiness, and Grand Jury Testimony*, 36 CASE W. RES. L. REV. 431, 435 (1986) ("Under the traditional framework, the

b. Federal Rule of Evidence 804(b)(1)

The text of the current Rule 804(b)(1) reads:

> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> > (1) *Former Testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.[98]

This language differs slightly from that originally drafted by the advisory committee and sent to Congress for approval.[99] The original rule would have admitted any "[t]estimony given as a witness [at a hearing or deposition] at the instance of or against a party with an opportunity to develop the testimony . . . with motive and interest similar to those of the party against whom now offered."[100] In other words, the rule as originally promulgated by the Supreme Court would have admitted testimony against *any* party in the present proceeding as long as *some* party at the prior proceeding had a motive to develop the testimony similar to the motive of the opposing party.[101] As such, the rule promulgated by the Supreme Court mirrored the trend toward accuracy and admissibility—and away from strict fairness to litigants—that had developed over time in the common law.[102] Not appreciating the general trend in evidence law and developments in the hearsay exception for prior testimony, however, Congress responded with a knee-jerk reaction that preserved liberal developments in terms of the "issues" inquiry but favored fairness to litigants with respect to the "parties" inquiry.[103] While the advisory committee would have admitted any

admission of hearsay is not left to the discretion of the trial court, even if the judge in a particular case believes that the hearsay is necessary or reliable."); *id.* at 436 n.24 ("The Committee's rejection indicates that the Federal Rules of Evidence were not intended to authorize the admission of hearsay whenever the trial judge believed it or determined that the probative value of the hearsay outweighed its prejudicial effect."); *see also infra* notes 203, 210–12 and accompanying text.

98. FED. R. EVID. 804(b)(1).

99. *See* Weissenberger, *supra* note 23, at 312–13 & n.96.

100. Rules of Evidence for United States Courts & Magistrates, 56 F.R.D. 183, 321 (1973).

101. *See* Weissenberger, *supra* note 23, at 299.

102. *See* Robinson, *supra* note 90, at 904 ("The Advisory Committee drafted Rule 804(b)(1) in conformity with the Wigmorean view. . . . The House Committee on the Judiciary amended the proposed rule to restore the requirement that the party opponent have had a prior opportunity to question the witness. Thus, the House chose an adversarial fairness model of litigation over a truth-seeking model, which would have emphasized maximum availability of generally reliable, relevant evidence." (footnotes omitted)); *see also supra* Part I.C.1–2.

103. *See* Robinson, *supra* note 90, at 904; Weissenberger, *supra* note 23, at 312–15. The legislative history of the rule reveals that Congress:

testimony as long as a party at the previous proceeding had a motive to develop it similar to that of the opposing party at the present proceeding,[104] Congress required that the party against whom the evidence was admitted be exactly the same in the criminal context and a "successor in interest" in the civil context.[105] Importantly, however, Rule 804(b)(1)'s language—both as promulgated by the Supreme Court and as amended by Congress—ensures that prior testimony is not admitted against a party unless that party's interests were represented when the testimony was developed at the previous proceeding.[106] Codified as such, the rule reflects liberal necessity and accuracy concerns in treating the "issues" requirement,[107] and it reflects concern for fairness to litigants in its "parties" requirement.[108] Absent from the rule—both at common law and as enacted by Congress—is any consideration of how the *type* of proceeding at which the prior testimony was developed might bear, in the abstract, upon a party's motive to examine the witness.[109]

D. Rule 804(b)(1) and Grand Jury Testimony

Rule 804(b)(1) asks courts to condition the admissibility of prior testimony hearsay on a comparison of the opposing party's "motive" to examine the witness at the previous proceeding with that party's hypothetical "motive" to examine the witness at trial.[110] Courts have had difficulty applying this test to grand jury testimony.[111] Not only did the drafters of the rule provide no guidance, but grand jury proceedings have

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> [C]onsidered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this . . . is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness. The Committee amended the Rule to reflect these policy determinations.

H.R. REP. NO. 93-650, at 15 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7088.

104. *See* Robinson, *supra* note 90, at 904.

105. *Id.* at 905 & n.71 ("The sole exception in 804(b)(1) to the same party requirement is that a predecessor in interest will suffice in a civil action or proceeding.").

106. *See* FED. R. EVID. 804(b)(1) advisory committee's note (explaining that the crux of admissibility has to do with whether the prior testimony was "develop[ed] fully" at the previous proceeding); H.R. REP. NO. 93-650, at 15 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7088 (explaining that Rule 804(b)(1), as amended by the House Committee, concerns whether the party opposing admission of prior testimony had an opportunity to handle the testifying witness at the previous proceeding); Martin, *supra* note 4, at 552 ("The proposed Rules have in effect retained the common-law minimum requirement that the former testimony be given at a prior hearing in which cross-examination could have been compelled or was in fact effected.").

107. *See* Robinson, *supra* note 90, at 897–99; Weissenberger, *supra* note 23, at 312–16; *see also supra* notes 101–05 and accompanying text.

108. *See* Robinson, *supra* note 90, at 905 & n.71; Weissenberger, *supra* note 23, at 313–14 (explaining that the House revision of Rule 804(b)(1) reflected an intent that litigants in civil matters should not be faced with prior testimony developed by any parties but themselves or their close privies).

109. *See supra* notes 82–84 and accompanying text.

110. *See* FED. R. EVID. 804(b)(1); *see also supra* note 4 and accompanying text.

111. *See supra* note 5 and accompanying text.

unique characteristics that make determining a prosecutor's "motive" for questioning especially difficult.[112] This section compares prosecutorial examination of grand jury witnesses with defense examination of preliminary hearing witnesses to demonstrate how strategic choices made by attorneys in each situation have influenced courts' "similar motive" analyses and led to inconsistent admissibility results.[113]

1. The Admissibility of Grand Jury Testimony Under Rule 804(b)(1)

Rule 804(b)(1) admits "[t]estimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding . . . ."[114] Despite a lack of guidance from the common law or from the drafters of the Federal Rule, it is now clear that this language pertains to grand jury testimony of an unavailable witness.[115] The admissibility of grand jury testimony pursuant to the hearsay exception for prior testimony remains controversial, however.[116]

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112. *See infra* Part I.D.1–2.

113. *See infra* Part I.D.2.b.i.

114. FED. R. EVID. 804(b)(1).

115. *See* United States v. Omar, 104 F.3d 519, 523 (1st Cir. 1997) (noting that the Supreme Court, in *United States v. Salerno*, 505 U.S. 317, 321 (1992), "all but held that Rule 804(b)(1) could embrace grand jury testimony"); 2 FRANCIS WHARTON, WHARTON'S CRIMINAL EVIDENCE §§ 470–92 (12th ed. 1955) (stating that grand jury testimony is admissible under the hearsay exception for prior testimony but failing to discuss the subject in any detail); Article, *A Comparison and Analysis of the Federal Rules of Evidence and New York Evidentiary Law* (Rule 804(b)(1): Former Testimony), 12 TOURO L. REV. 601, 602 (1996); *see also infra* Part I.D.2.b.

116. *See, e.g.*, 2 MCCORMICK, *supra* note 5, § 304, at 355–56 (explaining that "the Circuits appear divided as to whether in typical grand jury situations exculpatory testimony meets this ['similar motive'] requirement of the Rule"); Valerie A. DePalma, Comment, United States v. DiNapoli*: Admission of Exculpatory Grand Jury Testimony Against the Government Under Federal Rule of Evidence 804(b)(1)*, 61 BROOK. L. REV. 543, 572 & nn.163–64 (1995) (listing sources that discuss the admission of grand jury testimony pursuant to Rule 804(b)(1), primarily with respect to testimony offered against the defendant).

Although it is beyond the scope of this Note, the primary problem with introducing grand jury testimony against a defendant pursuant to Rule 804(b)(1) is that, because the grand jury proceeding is ex parte, the defendant would not have had an "opportunity" to develop the testimony. *See* FED. R. EVID. 804(b)(1); Weissenberger, *supra* note 35, at 1139. The Federal Rules of Evidence aside, admitting grand jury testimony against the defendant is also problematic under the Sixth Amendment's Confrontation Clause, which assures to the accused in criminal prosecutions the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI; *see also* FED. R. EVID. art. VIII advisory committee's note; Weissenberger, *supra* note 35, at 1139–40.

After the Supreme Court's decision in *United States v. Salerno*, 505 U.S. 317 (1992), it seems clear that Rule 804(b)(1) is the proper vehicle for the admission of grand jury testimony against the government. *See Omar*, 104 F.3d at 523. The *Salerno* holding did not, however, clarify how the rule's "similar motive" test should be applied to grand jury testimony or, specifically, what factors courts should consider to determine whether a prosecutor had a "similar motive" to examine a grand jury witness. *Cf.* 505 U.S. at 324–25 (declining to address the issue and remanding to the U.S. Court of Appeals for the Second Circuit for consideration of the meaning of "similar motive").

In a number of cases, courts have admitted grand jury testimony against the government under Rule 804(b)(1) without much discussion.[117] In other cases, courts have held that the prosecution's objective while examining a grand jury witness is not sufficiently similar to its objective for cross-examining the same witness at trial to justify admitting the grand jury testimony.[118] Cross-examination is the key to the reliability of prior testimony, so the very fact that the prosecution does not cross-examine witnesses in grand jury proceedings would seem to suggest that grand jury testimony should not be admissible against the government.[119] The advisory committee addressed this problem in its note to Rule 804(b)(1), however, and offered that the solution is "simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness."[120] The central problem with admitting grand jury testimony against the government stems not from whether "cross-examination" was technically conducted at a grand jury proceeding, but from Rule 804(b)(1)'s requirement that the party against whom the testimony is offered must have had a "similar motive to develop the testimony" at the previous proceeding.[121] The government's position in a number of cases where the defendant seeks to introduce grand jury testimony from an unavailable witness is that the inherent characteristics of grand jury proceedings preclude any possibility of finding a "similar motive."[122] Courts have had difficulty interpreting this elusive requirement of the rule, leading to the split in the circuit courts which is the subject of this Note.[123]

2. Rule 804(b)(1)'s "Opportunity and Similar Motive" Requirement

a. Opportunity

As it appears in Rule 804(b)(1), the word "opportunity" refers not to *any* chance that the opponent of prior testimony may have had to examine a witness on a particular matter, but only to a "meaningful" chance that

117. *See, e.g.*, United States v. Foster, 128 F.3d 949, 954–56 (6th Cir. 1997); United States v. Miller, 904 F.2d 65, 68 (D.C. Cir. 1990).

118. *See, e.g.*, *Omar*, 104 F.3d at 523–24; United States v. DiNapoli, 8 F.3d 909, 914–15 (2d Cir. 1993).

119. *See* FED. R. EVID. 804(b)(1) advisory committee's note (explaining that Rule 804(b)(1) could seem unfair to apply "[i]f the party against whom [testimony is] now offered is the one *by* whom the testimony was offered previously"); *see also* Ohio v. Roberts, 448 U.S. 56, 69–73 (1980) (explaining that cross-examination guarantees the reliability of prior testimony), *abrogated on other grounds by* Crawford v. Washington, 541 U.S. 36 (2004).

120. *See* FED. R. EVID. 804(b)(1) advisory committee's note; *see also* Weissenberger, *supra* note 35, at 1098–99.

121. *See* FED. R. EVID. 804(b)(1); 2 MCCORMICK, *supra* note 5, § 304, at 355.

122. *See, e.g.*, *Omar*, 104 F.3d at 523; United States v. Salerno, 937 F.2d 797, 806 (2d Cir. 1991) ("The government argued, and the district court agreed, that the government's motive in developing testimony in front of a grand jury is so different from the motive at trial that the rule 804(b)(1) hearsay exception does not apply."), *rev'd*, 505 U.S. 317 (1992).

123. *See* 2 MCCORMICK, *supra* note 5, § 304, at 355 (explaining the circuit split and citing cases).

would have presented itself to a "reasonable attorney."[124] Where it might have been physically possible for a party to question a witness on a particular matter but, for various reasons, no reasonable attorney would have, the "opportunity" element of Rule 804(b)(1) is not satisfied.[125] Nevertheless, a party's mere failure to question a witness on a relevant issue does not necessarily bar admission of the prior testimony.[126] There are plenty of situations in grand jury and other proceedings where, for strategic reasons, examining parties intentionally forgo certain lines of questioning.[127] In these situations, if the *motive* to examine the witness on a particular issue existed but the examining party simply chose not to conduct an examination, it would be unfair for the court to allow that decision to bar the testimony's admissibility if the witness later becomes unavailable.[128] This concern for adversarial fairness is especially significant in criminal cases, where the stakes are high.[129]

Often, witnesses testify before the grand jury under a grant of immunity from the government.[130] The prosecution may well be aware that the witness is unlikely to testify at trial unless immunity is extended to the trial proceeding;[131] yet, the government is under no obligation to grant immunity at trial.[132] This puts the prosecution in a uniquely powerful position with respect to developing—or declining to develop—exculpatory grand jury

124. *See id.* § 302, at 345–46 ("[T]he opportunity to cross-examine must have been such as to render the cross-examination actually conducted or the decision not to cross-examine meaningful in the light of the circumstances prevailing when the former testimony was given."); 5 WIGMORE, *supra* note 44, § 1371; Martin, *supra* note 4, at 559 ("It is unfair to hold a party to the former examination if no reasonable attorney would be expected to have elicited the now-relevant facts . . . .").

125. *See, e.g.*, United States v. Franklin, 235 F. Supp. 338, 341 (D.D.C. 1964) (refusing to admit prior testimony where the opposing party could have questioned the witnesses at the prior proceeding but had no meaningful reason to do so because the parties were not then adverse).

126. *See* 5 WIGMORE, *supra* note 44, § 1371.

127. *See, e.g.*, California v. Green, 399 U.S. 149, 195–97 (1970) (Brennan, J., dissenting) (explaining that defense counsel may wish not to provide the prosecution with "gratis discovery" by conducting a full cross-examination at a preliminary hearing); United States v. DiNapoli, 8 F.3d 909, 913 (2d Cir. 1993) (explaining, inter alia, that when a grand jury proceeding is conducted while an investigation is ongoing, the prosecution may wish to keep impeachment evidence secret so as not to compromise the investigation).

128. *See* 2 MCCORMICK, *supra* note 5, § 304, at 356 & n.14.

129. *See, e.g.*, United States v. Salerno, 505 U.S. 317, 323–24 (1992) (explaining the defendants' argument that the exculpatory grand jury testimony at issue in the case should be admitted against the government to stop the prosecution from using the following tactic: "If a witness inculpates a defendant during the grand jury proceedings, the United States immunizes him and calls him at trial; however, if the witness exculpates the defendant . . . the United States refuses to immunize him and attempts to exclude the testimony as hearsay."); Weissenberger, *supra* note 35, at 1105 (noting that "grave consequences flow[] from criminal convictions").

130. *See, e.g.*, 24 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 606.07[1] (3d ed. 1997) (explaining that "the grand jury is entitled to every person's testimony," and the prosecution may therefore immunize witnesses to overcome valid claims of the privilege against self-incrimination); Capra, *supra* note 53.

131. *See supra* notes 129–30.

132. *See* Capra, *supra* note 53; *see also supra* note 53.

testimony.[133] If the prosecution realizes that a grand jury witness is providing testimony unfavorable to its case, it can cease questioning the witness on that matter.[134] Later, at trial, after the government refuses to grant the witness immunity and the witness becomes "unavailable," the prosecution can then claim that it had no motive to examine the witness on the exculpatory matter and hence did not.[135] The importance of Rule 804(b)(1)'s "opportunity" requirement is to prevent the prosecution's—or any examiner's—strategic decision to limit questioning from influencing the admissibility inquiry where a court can determine that a *motive* to question the witness nonetheless existed.[136]

b. Similar Motive

In 1975, when Congress enacted Federal Rule of Evidence 804(b)(1), there was little guidance for how to apply the rule's "similar motive" requirement, even though the language had been present in common law commentary since at least 1899.[137] According to the advisory committee, the requirement was based on the common law's "identity of issues" analysis: "Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable."[138] Treatises at the time of the Federal Rules' enactment did not contain very useful descriptions of what made a motive to examine a witness's testimony sufficient to satisfy fairness and reliability requirements necessary for admission at a later proceeding.[139] The advisory committee itself also provided no criteria for interpreting the "similar motive" language of Rule 804(b)(1).[140] This was a useful tactic, in one sense, because the advisory committee wished to create an admissibility standard more flexible than the formalistic identity of parties and issues inquiry that had developed in the

133. *See* United States v. Salerno, 937 F.2d 797, 807 (2d Cir. 1991) (describing the government's powerful position with respect to the defendant in the conduct of grand jury proceedings), *rev'd*, 505 U.S. 317 (1992).

134. *See supra* note 129.

135. *See supra* note 129.

136. *See* WEINSTEIN & BERGER, *supra* note 2, ¶ 17.02[02], at 17-09 to -10 ("The rule is grounded on the assumption that it is fair to make a party who had the opportunity and motive to explore testimony at a prior proceeding bear the consequences of a failure to cross-examine adequately *or an election not to do so*." (emphasis added)); Weissenberger, *supra* note 35, at 1097 ("Where the party forgoes cross-examination, it is not unfair to make him or her suffer the consequences.").

137. *See* Martin, *supra* note 4, at 557; *see also supra* note 78 and accompanying text.

138. *See* FED. R. EVID. 804(b)(1) advisory committee's note.

139. *See* Martin, *supra* note 4, at 557–58 ("[A]lthough Wigmore first spoke in terms of interest and motive over 70 years ago [as of 1972], even the latest edition of his treatise does no more than indicate that in considering the admissibility of former testimony the issues must be 'substantially the same,' and that property law should be a reference, though not controlling, in determining whether the interests of the respective parties are sufficiently the same.").

140. *Id.* at 557.

common law.[141] For purposes of interpreting how Rule 804(b)(1) should apply to grand jury testimony offered against the government, however, the advisory committee's lack of guidance has been problematic.[142] As the U.S. Court of Appeals for the Second Circuit noted in *United States v. DiNapoli*, "the Advisory Committee discussed the offeror of testimony at the prior proceeding in terms primarily applicable to trials and did not discuss at all the situation where the prior proceeding was a grand jury."[143] Adding to the difficulty of interpreting how the rule should apply is the inconsistent case law governing two relatively similar situations: first, where the government seeks to introduce prior preliminary hearing testimony against defendants; and second, where defendants seek to introduce prior grand jury testimony against the government.[144]

i. Motive in the Preliminary Hearing and the Grand Jury

Many cases hold that the defendant's opportunity and motive to cross-examine a preliminary hearing witness's testimony is sufficient to guarantee the reliability of that testimony for admission at trial if the witness becomes unavailable.[145] These decisions tend to focus on the form of the preliminary hearing, which allows the defendant to cross-examine the witness on the same issues that will be raised at trial.[146] Compared with trial proceedings, however, preliminary hearings present an inherently limited vehicle for the defendant to cross-examine inculpatory testimony.[147]

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141. *See id.* ("Undoubtedly, the Advisory Committee was concerned that it should not bind trial court discretion by inelastic standards."); *see also supra* Part I.C.2. Note that even though the advisory committee did not want to bind judicial discretion with respect to the meaning of "similar motive," this is not the same thing as inviting the kind of broad judicial discretion championed by Judge Weinstein, who advocated for courts to determine admissibility based on case-by-case analysis of the hearsay's probative versus prejudicial value. *See supra* notes 95–96 and accompanying text.

142. *See, e.g.*, United States v. Omar, 104 F.3d 519, 523 (1st Cir. 1997) (noting "confusion on this issue [the application of Rule 804(b)(1) to grand jury testimony] in the circuits").

143. 8 F.3d 909, 913 n.4 (2d Cir. 1993) (en banc).

144. *See* 2 MCCORMICK, *supra* note 5, § 304, at 354–55; *see also* Capra, *supra* note 53, Michael Martin, *Grand Jury Testimony Against the Government*, N.Y. L.J., Dec. 13, 1991, at 3.

145. *See* 2 MCCORMICK, *supra* note 5, § 304, at 354–55 (citing several supporting cases).

146. *See* Martin, *supra* note 144 ("The focus of the decisions is on the preliminary hearing's form, in which the accused nominally has an opportunity to cross-examine about the same factual issues as are raised at trial."). Grand jury proceedings, by comparison, are not adversarial. *See, e.g.*, United States v. Salerno, 937 F.2d 797, 807 (2d Cir. 1991), *rev'd*, 505 U.S. 317 (1992); *see also infra* note 218.

147. *E.g.*, California v. Green, 399 U.S. 149, 197 (1970) (Brennan, J., dissenting) ("Cross-examination at the [preliminary] hearing pales beside that which takes place at trial. This is so for a number of reasons. First . . . the objective of the hearing is to establish the presence or absence of probable cause, not guilt or innocence proved beyond a reasonable doubt; thus, if evidence suffices to establish probable cause, defense counsel has little reason at the preliminary hearing to show that it does not conclusively establish guilt . . . . Second, neither defense nor prosecution is eager before trial to disclose its case by extensive examination at the preliminary hearing; thorough questioning of a prosecution witness by defense counsel may easily amount to a grant of gratis discovery to the State. Third, the schedules of neither court nor counsel can easily accommodate lengthy preliminary hearings.

The purpose of the preliminary hearing is to allow a magistrate judge to determine whether there is probable cause at the time of the hearing "to believe an offense has been committed and the defendant committed it."[148] If the prosecution meets this burden, the magistrate judge requires the defendant to appear for further proceedings.[149] The preliminary hearing is adversarial, but the lower burden of proof that the prosecution must meet (probable cause as opposed to "proof beyond a reasonable doubt" at trial) often makes it "a foregone conclusion that the defendant will lose."[150] As a result, defendants often choose to forgo aggressive or complete cross-examination so as to limit the prosecution's ability to preview the defense strategy or ascertain useful information, such as the defense's impeachment evidence.[151] In some cases, the preliminary hearing takes place early in the course of an investigation and the defendant may not yet have developed sufficient evidence with which to impeach the witness.[152] In other cases, the magistrate judge may limit the scope of the defense's cross-examination to the issue of probable cause, narrowing the range of issues that can be examined.[153] Although these factors taken together might suggest that a defendant's motive to examine a witness at a preliminary hearing is not comparable with the motive at trial—or that a defendant is justified in taking the strategic decision to limit cross-examination of a preliminary hearing witness—courts have typically not allowed such considerations to bar admission of preliminary hearing testimony where the similarity of the issues alone suggested an opportunity to cross-examine.[154]

Grand juries serve the dual function of protecting citizens from unfounded prosecution by the government and of ensuring that probable cause exists to show that a crime has been committed.[155] Indictment by a

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Fourth, even were the judge and lawyers not concerned that the proceedings be brief, the defense and prosecution have generally had inadequate time before the hearing to prepare for extensive examination. Finally, though counsel were to engage in extensive questioning, a part of its force would never reach the trial factfinder, who would know the examination only second hand.").

148. FED. R. CRIM. P. 5.1(e); *see also* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 14.1(a), at 714 (4th ed. 2004); 24 MOORE ET AL., *supra* note 130, § 605.1.03, at 605.1-5.

149. FED. R. CRIM. P. 5.1(e); 24 MOORE ET AL., *supra* note 130, § 605.1.13, at 605.1-11.

150. Capra, *supra* note 53; *see also Green*, 399 U.S. at 197 (Brennan, J., dissenting); LAFAVE ET AL., *supra* note 148, § 1.3(p), at 20–21.

151. *See Green*, 399 U.S. at 197 (Brennan, J., dissenting); *see also supra* note 147.

152. *See* Martin, *supra* note 144.

153. 24 MOORE ET AL., *supra* note 130, § 605.1.11, at 605.1-10.

154. *See* LAFAVE ET AL., *supra* note 148, § 14.1(d), at 719 ("The preliminary hearing presents substantially the same issues as the trial . . . . Accordingly, the critical question [for courts determining the admissibility of preliminary hearing testimony against the defendant] becomes whether the opportunity for cross-examination was sufficient, which does not require that it have been equal to the cross-examination opportunity at trial. Ordinarily, the opportunity is deemed adequate unless the magistrate imposed some significant restriction on the preliminary hearing cross-examination. . . . However, courts have suggested that insufficiency may be established by showing that defense counsel at the preliminary hearing lacked crucial information that would have altered the entire character of the cross-examination." (internal quotation marks omitted)); Capra, *supra* note 53; Martin, *supra* note 144.

155. United States v. Calandra, 414 U.S. 338, 343 (1974).

grand jury is constitutionally required before any person can be prosecuted by the federal government for a felony.[156] As investigatory bodies, grand juries have historically had wide latitude to inquire into possible criminal activity and even to seek assurance that a crime is not being committed.[157] Although grand juries traditionally had a measure of independence from other governmental bodies, today the expansive investigatory power of the federal grand jury reposes in the executive branch—specifically, the Department of Justice—which initiates and prepares all cases that come before any federal grand jury.[158] In practical terms, this means that the prosecutor has an exceptional amount of power in the grand jury proceeding.[159] There are several reasons for this. First, grand jury proceedings are ex parte, are conducted in secret, and are not presided over by a judge.[160] Second, the prosecutor has discretion to determine the course of the grand jury investigation, including which witnesses will be called and the order in which they will appear.[161] Third, grand juries may require the production of witness testimony through the use of subpoenas,[162] and the prosecutor may overcome a witness's invocation of the privilege against self-incrimination by granting the witness immunity from prosecution and thus compelling the witness to testify under threat of contempt.[163] Fourth, grand jury proceedings are generally not restrained by the procedural and evidentiary rules governing criminal trials.[164] Finally, commentators have noted the "psychological pressure" that the "star chamber setting" of grand jury interrogation imposes on witnesses, which increases the prosecution's power to overcome witness resistance and obtain information.[165] The otherwise broad investigatory powers of the grand jury are limited,

156. U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."); 24 MOORE ET AL., *supra* note 130, § 606.02[1], at 606-11 to -13.

157. *See Calandra*, 414 U.S. at 343; 24 MOORE ET AL., *supra* note 130, § 606.02[1], at 606-11 (citing United States v. R. Enters., Inc., 498 U.S. 292, 297 (1991)).

158. *See* 24 MOORE ET AL., *supra* note 130, § 606.02[1], at 606-13 ("[I]n modern times the grand jury has lost much of its independent force. Composed of laypersons functioning in a part-time capacity, the grand jury is no longer capable of taking the initiative in the complex matters that often arise in federal criminal litigation.").

159. *See* LAFAVE ET AL., *supra* note 148, § 8.2(c), at 410 ("Today, the critics [of grand jury practice] argue, the sweeping powers of the grand jury are exercised in reality by the prosecutor alone."); 24 MOORE ET AL., *supra* note 130, § 606.02[1], at 606-13 to -14 (explaining the relative power of the prosecutor in the grand jury scheme).

160. *Calandra*, 414 U.S. at 343–44.

161. *Id.* at 343; LAFAVE ET AL., *supra* note 148, § 8.2(c), at 410.

162. *See* 24 MOORE ET AL., *supra* note 130, § 606.02[1], at 606-13 to -14, § 606.07[1], at 606-110 ("In general, the grand jury is entitled to every person's testimony, and anyone summoned to appear is required to do so.").

163. LAFAVE ET AL., *supra* note 148, § 8.2(c), at 411; 24 MOORE ET AL., *supra* note 130, § 606.07[1], at 606-110 to -111.

164. *Calandra*, 414 U.S. at 343.

165. *See, e.g.*, LAFAVE ET AL., *supra* note 148, § 8.3(d), at 413 ("[N]o person stands more alone than a witness before a grand jury; in a secret hearing he faces an often hostile prosecutor and 23 strangers with no judge present to guard his rights, no lawyer present to counsel him and sometimes no indication of why he is being questioned." (internal quotation marks omitted)).

however, in that the prosecution may not utilize a grand jury for purposes of discovery when it is not seeking an indictment.[166]

The above characteristics of grand jury proceedings typically provide little incentive for prosecutors to conduct aggressive or complete examinations of potentially damaging grand jury witnesses.[167] Most significant is the lower burden (probable cause) that the prosecutor must meet to obtain an indictment than is required for a conviction at trial ("proof beyond a reasonable doubt").[168] A prosecutor who has met that burden is unlikely to expend the resources necessary to fully examine a witness whose testimony runs counter to the prosecution's theory of the case.[169] Similarly, the prosecution will often desire to limit examination of grand jury witnesses to conceal information or to maintain the secrecy of an ongoing investigation.[170] Furthermore, when grand jury questioning takes place early in an investigation, the prosecution may not yet possess the information necessary to impeach a witness, and the issues examined may not be the same as those that are later relevant at trial.[171] It should also be noted that the prosecution is under no duty to concern itself with exculpatory grand jury evidence.[172]

Although the circumstances of grand jury proceedings may suggest that the government has as little motive to develop exculpatory grand jury testimony as the defendant has to challenge inculpatory preliminary hearing testimony, courts generally have been more reluctant to admit grand jury testimony against the government than to admit preliminary hearing testimony against defendants.[173] The nonadversarial nature of grand jury

166. *See* United States v. R. Enters., Inc., 498 U.S. 292, 299 (1991) ("Grand juries are not licensed to engage in arbitrary fishing expeditions . . . ."); 24 MOORE ET AL., *supra* note 130, § 606.05[2][c], at 606-57 to -58 ("It is not permissible for the prosecutor to subpoena and question potential trial witnesses to an existing criminal proceeding when the sole or dominant purpose of such questioning is to obtain evidence for use in the upcoming trial. Simply stated, it is not a legitimate function of the grand jury to serve as a substitute for pretrial discovery." (footnote omitted)).

167. *See* Capra, *supra* note 53; *see also* Martin, *supra* note 144 (arguing that strategic concerns diminish a prosecutor's actual desire to conduct a thorough examination of grand jury witnesses, and, therefore, "grand jury testimony probably should not be admissible against the government under Rule 804(b)(1) because it almost never has the circumstantial assurance of trustworthiness coming from a prosecutor's motivation to develop it fully").

168. *See* United States v. DiNapoli, 8 F.3d 909, 913 (2d Cir. 1993) ("[B]ecause of the low burden of proof at the grand jury stage, even the prosecutor's status as an 'opponent' of the testimony does not necessarily create a motive to challenge the testimony that is *similar* to the motive at trial."); Martin, *supra* note 144; *see also supra* notes 150, 155 and accompanying text.

169. *See* Martin, *supra* note 144.

170. Capra, *supra* note 53.

171. *See id.*

172. *Id.*

173. *See* 2 MCCORMICK, *supra* note 5, § 304, at 354–55; *see also* Martin, *supra* note 144 ("[T]he same factors . . . pointed to as calling for exclusion of grand jury testimony offered by the defense argue against admitting preliminary hearing testimony offered by the prosecution. If 'what is sauce for the goose is sauce for the gander,' maybe the *Salerno* court's result is correct, after all."). The "*Salerno* court" admitted grand jury testimony against the government on a theory of adversarial fairness alone. *See* United States v. Salerno, 937 F.2d 797, 806 (2d Cir. 1991), *rev'd*, 505 U.S. 317 (1992).

proceedings could be one reason for the differing admissibility determinations.[174] Policy considerations, such as an interest in supporting the investigative activities of law enforcement, may also drive this result.[175] One commentator has suggested what could be another possible justification for differing admissibility holdings concerning preliminary hearing and grand jury testimony.[176] If certain Supreme Court decisions upholding the admissibility of preliminary hearing testimony against defendants can be said to *create* a motive for the defense to fully develop preliminary hearing testimony,[177] then a lack of Supreme Court precedent affirming the admission of grand jury testimony against the government[178] might be said to have the opposite effect, providing more support for the argument that the government has little motive to fully examine exculpatory grand jury witnesses.[179]

ii. Other Motive Considerations

Courts and commentators have supplied additional content to the meaning of Rule 804(b)(1)'s "similar motive" test since its codification in the Federal Rules of Evidence. In his concurring opinion in *United States v. Salerno*, Justice Harold Blackmun argued that "'similar motive' does not mean 'identical motive,'" and the admissibility inquiry is therefore

174. *Cf. supra* note 146 and accompanying text.

175. *See, e.g.*, United States v. Salerno, 952 F.2d 624, 625 (2d Cir. 1991) (Newman, J., dissenting) ("The panel's ruling [admitting grand jury testimony against the government] also creates serious problems for the Government in the development of evidence at the grand jury. If the Government calls to the grand jury witnesses other than those who are certain to give testimony helpful to the prosecution (and the Government will frequently prefer to call witnesses of this sort, both to investigate undeveloped matters and to freeze a hostile or wavering witness's testimony), it must then accept admission of their hearsay at trial if offered by the defense, or severely limit its opportunity to prosecute them by conferring use immunity." (citing United States v. North, 910 F.2d 843, 853–73 (D.C. Cir. 1990))); 2 STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 410 (5th ed. 1990) ("[R]uling that the government is deemed to have an adequate opportunity to examine witnesses before a grand jury for purposes of Rule 804(b)(1) would require that the government treat the grand jury investigation in every case as if it were a trial. This would greatly extend the proceedings and complicate them more than is necessary. Arguably, it would be good policy for the government to call all witnesses before grand juries and to develop all testimony fully for the benefit of the defense and the prosecution. But this is not the grand jury system as it now exists for federal prosecutions . . . .").

176. *See* Martin, *supra* note 4, at 562 n.75.

177. *See id.* (remarking that decisions such as *California v. Green*, 399 U.S. 149, 165–66 (1970), and *Pointer v. Texas*, 380 U.S. 400, 407 (1965), "which indicate that there is at least no confrontation clause violation when testimony given at a 'full-fledged' preliminary hearing is offered at trial . . . may by themselves provide a motive and interest in full development of the [preliminary hearing] testimony" by the defendant).

178. Only *United States v. Salerno*, 505 U.S. 317, 321 (1992), holds that grand jury testimony may be admitted against the government as prior testimony hearsay pursuant to Rule 804(b)(1), and it does so by implication. *See* United States v. Omar, 104 F.3d 519, 523 (1st Cir. 1997) (noting that, in *Salerno*, 505 U.S. at 321, "the Supreme Court all but held that Rule 804(b)(1) could embrace grand jury testimony").

179. For reasons why the government lacks motive to develop exculpatory grand jury testimony, see *supra* notes 160–72 and accompanying text.

inherently "*factual*," with its outcome depending on analysis of the specific circumstances surrounding the grand jury questioning in each case.[180] Similarly, commentators have argued that the inquiry is concerned primarily with comparing a reasonable attorney's motive to develop *facts* at the previous proceeding with the attorney's hypothetical motive to develop those facts at trial.[181] The majority in *Salerno* confirmed that Rule 804(b)(1) must be interpreted according to its plain language and not by reference to expansive policy considerations.[182] In situations where information that would have been useful for examining a witness at a prior proceeding first surfaces subsequent to that proceeding, this alone is not enough to render the prior testimony inadmissible where the existing motive for examination was satisfactory in light of the circumstances prevailing at the second proceeding.[183] Furthermore, Federal Rule of Evidence 806 allows for impeachment of prior testimony hearsay in the same manner as if the witness were available at trial, so an opposing party is not without the ability to bring newly developed evidence to bear on discrediting prior testimony.[184] Where courts have found that the issues at

180. *See Salerno*, 505 U.S. at 326 (Blackmun, J., concurring) ("Moreover . . . the similar-motive inquiry appropriately reflects narrow concerns of ensuring the reliability of evidence admitted at trial—not broad policy concerns favoring either the Government in the conduct of grand jury proceedings or the defendant in overcoming the refusal of other witnesses to testify."); *see also* Feaster v. United States, 631 A.2d 400, 404, 406 (D.C. 1993) (admitting exculpatory grand jury testimony and explaining that because the prosecution focused its inquiry on the defendant's guilt at both proceedings it did not matter that the prosecutor did not assume as "adversarial, inquiring, searching, and explicative" of an approach as the prosecution at trial might have wished for (internal quotation marks omitted)).

181. *See* Weissenberger, *supra* note 35, at 1101–02 ("The Rule seeks to achieve fairness by imposing factual testimony on a party only where the party . . . had a motive to develop or, alternatively, to limit the weight of the testimony at the former proceeding. Accordingly, the similar motive requirement should be read to mean 'motive to develop *facts*' or 'motive to *limit* the weight to be accorded the prior testimony.'" (footnote omitted)); *see also* Martin, *supra* note 4, at 558–59 ("Since the opponent's argument against admission of former testimony is that he is deprived of the opportunity to bring out relevant facts, the objective of the motive and interest test is to determine whether there is any significant reason why facts relevant to the present inquiry . . . would not have been elicited at the prior hearing. A 'significant reason' for these purposes would be one which would affect the conduct of the examination by a reasonable attorney in the same circumstances. It is unfair to hold a party to the former examination if no reasonable attorney would be expected to have elicited the now-relevant facts; but if the circumstances were such that those facts could have been brought out if they were available, the present opponent can fairly be held.").

182. *See Salerno*, 505 U.S. at 321 (rejecting the defendants' argument that Rule 804(b)(1) should not be applied in a "slavishly literal fashion" and holding that a court may not admit prior testimony under the rule "absent satisfaction of each of the Rule's elements" (internal quotation marks omitted)); *see also* United States v. Salerno, 974 F.2d 231, 238 (2d Cir. 1992) ("The Supreme Court has made clear in recent years that the Federal Rules of Evidence . . . are to be read with regard to their 'plain meaning.'" (citing Bourjaily v. United States, 483 U.S. 171, 178–79 (1987)), *vacated en banc sub nom.* United States v. DiNapoli, 8 F.3d 909 (2d Cir. 1993); Capra, *supra* note 53 (discussing the Supreme Court's application of the plain meaning rule).

183. *See, e.g.*, United States v. Koon, 34 F.3d 1416, 1427 (9th Cir. 1994).

184. According to Rule 806, "[w]hen a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness." FED. R. EVID. 806. *See also* Capra, *supra* note 53 (explaining that the Second

the two proceedings are sufficiently different, such that "questions on a particular subject would have been largely irrelevant at the earlier proceeding," the prior proceeding's testimony has generally been held inadmissible.[185]

Ultimately, the "similar motive" inquiry requires that "the issues in the first proceeding, and hence the purpose for which the testimony was offered, must have been such [that the present opponent had] an adequate motive for testing on cross-examination the credibility of the testimony."[186] The rule ensures fairness to litigants by preventing the imposition of a prior proceeding's factual testimony on a party unless that party "had a motive to develop or, alternatively, to limit the weight of the testimony at the former proceeding."[187] The rule is not only concerned with fairness, however; the advisory committee's adoption of Dean Wigmore's "interests and motives" formulation demonstrates that the rule is also meant to serve necessity concerns by providing the fact-finder with as much information as possible under a less restrictive admissibility framework than common law courts employed.[188]

The next part of this Note examines recent U.S. Courts of Appeals cases where Rule 804(b)(1)'s "similar motive" test was used to admit or deny grand jury testimony offered against the government. The issues detailed above concerning the meaning of "similar motive" will be discussed in the context of the influence they had on the courts' decisions, and those decisions themselves will be analyzed for the purpose of devising a uniform "similar motive" admissibility test for grand jury testimony offered against the government.

II. CASES APPLYING RULE 804(b)(1)'S "SIMILAR MOTIVE" TEST TO GRAND JURY TESTIMONY OFFERED AGAINST THE GOVERNMENT

A split has developed in the circuit courts over the proper interpretation of Rule 804(b)(1)'s "similar motive" language in the context of admitting grand jury testimony against the government.[189] The Second and First Circuits have construed the requirement narrowly and issued decisions suggesting that exculpatory grand jury testimony would rarely be

Circuit panel in *United States v. Salerno*, 937 F.2d 797, 806–08 (2d Cir. 1991), *rev'd*, 505 U.S. 317 (1992), admitted prior testimony against the government partly on fairness grounds, based on the fact that the government would never have lost the ability to impeach the unavailable witness's testimony under Rule 806).

185. *See* 2 MCCORMICK, *supra* note 5, § 302, at 346 (citing United States v. Wingate, 520 F.2d 309, 315–16 (2d Cir. 1975) (holding that testimony from a hearing on a motion to suppress due to involuntariness is not admissible at trial where the innocence of the defendant is at issue)); *see also* Weissenberger, *supra* note 35, at 1102 ("The critical issue raised by Rule 804(b)(1) is whether to admit the evidence or completely sacrifice the testimony of the [declarant]; consequently, only genuinely dissimilar motives should result in exclusion.").

186. *See* 2 MCCORMICK, *supra* note 5, § 304, at 354.

187. Weissenberger, *supra* note 35, at 1101–02.

188. *See supra* Part I.C.1–2.

189. *See* 2 MCCORMICK, *supra* note 5, § 304, at 355.

admissible against the government.[190] The District of Columbia, Sixth, and Ninth Circuits, by contrast, have compared the government's motives "at a high level of generality"[191] and have issued decisions suggesting that exculpatory grand jury testimony is almost always admissible against the government.[192] This section will analyze the facts of each case, each court's specific interpretation of Rule 804(b)(1), and other factors—such as policy considerations and judicial discretion—that led to the divergent holdings.

A. The Second and First Circuits' Narrow Admissibility Decisions

In the two cases that follow, the courts wrestled with how to determine whether exculpatory testimony should be admitted against the government under Rule 804(b)(1). Both courts ultimately excluded the testimony, reasoning, inter alia, that the nature of the grand jury proceeding itself generally precludes a finding of "similar motive."[193]

1. The Second Circuit: *United States v. DiNapoli*

a. Facts and Procedural History

On April 7, 1987, a grand jury sitting in the Southern District of New York returned a thirty-five–count third superseding indictment against eleven defendants, including Anthony Salerno and Vincent DiNapoli, for alleged RICO violations related to mafia activity.[194] The trial lasted thirteen months and focused primarily on the government's attempts to prove that the defendants were involved in a scheme to rig bids for concrete construction work in Manhattan.[195] By controlling labor unions and the supply of concrete, the Genovese organization was able to ensure that all large concrete projects were allocated among a select group of contractors, called the "Club," who then paid a fee to the defendants.[196] Pursuant to its obligation under *Brady v. Maryland*,[197] the prosecution informed the defendants that two witnesses, Pasquale J. Bruno and Frederick DeMatteis, had testified before the grand jury under a grant of immunity and provided "potentially exculpatory evidence."[198] These two witnesses were principals in the Cedar Park Concrete Construction Corporation, alleged to belong to

190. *See* United States v. Omar, 104 F.3d 519, 523 (1st Cir. 1997); United States v. DiNapoli, 8 F.3d 909, 914–15 (2d Cir. 1993).

191. *See* United States v. McFall, 558 F.3d 951, 962 (9th Cir. 2009).

192. *See id.* at 963; United States v. Foster, 128 F.3d 949, 955–56 (6th Cir. 1997); United States v. Miller, 904 F.2d 65, 68 (D.C. Cir. 1990).

193. *See Omar*, 104 F.3d at 523; *DiNapoli*, 8 F.3d at 914–15.

194. United States v. Salerno, 937 F.2d 797, 800–01 (2d Cir. 1991) [hereinafter *Salerno I*], *rev'd*, 505 U.S. 317 (1992).

195. *Id.* at 801–02.

196. *Id.* at 802.

197. 373 U.S. 83, 87 (1963) (holding that prosecutors violate due process when they fail to turn over exculpatory evidence to defendants upon request).

198. *Salerno I*, 937 F.2d at 804.

the "Club," yet the two men testified that no such "Club" existed.[199] To counter their testimony, the prosecution confronted them with a wiretapped conversation—which had been made public at a previous trial—implicating the witnesses' company in the bid-rigging scheme.[200] Referring to its grand jury examination, the prosecution later claimed that "[w]e did not cross-examine Bruno and did not tip our cards, and the same thing was true with respect to DeMatteis."[201]

Before the grand jury, Bruno and DeMatteis each gave contradictory testimony.[202] At one point, Bruno was excused from the grand jury room and told, upon his return, that the grand jurors strongly doubted the truthfulness of his testimony.[203] Four days after Bruno testified, his lawyer informed the prosecutor that Bruno's testimony may have been false.[204] He suggested that Bruno would submit new answers by affidavit if the prosecution would agree to furnish the questions in writing, but the prosecution declined to do so.[205]

At their trial, the defendants subpoenaed Bruno and DeMatteis to testify, but the witnesses invoked their Fifth Amendment privilege against self-incrimination.[206] The defendants then requested that the government grant the witnesses immunity.[207] When the government declined, the defendants moved to introduce Bruno and DeMatteis's grand jury testimony pursuant to Rule 804(b)(1).[208] To maintain the secrecy of the grand jury transcripts, the district judge conferred ex parte with the prosecution regarding the defendants' motion.[209] The prosecution explained that it had little motive to develop the testimony of witnesses who were known to be lying.[210] It also argued, in general terms, that prosecutorial motive for investigating witnesses in the grand jury is so different from motive at trial that Rule 804(b)(1) should not apply.[211] The district court agreed and denied the defendants' motion.[212]

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199. *Id.* at 804, 808.

200. United States v. DiNapoli, 8 F.3d 909, 911 (2d Cir. 1993).

201. United States v. Salerno, 974 F.2d 231, 237 (2d Cir. 1992) [hereinafter *Salerno II*] (alteration in original) (internal quotation marks omitted), *vacated en banc sub nom.* United States v. DiNapoli, 8 F.3d 909 (2d Cir. 1993).

202. *See DiNapoli*, 8 F.3d at 911 n.1.

203. *Id.* at 911.

204. *Id.*

205. *Id.*

206. *Id.*; *see also* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

207. *Salerno I*, 937 F.2d 797, 804 (2d Cir. 1991), *rev'd*, 505 U.S. 317 (1992).

208. *Id.*

209. *Salerno II*, 974 F.2d 231, 236 (2d Cir. 1992), *vacated en banc sub nom.* United States v. DiNapoli, 8 F.3d 909 (2d Cir. 1993).

210. *Salerno I*, 937 F.2d at 806 (explaining that the prosecution had submitted sealed affidavits arguing that it has "little or no incentive to conduct a thorough cross-examination of Grand Jury witnesses who appear to be falsifying their testimony" (internal quotation marks omitted)).

211. *Id.*

212. *Id.* ("The government argued, and the district court agreed, that the government's motive in developing testimony in front of a grand jury is so different from the motive at trial that the Rule 804(b)(1) hearsay exception does not apply.").

After their conviction, the defendants appealed.[213] A panel of the Second Circuit held that the district court had improperly denied admission of the grand jury testimony.[214] Because the witnesses could have been made available through a grant of immunity, the court reasoned, Bruno and DeMatteis were only "unavailable" to the defendants.[215] Therefore, the same bar that stops a party from procuring a witness's unavailability so as to admit prior testimony[216] should also prohibit the government from invoking Rule 804(b)(1)'s "similar motive" test to block the admission of prior testimony where the government's refusal to grant immunity effectively kept the witnesses from the courtroom.[217] In the court's reasoning, concern for fairness to the defendants and the prevention of governmental overreaching counseled in favor of admissibility,[218] regardless of whether the explicit requirements of the "similar motive" test were met.[219] The court also reasoned that grand jury proceedings are by their nature adverse to defendants, so the admission of grand jury testimony against the government does not raise the kind of reliability concerns that are present when, for instance, grand jury testimony is offered against the defendant.[220] Finally, the court reasoned that the government had violated the spirit of *Brady v. Maryland*[221] by informing the defendants that the witnesses had provided testimony favorable to them and then trying to exclude that testimony at trial.[222]

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213. *Id.* at 803.

214. *Id.* at 808.

215. *Id.* at 806 ("Had Bruno and DeMatteis been, for example, ill or dead at the time of trial (and therefore, under rule 804(a)(4), 'unavailable' to *either* side), the district court would have properly inquired whether the government had a 'similar motive' to examine them in the grand jury before allowing their testimony before the grand jury to be admitted under rule 804(b)(1), because neither the government nor the defendant would be able to examine the witness at trial. But since these witnesses were available to the government at trial through a grant of immunity, the government's motive in examining the witnesses at the grand jury was irrelevant.").

216. *See supra* note 51 and accompanying text.

217. *See Salerno I*, 937 F.2d at 806–07. Note that the government is not required to grant immunity to a witness who has invoked the privilege against self-incrimination. *Id.* at 807; *see also* Capra, *supra* note 53.

218. *See Salerno I*, 937 F.2d at 807 ("[W]hen the *defendant* wishes to introduce the grand jury testimony that the government used to obtain his indictment, . . . concerns about reliability and accuracy are absent. Every factor present in the grand jury—the *ex parte* nature of the proceeding, the leading questions by the government, the absence of the defendant, the tendency of a witness to favor the government because of the grant of immunity, the absence of confrontation—is adverse to the interest of the defendants, not the government. . . . Since the witnesses were only unilaterally 'unavailable' and could have been subjected to cross-examination by the government, we will not countenance the exclusion of their grand jury testimony on the ground of purported fairness to the government."); *see also infra* text accompanying notes 221–22.

219. *See Salerno I*, 937 F.2d at 806 ("While we agree that the government may have had no motive before the grand jury to impeach the allegedly false testimony of Bruno and DeMatteis, we do not think that is sufficient to exclude the evidence at trial.").

220. *Id.* at 807; *see also supra* notes 116, 218.

221. 373 U.S. 83 (1963); *see also supra* note 197.

222. *Salerno I*, 937 F.2d at 807.

b. The Supreme Court Decision in United States v. Salerno

After the Second Circuit denied the government's petition for a rehearing en banc,[223] the government appealed to the Supreme Court, which reversed the panel's decision.[224] The Court held that prior testimony is not admissible pursuant to Rule 804(b)(1) unless the "similar motive" test is satisfied; adversarial fairness alone is not grounds for admitting prior testimony under the rule.[225] The Court declined to decide whether the government had a "similar motive" to question Bruno and DeMatteis before the grand jury, however, and remanded for further consideration of the government's "motive" in light of the evidentiary standard prescribed by the Court.[226]

In his concurrence, Justice Blackmun disagreed with the district court's suggestion that prosecutorial motive to examine witnesses before the grand jury is never sufficiently similar to its motive at trial.[227] He argued:

> Because "similar motive" does not mean "identical motive," the similar-motive inquiry, in my view, is inherently a *factual* inquiry, depending in part on the similarity of the underlying issues and on the context of the grand jury questioning. It cannot be that the prosecution either *always* or *never* has a similar motive for questioning a particular witness with respect to a particular issue before the grand jury as at trial.[228]

Furthermore, Justice Blackmun argued, the similar motive inquiry should not reflect policy favoring either the government or the defendant; it should focus solely on the reliability of the testimony in evidentiary terms.[229]

Dissenting, Justice John Paul Stevens argued that the government did have a similar motive and opportunity to examine Bruno and DeMatteis before the grand jury because the witnesses' testimony was inconsistent with the prosecution's theory of the case.[230] According to Justice Stevens, although the government argued lack of motive in the abstract, the transcript revealed otherwise.[231] By probing the basis of the witnesses' statements regarding the existence of the "Club" and introducing wiretap evidence to contradict them, the prosecution demonstrated that it possessed

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223. United States v. Salerno, 952 F.2d 624, 624 (2d Cir. 1991). Judge Jon O. Newman, who would later write the *DiNapoli* opinion, dissented from the denial. *Id.* Among his arguments was that the Second Circuit's holding would frustrate the government's development of grand jury testimony. *Id.* at 625–26; *see also supra* note 175.

224. United States v. Salerno, 505 U.S. 317, 325 (1992).

225. *See id.* at 321; Article, *supra* note 115, at 601.

226. *Salerno*, 505 U.S. at 325 ("The Court of Appeals, as noted, erroneously concluded that the respondents did not have to demonstrate a similar motive in this case to make use of Rule 804(b)(1). It therefore declined to consider fully the arguments now presented by the parties about whether the United States had such a motive.").

227. *See id.* at 325–26 (Blackmun, J., concurring).

228. *Id.* at 326.

229. *See id.*

230. *Id.* at 326–29 (Stevens, J., dissenting) ("[A] party has a motive to cross-examine any witness who, in her estimation, is giving false or inaccurate testimony about a fact that is material to the legal question at issue in the proceeding.").

231. *See id.* at 327–28, 331–32.

a motive to examine the witnesses' grand jury testimony on the issues relevant at trial.[232] Justice Stevens also argued that strategic considerations should not influence the "similar motive" inquiry:

> [A] party might decide—for tactical reasons or otherwise—not to engage in a rigorous cross-examination, or even in any cross-examination at all. In such a case, however, I do not believe that it is accurate to say that the party lacked a similar motive to cross-examine the witness; instead, it is more accurate to say that the party had a similar motive to cross-examine the witness . . . *but chose not to act on that motive*."[233]

Thus, for Justice Stevens, there is a distinction between the reasons a prosecutor might want to limit questioning at the grand jury and the bare "motive" the prosecutor would otherwise have to question the witness; and the reasons for limiting questioning should not intrude on the "motive" analysis.[234]

c. The Second Circuit Panel Decision on Remand

On remand from the Supreme Court, a panel of the Second Circuit held that the prosecution had a similar motive to examine the witnesses before the grand jury, and, therefore, the district court should have admitted Bruno and DeMatteis's testimony.[235] The court explained that the "similar motive" test does not require finding an "identical" motive; it stressed that "similar motive" exists where "the issues in the two proceedings [are] sufficiently similar to assure that the opposing party had a meaningful opportunity to cross-examine when the testimony was first offered."[236] Despite the government's argument in the abstract that grand jury proceedings do not support finding a "similar motive" to develop testimony, the court held that the transcript of the grand jury questioning demonstrated a prosecutorial attempt to discredit the witnesses' testimony within the meaning of the "similar motive" test.[237] The court also described what may be thought of as a two-part test to determine whether a prosecutor demonstrates "similar motive" to examine a grand jury witness.[238] First, a

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232. *See id.* at 326–28, 332.

233. *See id.* at 329 (emphasis added and footnote omitted).

234. *See id.* at 329–30 ("[N]either the fact that the prosecutors might decline to cross-examine a grand jury witness whom they fear will talk to the target of the investigation nor the fact that they might choose to undermine the witness' credibility other than through rigorous cross-examination alters the fact that they had an opportunity and similar motive to challenge the allegedly false testimony through questioning before the grand jury. Although those might be reasons for declining to take advantage of the opportunity to cross-examine a witness, neither undermines the principal motive for engaging in cross-examination, *i.e.*, to shake the witness' allegedly false or misleading testimony."). *But see* Capra, *supra* note 53 (arguing that Justice John Paul Stevens's refusal to include strategic concerns in the "similar motive" analysis is too "harsh" an application of the rule).

235. *Salerno II*, 974 F.2d 231, 232 (2d Cir. 1992), *vacated en banc sub nom.* United States v. DiNapoli, 8 F.3d 909 (2d Cir. 1993).

236. *See id.* at 238 (quoting United States v. Wingate, 520 F.2d 309, 316 (2d Cir. 1975) (internal quotation marks omitted)).

237. *See id.* at 240–41.

238. *See id.* at 239.

court should look to the examination that was "*in fact*" conducted to determine if it is equivalent to the examination the prosecution would wish to conduct at trial.[239] If the results are inconclusive, the court should determine, objectively, whether a "reasonable examiner under the circumstances" would have had a similar motive to develop the witness's testimony.[240] According to the court, "[t]his latter inquiry ensures that the failure to vigorously examine the witness—for tactical reasons or otherwise—does not insulate the prior testimony from admission."[241] This language suggests that, under the court's test, a prosecutor's strategic decision to forgo examination on a particular issue might not factor into the "similar motive" analysis.[242] But, because the panel concluded that the grand jury transcript demonstrated a "similar motive," the panel did not clearly apply its "reasonable examiner" test to the facts in this case.[243]

d. The Rehearing en Banc Decision: United States v. DiNapoli

Again the government petitioned for a rehearing en banc, and this time it was granted.[244] The Second Circuit, sitting en banc, vacated the panel's decision and held that Bruno and DeMatteis's grand jury testimony was not admissible.[245] The court reasoned that, because the "similar motive" inquiry is inherently factual, it is possible for the government to have a motive at the grand jury that is equivalent to its motive at trial.[246] But, in this case, the government's interest in discrediting the witnesses' testimony was substantially less "intense" than it would have been at trial.[247] The

239. *Id.*
240. *Id.*
241. *Id.*
242. *See id.*
243. *See id.* at 240–41 ("Nevertheless . . . the court need not turn to abstract notions of "motive" if what the examiner *actually did* in the prior proceeding was "similar" to what the examination would be in the current one."); *see also* Judith M. Mercier, Student Topic, United States v. Salerno*: An Examination of Rule 804(b)(1),* 48 U. MIAMI L. REV. 323, 336–40 (1993) (arguing that the panel's "reasonable examiner" test is the correct one for admissibility of grand jury testimony under Rule 804(b)(1) but implying that the panel meant to include, rather than exclude, strategic considerations as a factor bearing on "motive").
244. *See* United States v. DiNapoli, 8 F.3d 909, 910 (2d Cir. 1993) (en banc). Anthony Salerno, one of the defendants from the earlier proceedings, died during the pendency of the appeal, and the Second Circuit issued its en banc decision under case name *United States v. DiNapoli*. *Id.* at 911 n.2.
245. *Id.* at 910, 915.
246. *See id.* at 913–14 ("[W]e do not accept the position, urged by the Government upon the Supreme Court, that a prosecutor generally will not have the same motive to develop testimony in grand jury proceedings as he does at trial. Though the Supreme Court declined to assess that contention . . . we discern in its opinion a reluctance to engraft any general exception onto Rule 804(b)(1)." (citation omitted) (internal quotation marks omitted)). Compare this reasoning with the district court's earlier conclusion that grand jury proceedings, by their nature, preclude a finding of "similar motive." *See supra* notes 210–12, 227–28 and accompanying text.
247. *See DiNapoli*, 8 F.3d at 914–15 ("[T]he inquiry as to similar motive must be fact specific, and the grand jury context will sometimes, but not invariably, present circumstances that demonstrate the prosecutor's lack of a similar motive. We accept neither the Government's view that the prosecutor's motives at the grand jury and at trial are almost

court explained: "The test must turn not only on whether the questioner is on the same side of the same issue at both proceedings, but also on whether the questioner had . . . a substantially similar *degree of interest* in prevailing on that issue."[248] The court read Rule 804(b)(1)'s "similar motive" language as requiring nearly equivalent stakes at both proceedings.[249]

The court also noted that "[t]he nature of the two proceedings," including "what is at stake and the applicable burden of proof," as well as the examination at the prior proceeding, "both what was undertaken and what was available but forgone," should factor into the analysis.[250] Where two proceedings are different in their purposes or burden of proof, a party's motives for questioning a witness could differ, even though that party is on the same "side" at both proceedings.[251] Motive depends upon many things, including the stage of the investigation at the time the witness is examined and what the prosecution desires to use the witness's testimony for at that stage of its investigation.[252]

Applying the above principles to this case, the court concluded that there were two overriding reasons why the government lacked a similar motive to examine Bruno and DeMatteis before the grand jury: (1) the defendants were already indicted, so the prosecution had no need to undermine testimony that exculpated them; and (2) the prosecution had no interest in proving the witnesses' testimony false because the grand jurors themselves had informed the prosecution that they did not believe Bruno's testimony.[253] The court also noted that the prosecution limited its questioning to matters that were already publicly disclosed so as not to reveal information that remained secret at that stage of the investigation.[254]

Judge George C. Pratt, who wrote the panel's decision on remand from the Supreme Court, dissented.[255] He believed that the en banc majority erred by rewriting the "similar motive" test into a "same motive" test.[256] The majority's admissibility requirement, he argued, was stricter than the one for which the Federal Rules of Evidence called.[257] Judge Pratt also criticized the majority for accepting at face value the government's own

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always dissimilar, nor the opposing view, apparently held by the District of Columbia Circuit, that the prosecutor's motives in both proceedings are always similar. . . . The proper approach . . . in assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue.").

248. *Id.* at 912 (emphasis added).

249. *See id.* at 914–15; *see also supra* note 247.

250. *DiNapoli*, 8 F.3d at 915.

251. *See id.* at 912–15.

252. *See id.* at 913.

253. *See id.* at 915. Note that the prosecutor's belief that questioning was unnecessary because the jurors disbelieved the testimony is dubious because "[t]he grand jurors had not informed the prosecutor that they found Bruno's testimony incredible until *after* Bruno had testified." *See* DePalma, *supra* note 116, at 588.

254. *See DiNapoli*, 8 F.3d at 915.

255. *Id.* (Pratt, J., dissenting); *see also supra* Part II.A.1.c.

256. *DiNapoli*, 8 F.3d at 916 (Pratt, J., dissenting).

257. *See id.*

after-the-fact, self-serving arguments about its motive at the grand jury proceeding.[258] Instead of applying its own test, the court had simply accepted the government's argument that it had no motive to impeach Bruno and DeMatteis.[259] Finally, Judge Pratt questioned why the prosecution was using the grand jury at all if the prosecution was so secure in its indictments that it did not need to challenge exculpatory testimony.[260]

e. Summary

The district court excluded Bruno and DeMatteis's testimony because it agreed with the government that the nature of the grand jury proceeding itself provides prosecutors little motive to examine exculpatory witnesses.[261] It also agreed that, in this case, there was little motive to examine the witnesses because the jurors did not credit their testimony.[262]

The Second Circuit panel admitted the testimony primarily to promote a policy of fairness to the defendants.[263] It noted that grand jury proceedings inherently favor the government and that Bruno and DeMatteis were not, strictly speaking, "unavailable" to the government.[264] The prosecution would never have lost the opportunity to impeach the testimony had it been admitted.[265]

The Supreme Court implied that the "similar motive" inquiry is factual, so the legal conclusion that the nature of grand jury proceedings precludes a finding of similar motive is untenable.[266] The Court also ruled that the evidentiary terms of the rule must be satisfied; prior testimony cannot be admitted based on a policy of correcting an unequal balance of power between two parties or of protecting one party from the other.[267]

On remand, the Second Circuit panel upheld the admission of Bruno and DeMatteis's testimony because the transcript of their grand jury examination demonstrated prosecutorial motive sufficient to meet the requirements of Rule 804(b)(1).[268] The court described a reasonable examiner test for similar motive which, as explained, would ensure that

258. *Id.*; *see also supra* notes 210–11, 253 and accompanying text.

259. *DiNapoli*, 8 F.3d at 916 (Pratt, J., dissenting); *see also supra* notes 210–11, 253 and accompanying text. Judge Robert J. Miner, in his dissent, argued that the prosecution had actually tried to establish the falsity of the grand jury testimony. *DiNapoli*, 8 F.3d at 917 (Miner, J., dissenting). He cited the fact that the prosecution had *told* Bruno that the grand jurors disbelieved his testimony as an attempt to impeach it and to provide Bruno with an opportunity to correct it. *Id.*

260. *Id.* at 916 (Pratt, J., dissenting) (noting that it is improper to utilize the grand jury for discovery purposes); *see also supra* note 166 and accompanying text.

261. *See supra* notes 209–12 and accompanying text.

262. *See supra* notes 210–12 and accompanying text.

263. *See supra* notes 215–22 and accompanying text.

264. *See supra* notes 215–20 and accompanying text.

265. *See supra* note 184 and accompanying text.

266. *See supra* notes 225, 227–28, 246 and accompanying text.

267. *See supra* note 225 and accompanying text.

268. *See supra* notes 237, 243 and accompanying text.

"tactical" limitations on questioning would not bar admissibility of prior testimony.[269]

Finally, on rehearing, an en banc majority of the Second Circuit vacated the panel's decision and excluded the testimony.[270] It agreed with the government that there is no motive to examine exculpatory grand jury witnesses (1) whom the jurors themselves disbelieve, and (2) when the defendants' indictments are secure.[271] It also reasoned that the lower evidentiary burden at the grand jury makes the motive to challenge exculpatory testimony less "intense" than it would be at trial, and therefore not "similar."[272] The court credited the argument that the prosecution's desire to maintain the secrecy of information diminishes motive.[273]

The courts above considered several factors in applying Rule 804(b)(1)'s "similar motive" test to Bruno and DeMatteis's grand jury testimony: whether the testimony itself was credible, whether the nature of grand jury examinations precludes a finding of "similar motive," the power balance between the prosecution and the defense with respect to obtaining evidence in the grand jury, whether a "similar motive" ruling may be made as a matter of law, and whether the "similar motive" analysis encompasses strategic use of questioning. These issues reappear in the cases that follow.

2. The First Circuit: *United States v. Omar*

In *United States v. Omar*,[274] the defendants appealed from convictions for bank larceny, money laundering, and conspiracy.[275] The charges stemmed from the 1991 staged hijacking of a Brinks armored car, driven by one of the defendants, from which the defendants stole approximately $900,000.[276] The government's most damning evidence came from the trial testimony of Lee Najarian, who lived with a friend of defendant Sohiel Omar named Raymond Femino, and who testified that Omar brought a large trash bag full of cash to her and Femino's house on the night of the robbery.[277] She and Femino had run a trash hauling firm, and she testified that some of the stolen money had been deposited into the firm's account, out of which Omar directed her to write checks on his behalf.[278]

Najarian first testified before a grand jury in 1993 and, on that occasion, denied having any knowledge of the robbery or bank deposits.[279] Several months later, however, under a grant of immunity, Najarian gave testimony similar to that which she delivered at trial.[280] At a much earlier grand jury

269. *See supra* notes 238–43 and accompanying text.
270. *See supra* notes 244–45 and accompanying text.
271. *See supra* note 253 and accompanying text.
272. *See supra* notes 247–53 and accompanying text.
273. *See supra* note 254 and accompanying text.
274. 104 F.3d 519 (1st Cir. 1997).
275. *Id.* at 520.
276. *Id.*
277. *Id.* at 521.
278. *Id.*
279. *Id.*
280. *Id.*

session in 1991, before Najarian's damning testimony, Femino testified "for about 10 to 20 minutes" on various aspects of the case and "briefly but flatly denied receiving money from Omar" in any form.[281] Femino died in 1993 and was therefore unavailable to testify at trial.[282] To counter Najarian's testimony, the defendants sought to introduce Femino's 1991 grand jury testimony under Rule 804(b)(1).[283]

The district court excluded Femino's testimony, and the only question on appeal was whether the exclusion was error.[284] Case law from the U.S. Court of Appeals for the First Circuit had previously held that Rule 804(b)(1) did not apply to grand jury testimony.[285] The court conceded, however, that the Supreme Court, in *United States v. Salerno*, "all but held that Rule 804(b)(1) could embrace grand jury testimony."[286] Nonetheless, the court agreed with the government's general argument that "the prosecution ordinarily does *not* in a grand jury proceeding have the kind of motive to develop testimony that it would in an ordinary trial or that is required to meet the express test and rationale of Rule 804(b)(1)."[287] The court cited certain factors to support its position. First, trials are ordinarily "last chance" proceedings for both sides;[288] in the grand jury, by comparison, the government is often only seeking information as part of an investigation and neither aims to discredit, nor to vouch for, witnesses.[289] Second, because of the low burden that the government must meet at grand jury proceedings and the fact that the government calls its own witnesses and can call as many as it likes, discrediting individual grand jury witnesses is usually not essential, as it would be at trial.[290]

Applying the "similar motive" test to Femino's grand jury testimony, the First Circuit held that it was not admissible.[291] Because his examination took place so early in the investigation, long before Najarian offered testimony that directly contradicted Femino's, "the government had no meaningful opportunity to discredit Femino at the time."[292] Also, because other evidence already implicated the defendants at the time, and because Femino's exculpatory statements were a minor part of his overall testimony, the government "had no reason to fear that Femino's terse denials, if he

281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.* at 520.
285. *Id.* at 522–23; *see* United States v. Donlon, 909 F.2d 650, 653 (1st Cir. 1990).
286. *Omar*, 104 F.3d at 523 (citing *United States v. Salerno*, 505 U.S. 317, 325 (1992), remanding for a determination of whether grand jury testimony meets Rule 804(b)(1)'s "similar motive" requirement, implying that grand jury testimony is admissible under the rule).
287. *See id.*
288. *See id.* ("If a new trial later becomes necessary and the witness proves unavailable, it may be a fair guess that each side has already done at the original trial all that the party would do if the declarant were now present for a new trial.").
289. *Id.*
290. *Id.*
291. *Id.* at 523–24.
292. *See id.* at 523.

were not directly confronted, would lead the grand jury to refuse to indict."[293] The court reasoned that, because the indictment was not in jeopardy, the government lacked a motive to discredit the exculpatory testimony similar to the motive it would have at trial.[294] The court also stated that the government could have been trying to conceal information from Femino at the early stage of the investigation during which he was questioned, but the government did not make this argument.[295] Importantly, however, the court, in dicta, stated that, even if the prosecution had forgone questioning to preserve secrecy, this strategic withholding of information would contribute to a *lack* of motive to examine.[296]

The primary basis for this court's decision to exclude Femino's testimony was its finding that at the time of his examination, early in the investigation, the prosecution did not yet possess sufficient information with which to challenge his exculpatory testimony.[297] The court also, however, linked "motive" to the strategic considerations that influence grand jury examination and reasoned that, where it would make strategic sense for a prosecutor to forgo examination, the government in such cases lacks the motive necessary to meet "the express test and rationale of Rule 804(b)(1)."[298] Under this reasoning, unless the government has actually attacked exculpatory grand jury testimony, it would seem easy for a court to hold that it lacked the motive to do so.[299]

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293. *See id.* at 524.

294. *See id.*

295. *See id.* at 523–24.

296. *See id.* ("[I]t is arguable that the government had no meaningful opportunity to discredit Femino at the time. In any case, it certainly lacked any evident motive to do so. If the government had had Najarian's cooperation in 1991, it could well have preferred to keep it secret from Femino. The prosecutor might have wished to protect a key witness for the time being or to bargain later with Femino, armed with a perjury charge against him. Given the other evidence against the defendants, the government surely had no reason to fear that Femino's terse denials, if he were not directly confronted, would lead the grand jury to refuse to indict." (footnote omitted)).

297. *Id.* at 523; *see also supra* note 296.

298. *See Omar*, 104 F.3d at 523–24 ("Often, the government neither aims to discredit the witness [in the grand jury] nor to vouch for him. The prosecutor may want to secure a small piece of evidence as part of an ongoing investigation or to compel an answer by an unwilling witness or to "freeze" the position of an adverse witness. In particular, discrediting a grand jury witness is rarely essential, because the government has a modest burden of proof, selects its own witnesses, and can usually call more of them at its leisure."); *see also supra* note 296.

299. This is because the government could always argue that it was not sufficiently motivated to ask the questions that, under trial conditions, it would have asked; and, the court has, by implication, credited this argument. *See also* United States v. DiNapoli, 8 F.3d 909, 914 (2d Cir. 1993) ("In virtually all subsequent proceedings, examiners will be able to suggest lines of questioning that were not pursued at a prior proceeding. In almost every criminal case, the Government could probably point to some aspect of cross-examination . . . that could have been employed . . . at a prior grand jury proceeding.").

B. The District of Columbia, Sixth, and Ninth Circuits' Broad Admissibility Decisions

In the three cases that follow, the courts admitted exculpatory grand jury testimony against the government, reasoning, inter alia, that the prosecution had an adequate motive and opportunity to develop the unavailable witness's testimony at the grand jury.[300]

1. The District of Columbia Circuit: *United States v. Miller*

In *United States v. Miller*,[301] two defendants appealed their convictions for charges related to wire fraud.[302] They were in the business of providing collateral, in the form of certificates of deposit issued by the Commercial Bank of Djibouti, to entities seeking large commercial loans.[303] The Bank, however, was not properly registered under Djibouti's laws.[304] Part of the government's case depended on showing beyond a reasonable doubt that the defendants knew the certificates were worthless.[305] To do this, the prosecution emphasized, for instance, that certificates allegedly worth $17 million were found on the floor in an unlocked office owned by one of the defendants.[306] To refute such evidence, the defendants sought to call John S. Matarazzo, who was present when the defendants met with a representative of the Bank and supposedly received confirmation that the certificates were legitimate.[307] Matarazzo had testified before the grand jury earlier as a defense witness but asserted his privilege against self-incrimination when called at trial.[308] The defendants argued that Matarazzo was precluded from asserting his privilege under the U.S. Court of Appeals for the District of Columbia Circuit's *Ellis* rule,[309] and that his grand jury testimony should be admissible under Rule 804(b)(1).[310]

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300. *See* United States v. McFall, 558 F.3d 951, 963 (9th Cir. 2009); United States v. Foster, 128 F.3d 949, 955–56 (6th Cir. 1997); United States v. Miller, 904 F.2d 65, 68 (D.C. Cir. 1990).

301. 904 F.2d 65 (D.C. Cir. 1990).

302. *Id.* at 65.

303. *Id.* at 66.

304. *Id.*

305. *See id.* at 68.

306. *Id.* at 66, 68.

307. *Id.* at 66.

308. *Id.*

309. *Id.* at 66–67; *see also* Ellis v. United States, 416 F.2d 791, 800 (D.C. Cir. 1969). Under the *Ellis* rule, unique in the U.S. Court of Appeals for the District of Columbia Circuit at the time, a witness who knowingly waived his Fifth Amendment rights and testified in front of the grand jury was not eligible to later invoke those rights and refuse to testify at trial. *Ellis*, 416 F.2d at 800; *see also Miller*, 904 F.2d at 67. In *Miller*, the defendants argued that if Matarazzo had in fact waived his privilege when testifying before the grand jury, then it was error to allow him to refuse to testify at trial; or, in the alternative, if Matarazzo had not waived his privilege before the grand jury, then it was error to refuse to admit his grand jury testimony under Rule 804(b)(1). 904 F.2d at 66–67. The D.C. Circuit remanded to determine whether Matarazzo had knowingly waived his rights but held that either way the convictions were reversed. *Id.* at 67.

310. *Id.*

With little discussion, the court held that, barring a determination that Matarazzo was required to testify under the *Ellis* rule, his grand jury testimony should have been admitted.[311] The court concluded that the prosecution had the same motive to question Matarazzo before the grand jury as it did at trial.[312] This is because, "[b]efore the grand jury and at trial, Matarazzo's testimony was to be directed to the same issue—the guilt or innocence of [the defendants]."[313]

In discussing whether Matarazzo had knowingly waived his privilege before the grand jury as part of its *Ellis* analysis, the court noted that the government, which was the only party in a position to know what transpired at the grand jury proceeding, behaved in a self-serving and "somewhat disingenuous[]" manner in suggesting that Matarazzo had not waived his privilege.[314] The court also recognized that the prosecution's "contemptuous objection" to the defendant's request to introduce Matarazzo's grand jury testimony was "promptly endorsed" by the trial court.[315] The court's discussion on these points suggests that part of the basis for its holding may have been to right a perceived unfairness perpetrated against the defendants when the prosecution's overzealous behavior was endorsed by the trial court.[316] But, the court's primary reason for its holding—that, after examining Matarazzo's grand jury testimony, it could "see no reason why the government's position in the second proceeding would differ from the first"—was based not on concern for protecting the defendant, but on the fact that the prosecution had a demonstrated motive at the grand jury proceeding to attack Matarazzo's testimony.[317]

2. The Sixth Circuit: *United States v. Foster*

In *United States v. Foster*,[318] the defendant appealed from convictions related to cocaine possession and intent to distribute.[319] He was convicted on evidence that was largely circumstantial[320]—namely, records seized from his home indicating that he had made large cash purchases despite lacking a substantial source of income, and his presence in the home of

311. *Id.*
312. *Id.* at 68.
313. *Id.*
314. *See id.* at 67 ("The government, somewhat disingenuously in its brief to this court, claims the prosecutor 'conceded' before the district judge that Matarazzo had *not* waived his privilege. (Since the government was attempting to prevent Matarazzo's testimony at trial, that is an interesting use of the word 'conceded.') In fact, the prosecutor, who presumably was in a position to know what occurred, represented to the court below that 'there was not a waiver *as such*,' whatever that means.").
315. *See id.* at 68.
316. *See id.* at 67–68 (noting that the government's only argument against the admission of the grand jury testimony (which was endorsed by the trial court) was an overly formalistic argument that the issue was not properly preserved for appeal).
317. *See id.* at 68 & n.3.
318. 128 F.3d 949 (6th Cir. 1997).
319. *Id.* at 950.
320. *Id.* at 956.

another suspected drug trafficker, Timothy Williams, when Williams's home was searched and large amounts of money and cocaine were found.[321] Before the defendant, Charles H. Foster, was indicted, Williams testified before a grand jury under a grant of immunity on three separate occasions.[322] Each time, Williams claimed that Foster had not been involved in selling drugs and that Foster would not have been present in Williams's home had he known about Williams's narcotics activities.[323] Furthermore, "the government repeatedly made it clear to Williams that it believed he was lying and that his testimony could subject him to perjury charges."[324] After his indictment, Foster's attorney requested a copy of Williams's grand jury testimony.[325] The government did not provide it and told Foster's attorney only that Williams had "provided false exculpatory testimony" about Foster.[326]

Approximately three weeks before Foster's trial was to begin, the district court requested copies of Williams's grand jury testimony.[327] After guarding them for approximately two weeks, the court ordered the government to release the transcripts to Foster's attorney.[328] As soon as he received them, Foster's attorney subpoenaed Williams and learned that an Assistant U.S. Attorney allegedly told Williams he would revoke Williams's grant of immunity if Williams agreed to testify for Foster.[329] Once the trial began, Foster's attorney moved for a continuance, claiming that he had not received Williams's grand jury transcripts in time to subpoena Williams.[330] The district court determined, however, that Foster's attorney failed to exercise due diligence because he could have attempted to subpoena Williams as soon as the government informed him that Williams provided "false exculpatory testimony."[331] The district court refused to admit the grand jury testimony under Rule 804(b)(1) because it found that Williams was not "unavailable" where his absence was caused by a lack of diligence in procuring him.[332]

On appeal, Foster's attorney argued that the continuance should have been granted because governmental misconduct prevented him from subpoenaing Williams.[333] He also argued that the grand jury testimony should have been admitted under Rule 804(b)(1).[334] The U.S. Court of Appeals for the Sixth Circuit reasoned that the government had not behaved

321. *Id.* at 950–51.
322. *Id.* at 951.
323. *Id.*
324. *Id.* at 954.
325. *Id.* at 951.
326. *Id.* (internal quotation marks omitted).
327. *Id.*
328. *Id.*
329. *Id.* at 951–52.
330. *Id.* at 952.
331. *Id.* at 951–52, 955 (internal quotation marks omitted).
332. *Id.* at 952.
333. *Id.*
334. *Id.*

improperly by failing to turn over the grand jury transcripts sooner,[335] but that its conduct in "warning" Williams's attorney that Williams would be subject to prosecution if he testified was possibly an attempt to intimidate the witness.[336] The court reasoned that the district court, however, had waited too long to order the government to turn over the transcripts and that Foster's failure to subpoena Williams earlier was therefore not caused by a lack of due diligence.[337] The court also reasoned that the grand jury testimony should have been admitted because the government was able to "strenuously" question Williams before the grand jury, and "throughout [Williams's] testimony he continually asserted Foster's innocence even though he was repeatedly warned about the dangers of perjury and the risk of losing his immunity."[338]

The court noted that "the two factors which led the Second Circuit to reject finding that the prosecutor had a similar motive in *DiNapoli* are not present in this case": (1) Foster was indicted *after* Williams was questioned in the grand jury, and (2) there was no indication that the grand jurors as a whole did not believe Williams's testimony.[339] Although the court may seem to have applied a bright-line rule favoring the admissibility of exculpatory grand jury testimony against the government,[340] the court's method of analysis—comparing the circumstances of the grand jury proceeding in this case with those present in *DiNapoli*—suggests that it applied a presumption in favor of admissibility unless specific factors indicate that the testimony should not be admissible.[341] The circumstances of this case favored such a holding: the facts indicated both the importance of the witness's testimony—because the indictment had not yet been handed down—and the government's "strenuous" opposition to that testimony before the grand jury.[342] These are the same characteristics that would presumably govern the prosecution's attitude toward the testimony at trial.[343] It is also noteworthy that the court expressed disdain for the activities of the prosecution and the district court with respect to

335. *Id.* at n.2.
336. *See id.* at 954.
337. *See id.* at 955.
338. *Id.* & n.6.
339. *See id.* at 956 n.7; United States v. DiNapoli, 8 F.3d 909, 914–15 (2d Cir. 1993); *see also supra* note 253 and accompanying text.
340. See, for example, the court's reading of the holding in *Miller*: "Three Circuits have suggested and the District of Columbia Circuit has affirmatively ruled that the government has the same motive to develop a witness' testimony during a grand jury proceeding as it does at trial." *Foster*, 128 F.3d at 955 (citing United States v. Miller, 904 F.2d 65, 68 (D.C. Cir. 1990)).
341. Those specific factors are the ones present in *DiNapoli*: that the grand jurors discredited the grand jury testimony, and that the defendant had already been indicted by the time the exculpatory grand jury testimony was recorded. *Id.* at 956 n.7 (citing United States v. DiNapoli, 8 F.3d 909, 914–15 (2d Cir. 1993)).
342. *See id.* at 951, 955.
343. *See, e.g.*, United States v. Omar, 104 F.3d 519, 523 (1st Cir. 1997) (comparing the stakes of trial proceedings with those of grand jury proceedings); *see also supra* notes 288–90 and accompanying text.

withholding information from the defense.[344] It suggests that part of the reason for the court's holding was to right a wrong that it believed had been committed against the defendant.[345]

3. The Ninth Circuit: *United States v. McFall*

Monte D. McFall, a California lobbyist, appealed from convictions related to extortion, honest services mail fraud, and witness tampering.[346] One of the charges concerned an alleged scheme to extort money from a company called Digital Angel that manufactured electronic tracking devices.[347] California's Office of Criminal Justice Planning (OCJP) awarded a large grant to Digital Angel to fund a pilot project using its tracking devices.[348] McFall and Neat Allen Sawyer, Chief Deputy Director of the OCJP, met with an official for the company and allegedly promised that more money would be forthcoming if, and only if, Digital Angel paid a $100,000 consulting fee to a company owned by McFall.[349]

Sawyer was eventually indicted and pled guilty to one count of honest services mail fraud.[350] As part of his plea agreement, he agreed to cooperate with the government "with respect to its investigations and prosecutions of public corruption in the Eastern District of California and elsewhere."[351] Prior to his indictment, however, Sawyer appeared before a grand jury and testified at length about the events involving Digital Angel.[352] He called the charge that he and McFall had attempted to extort Digital Angel "ridiculous," and he maintained the same version of the story later in his post-plea debriefing.[353]

At McFall's trial, the government declined to call Sawyer as a witness despite its authority to do so pursuant to his plea agreement.[354] When McFall called him as a witness, Sawyer invoked his privilege against self-incrimination.[355] Consequently, McFall sought to introduce Sawyer's grand jury testimony under Rule 804(b)(1).[356] The district court excluded the testimony, however, citing concerns about unfair prejudice to the government and concluding that the prosecution lacked an adequate motive to examine Sawyer before the grand jury.[357] In support of its conclusion,

344. *See Foster*, 128 F.3d at 952 n.2.
345. *But cf.* United States v. Salerno, 505 U.S. 317, 326 (1992) (Blackmun, J., concurring) (arguing that the "similar motive" analysis in a given case should not express a policy favoring either the defendant or the government, but should "reflect[] narrow concerns of ensuring the reliability of evidence").
346. United States v. McFall, 558 F.3d 951, 953 (9th Cir. 2009).
347. *Id.* at 955.
348. *Id.*
349. *See id.* at 953, 955.
350. *Id.* at 954.
351. *Id.* (internal quotation marks omitted).
352. *Id.* at 960–61.
353. *See id.* at 961 (internal quotation marks omitted).
354. *Id.* at 964.
355. *Id.* at 961.
356. *Id.*
357. *See id.* at 960.

the district court cited several key findings, among them the following: (1) the grand jury proceeding was fact-finding in nature, not adversarial, "notwithstanding the fact that the government's attorneys *did in fact question* Mr. Sawyer"; (2) "the motive for obtaining Mr. Sawyer's testimony . . . was completely different from what it would be" at trial; and (3) Sawyer was the subject of a perjury indictment resulting from his testimony before the grand jury.[358] On appeal, the government argued, inter alia, that Sawyer's grand jury testimony should not have been admitted because it was misleading.[359]

The U.S. Court of Appeals for the Ninth Circuit began its analysis by noting the circuit split concerning the appropriate "level of generality" at which to compare grand jury and trial motive for purposes of Rule 804(b)(1).[360] The *Miller* court used "a high level of generality," where motive to merely show the guilt or innocence of the defendant at both proceedings would be sufficient.[361] McFall argued that Sawyer's testimony should be admissible under the *Miller* test because "the government's primary goal in questioning Sawyer before the grand jury was to incriminate McFall," the "same" motive it would have at trial.[362] The *DiNapoli* court, in contrast, compared motives at "a fine-grained level of particularity" and required "a substantially similar *degree of interest* in prevailing" at both proceedings.[363] The Ninth Circuit noted that the prosecution's motive in examining Sawyer before the grand jury was "likely not as intense as it would have been at trial," but that requiring an "identical quantum of motivation" violates the plain language of Rule 804(b)(1).[364] Because the prosecution's "fundamental objective" in examining Sawyer before the grand jury was to elicit testimony damaging to McFall—the same motive that the prosecution would hypothetically have at trial—the court concluded that Rule 804(b)(1)'s "similar motive" test had been met, and Sawyer's testimony should have been admitted.[365] The court distinguished its facts from those in *DiNapoli*: Although McFall had already been indicted, the final superseding indictment against him was not obtained until after Sawyer was questioned, and, the nature of the relevant charge against McFall—conspiracy to extort—provided prosecutors questioning Sawyer with ample opportunity to develop testimony incriminating McFall, despite the existing indictment.[366]

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358. *Id.* at 961–62 (emphasis added).
359. *See id.* at 964 n.11.
360. *Id.* at 962.
361. *Id.* (citing United States v. Miller, 904 F.2d 65, 68 (D.C. Cir. 1990)).
362. *Id.*
363. *Id.* (quoting United States v. DiNapoli, 8 F.3d 909, 912 (2d Cir. 1993)) (internal quotation marks omitted).
364. *Id.* at 963 ("As one of the dissenters in *DiNapoli* . . . noted, the requirement of similar 'intensity' of motivation conflicts with the rule's plain language, which requires 'similar' but not identical motivation." (citing United States v. DiNapoli, 8 F.3d 909, 916 (2d Cir. 1993) (Pratt, J., dissenting))); *see also supra* notes 255–60 and accompanying text.
365. *McFall*, 558 F.3d at 963.
366. *Id.*

Finally, the court reasoned on policy grounds that Sawyer's testimony should have been admitted because, due to Sawyer's plea agreement, he was only "unavailable" to McFall.[367] The government could have required him to testify at any time.[368] It also reasoned that the government's motion for a downward sentencing departure at Sawyer's sentencing hearing, implying its endorsement of Sawyer's post-plea cooperation—including his continued denial of McFall's wrongdoing with respect to Digital Angel—undercut the government's contention that Sawyer's grand jury testimony was "unreliable and misleading."[369]

The Ninth Circuit's holding was based primarily on comparison of the prosecution's examination of Sawyer before the grand jury with the examination it would hypothetically wish to conduct at trial.[370] The court eschewed *DiNapoli*'s "intensity" inquiry[371] and rejected the district court's suggestion that the *type* of proceeding itself—fact-finding as opposed to adversarial—precluded a finding of "similar motive" regardless of the questioning that actually took place.[372] The court's discussion of possible prosecutorial disingenuousness regarding the truthfulness of Sawyer's testimony, however, suggests that it may itself have judged whether Sawyer was telling the truth and desired to check prosecutorial misconduct.[373]

III. ANALYSIS OF DECISIONS AND PROPOSED RESOLUTION

The cases described above exemplify recent jurisprudence concerning the admission of grand jury testimony against the government under Rule 804(b)(1). In these cases, courts reached their holdings after analyzing a common set of recurring factors. Some of them are the same factors upon which holdings pertaining to the admissibility of preliminary hearing testimony against defendants, discussed in Part I.D.2.b.i, are based. For both grand jury and preliminary hearing proceedings, specific characteristics of the proceedings themselves deter attorneys from examining witnesses in as complete a manner as they would at trial.[374] Yet, where grand jury examinations are concerned, courts have been willing to respect that prosecutors' strategic decisions to limit questioning should count against a finding of "similar motive" and thus bar admission of grand jury testimony.[375] In contrast, courts have been less likely to view defense attorneys' similar choices to limit questioning as a bar to admitting preliminary hearing testimony. This Note argues that the strategic factors—which were illustrated in the principal cases above, and upon which the difference in admissibility holdings between grand jury and preliminary

367. *Id.* at 964.
368. *Id.*
369. *Id.* at n.11.
370. *See id.* at 963.
371. *See id.*
372. *Id.* at 961–62.
373. *See id.* at 964 n.11.
374. *See supra* Part I.D.2.b.i.
375. *See supra* Part I.D.2.b.i.

hearing testimony is based—should not be considered in the Rule 804(b)(1) analysis. Likewise, neither generalized policy concerns nor favoritism for the government or the defendant should affect the Rule 804(b)(1) admissibility determination.

Part III.A discusses the holdings in the principle cases from Part II and distills from them a set of factors that the courts considered in their admissibility determinations. This Part analyzes the case holdings and the decisive factors in light of the evidentiary purposes of Rule 804(b)(1) and divides the factors into two categories—those which should legitimately be considered in the "similar motive" analysis and those which should not. Part III.B proposes an objective test for "similar motive" at the grand jury that is designed to avoid the factors that are beyond the scope of Rule 804(b)(1).

A. Analysis of Circuit Court Decisions

In evidentiary terms, Rule 804(b)(1) balances the fairness of admitting testimony against a party with the necessity of providing as much information as possible to the fact-finder.[376] Under the liberalized hearsay rules embodied in the Federal Rules of Evidence, the common law's formalistic tests for assuring that the opposing party conducted substantially the same cross-examination at the prior proceeding that it would conduct at trial have given way to more flexible admissibility requirements.[377] Rather than focus on "identity of parties" and "identity of issues," the drafters of the Federal Rules of Evidence centered the admissibility inquiry on the interests of the parties involved, and hence on the "motive" for examination.[378] In this way, they broadened the meaning of fairness to litigants[379] and also satisfied necessity concerns by creating a test that admits a potentially greater range of prior testimony hearsay than would have been admissible at the common law.[380] Nonetheless, the purpose of the exception remains to admit prior testimony only when the opposing party's "opportunity" to examine the witness at the prior proceeding was similar enough to the opportunity it would have at trial to merit holding the party to the prior testimony.[381] The rule's "opportunity" element thus guards against parties being able to determine what testimony may later be admitted against them by strategically limiting prior proceeding questioning.[382] Given these considerations, it is clear that no bright-line test could ever be applied to admit or exclude all grand jury or preliminary hearing testimony.[383] It is also clear that both the narrow and broad

376. *See supra* Part I.C.1.
377. *See supra* Part I.C.2–3.
378. *See supra* Part I.C.3.b.
379. The drafters did this by supplanting the common law test—under which similarity of issues and privity relationships stood in as proxies for the interests of parties—with a test that inquires into the parties' interests or motivations themselves. *See supra* Part I.C.
380. *See supra* notes 107–08 and accompanying text; *see also supra* Part I.C.2–3.
381. *See supra* Part I.D.2.a.
382. *See supra* Part I.D.2.a.
383. *See supra* text accompanying note 228.

interpretations of Rule 804(b)(1)'s "similar motive" requirement, discussed in Part II, fall short of fulfilling the evidentiary purposes of the exception.

1. The Narrow Admissibility Decisions

Although they do not adhere to a bright-line rule, the Second and First Circuits utilize a test under which exculpatory grand jury testimony would almost never be admissible against the government.[384] The Second Circuit's test considers "whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue."[385] The First Circuit, in comparison, expresses concern that the very nature of grand jury proceedings provides little incentive for the government to examine exculpatory witnesses with a motive "similar" to that which would be present under trial conditions; therefore, grand jury testimony can almost never satisfy "the express test and rationale of Rule 804(b)(1)."[386] Both of these positions bear an essential flaw.

By requiring the opposing party to show an interest of comparable "intensity" to disprove the witness's testimony at the prior proceeding, the Second Circuit's test adds a stringency that Rule 804(b)(1)'s plain language does not support.[387] As Justice Blackmun argued in his *United States v. Salerno* concurrence, "'similar motive' does not mean 'identical motive.'"[388] By looking for a quantum of motivation that substantially matches the quantum present at trial, the Second Circuit effectively collapses Rule 804(b)(1)'s test into one that looks for the *same* motivation. The government could always argue that, given whatever circumstances prevailed at a particular grand jury proceeding, its motive to examine the witness was not as intense as its motive at trial.[389] From a pure policy perspective, this argument might be difficult to refute because witnesses are examined in front of grand juries under a wide array of circumstances, many of which provide little incentive for aggressive challenges to exculpatory testimony.[390] Under the evidentiary rule as it stands, however, the test requires "similar," not the "same," motivation.[391] To read the rule looking for the same quantum of motivation at both proceedings harks back to the common law's excessively formalistic requirements that ensured the strictest fairness to the opposing party, but at the expense of necessity to fact-finders.[392] Such a reading of the rule ignores the liberalizing tendency

384. *See* United States v. Omar, 104 F.3d 519, 523 (1st Cir. 1997); United States v. DiNapoli, 8 F.3d 909, 914–15 (2d Cir. 1993); *see also supra* Part II.A.

385. *See DiNapoli*, 8 F.3d at 914–15; *see also supra* Part II.A.1.d.

386. *See Omar*, 104 F.3d at 523; *see also supra* note 298 and accompanying text.

387. *See, e.g.*, United States v. McFall, 558 F.3d 951, 963 (9th Cir. 2009) (reasoning, in criticism of the *DiNapoli* opinion, that "Rule 804(b)(1) does not require an identical quantum of motivation").

388. United States v. Salerno, 505 U.S. 317, 326 (1992) (Blackmun, J., concurring).

389. *See supra* note 299 and accompanying text.

390. *See supra* Part I.D.2.b.i.

391. FED. R. EVID. 804(b)(1); *see also supra* text accompanying note 228.

392. *See supra* Part I.C.2.

of the Federal Rules of Evidence.[393] Furthermore, with respect to grand jury testimony, the "same motive" test is one that could likely only be met where the indictment was in doubt such that the prosecution felt compelled to actively discredit, rather than sidestep, unexpected exculpatory statements.[394] Because this is not often the case, requiring the prosecution to have had the "same motive" would almost always result in exculpatory testimony developed before the grand jury being inadmissible at trial.

The decision in *United States v. Omar*[395] provides a rich context for discussing how strategic concerns bear on "motive." In this case, the First Circuit ruled against admission of exculpatory grand jury testimony on generalized reasoning that the grand jury proceeding itself does not create a motive sufficient for prosecutors to examine exculpatory witnesses.[396] This reasoning ignores that Rule 804(b)(1) was designed to admit prior testimony that meets certain guarantees of fairness and reliability without regard for the type of proceeding at which the declarant testified.[397] The internal logic of the rule suggests that the admissibility inquiry in a given case should focus on whether the prior testimony has met the "similar motive" standard of the rule, not on the pressures common to proceedings of a certain type. By allowing the "similar motive" inquiry to be colored by the strategic choices that prosecutors commonly make at grand jury proceedings, the court ensured strict fairness to the prosecution, but it failed to account for the "necessity" concerns that Rule 804(b)(1) also embodies.[398] In other words, the court's reasoning that prosecutors conducting grand jury examinations ordinarily do not have the motive necessary to meet "the express test and rationale of Rule 804(b)(1)"[399] ignores that Rule 804(b)(1) requires "similar"—not "same"—motive,[400] and that in doing so the rule satisfies the "necessity" concern as well as the "fairness" concern.

The First Circuit also ignored a fundamental principle of the prior testimony admissibility inquiry: a party's strategic choices during questioning should not influence the court's admissibility determination where a meaningful opportunity to develop the testimony was otherwise present.[401] In effect, the court reasoned that because it makes sense, strategically, for prosecutors to forgo lines of questioning at grand jury proceedings to preserve the secrecy of information, prosecutors will rarely have a motive to attack witness testimony at the grand jury that is "similar" to the motive they would have at trial, where they have no secrets to preserve.[402] This may be true—and, as a result, it might make sense from a

393. *See supra* Part I.C.3.
394. *Cf.* text accompanying note 290.
395. 104 F.3d 519 (1st Cir. 1997).
396. *See supra* Part II.A.2.
397. *See supra* notes 82–84 and accompanying text.
398. *See supra* Part I.C.1.
399. *Omar*, 104 F.3d at 523.
400. *See supra* note 228 and accompanying text.
401. *See supra* Part I.D.2.a; *see also supra* notes 230–34 and accompanying text.
402. *See Omar*, 104 F.3d at 523.

policy perspective to exclude all exculpatory grand jury testimony offered against the government.[403] But, in evidentiary terms, the rule is not concerned with generalized policy considerations beyond balancing fairness to litigants with the necessity of information for fact-finders.[404] Also, the rule's "opportunity" test stands as a reminder that attorneys examining witnesses should not be able to control, through their strategic decisions, the later admissibility of statements under the hearsay exception for prior testimony if the witness becomes unavailable.[405]

Neither the common law hearsay exception for prior testimony nor the Federal Rule as enacted by Congress emphasized the type of proceeding at which the declarant testified.[406] As the exception developed, it was liberalized to admit more evidence at trial, as long as that evidence met the rule's standard of reliability based on the *opportunity* for examination.[407] The inherent power that the prosecution has in conducting grand jury investigations[408] means that when applying Rule 804(b)(1) to grand jury testimony offered against the government, courts must be especially vigilant to prevent prosecutorial control of the proceeding from influencing the later admissibility of the testimony. Just because a prosecutor conducting a grand jury investigation might have the luxury of not challenging exculpatory testimony does not mean there was no "motive" to do so.[409] By taking strategy into account when determining whether a prosecutor had adequate motive to examine a grand jury witness, the Second and First Circuits have allowed the "similar motive" analysis to stray from the narrow evidentiary purposes of the rule and have instituted a policy favoring the government's interests with respect to exculpatory grand jury testimony.

2. The Broad Admissibility Decisions

Unlike the Second and First Circuits, the District of Columbia, Sixth, and Ninth Circuits have created a presumption of admissibility against the government for exculpatory grand jury testimony based on the fact that at both proceedings the government is adverse to any testimony exculpating the subject of its grand jury investigation.[410] The Sixth and Ninth Circuits, which had the benefit of comparing their cases with *United States v. DiNapoli*,[411] each noted that the particular facts upon which the *DiNapoli*

403. *See supra* Part I.D.2.b.i. *Compare supra* text accompanying note 233 *with supra* note 167 and accompanying text.

404. *See supra* Part I.C.1; *see also supra* note 225 and accompanying text.

405. *See supra* Part I.D.2.a.

406. *See supra* notes 82–84, 109 and accompanying text.

407. *See supra* Part I.C.2–3.

408. *See supra* notes 157–65, 218 and accompanying text.

409. *See supra* notes 230–34 and accompanying text.

410. *See* United States v. McFall, 558 F.3d 951, 963 (9th Cir. 2009); United States v. Foster, 128 F.3d 949, 955–56 (6th Cir. 1997); United States v. Miller, 904 F.2d 65, 68 (D.C. Cir. 1990).

411. 8 F.3d 909 (2d Cir. 1993).

court relied were not present in their cases.[412] Specifically, the final indictment had not yet been handed down at the time of questioning, and the grand jurors had not taken the unusual step of informing the prosecution that they did not believe the witnesses' exculpatory testimony.[413] The comparison with *DiNapoli*'s facts suggests that the Sixth and Ninth Circuits employed a presumption of admissibility based upon prosecutorial adversity (from *Miller*[414]) that could be overcome in circumstances such as those present in *DiNapoli*. In other words, these courts employed a test where grand jury testimony is presumed to be admissible against the government unless rather rare circumstances prevailed at the grand jury.

This rule is inadequate because it does not place enough emphasis on whether the prosecution actually had a "similar motive," in evidentiary terms, to examine the testimony of a grand jury witness. Instead, it focuses only on whether the prosecution would have been adverse to the witness's testimony at the time it was delivered.[415] Admitting grand jury testimony against the government under such a loose standard might go a long way toward countering the prosecution's inherently greater power with respect to developing evidence in the grand jury;[416] but, as the Supreme Court has held, an interpretation of Rule 804(b)(1) that bypasses its evidentiary requirements in the interest of evening the odds for the defense violates the fundamental character of the Federal Rules of Evidence.[417] Subscribing to the factual inquiry that the rule calls for, one must concede that, strategic concerns aside, there will be times when the prosecution does not have an adequate motive to develop some aspect of a grand jury witness's exculpatory testimony, even though the prosecution might meet a minimal standard of adversity at the time of the questioning. So, a line of holdings that presumes exculpatory grand jury testimony is admissible against the government except under rather rare circumstances, such as those in *DiNapoli*, violates the scheme for admissibility set out in the Federal Rules of Evidence.[418]

3. Analysis of Deciding Factors

The case holdings discussed above, along with the decisions admitting preliminary hearing testimony against defendants discussed generally in Part I.D.2.b.i, were based on courts' analyses of a set of factors which appeared in some or all of the cases and dissenting opinions. They are as follows:

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412. *See McFall*, 558 F.3d at 963; *Foster*, 128 F.3d at 956 n.7.

413. *Cf. DiNapoli*, 8 F.3d at 915.

414. *See Miller*, 904 F.2d at 68; *see also supra* text accompanying notes 311–13.

415. *See, e.g.*, *McFall*, 558 F.3d at 962–63 ("The *Miller* Court concluded that '[b]efore the grand jury and at trial' the testimony of an unavailable co-conspirator 'was to be directed to the same issue—the guilt or innocence' of the defendants, and thus, the government's motives were sufficiently similar. . . . On balance, we agree with the D.C. Circuit's elaboration of the 'similar motive' test . . . .").

416. *See supra* notes 157–65, 218 and accompanying text.

417. *See supra* Part II.A.1.b.

418. *See supra* Part II.A.1.b.

1. Whether, with regard to the specific issue for which the testimony was offered at trial, the prosecution or defense had enough information at the time the witness was questioned to challenge the testimony.[419]
2. Whether the examination conducted by the prosecution or defense revealed a motive to challenge the testimony, even if the challenge was not as aggressive or as complete as it would have been at trial.[420]
3. Whether the prosecution or defense limited questioning on a specific issue to maintain the secrecy of information.[421]
4. Whether the characteristics inherent in the proceeding at which the declarant testified—such as the low probable cause burden or the non-adversarial nature of the proceeding—acted to limit the questioning of witnesses.[422]
5. Whether, in a grand jury proceeding, the indictment was secure, or whether, in a preliminary hearing proceeding, the defense had a reasonable chance of overcoming the prosecution's burden of probable cause.[423]
6. Whether the government, the defendant, or the lower court behaved disingenuously or overzealously, and whether admitting or excluding prior testimony would seem to redress the behavior.[424]
7. Whether the declarant was only "unavailable" to the defendant, such that admitting the prior testimony would not prejudice the government.[425]
8. Whether recognizing the government's inherently more powerful position with respect to obtaining evidence in the grand jury encourages a policy of admitting grand jury testimony against the government.[426]

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419. *See* United States v. Salerno, 505 U.S. 317, 326–32 (1992) (Stevens, J., dissenting); *McFall*, 558 F.3d at 963; *Miller*, 904 F.2d at 68 & n.3; *see also supra* notes 230–32, 312–13, 317, 365 and accompanying text.

420. *See Salerno*, 505 U.S. at 326–32 (1992) (Stevens, J., dissenting); *McFall*, 558 F.3d at 963; United States v. Omar, 104 F.3d 519, 523 (1st Cir. 1997); United States v. Foster, 128 F.3d 949, 955 & n.6 (6th Cir. 1997); *Salerno II*, 974 F.2d 231, 240–41 (2d Cir. 1992), *vacated en banc sub nom.* United States v. DiNapoli, 8 F.3d 909 (2d Cir. 1993); *Miller*, 904 F.2d at 68 & n.3; *see also supra* notes 230–32, 237, 292, 297, 312–13, 317, 338, 364–65, 370 and accompanying text.

421. *See Salerno*, 505 U.S. at 329–30 (Stevens, J., dissenting); *Omar*, 104 F.3d at 523–24; United States v. DiNapoli, 8 F.3d 909, 915 (2d Cir. 1993); *see also supra* notes 233–34, 254, 295–96 and accompanying text.

422. *See Salerno*, 505 U.S. at 325–26 (Blackmun, J., concurring); *McFall*, 558 F.3d at 961–62; *Omar*, 104 F.3d at 523–24; *DiNapoli*, 8 F.3d at 912–15; *Salerno I*, 937 F.2d 797, 806 (2d Cir. 1991), *rev'd*, 505 U.S. 317 (1992); *see also supra* notes 211–12, 227–28, 247–51, 287–90, 298, 358 and accompanying text.

423. *See McFall*, 558 F.3d at 963; *Omar*, 104 F.3d at 524; *Foster*, 128 F.3d at 956 n.7; *DiNapoli*, 8 F.3d at 915; *see also supra* notes 253, 293–94, 339, 366 and accompanying text.

424. *See Foster*, 128 F.3d at 952 & n.2, 954–55; *Salerno I*, 937 F.2d at 807; *Miller*, 904 F.2d at 67–68; *see also supra* notes 221–22, 314–16, 335–37, 344–45 and accompanying text.

425. *See McFall*, 558 F.3d at 964; *Salerno I*, 937 F.2d at 806–07; *see also supra* notes 215–17, 367–68 and accompanying text.

426. *See Salerno*, 505 U.S. at 326 (Blackmun, J., concurring); *Salerno I*, 937 F.2d at 806–07; *see also supra* notes 215–20, 229 and accompanying text.

9. Whether the court believed the prior testimony was truthful.[427]

These factors may be divided into two categories, those that may legitimately be considered as part of the "similar motive" analysis given the history and evidentiary purposes of Rule 804(b)(1), and those that are beyond the scope of the rule and should not affect admissibility decisions. Of the factors listed, only the first two are a legitimate subject of the "similar motive" inquiry. They alone adhere to the evidentiary purposes of Rule 804(b)(1) and bear on "motive" to examine at a prior proceeding without introducing strategy, policy, favoritism, or impermissible judicial discretion into the analysis. Factors (3)–(5) are each relevant to a discussion of whether the prosecution, before the grand jury, or the defense, in the preliminary hearing, would have felt an incentive to examine its witness with the same "intensity" as it might at trial. But these factors are not relevant to whether the bare "motive" to examine, for purposes of the hearsay exception, existed.[428] Factors (6)–(8) concern issues of policy which are beyond the narrow evidentiary scope of the Federal Rules of Evidence in general, and Rule 804(b)(1) in particular. Finally, factor (9), which concerns whether the court believes that the prior testimony should be admitted or excluded on the basis of its perceived truthfulness,[429] violates the intent of the advisory committee that judicial discretion should not play a role in the hearsay admissibility analysis.[430]

B. Proposed Resolution

As courts and commentators have noted, neither the Federal Rules themselves nor the Supreme Court's opinions definitively state what kind of test courts should use in determining whether a "similar motive" exists for purposes of Rule 804(b)(1).[431] The Rules' drafters purposely avoided boxing courts into a rigid inquiry that might detract from a case-by-case analysis.[432] The fact that courts have employed differing admissibility standards for grand jury testimony offered against the government suggests, however, that a uniform "similar motive" test for grand jury testimony might be needed. This test should avoid anything approaching a bright-line rule, and it should prevent strategic use of questioning, policy considerations, favoritism, or judicial discretion from influencing the admissibility determination.

On remand from the Supreme Court's decision in *United States v. Salerno*, the Second Circuit panel employed a two-step "reasonable examiner" test that suggests a solution.[433] Because the admissibility

427. *See McFall*, 558 F.3d at 961–62, 964 n.11; *DiNapoli*, 8 F.3d at 916 (Pratt, J., dissenting); *Salerno I*, 937 F.2d at 806; *see also supra* notes 210, 212, 258–59, 358, 369, 373 and accompanying text.

428. *See supra* notes 233–34 and accompanying text.

429. *See, e.g.*, *supra* notes 203, 210, 212 and accompanying text.

430. *See supra* notes 95–96 and accompanying text.

431. *See supra* Parts I.D.2.b, II.A.1.b.

432. *See supra* notes 140–41 and accompanying text.

433. *See supra* Part II.A.1.c.

inquiry for prior testimony concerns whether it is fair to hold a party to testimony that was developed in a previous proceeding, and it is only fair to do so when the opposing party had an adequate opportunity to develop the testimony by examination or cross-examination,[434] the first step in the admissibility inquiry should be for the court to look at the examination that the prosecution actually conducted before the grand jury.[435] If the prosecution conducted even a limited examination designed to discredit the exculpatory testimony with regard to the issues now relevant at trial, it should be very difficult for the government to argue that it lacked a motive to do so.[436]

It is not enough, however, to stop with an inquiry into the extent of examination that the prosecution actually conducted.[437] Rule 804(b)(1) admits testimony where the opportunity and motive to develop it existed, not merely where an actual examination or cross-examination took place.[438] This aspect of admissibility assures that strategic considerations, which might counsel an attorney against conducting as thorough an examination at the prior proceeding as he or she would conduct at trial, do not influence the later admissibility of the evidence.[439] Therefore, where the initial inquiry into the questioning that was actually conducted before the grand jury reveals that something short of sufficient examination on the material issues occurred, the second step is for the court to determine whether a "similar motive" would have existed for examination, despite the lack of actual questioning on the material issues.[440]

This is a difficult inquiry that goes to the heart of what it means for the prosecution to have a "similar motive" at the grand jury proceeding. As Professor Michael Martin has explained, referring to the substantially similar admissibility test promulgated by the Supreme Court in its initial version of Rule 804(b)(1),[441]

> [T]he objective of the motive and interest test is to determine whether there is any significant reason why facts relevant to the present inquiry . . . would not have been elicited at the prior hearing. A "significant reason" for these purposes would be one which would affect the conduct of the examination by a reasonable attorney in the same circumstances. It is unfair to hold a party to the former examination if no reasonable attorney would be expected to have elicited the now-relevant facts; but if the circumstances were such that those facts could have been brought out if they were available, the present opponent can fairly be held.[442]

With respect to grand jury testimony, strategic use of questioning is one of the primary reasons why reasonable prosecutors do not elicit facts. This

434. *See supra* Part I.B.
435. *See supra* Part II.A.1.c.
436. *See supra* Parts I.D.2.a, I.D.2.b.ii; *see also* cases cited *supra* note 420.
437. *See supra* Part I.D.2.a.
438. *See supra* Part I.D.2.a.
439. *See supra* Part I.D.2.a.
440. *See supra* Part II.A.1.c.
441. *See supra* notes 100–01 and accompanying text.
442. Martin, *supra* note 4, at 558–59.

Note argues, however, that strategic considerations are not "significant" within the evidentiary scope of Rule 804(b)(1); hence, the "reasonable attorney" test should not consider a prosecutor's motive for examination at the grand jury to be diminished when questioning was limited because of prosecutorial strategy. A refinement of the reasonable attorney test is needed that can determine whether a motive existed to elicit now-relevant facts, but that avoids taking into consideration such things as strategic limitation of questioning, policies favoring either the prosecution or the defense, or judicial determinations concerning the merit of prior testimony.

In his Second Circuit panel opinion on remand from the Supreme Court in *United States v. Salerno*, Judge Pratt reasoned that, if the inquiry into whether the prosecution actually conducted a similarly motivated grand jury examination on the material issues is inconclusive, then the second step is for the court to objectively determine "whether a reasonable examiner under the circumstances would have had a similar motive to examine the witness."[443] The purpose of this inquiry is to ensure "that the failure to vigorously examine the witness—*for tactical reasons or otherwise*—does not insulate the prior testimony from admission."[444] So, in the test put forward by the Second Circuit panel, the reasonableness determination, at least in the abstract,[445] does not consider the strategic choices that actual prosecutors are likely to make. The "similar motive" test for grand jury testimony offered against the government could thus be restated as follows: Considering the scope of the investigation and the information available to the prosecution at the time of questioning, the court should determine whether a reasonable prosecutor would have had a motive to challenge the testimony with respect to the issues now relevant at trial, regardless of whether any such challenge was forgone for strategic reasons or otherwise. Alternatively, the test could be stated: Considering the scope of the investigation and the information available to the prosecution at the time of questioning, the court should determine whether a reasonable prosecutor, proceeding as if the witness were testifying at trial, would have had a motive to discredit the exculpatory testimony.

Professor Glen Weissenberger has noted that "[t]he critical issue raised by Rule 804(b)(1) is whether to admit the evidence or completely sacrifice the testimony of the [declarant]; consequently, only genuinely dissimilar motives should result in exclusion."[446] This understanding of Rule 804(b)(1) highlights the fact that the rule's evidentiary function is to provide needed information to fact-finders, and not merely to ensure strict fairness to litigants.[447] In many grand jury situations, a prosecutor's motive to develop exculpatory testimony, although not as "intense" as it might be

443. *Salerno II*, 974 F.2d 231, 239 (2d Cir. 1992), *vacated en banc sub nom.* United States v. DiNapoli, 8 F.3d 909 (2d Cir. 1993); *see also supra* Part II.A.1.c.

444. *Salerno II*, 974 F.2d at 239; *see also supra* Part II.A.1.c.

445. The court did not clearly apply the test to its facts. *See supra* note 243 and accompanying text.

446. Weissenberger, *supra* note 35, at 1102.

447. *See supra* Part I.C.1.

at trial, would nonetheless not be "genuinely dissimilar" from the motive the prosecution would have at trial.[448] Rather, it is simply that a low burden and the nature of prosecutorial power in the grand jury leave the prosecution with no urgent need to exercise its "motive."[449] If strategic considerations brought on by grand jury conditions were eliminated from the "similar motive" test, Rule 804(b)(1)'s evidentiary purpose could be better served by providing more information to the fact-finder without sacrificing essential fairness to the government. After all, "[w]here [a] party forgoes cross-examination, it is not unfair to make him or her suffer the consequences."[450] Furthermore, where the prosecution has obtained grand jury testimony by granting immunity to the witness, it is foreseeable that the witness might become "unavailable" at trial if immunity is not extended, and, consequently, the grand jury testimony might be admissible pursuant to Rule 804(b)(1). In the parallel situation concerning preliminary hearing testimony, it has been suggested that the defense might have a "motive" to cross-examine a preliminary hearing witness simply because it is aware that the testimony might become admissible if the witness is "unavailable" at trial.[451] If that is so, might not the prosecution have a "motive" to examine an exculpatory grand jury witness to whom the government has granted immunity simply because it understands that the witness is likely to become "unavailable" if immunity is not extended to the trial?[452]

As it generally stands, there is a discontinuity between admissibility determinations for preliminary hearing and grand jury testimony under Rule 804(b)(1).[453] The "reasonable examiner" test above, which does not take into account the strategic decisions of examiners, seems already to be applied by courts to preliminary hearing testimony that is offered against the defendant.[454] But, in situations where exculpatory grand jury testimony is offered against the government, courts have allowed prosecutors' strategic choices to influence the admissibility determination, and some have even favored the government by holding that the nature of grand jury proceedings themselves precludes finding prosecutorial motive for examination.[455] In both grand jury and preliminary hearing situations, similar forces influence the extent to which an examiner is likely to question a witness.[456] Before the grand jury, the government's burden is

448. *See, e.g.*, United States v. McFall, 558 F.3d 951, 963 (9th Cir. 2009) (arguing that, although the prosecution may not have had "an identical quantum of motivation" to examine the exculpatory witness before the grand jury, the district court nonetheless "erred in concluding that the government's respective motives were 'completely different'" at the grand jury and at trial).

449. *See supra* Part I.D.2.b.i; *see also supra* notes 233–34 and accompanying text.

450. Weissenberger, *supra* note 35, at 1097; *see also supra* note 136 and accompanying text.

451. *See supra* notes 176–77 and accompanying text.

452. *See supra* notes 129–30. *But see supra* notes 173–75 and accompanying text.

453. *See supra* Part I.D.2.b.i.

454. *See supra* Part I.D.2.b.i.

455. *See supra* Parts I.D.2.b.i, II.A.

456. *See supra* Part I.D.2.b.i.

low and it is often in the prosecution's interest not to reveal all that it might know about an investigation—not to "tip its hand"—by thoroughly questioning an exculpatory witness when its burden has been met.[457] Similarly, the prosecution must meet a low burden at preliminary hearings in criminal cases, so it is often not in the defense's interest to discredit the prosecution's inculpatory evidence using means as aggressive as it would at trial, where the prosecution's higher burden favors the defense.[458] Yet, despite the similarities between the factors influencing "motive" at these two proceedings, courts have treated them differently.[459]

Convincing policy arguments might be made for employing Rule 804(b)(1)'s "similar motive" test in such a way as to either support the activities of law enforcement or protect the interests of defendants. For instance, some argue that liberally admitting grand jury testimony against the government would encourage prosecutors to expand the scope of grand jury proceedings and treat them, at least as far as witness examination is concerned, more like trials. This in turn would increase the burden on the government with respect to conducting grand jury investigations and would decrease the overall effectiveness of law enforcement.[460] It has also been argued that admitting grand jury testimony against the government when the witness is only realistically "unavailable" to the defense is a necessary measure to counterbalance the prosecution's greater power with respect to obtaining evidence in the grand jury.[461] Such generalized policy considerations, along with the strategic considerations discussed above, are beyond the evidentiary scope of Rule 804(b)(1), however, and should not be considered in the prior testimony admissibility analysis.[462] If the reasonable examiner test that the Second Circuit panel described were applied to both grand jury and preliminary hearing testimony as the sole means by which prior testimony could be admitted, it would ensure that the evidentiary purpose behind Rule 804(b)(1) was met in each instance. It would prevent courts from basing admissibility decisions on before-the-fact determinations of the truthfulness or accuracy of the testimony. It would prevent courts that identify with the interests of either the government or the defense from favoring one or the other in admissibility determinations. It would screen "intensity" of motive from the "similar motive" inquiry and place the focus instead on a party's reasonable opportunity to develop facts at the prior proceeding. Finally, it would prevent courts from considering questioners' strategic decisions in the admissibility determination. The "reasonable examiner" test would direct courts instead to consider the circumstances that prevailed at grand jury and preliminary hearing proceedings—to consider what the attorneys knew at the time they questioned their witnesses, and whether they possessed sufficient

457. *See supra* notes 167–69 and accompanying text.
458. *See supra* notes 150–54 and accompanying text.
459. *See supra* Part I.D.2.b.i.
460. *See supra* note 175 and accompanying text.
461. *See* cases cited *supra* note 425; *see also supra* Part I.D.2.b.i.
462. *See supra* Part II.A.1.b.

information to recognize the witnesses' testimony as adverse and therefore discredit it.

CONCLUSION

U.S. Courts of Appeals applying Federal Rule of Evidence 804(b)(1)'s "similar motive" test to grand jury testimony offered against the government have based their admissibility determinations on different factors common to grand jury examinations. As a result, a split has developed between those circuit courts that have narrowly construed the requirement and would rarely encounter circumstances that could satisfy their stringent admissibility test, and those circuits that have taken a more expansive view of prosecutorial motive and would presumptively admit grand jury testimony against the government in most cases. The primary factor resulting in the split is whether the court would consider a prosecutor's strategic use of limited questioning at the grand jury to bear upon the prosecution's "motive" for examination in the abstract. Neither the narrow test, which considers such strategic use of questioning, nor the broad test, which dismisses it, is true to the evidentiary purposes of Rule 804(b)(1). The admissibility inquiry is further complicated by a seemingly contradictory interpretation of the "similar motive" test with respect to preliminary hearing testimony offered against defendants. In those cases, under circumstances analogous to those present in the grand jury setting, courts usually have held preliminary hearing testimony admissible. If the "reasonable examiner" test described by the Second Circuit panel on remand from the Supreme Court in *United States v. Salerno* were adopted with the explicit provision that strategic decisions to limit questioning in both the grand jury and preliminary hearing contexts should not influence courts' "similar motive" determinations, several benefits would ensue. Courts would have a more uniform and predictable standard for determining the admissibility of grand jury testimony against the government; and, the standard for grand jury testimony would parallel that already employed for preliminary hearing testimony, where defendants' low motive to challenge witnesses due to the proceeding's low burden of proof does not bar admission of the testimony. Also, application of a uniform "similar motive" test would allow prosecutors to more accurately predict when exculpatory testimony uncovered in the grand jury might later resurface at trial pursuant to Rule 804(b)(1). Finally, applying the "reasonable examiner" test to grand jury testimony offered pursuant to Rule 804(b)(1) would ensure that courts do not resort to impermissible discretion based upon the perceived merit of the contested testimony, and that they remain within the evidentiary confines of the rule and do not consider such extrinsic factors as adversarial fairness in the abstract or policy favoring either the government or the defense.