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EVIDENCE: *United States v. DiNapoli:* Admission of Exculpatory Grand Jury Testimony Against the Government Under Federal Rule of Evidence 804(b)(1)

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*UNITED STATES V. DINAPOLI**: ADMISSION OF EXCULPATORY GRAND JURY TESTIMONY AGAINST THE GOVERNMENT UNDER FEDERAL RULE OF EVIDENCE 804(b)(1)

INTRODUCTION

Rule 804(b)(1) of the Federal Rules of Evidence provides that former testimony is admissible as an exception to the hearsay rule[1] provided that the party opposing admission of the testimony "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."[2] Accordingly, a proponent of former testimony must establish, as a predicate to admission, that the party resisting admission of the evidence had a motive similar to one it would have had at trial to develop the testimony in the prior proceeding. Rule 804(b)(1)'s similar-motive requirement, "like other [requirements] involving the admission of evidence, . . . appropriately reflects narrow concerns of ensuring the reliability of evidence admitted at trial . . . ."[3] The Federal Rules of Evidence do not,

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

[1] Rule 802 of the Federal Rules of Evidence provides that, "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." FED. R. EVID. 802.

Rule 801(c) of the Federal Rules of Evidence defines hearsay as "a statement, other than one made by [a] declarant testifying at [a] trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c).

[2] Rule 804(b)(1) of the Federal Rules of Evidence provides:

> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> (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.

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

[3] United States v. Salerno, 112 S. Ct. 2503, 2509 (1992) (Blackmun, J., concurring).

however, define "similar motive."

The construction of the rule's similar motive requirement sharply divided the Second Circuit Court of Appeals in *United States v. DiNapoli*.[4] In *DiNapoli*, the defendants sought to admit, under Rule 804(b)(1), the exculpatory grand jury testimony of two defense witnesses who had invoked their fifth amendment privilege against self-incrimination at trial.[5] The district court excluded the grand jury testimony, concluding that a prosecutor's motive for examining a grand jury witness is "far different" from the one which he has at trial.[6]

After a series of complex appeals, and on remand from the United States Supreme Court, an en banc majority of the Second Circuit held that the district court had properly excluded the exculpatory grand jury testimony under Rule 804(b)(1) because the government did not have a similar motive to develop the testimony in the grand jury as it would have at trial.[7] The majority found that, because the defendants already were indicted at the time the witnesses testified,[8] and because the grand jurors had informed the prosecutor that they did not believe the testimony of Pasquale Bruno, one of the grand jury witnesses, the prosecutor had a substantially diminished motive to develop the witnesses' testimony in the grand jury.[9] The majority further found that the government's restriction of its grand jury examination to matters already publicly disclosed, and its failure to respond to Bruno's subsequent offer to correct false answers in his testimony, supported its conclusion that the government lacked a similar motive.[10]

In so holding, the majority vacated the Second Circuit panel's decision in *United States v. Salerno*[11] in which the

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[4] 8 F.3d 909 (2d Cir. 1993).

[5] The Fifth Amendment to the United States Constitution provides, in pertinent part, that: "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

[6] United States v. Salerno, 974 F.2d 231, 237 (2d Cir. 1991) [hereinafter *"Salerno II"*] ("[T]he motive of a prosecutor in questioning a witness before the grand jury in the investigatory stages of a case is far different from the motive of a prosecutor in conducting the trial.").

[7] *DiNapoli*, 8 F.3d at 910.

[8] *Id.* at 913.

[9] *Id.* at 915.

[10] *Id.*

[11] 974 F.2d 231 (2d Cir. 1991). Anthony Salerno, the lead defendant, died during the pendency of the petition for rehearing en banc; hence, the different case

panel had concluded that the government indeed had a similar motive to develop the testimony in the grand jury as it would have had at trial. The *Salerno* panel found that the government had cross-examined the grand jury witnesses extensively by challenging them with a tape-recorded conversation made public at a previous trial, by reminding them of the penalties for perjury, and by employing ridicule and sarcasm, among other things.[12] It held that the lower court had erroneously excluded the prior testimony under Rule 804(b)(1) and found that the exclusion had "tainted" the entire case. The panel subsequently reversed all of the defendants' convictions, which followed a thirteen-month trial.[13]

This Comment contends that the *Salerno* panel was troubled by what it perceived as prosecutorial misconduct and judicial partiality towards the government. The en banc majority, on other hand, was motivated by a different concern: the possibility that the admission of the grand jury testimony in this case would seriously frustrate the government's development of evidence in the grand jury. The majority's deferential treatment of the government's arguments against the admission of this testimony erroneously elevated policy over an analysis of whether the hearsay was reliable.

This Comment will argue that the facts on which the en banc majority relied do not demonstrate that the government lacked a similar motive to examine in the grand jury. Rather, these facts indicate only that the witnesses' grand jury testimony was probably false. Moreover, the defendants' indictments do not rebut the compelling evidence of similar motive revealed by the government's cross-examination. The majority in effect used Rule 804(b)(1)'s similar motive requirement as a pretext to exclude incredible, rather than unreliable, hearsay. In so doing, its decision subverted the categorical structure of the Federal Rules of Evidence by adding an admissibility requirement tantamount to a trustworthiness test. The text of Rule 804(b)(1) does not contain such a test.

This Comment agrees with the panel's conclusion that the government's actual cross-examination *in this case* was power-

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name. *DiNapoli*, 8 F.3d at 911 n.2.

[12] *Salerno II*, 974 F.2d at 240-41.

[13] *Id.* at 241.

ful evidence of similarity of motive, and therefore that the grand jury testimony should have been admitted. As the government argued in *DiNapoli*, however, the nature of grand jury proceedings often inhibits a prosecutor's motive to cross-examine exonerating witnesses.[14] In this regard, *DiNapoli* is an anomolous case: despite the government's purported lack of incentive to cross-examine, the prosecutor in fact engaged in extensive cross-examination of the grand jury witnesses.

Part I of this Comment sets forth the facts and procedural history of *DiNapoli*. Part II discusses the categorical approach of the Federal Rules of Evidence and Rule 804(b)(1)'s similar motive and opportunity requirement. Part II also compares the government's arguments for excluding the grand jury testimony with the defendants' arguments against the admission of preliminary hearing testimony. Part III analyzes both the panel's decision in *Salerno* and the en banc majority's decision in *DiNapoli*. Part IV concludes that the grand jury testimony should have been admitted in *DiNapoli*.

I. *UNITED STATES V. DINAPOLI*

A. *Facts and Procedural History*

A complex procedural history preceded the Second Circuit's en banc decision in *DiNapoli*. On April 7, 1987, a grand jury sitting in the Southern District of New York returned a thirty-five count indictment against eleven defendants.[15] The indictment alleged that, between 1970 and the date of the indictment, the defendants had participated in a racketeering enterprise known as the Genovese Family of the Cosa Nostra, and had conspired to do so in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO").[16]

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[14] *Id.* at 237-38.

[15] United States v. Salerno, 937 F.2d 797 (2d Cir. 1991), *rev'd*, 112 S. Ct. 2503 (1992) [hereinafter *"Salerno I"*]. The eleven defendants included Anthony Salerno, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward Halloran, Alvin O. Chattin, Aniello Migliore, Matthew Ianniello, John Tronolone, Milton Rockman and Richard Costa. *Id.* at 801.

[16] 18 U.S.C. § 1962(d); *Salerno I*, 937 F.2d at 801.

In support of these charges, the indictment further alleged that the defendants had engaged in a pattern of racketeering activity, consisting of forty-one predicate acts. These predicate acts included fraud in the concrete construction

The thirteen-month trial focused primarily on various aspects of the construction industry.[17] The government sought to prove that the defendants had participated in a scheme to rig bids for concrete work, valued at more than $2 million, on high-rise buildings in Manhattan.[18] By establishing control over the construction unions and over the supply of concrete, the Genovese Family formed a "Club" of concrete companies.[19] After rigging the contract bids, the Genovese Family allocated the construction jobs among the companies.[20]

Pursuant to its obligations under *Brady v. Maryland*,[21] the government informed the defendants that Pasquale Bruno and Frederick DeMatteis had testified under a grant of immunity in the grand jury, and that their testimony was possibly exculpatory.[22] Bruno and DeMatteis were principals in the Cedar Park Concrete Construction Corporation ("Cedar Park"), an alleged member of the "Club."[23] Contrary to the prosecution's expectations, Bruno and DeMatteis denied any awareness of the "Club" during their grand jury testimony.[24]

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industry, fraud against the International Brotherhood of Teamsters, illegal labor payoffs, attempted extortion, extortion and fraud in the food industry, participating in illegal numbers and bookmaking businesses, and loansharking. *Salerno I*, 937 F.2d at 801.

[17] *Salerno I*, 937 F.2d at 801.

[18] *Id.* at 801-02.

[19] *Id.* at 802.

[20] *Id.*

[21] 373 U.S. 83 (1963). *Brady* holds that prosecutors must turn over to defendants exculpatory evidence and that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87.

[22] *Salerno I*, 937 F.2d at 804.

[23] *Id.*

[24] *Id.* at 808. Both at trial and before the grand jury, the government contended that Cedar Park Concrete Construction Corporation ("Cedar Park") had paid the two-percent surcharge to participate in concrete construction projects, notably, the Libya House and EAB Plaza. *Salerno II*, 974 F.2d at 234. The government further maintained that Bruno's sudden retirement from Cedar Park was due to his reluctance to pay the two-percent surcharge. *Id.* at 234. During the following inquiry, the assistant United States Attorney questioned DeMatteis concerning his knowledge of the "Club."

Q. Mr. DeMatteis, I'm going to read you a small part of a conversation that was intercepted pursuant to court order on August 14th, 1984. Do you know a man by the name of Ralph Scopo?

A. Do I know him personally or by name?

Q. Do you know him by name?

A. Now I do.
Q. When did you first learn who Ralph Scopo was?
A. Reading it in the newspapers.
Q. In all the years you're working in the construction industry, you never heard of Ralph Scopo?
A. Mr. Hellerer, I don't get involved with the construction any more. I believe I explained that to you. I don't know who delegates are, who anybody is.
Q. You don't know who the head of one of the major unions that represents your employees is?
A. I couldn't ever—he doesn't represent my employees. I don't do any of the work myself.
Q. Never represented any workers at Cedar [P]ark or Big Apple?
A. Cedar Park, maybe. What union is it?
Q. Concrete and Cement Workers.
A. Then Cedar Park dealt with him.
Q. And you didn't even know who he was? This is a conversation that Mr. Scopo is having with another gentleman in the concrete industry. The other gentleman says, "What happened with Cedar Park with, wasn't that" — Mr. Scopo says, "they didn't pay and they went out of business." The other gentleman says, "but they were supposed to pay, right?" Mr. Scopo says, "but they wouldn't pay. They wanted them to pay and Cedar Park about New York it's not New York and all that bullshit." He said, "what did he have, that Indian job that time, what the F., it was a small job, it was three, a little better than three million. He paid for that; and he was, and he was all, he says, 'if I got to pay the two points, I quit.' Broke up the whole business but he wouldn't pay for the other job." The other gentleman says, "that guy, he's—" And then Mr. Scopo says, "and they told him if you, if he don't pay for that job, he's not going to get another F-ing job in the city." He says good and he quit. One guy went to Florida and Jimmy I hear he hooked up with another company or something." Now, Mr. DeMatteis, obviously Mr. Scopo is talking about Cedar [P]ark Concrete, he's talking about Pat Bruno, he's talking about the Libya House job on which the two percent was paid, and he's talking about the EAB job on which the two percent was not paid, and when it wasn't paid, Pat Bruno left the business and closed up shop with you, with Cedar Park. And you're telling us you never discussed with Pat Bruno any payments of the two percent?
A. Mr. Hellerer, on my children's lives, no.
Q. You never discussed with any other individual, the payments of the two percent?
A. No.

. . . .

Q. Did you ever talk to Ralph Scopo about it?
A. No.
Q. Vincent DiNapoli [alleged organizer of the "Club"]?
A. No.
Q. Any representatives of either of those gentleman?
A. No one. No.

In response to both witnesses' denials, the prosecutor confronted the witnesses with the substance of a wiretapped conversation that had become public at a prior trial.[25]

During Bruno's grand jury testimony, the prosecutor excused Bruno from the jury room after his denials and after giving testimony inconsistent with that of DeMatteis.[26] When Bruno returned, the prosecutor informed him that the grand jury had a "strong concern" that his testimony "had not been truthful."[27] Four days after Bruno's testimony, Bruno's lawyer wrote a letter to the prosecutor advising him that some of Bruno's testimony in the grand jury may have been false, and

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Q. It might interest you to know, Mr. Bruno, that Mr. Scopo has been intercepted under electronic surveillance saying that in fact you did pay two percent on the Libya House job.
A. I can't help that.
Q. You're saying that is not true?
A. That is correct.
Q. Isn't it a fact that one of the reasons you decided to leave Cedar Park is because in fact you refused to pay two percent on the EAB job?
A. That is not true.
Q. Absolutely untrue?
A. Not true at all.
Q. No basis for that at all?
A. No.
Q. That is your testimony under oath?
A. Yes.
Q. I have explained to you the penalties for perjury previously.
A. I know you have.
Q. And that is still your testimony?
A. Yes.
Q. Did you ever discuss with any of your partners any payments of that nature?
A. No.

Id. at 235-36.

[25] *DiNapoli*, 8 F.3d at 911. The prosecution had previously introduced this tape in another prosecution, *United States v. Persico*, 84 Cr. 809 (S.D.N.Y. 1984). *Id.* at 911. The taped conversation was between Ralph Scopo, the head of the Concrete and Cement Workers Union, and an unidentified person. The prosecutor challenged Bruno and DeMatteis with that portion of the conversation which concerned Cedar Park, its payment of the two-percent surcharge on the Libya House project, its subsequent failure to pay the two-percent surcharge on the EAB project, and Bruno's subsequent retirement from Cedar Park. *Salerno II*, 974 F.2d 231 at 235.

[26] DeMatteis testified that Bruno had interviewed Joseph Conti and had assured DeMatteis of Conti's experience in the concrete industry. DeMatteis testified that, based upon this assurance, he had become partners with Conti. However, Bruno denied having conducted the interview. *DiNapoli*, 8 F.3d at 911 n.1.

[27] *Id.* at 911.

suggested that the prosecutor resubmit his questions to Bruno in writing; Bruno would respond by affidavit.[28] The prosecutor declined.[29]

Upon hearing of Bruno's and DeMatteis's exculpatory testimony in the grand jury, the defendants subpoenaed Bruno and DeMatteis to testify at trial. Both Bruno and DeMatteis, however, invoked the fifth amendment privilege against self-incrimination.[30] The defendants requested that the prosecution grant the witnesses use immunity,[31] and the prosecution refused.[32] The defendants then moved to admit Bruno's and DeMatteis's grand jury testimony as former testimony under Rule 804(b)(1).[33]

To maintain the secrecy of the grand jury transcripts, the district court judge conferred with the prosecution ex parte on the defendants' motion.[34] The district court thereafter denied the defendants' motion to admit.[35] The court reasoned that "the motive of a prosecutor in the investigatory stages of a case is far different from the motive of the prosecutor at trial."[36]

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[28] *Id.* at 911; *see also Salerno II*, 974 F.2d at 237 ("I might have given some false answers in the grand jury in the sea of denials that I gave you to a series of questions, and those answers in some material respect might have been false, and I would like a chance maybe to reanswer specific questions to correct some of those answers.").

[29] *DiNapoli*, 8 F.3d at 911.

[30] *Salerno I*, 937 F.2d at 804.

[31] Use immunity bars the prosecution from using testimony or other information derived from a person "or any information directly or indirectly derived from such testimony or other information" in a subsequent prosecution of that person. 18 U.S.C. § 6002 (year); *see also*, Kastigar v. United States, 406 U.S. 441 (1972); *see generally* STEVEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 484-85 (4th ed. 1992).

[32] *Salerno I*, 937 F.2d at 804.

[33] FED. R. EVID. 804(b)(1).

[34] *Salerno II*, 974 F.2d at 236. The prosecution had submitted sealed affidavits explaining that it had "little or no incentive to conduct a thorough cross-examination of Grand Jury witnesses who appear to be falsifying their testimony to assist Grand Jury targets or other witnesses." *Salerno I*, 937 F.2d at 806. During the conference, the prosecutor informed the judge that Bruno's and DeMatteis's grand jury testimony "ha[d] to be characterized as a denial—they denied any knowledge of any of this stuff." *Salerno II*, 974 F.2d at 237. The prosecutor further advised the judge of the letter that Bruno's counsel had written, and stated "[w]e did not cross-examine Bruno and did not tip our cards, and the same thing was true with respect to DeMatteis." *Id.* The remainder of the in camera conference concerned the trustworthiness of Bruno's grand jury testimony. *Id.*

[35] *Salerno I*, 937 F.2d at 804.

[36] *Salerno II*, 974 F.2d at 237.

Thus, the court concluded that the government did not have a similar motive to examine Bruno and DeMatteis at trial as it had in the grand jury, and held that their respective grand jury testimony was inadmissible under Rule 804(b)(1).[37] The jury subsequently convicted the defendants of the RICO conspiracy and substantive counts; eight defendants appealed their convictions.[38]

B. *The Second Circuit Panel Decision*

A panel of the Second Circuit reversed each of the defendants' convictions and held that the district court had improperly denied the defendants' motion to admit the grand jury testimony of Bruno and DeMatteis as former testimony under Rule 804(b)(1).[39] The court acknowledged that Bruno and DeMatteis were, by their invocation of the Fifth Amendment, unavailable declarants under Rule 804(a)(1).[40] The court pointed out, however, that the government could have compelled their testimony through a grant of use immunity.[41]

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[37] *Id.* With respect to the reliability of Bruno's testimony, the court further noted, "if the government, at trial, was compelled to discredit the grand jury testimony by using materials under seal, it would be required to publicly disclose information in possession of the grand jury which the government is prevented from disclosing under FED. R. CRIM. P. 6. This Court finds therefore that there is no adequate guarantee of reliability of the grand jury testimony to justify its placement before this jury." *Id.*

[38] Matthew Ianniello, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward J. Halloran, Aniello Migliore, Anthony Salerno, Alvin O. Chattin and Richard Costa, were convicted of Counts One and Two of the indictment, the RICO conspiracy and substantive RICO counts arising out of the allegations of fraud in the construction industry. *Salerno I*, 937 F. 2d at 802, 814-15. The jury also found various defendants guilty of labor payoffs, gambling, loansharking and fraud in the food industry. *Id.* The jury acquitted individual defendants with respect to the mail fraud, gambling and loansharking charges. *Id.* The jury also returned a forfeiture verdict against the defendants, awarding the government the defendants' interests in various construction and concrete supply companies. *Id.* at 802-03. Those who appealed included Matthew Ianniello, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward J. Halloran, Aniello Migliore, Anthony Salerno and Alvin O. Chattin. *Id.* at 797.

[39] *Id.* at 937 F.2d 797.

[40] *Id.* at 804-05. Rule 804(a)(1) of the Federal Rules of Evidence provides: (a) Definition of unavailability.
Unavailability as a witness includes situations in which the declarant—
(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement. FED. R. EVID. 804(a)(1).

[41] *Salerno I*, 937 F.2d at 805. The court contrasted this situation to one in

Noting that Rule 804(a) prohibits admission of former testimony if the proponent of the testimony procures the witness's unavailability,[42] the court reasoned that "the same principle of adversarial fairness" should bar the opponent of former testimony from invoking Rule 804(b)(1)'s similar motive requirement when the declarant is available to it.[43] The court concluded that the witnesses were "available" to the government by virtue of its power to grant the witnesses use immunity, but unavailable to the defendants because the witnesses had invoked the fifth amendment privilege against self-incrimination.[44]

While agreeing with the government's contention that it may not have had a similar motive to impeach the witnesses in the grand jury as it had at trial, the court concluded that this reason was insufficient to bar admission of the witnesses' grand jury testimony at trial.[45] Because Bruno and DeMatteis were available to the government for cross-examination through a grant of use immunity, the court concluded that the government's motive in examining Bruno and DeMatteis was irrelevant, and that "[w]hen the reason for the [similar motive] requirement evaporates, so does the requirement."[46] In short, the court found that the government's refusal to grant use immunity to the witnesses resulted in their unavailability at trial.[47] The panel therefore refused to consider the

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which the declarant is either ill or dead, and thus unavailable to both the proponent and the opponent of the former testimony. *Id.* at 806.

[42] *Id.* at 805 ("A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the *proponent* of a statement for the purpose of preventing the witness from attending or testifying.").

[43] *Id.* (adversarial fairness "should prevent the *opponent* of a hearsay declaration from invoking the protections of rule 804(b)(1) when the declarant, although unavailable to the *proponent*, is available to the *opponent* of the declaration").

[44] *Id.* at 805.

[45] *Id.* at 806.

[46] *Id.* The court further noted the reliability concerns which attend the admission of grand jury testimony against a defendant, and emphasized that these concerns are absent when a defendant offers grand jury testimony against the government. *Id.* at 806-07. The court reasoned that grand jury proceedings are "adverse to the interest[s] of [defendants]" due to "the ex parte nature of the proceeding, the leading questions [asked] by the government, the absence of the defendant, the tendency of a witness to favor the government because of [a] grant of immunity, and [confrontation clause concerns]." *Id.* at 807.

[47] The court acknowledged that grants of immunity are executive branch func-

government's arguments based on lack of similar motive to exclude the grand jury testimony under Rule 804(b)(1).[48]

The panel subsequently amended its opinion and limited its ruling with regard to unavailability to cases involving Rule 804(b)(1).[49] In the amended opinion, the panel explained that, in construing Rule 804(b)(1) and its similar motive requirement, it had concluded that Bruno's and DeMatteis's testimony had been unavailable to the defendants, but available to the government.[50] The court emphasized, however, that it had not considered "whether the government's power to grant immunity would affect a declarant's 'availability' under any of the other subdivisions of Rule 804(b)."[51]

The government petitioned for a rehearing en banc, and a majority of the court denied the motion.[52] Chief Judge Jon O. Newman dissented.[53] Judge Newman criticized the panel's decision not only for ignoring "the settled law of this Circuit and elsewhere" that a declarant who invokes his fifth amendment privilege against self-incrimination is unavailable under Rule 804(a)(1), but also for eroding prior Second Circuit rulings

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tions and that the government is not required to grant defense witnesses use immunity. However, the court characterized the decision whether to grant immunity as a "series of choices." *Salerno I*, 937 F.2d at 807. To obtain an indictment against the defendants, the government had "chosen" to immunize Bruno and DeMatteis; the court found that to present the government with "a similar choice at trial is not too great a burden to cast on the government." *Id.* The court explained that, had the testimony been admitted under Rule 804(b)(1), the government could have immunized Bruno and DeMatteis, called them as witnesses, and then cross-examined them under Rule 806, which permits a party to attack the credibility of a hearsay declarant. *Id.* at 808. Even if the government had declined to call Bruno and DeMatteis, it could have still invoked Rule 806 to impeach their credibility. *Id.* Thus, the court found that admission of Bruno's and DeMatteis's testimony would not have deprived the government of "a full and fair opportunity to discredit that testimony" because of the impeachment opportunities afforded by Rule 806. *Id.*

[48] The court was further troubled that the government had opposed the admission of the grand jury testimony at trial after disclosing its exculpatory nature to the defendants pursuant to *Brady*. *Id.* at 808 ("[i]n resisting the admission of the grand jury transcripts, the government was not true to the letter or spirit of *Brady*"). The court, however, declined to reach the *Brady* issue, invoking the rule that it should not decide constitutional issues unless absolutely necessary. *Id.*

[49] United States v. Salerno, 952 F.2d 623 (2d Cir. 1991).

[50] *Id.* at 623.

[51] *Id.*

[52] *Id.* at 624.

[53] *Id.* Judges Kearse, Mahoney, and Walker joined in Chief Judge Newman's dissent.

refusing to obligate the government to confer use immunity on defense witnesses.[54]

Judge Newman further noted that the panel's decision would frustrate the government's development of grand jury testimony.[55] Despite the panel's amended opinion that limited its holding to cases involving Rule 804(b)(1), Judge Newman acknowledged the government's apprehension that the panel's ruling would apply to other situations where the government is able to confer use immunity, thus making the declarant "available" to it.[56]

C. *The Supreme Court's Decision*

The government appealed the panel's decision to the Supreme Court.[57] The Court reversed the panel's decision and held that admission of former testimony under Rule 804(b)(1) requires a showing that the party against whom the former testimony is offered had a similar motive and opportunity to develop the testimony in the prior proceeding.[58]

Arguing that the panel's decision should be upheld, the defendants contended that notions of "adversarial fairness" should preclude the government from invoking Rule 804(b)(1)'s similar motive requirement to prevent the admission of exculpatory grand jury testimony against it.[59] The Court rejected

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[54] *Id.* at 625; *see also*, United States v. Pinto, 850 F.2d 927, 935 (2d Cir.), *cert. denied*, 488 U.S. 867 (1988); United States v. Turkish, 623 F.2d 769, 772-74 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077 (1981).

[55] *Salerno*, 952 F.2d at 625.

[56] *Id.*

[57] For a discussion of the government's arguments on appeal to the Supreme Court, *see infra* note 75 and accompanying text.

[58] United States v. Salerno, 112 S. Ct. 2503 (1992).

[59] The defendants urged the Court not to construe Rule 804(b)(1) in a "'slavishly literal' fashion." *Id.* at 2507. Instead, they maintained that adversarial fairness should permit the admission of exculpatory evidence without a showing of similar motive under Rule 804(b)(1), and, particularly, that adversarial fairness prohibits the suppression of exculpatory evidence generated in the grand jury. *Id.* at 2508. In support of this argument, they contended that the government can manipulate its power to grant immunity in the grand jury to develop testimony in a one-sided manner: "[i]f 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, as Bruno and DeMatteis each did here, the United States refuses to immunize him and attempts to exclude the testimony as hearsay." *Id.*

this argument, observing that "[n]othing in the language of Rule 804(b)(1) suggests that a court may admit former testimony absent satisfaction of each of the Rule's elements."[60] The Court then remanded the case for further consideration of whether the government had a similar motive.[61]

Justice Blackmun, concurring in the opinion, remarked that the district court appeared to hold as a matter of law that the prosecution's motive to cross-examine a witness in the grand jury is far different from its motive at trial.[62] In his view, however, "'similar motive' does not mean 'identical motive,'" and the "similar-motive inquiry . . . is inherently a *factual* inquiry, depending in part on the similarity of the underlying issues and on the context of the grand jury questioning."[63] Thus, Justice Blackmun concluded, the prosecution's motive to develop testimony before the grand jury is not "always" or "never" the same as it is at trial.[64] Instead, Justice Blackmun advised that the similar-motive inquiry should consider whether the evidence is reliable, and should not reflect policy arguments favoring either the government or the defendant.[65]

Justice Stevens dissented, finding that the government had a similar motive and opportunity to develop the grand jury testimony of Bruno and DeMatteis as it would have had at trial.[66] Justice Stevens found that the witnesses' testimony was completely inconsistent with the government's theory of the case.[67] Thus, Justice Stevens concluded, the government had the same interest in demonstrating the falsity of the grand jury witnesses' testimony as it would have had at trial.[68] Rejecting the government's contention that it typically lacks a motive to develop grand jury testimony similar to its motive at trial, Justice Stevens pointed out that the grand jury minutes revealed that the prosecutor had in fact challenged the witnesses' denials by probing the basis of their statements and

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[60] *Id.* at 2507.
[61] *Id.* at 2509.
[62] *Id.*
[63] *Id.*
[64] *Salerno*, 112 S. Ct. at 2509.
[65] *Id.*
[66] *Id.* (Stevens, J., dissenting).
[67] *Id.*
[68] *Id.* at 2510.

by confronting them with contrary statements made by others.[69]

D. *The Second Circuit Panel Decision On Remand*

On remand, the panel ruled that the prosecution had a similar motive and opportunity to develop Bruno's and DeMatteis's grand jury testimony as it would have had at trial. Accordingly, it held that the lower court had abused its discretion in denying the defendants' motion to admit the grand jury testimony as former testimony under Rule 804(b)(1).[70] In its decision, the court stated that "in determining similarity of motive the court should look first to what examination *in fact* occurred at the prior proceeding, in order to determine whether the prior examination was 'the equivalent of what would now be done if the opportunity [to examine] were presented.'"[71] The panel added that if this inquiry is not dispositive of similarity of motive, the judge should inquire whether "a reasonable examiner under the circumstances would have had a similar motive to examine the witness."[72] The panel explained that this objective test aimed to prohibit the exclusion of former testimony based on a tactical decision not to cross-examine, rather than a bona fide lack of similar motive.[73]

The court concluded that the prosecution's opportunity to cross-examine in the grand jury had not only been meaningful, but that the prosecution in fact had meaningfully exercised its opportunity.[74] The court rejected the government's arguments that the nature of the grand jury proceeding diminishes its motive to cross-examine exonerating witness,[75] concluding

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[69] *Id.* at 2512.

[70] *Salerno II*, 974 F.2d at 232.

[71] *Id.* at 239.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 239.

[75] Before the Supreme Court, and in its brief before the Second Circuit on remand, the government argued that it "typically does not have the same motive to cross-examine hostile witnesses in the grand jury that it has to cross-examine them at trial." *Id.* at 237. The government offered three arguments in support of its position. First, the government asserted that the need to maintain the secrecy of the grand jury proceedings limits the government's examination of witnesses in the grand jury. *Id.* The government maintained that to confront a perjurious witness with all contradictory evidence would undermine the status of an ongoing

that these arguments were "long on policy considerations and generalities . . . but short on specific facts."[76] Even accepting the government's arguments, the court found that the government's examination had, in fact, "comported with the principal *purpose* of cross-examination" and rebutted the major premise of each of the government's "abstract policy arguments."[77]

In reaching this conclusion, the court relied heavily on the transcript of Bruno's and DeMatteis's grand jury testimony. First, the court found that the prosecutor had examined the witnesses extensively and had challenged them with intercepted conversations.[78] Second, the court noted that the prosecutor had made "vigorous, on-the-spot examinations" of both witnesses.[79] Among other things, the court noted that the prosecutor had employed "ridicule and sarcasm," and had warned both witnesses of the penalties for perjury.[80] Third, the court found that the issue before the grand jury—the existence of the "Club" of concrete contractors—was the same as the one at trial.[81] Accordingly, the court concluded that the government had a similar motive to develop Bruno's and DeMatteis' grand jury testimony as it would have had at trial, and that, therefore, the lower court had improperly excluded the grand jury testimony under Rule 804(b)(1).[82]

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investigation. *Id.* Second, the government argued that it has little incentive to rigorously cross-examine a perjurious witness in the grand jury. The government claimed that this lack of incentive results from its ability either to prosecute the witness for perjury, or to recall the witness and further challenge him with damaging evidence produced by the investigation. *Id.* Third, the government asserted that the issues before the grand jury may not be the same as those presented at trial. *Id.* at 238. The government maintained that, although the grand jury determines "whether there is probable cause to believe that a crime has been committed, the scope and nature of the crime and the identities of the potential participants may well not have crystallized at the time a particular witness testifies before the grand jury." *Id.*

[76] *Salerno II*, 974 F.2d. at 240.

[77] *Id.*

[78] *Id.*

[79] *Id.* at 240-41.

[80] *Id.* at 241.

[81] *Id.*

[82] *Salerno II*, 974 F.2d at 241.

E. *Decision on Rehearing En Banc*

1. The Majority Opinion

The government again petitioned for rehearing en banc, and this time the motion was granted. A majority of the court considered the case appropriate for en banc review because, although the case presented a narrow question of evidence law, it had "potentially broad implications for the administration of criminal justice."[83] On rehearing en banc, a majority of the Second Circuit, by a vote of eight to three, vacated the panel's decision, holding that the prosecution had not had a similar motive and opportunity to develop the witnesses' testimony in the grand jury, and that, therefore, the lower court had properly excluded the grand jury testimony.[84]

The court observed that the similar-motive inquiry must be "fact specific," and that the circumstances surrounding a grand jury proceeding will sometimes, but not always, demonstrate the government's lack of similar motive.[85] It articulated the test to determine similar motive under Rule 804(b)(1) as "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."[86] The court added that the nature of the two proceedings, and, to a lesser degree, the cross-examination undertaken at the prior proceeding, will be relevant in determining similarity of motive.[87]

Applying this standard, the court found that two circumstances demonstrated "beyond reasonable dispute" that the prosecutor had not had a similar motive.[88] First, because the defendants had already been indicted at the time of the witnesses' testimony, it was "fanciful" to believe that the government had any appreciable motive in establishing the falsity

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[83] *DiNapoli*, 8 F.3d at 910; *see also* Jon O. Newman, *In Banc Practice in the Second Circuit, 1989-93*, 60 BROOK. L. REV. 491, 498-99 (1994).

[84] *DiNapoli*, 8 F.3d at 910.

[85] *Id.* at 912.

[86] *Id.* at 914-15.

[87] *Id.* at 915.

[88] *Id.* at 915.

of the witnesses' testimony.[89] Second, the grand jurors had already informed the prosecutor that they did not find Bruno credible, and this fact, in the majority's view, nullified the prosecutor's interest in demonstrating the falsity of the witnesses' testimony.[90] The court determined that these circumstances demonstrated a dissimilarity of motive, and that the "limited cross-examination" employed by the prosecutor did not rebut this finding.[91] Thus, the court held that the district court had properly excluded the grand jury testimony under Rule 804(b)(1).

2. The Dissent

In his dissent, Judge Pratt, author of the panel's decision on remand, criticized the majority's opinion for applying "a gloss to the language of the rule" which "effectively [rewrote] the rule from 'similar motive' to 'same motive.'"[92] Judge Pratt further remarked that the majority's test was stricter than that called for by the rule.[93] Observing that the majority's test entailed a comparison of the prosecutor's states of mind, he predicted that the majority's test would be difficult to administer and would require the trial court to conduct an evidentiary hearing.[94]

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[89] *Id.* ("[I]t is fanciful to think that the prosecutor would have had any substantial interest in showing the falsity of the witnesses' [testimony] to persuade the grand jury to add one more project to the indictment.").

[90] *DiNapoli*, 8 F.3d at 915. ("A prosecutor has no interest in showing the falsity of testimony that a grand jury already disbelieves.").

[91] *Id.* The court explained that a prosecutor's motive in "asking a few challenging questions" in the grand jury might be to support a subsequent perjury prosecution or to provoke the witness. *Id.* ("[T]he prosecutor might want to provoke the witness into volunteering some critical new fact in the heat of an emphatic protestation of innocence."). The court also noted that the government's restriction of its questioning to publicly-disclosed matters, and the prosecutor's decision not to respond to "Bruno's generous offer to correct inaccuracies in his testimony," further supported its finding of dissimilarity of motive. *Id.*

[92] *Id.* at 916 (Pratt, J., dissenting).

[93] *Id.*

[94] *Id.* at 916. Judge Pratt further criticized the majority for "accepting, at face value the prosecutor's post hoc, self-serving, un-cross-examined statements as to his own motives." *Id.* He also questioned the majority's reliance on the government's contention that since the defendants had already been indicted when Bruno and DeMatteis testified, and thus, probable cause had already been established, that the government did not intend to add any new defendants to the indictment. *Id.* He asked, "If all these things were true, then why was the prose-

Judge Miner also dissented from the en banc majority's opinion.[95] He found, based upon his reading of the record that, the prosecution had attempted to establish the falsity of the witnesses' testimony in the grand jury.[96] Judge Miner further remarked that "[t]he government had an interest in plumbing the depths of the entire scheme to determine whether there might be additional projects or additional defendants within the purview of the existing indictment, as the majority all but concedes."[97]

II. BACKGROUND OF RULE 804(B)(1)

A. *Rule 804(b)(1) and the Federal Rules of Evidence's Categorical Approach to Hearsay*

The Federal Rules of Evidence represent a categorical approach to the admission of hearsay, and, in that respect, are essentially modeled after the common law.[98] They provide a general rule excluding hearsay,[99] subject to two categories of exceptions.[100] These two categories of exceptions, which represent the traditional hearsay exceptions, are contained in Rules 803 and 804.[101] Rule 803 admits certain types of hearsay statements regardless of the declarant's availability, while Rule 804 conditions admission of the hearsay on proof that the declarant is unavailable.[102] One of the only departures from

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cutor using the grand jury at all?" *Id.*

[95] *Id.* (Miner, J., dissenting).

[96] *DiNapoli*, 8 F.3d at 916 (Miner, J., dissenting). Judge Miner also disagreed with the majority's conclusion that the government had no motive to demonstrate the falsity of Bruno's testimony once the grand jury had expressed its doubts about Bruno's credibility. *Id.* Instead, he concluded that "the announcement to the witness that the grand jury was strongly concerned about (not that it rejected) the witness' testimony was intended to invite the witness to continue to testify and, it seems obvious, to contradict his previous denial of the existence of a 'Club.'" *Id.*

[97] *Id.*

[98] FED. R. EVID. Art. VIII advisory committee's note; *see also* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 14.01[02]; Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CALIF. L. REV. 1341, 1347 (1987).

[99] FED. R. EVID. 802.

[100] FED. R. EVID. Art. VIII advisory committee's note.

[101] *Id.*

[102] *Id.*; *see also*, FED. R. EVID. 803 and 804.

the common law approach appears in the Federal Rules' provision for opened-ended, "residual" exceptions, contained in Rules 803(24) and 804(b)(5).[103] These two rules permit the admission of hearsay which does not fit within any of the enumerated exceptions, but has "equivalent circumstantial guarantees of trustworthiness."[104]

In adopting the common law approach, the drafters of the Federal Rules rejected two other theories which viewed the traditional scheme as "bulky and complex, fail[ing] to screen good from bad hearsay realistically, and inhibit[ing] the growth of the law of evidence."[105] The first theory advocated the abolition of the hearsay rule.[106] The second theory endorsed admission of hearsay "possessing sufficient probative force, but with procedural safeguards."[107] The advisory committee rejected this approach because, among other things, it accorded judges too much discretion in determining the admissibility of hearsay.[108] The advisory committee observed that "[f]or a

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[103] FED. R. EVID. Art. VIII advisory committee's note; FED. R. EVID. 803(24) and 804(b)(5); WEINSTEIN & BERGER, *supra* note 98 at ¶ 14.01[02].

The text of Rule 804(b)(5) is identical to that of Rule 803(24). However, the proponent of a Rule 804(b)(5) statement must demonstrate that the declarant is unavailable under one of 804(a)'s definitions of unavailability. FED. R. EVID. 804(b). Rule 804(b)(5) states, in pertinent part:

> Rule 804. Hearsay Exceptions; Declarant unavailable
> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
> . . . .
> (5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

[104] *See* FED. R. EVID. 803(24) and 804(b)(5).

Rule 803(6) of the Federal Rules of Evidence, the business records exception to the hearsay rule, also permits courts to exclude hearsay on the grounds that it lacks trustworthiness. FED. R. EVID. 803(6) (business records admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness").

[105] FED. R. EVID. Art. VIII advisory committee's note.

[106] *Id.*

[107] *Id.* (citing Jack B. Weinstein, *The Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961)).

[108] *Id.*

judge to exclude evidence because he does not believe it . . . [is] 'altogether atypical, extraordinary.'"[109]

Thus, once a proponent of former testimony under Rule 804(b)(1) establishes that the testimony was given under oath, at a prior proceeding in which the party resisting admission of the evidence had a similar motive and opportunity to develop the testimony, the former testimony is admissible. In Rule 804(b)(1) cases, courts have properly refused to excluded former testimony on the grounds that the testimony is "inherently unreliable," or that it lacks sufficient circumstantial guarantees of trustworthiness. These courts recognize that to exclude former testimony on such grounds would be to import an additional admissibility requirement to the text of Rule 804(b)(1), and thereby to engage in judicial revisionism of the hearsay rule.[110] These courts further acknowledge that to exclude former testimony because they find it incredible would be to invade the province of the jury, whose duty it is to make credibility determinations.[111]

For instance, in *Ohio v. Roberts*,[112] the Supreme Court, in holding that the admission of cross-examined preliminary hearing testimony did not violate the defendant's right to confrontation, rejected the defendant's argument that the testimony was unreliable and that the Court should require an additional guarantee of trustworthiness besides cross-examination before admitting this type of hearsay against a defendant.[113]

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[109] *Id.* (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)); *see also* United States v. DiMaria, 727 F.2d 265, 271 (2d Cir. 1984) (discussing the categorical approach of the Federal Rules of Evidence and holding that lower court had erroneously excluded declaration of defendant's state of mind under Rule 803(3), because while statement may have been false, it fell within purview of Rule 803(3), and its "truth or falsity was for the jury to determine").

[110] *See, e.g.*, United States v. Pizarro, 717 F.2d 336, 350 (7th Cir. 1983); *see also* United States v. Moore, 791 F.2d 566, 573 (7th Cir. 1986) (under Rule 803(2), the excited utterance exception, the proponent of the statement need only satisfy requirements of the Rule, and need not establish independent circumstantial guarantees of trustworthiness because those guarantees are inherent in the requirements of the rule).

[111] *See* 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).

[112] 448 U.S. 56 (1980).

[113] *Id.* at 72. The defendant argued that the declarant "had every reason to lie

The Court observed that the preliminary hearing itself guarantees the trustworthiness of the hearsay by affording an adequate opportunity to cross-examine and that the inherent reliability or unreliability of the declarant or his statement is irrelevant.[114]

Similarly, in *United States v. Pizarro*,[115] the Seventh Circuit rejected the government's claim that the declarant's trial testimony was "inherently unreliable" and "wholly uncorroborated," and therefore that the district court had properly excluded the testimony under Rule 804(b)(1). Holding that the trial testimony should have been admitted, the court remarked that the government's argument was flawed because it sought "to have the admissibility of previously cross-examined trial testimony turn on a subsequent court's view of the unavailable declarant's reliability."[116] The court declined to "engraft such a reliability requirement" onto the rule, where "no such limitation was imposed by Congress."[117] Thus, once a court determines that former testimony meets the admissibility requirements of Rule 804(b)(1), the statement is admissible, regardless of the inherent reliability or unreliability of the declarant, or his testimony.[118]

1. Rule 804(b)(1)—In General

Former testimony is admissible under Rule 804(b)(1) if a presently-unavailable declarant made the statement while testifying under oath as a witness at a prior proceeding, and the party resisting admission of that evidence had a similar motive and opportunity to develop the testimony by direct,

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to avoid prosecution and parental reprobation," that the declarant's disappearance was "an effort to avoid punishment, perjury, or self-incrimination," and that, as a result, "her testimony [fell] on the unreliable side, and should have been excluded." *Id.*

[114] *Id.* at 73 (citing Mancusi v. Stubbs, 408 U.S. 204 (1972); California v. Green 399 U.S. 149 (1970)).

[115] 717 F.2d 336 (7th Cir. 1983).

[116] *Id.* at 350.

[117] *Id.*

[118] *See* Feaster v. United States, 631 A.2d 400, 408-09 (D.C. 1993) (holding that lower court had improperly invaded the province of the jury when it considered the credibility of the declarant's grand jury testimony in excluding the testimony under the District of Columbia's prior recorded testimony exception).

cross or redirect examination.[119] To combat inaccuracies in memory, perception and narration—the infirmities which plague hearsay—a witness ideally will be required to testify under three conditions: oath, personal presence at trial and cross-examination.[120] Therefore, former testimony is considered to be one of the most reliable forms of hearsay because of the presence of all of the ideal testimonial conditions except for the opportunity of the fact-finder to observe the witness's demeanor.[121]

2. Opportunity to Cross-Examine

Prior cross-examination ensures the reliability of former testimony and is the primary justification for its admission as an exception to the hearsay rule.[122] The Supreme Court, in *Ohio v. Roberts*,[123] held that preliminary hearing testimony, which had been subjected to the equivalent of significant cross-examination, "bore sufficient 'indicia of reliability'" to afford the jury a basis upon which to evaluate its truth or falsity.[124] Similarly, in *United States v. Pizarro*,[125] the Seventh Circuit, in reversing the district court's exclusion of a codefendant's prior trial testimony under Rule 804(b)(1), found that the government had a meaningful opportunity, upon which it in fact acted, to attack the credibility of the codefendant, at a prior trial, and thus, the testimony should have been admitted.[126]

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[119] FED. R. EVID. 804(b)(1); *see also* Glen Weissenberger, *Federal Rule of Evidence 804: Admissible Hearsay from an Unavailable Declarant*, 55 CINCINNATI L. REV. 1079, 1090 (1987).

[120] *See* FED. R. EVID. 804(b)(1); WEINSTEIN & BERGER, *supra* note 98, ¶ 800[01] at 804-11; 2 McCormick on Evidence § 245 at 93 (4th ed. 1992); *see also*, I. Daniel Stewart, Jr., *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of Evidence*, 1970 UTAH L. REV. 1, 8-9; Lawrence Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957, 958-61 (1974).

[121] FED. R. EVID. 804(b)(1) advisory committee's note; WEINSTEIN & BERGER, *supra* note 98, ¶ 804(b)(1)[01] at 804-85; MCCORMICK, *supra* note 120, § 301 at 304.

[122] WEINSTEIN & BERGER, *supra* note 98, ¶ 804(b)(1)[02] at 804-89; *see also*, Weissenberger, *supra* note 119, at 1096.

[123] 448 U.S. 56, 73 (1980).

[124] *Id.* at 57.

[125] 717 F.2d 336 (7th Cir. 1983), *cert. denied*, 471 U.S. 1139 (1985).

[126] *Id.* at 349. Likewise, the Second Circuit held that deposition testimony taken in France was admissible under Rule 804(b)(1) because the defendant had been afforded a full and fair opportunity to cross-examine the witness, "despite the

According to one leading treatise, "merely an *opportunity to exercise the right to cross-examine if desired*," rather than actual cross-examination, is all that the Rule requires.[127] Thus, courts have admitted preliminary hearing testimony against defendants under Rule 804(b)(1), even though limitations on the scope of preliminary hearings and tactical considerations[128] often restrict a defendant's cross-examination of prosecution witnesses.[129] In *United States* ex rel. *Haywood v. Wolff*,[130] for example, the Seventh Circuit, in reversing a district court's grant of a writ of habeas corpus, held that the

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obstacles imposed by the French court and despite the need to conduct the deposition in a disadvantageous manner," including the absence of defense counsel during the French court's questioning of the witness, the inability of the defendant to simultaneously observe the proceedings, and the lack of oath by the witness. United States v. Salim, 855 F.2d 944, 954 (2d Cir. 1988). Because under French law the court, and not the attorneys, questions the witnesses, the French court required both the prosecutor and defense counsel to submit their questions in writing. *Id.* at 947. The court found that defense counsel's questioning was the equivalent of cross-examination, and that the testimony was thus sufficiently reliable. *Id.* at 954.

[127] WEINSTEIN & BERGER, *supra* note 98, ¶ 804(b)(1)[02] at 804-91 (quoting 5 WIGMORE, EVIDENCE § 1371 at 55 (Chadbourn rev. 1974)).

The Supreme Court suggested that admission of preliminary hearing testimony would not offend a defendant's right to confrontation, even absent actual cross-examination, so long as the opportunity to cross-examine was afforded. *Roberts*, 488 U.S. at 69-70. The Court, however, declined to decide this issue, finding that defense counsel had engaged in "cross-examination as a matter of *form*," that his inquiry was "replete with leading questions," and that his questioning "comported with the principal *purpose* of cross-examination." *Id.* at 70-71; *see also* WEINSTEIN & BERGER, *supra* note 98, ¶ 804(b)(1)[02] at 804-94-95.

[128] Tactical considerations which inhibit a defendant's motive to cross-examine prosecution witnesses include the desire not to disclose the defense's trial strategy or to provide free discovery to the prosecution. *See infra* notes 182-85 and accompanying text.

[129] WEINSTEIN & BERGER, *supra* note 98, ¶ 804(b)(1)[02] at 804-92; MCCORMICK, *supra* note 120, § 302 at 306-07. *See Roberts*, 448 U.S. 56 (1980); California v. Green, 399 U.S. 149 (1970); United States v. Poland, 659 F.2d 884 (9th Cir.), *cert. denied*, 454 U.S. 1059 (1981).

Courts have similarly admitted discovery depositions, even though the opposing party has a diminished motive to cross-examine at such proceedings. WEINSTEIN & BERGER, *supra* note 98, ¶ 804(b)(1)[02] at 804-97; MCCORMICK, *supra* note 120, § 304 at 316. Thus, in *Hendrix v. Raybestos-Manhattan, Inc.*, the court held that a deposition had been properly admitted under Rule 804(b)(1), noting that "a party's decision to limit cross-examination in a discovery deposition is a strategic decision and does not preclude his adversary's use of the deposition at a subsequent proceeding." Hendrix v. Raybestos-Manhattan, 776 F.2d 1492, 1506 (11th Cir. 1985).

[130] 658 F.2d 455 (7th Cir.), *cert. denied*, 454 U.S. 1088 (1981).

admission of preliminary hearing testimony at the defendant's trial had not violated the defendant's right to confrontation because defense counsel's cross-examination supplied adequate indicia of reliability to permit the jury to evaluate its truth.[131] The court rejected the district court's reasoning that the defendant had not had an adequate opportunity to cross-examine because of the limitations placed on the scope of examination at preliminary hearings under Illinois law.[132] The court concluded that the rule does not require that a defendant's opportunity to cross-examine at a preliminary hearing be identical to that at trial, or that the cross-examination undertaken at a preliminary hearing be "as full and complete" as that permitted at a trial.[133]

Courts have further held that the unavailability of evidence which would have been useful during the prior examination does not establish a lack of opportunity to cross-examine.[134] In *Thomas v. Cardwell*, for instance, the Ninth Circuit

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[131] *Id.* at 461.

[132] *Id.* at 461-62.

[133] *Id.* The dissent, however, disagreed that the former testimony was sufficiently reliable to be admissible against the defendant, pointing to several facts which indicated that the declarant was untrustworthy. *Id.* at 465; *see also* United States ex rel. Bracey v. Fairman, 712 F.2d 315 (7th Cir. 1983). In *Fairman*, the Seventh Circuit, in reversing a district court grant of a writ of habeas corpus, held that the states were not constitutionally required to admit hearsay, "in the face of . . . [factors indicating] manifest and utter reliability," and disagreed with the district court's reasoning that an opportunity to cross-examine and oath were "ipso facto guarantees of reliability." *Id.* at 317. In *Fairman*, the defendant had sought to admit the preliminary hearing testimony of a witness who had invoked her fifth amendment privilege against self-incrimination when called to the stand at trial. *Id.* at 316. The witness had testified that she had shot the victim, thereby exculpating the defendant from the attempted murder charge. *Id.* at 316. The court found that, among other things, the declarant's relationship with the defendant and her willingness to recant her guilty confession indicated that her testimony was unreliable. *Id.* at 317.

[134] *See* United States v. Koon, 34 F.3d 1416, 1427 (9th Cir. 1994), *cert. granted on other grounds*, 63 U.S.L.W. 3756 (U.S. Sept. 27, 1995). In *Koon*, the defendants claimed that the lower court had erred in admitting a videotaped statement made by a codefendant and recorded at a prior state trial, because the unavailability of enhancements to the videotape at the state trial amounted to a lack of opportunity to cross-examine. *Id.* at 1426-27. The Ninth Circuit rejected this argument and held that the lower court had properly admitted the tape because the defendants had had an adequate opportunity to cross-examine the codefendant at the state proceeding. *Id.* It found that the defendants had only lacked some of the "tools" for effective cross-examination which had later become available, and that this lack of "tools" did not "alter the fact that" they had an opportunity to cross-examine.

held that the lower court had properly admitted the former trial testimony of a witness whom the defendant subsequently learned was a schizophrenic.[135] The court rejected the defendant's claim that the unavailability of this evidence demonstrated his lack of opportunity to cross-examine at the prior trial, noting that damaging information often comes to light after an examination has occurred.[136] The court concluded, however, that this lack of information does not render a prior opportunity to examine inadequate.[137]

The opportunity to cross-examine must be "meaningful in the light of the circumstances which prevail when the former testimony is offered."[138] Hence, where the circumstances surrounding the prior proceeding are significantly different from those at the second proceeding, such as when the issues at the two proceedings are distinct, courts have barred admission of the prior testimony.[139] In *United States v. Wingate*, the Second Circuit held that the lower court had properly excluded, under Rule 804(b)(1), suppression hearing testimony concerning the voluntariness of a codefendant's confession because the government had lacked motive and opportunity to examine the codefendant at the hearing similar to those it would have had at trial.[140] The court found that, because the issues at the two proceedings were sufficiently dissimilar, the government had not had a meaningful opportunity to cross-examine the codefendant. The issue at the suppression hearing was whether the codefendant's confession had been voluntary, and not the guilt or innocence of the defendant.[141]

Id. at 1427.

[135] 626 F.2d 1375, 1386 n.34 (9th Cir. 1980), *cert. denied*, 449 U.S. 1089 (1981).

[136] *Id.*

[137] *Id.*

[138] WEINSTEIN & BERGER, *supra* note 98, ¶ 804(b)(1)[02] at 804-91 (quoting MCCORMICK, *supra* note 120, § 225 at 616).

[139] MCCORMICK, *supra* note 120, § 302 at 307; WEINSTEIN & BERGER, *supra* note 98, ¶ 804(b)(1)[02] at 804-91; *see* United States v. Taplin, 954 F.2d 1256, 1258 (6th Cir. 1992) (in reversing defendant's conviction, court held that lower court had improperly admitted coconspirator's suppression hearing testimony, finding that, even though defense counsel had been present, the defendant had not been, and thus the defendant had not had a similar motive and opportunity to develop the testimony. The court noted that "[i]f the motion for which testimony is elicited does not require the defendant's presence, then the fortuity of his appearance is not the equivalent of a full opportunity to develop testimony.").

[140] 520 F.2d 309, 315-16 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976).

[141] *Id.* at 312, 316. Furthermore, the lower court had precluded the government

3. Similar Motive to Cross-Examine

Rule 804(b)(1)'s similar motive requirement represents an expansion of the common law's "identity of issues" requirement.[142] Rather than requiring exact identity of issues, or even a substantial identity of issues, the rule at most 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."[143] Because the rule purports to "salvage" the testimony of an unavailable declarant, and does not bind the party opposing admission of the testimony, a requirement of exact identity of issues is not warranted.[144] Thus, neither the presence of additional issues nor a shift in the case's theory renders former testimony inadmissible under the Rule.[145]

The similar motive requirement embodies notions of adversarial fairness by imposing prior testimony on a party only when that party has a motive to limit the weight to be accorded the testimony.[146] Hence, Rule 804(b)(1)'s similar motive

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from questioning the codefendant concerning the defendant's involvement in the conspiracy charged. *Id.* at 316 n.7.

[142] WEINSTEIN & BERGER, *supra* note 98, ¶ 804(b)(1)[04] at 804-100-02; Weissenberger, *supra* note 119, at 1101.

[143] MCCORMICK, *supra* note 120, § 304 at 316.

[144] MCCORMICK, *supra* note 120, § 304 at 315; Weissenberger, *supra* note 119, at 1101.

[145] Weissenberger, *supra* note 119, at 1101; WEINSTEIN & BERGER, *supra* note 98, ¶ 804(b)(1)[04] at 804-02.

[146] FED. R. EVID. 804(b)(1) advisory committee's note ("In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness of the earlier occasion."); Judith M. Mercier, United States v. Salerno: *An Examination of Rule 804(b)(1)*, 48 U. MIAMI L. REV. 323, 325 (1993) (arguing that courts should apply the "reasonable examiner" approach endorsed by the panel in *Salerno* to effectuate adversarial fairness); Glen Weissenberger, *The Former Testimony Hearsay Exception: A Study in Rulemaking, Judicial Revisionism, and the Separation of Powers*, 67 N.C. L. REV. 295, 297, 299 (1989) (arguing that Congress' addition of "predecessor in interest" to the text of Rule 804(b)(1) demonstrates that it intended to protect the adversarial rights of a party by precluding admission of former testimony against that party if the party lacked a motive and opportunity to develop the testimony in the prior proceeding); Weissenberger, *supra* note 119, at 1101-02 ("The Rule seeks to achieve fairness by imposing factual testimony on a party only where the party (or his or her predecessor [in interest] in a civil case) had a motive to de-

requirement ensures that a party's opportunity to cross-examine at the prior proceeding is meaningful.[147] The nature of the proceeding, including its purpose and burden of proof, will influence an examiner's motive to develop testimony.[148]

As discussed above, courts generally have admitted preliminary hearing testimony against defendants even though a defendant's motive to cross-examine at a preliminary hearing may be significantly diminished.[149] For instance, in *United States v. Poland*,[150] the Ninth Circuit held that the lower court had properly admitted the identification testimony of a deceased witness at the defendants' trial. Rejecting the defendants' arguments that the defense's motive to examine at a suppression hearing differs from its motive at trial, the court found that the issue at an identification hearing is not only whether the identification procedure was suggestive, but whether the identification was reliable. Consequently, the court found that a defendant has a similar motive to cross-examine an identification witness at a suppression hearing as

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velop or, alternatively, to limit the weight of the testimony at the former proceeding."); *see also Salerno I*, 937 F.2d at 806 (adversarial fairness should preclude the opponent of former testimony from arguing it lacked a similar motive when the declarant is available to it); DeLuryea v. Winthrop Lab., 697 F.2d 222, 226-27 (8th Cir. 1983); Lloyd v. American Export Lines, Inc., 580 F.2d 1179, 1190-93 (3d Cir.) (Stern, J., concurring), *cert. denied*, 439 U.S. 969 (1978); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1288-91 (E.D. Penn. 1980).

[147] *Salerno II*, 974 F.2d at 238.

[148] United States v. DiNapoli, 8 F.3d 909, 912-13 (2d Cir. 1993); *see also* Coffin v. State, 885 S.W.2d 140, 151 (Tex. Crim. App. 1994) (en banc) (Baird, J., dissenting) ("a more narrow focus may also dictate a narrow motive to question witnesses") (citing Barber v. Page, 390 U.S. 719, 725 (1968) (finding that a preliminary hearing limited to a determination of probable cause is ordinarily a "much less searching exploration into the merits.")); Michael M. Martin, *The Former-Testimony Exception in the Proposed Federal Rules of Evidence*, 57 IOWA L. REV. 547, 562-565 (1972) (discussing factors, including the purpose of and the burden of proof at a prior proceeding, which may affect an examiner's interest and motive in developing testimony).

[149] MCCORMICK, *supra* note 120, § 304 at 316; *see also*, Barber v. Page, 390 U.S. 719, 725 (1968) ("A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial."); Virgin Islands v. Aquino, 378 F.2d 540, 549 (3d Cir. 1967) (discussing differences between preliminary hearing and trial, and stating "[a]t the preliminary hearing . . . the cross-examiner is much more narrowly confined by the nature of the proceeding").

[150] 659 F.2d 884 (9th Cir.), *cert. denied*, 454 U.S. 1059 (1981).

he has at trial.[151]

Courts have further held that where an opportunity to cross-examine exists, strategic decisions to curtail or waive cross-examination do not render former testimony inadmissible.[152] One commentator describes this reasoning as "rough justice": courts faced with the choice between excluding former testimony to the disadvantage of the "innocent," proffering party, or admitting it to the disadvantage of the opposing party, who had an adequate prior opportunity to cross-examine, tend to favor admission.[153] These courts consider it fair to hold the opposing party responsible for his or her mistaken strategic judgments.

For example, in *United States v. Zurosky*,[154] the First Circuit held that the lower court acted properly in admitting suppression hearing testimony under Rule 804(b)(1) because the defendant already had a meaningful opportunity to cross-examine the witness at the suppression hearing. The court remarked that the defendant had made a tactical decision not to cross-examine, but was not denied an opportunity to do so.[155] Similarly, in *United States v. Pizarro*,[156] the Seventh Circuit, held that it was reversible error for the lower court to have excluded a codefendant's former trial testimony under Rule 804(b)(1), and rejected the government's arguments that it had been unable to cross-examine the codefendant with regard to death threats the defendant allegedly had made to him.[157] The court found that, among other things, the government had curtailed its cross-examination in this regard to dampen a defense motion for severance, and that "[s]uch a self-imposed restriction did not constitute an actual preclusion of the issue," but rather a tactical decision.[158]

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[151] *Id.* at 896.

[152] MCCORMICK, *supra* note 120, § 304 at 317.

[153] MCCORMICK, *supra* note 120, § 304 at 317 n.14.

[154] 614 F.2d 779 (1st Cir. 1979), *cert. denied*, 446 U.S. 967 (1980).

[155] *Id.* at 793. The court noted that the lower court had invited the defendant to cross-examine his codefendant when the codefendant began to incriminate the defendant, and that once this had occurred, the codefendant's testimony "invited, if not compelled, cross-examination." *Id.*

[156] 717 F.2d 336 (7th Cir. 1983), *cert. denied*, 471 U.S. 1139 (1985).

[157] *Id.* at 349.

[158] *Id.* In contrast, the Second Circuit, in *United States v. Serna*, upheld the government's argument that it lacked a similar motive because of its strategic

Finally, courts will exclude former testimony when extreme differences between the nature of the two proceedings and the stakes involved preclude a finding of similar motive.[159] For example, in *United States v. Powell*,[160] the Seventh Circuit held that the lower court had properly excluded a coconspirator's testimony during his guilty plea because a prosecutor's motive at such a proceeding is to ensure that the plea is entered knowingly and voluntarily, and that there is a factual foundation for it.[161] Furthermore, the court accepting the plea is primarily responsible for ensuring the voluntariness of the plea, and, in this case, the court, and not the prosecutor, had conducted the questioning.[162]

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determination not to pursue a line of cross-examination and that the lower court had properly excluded, under Rule 804(b)(1), the prior trial testimony of one of the defendant's criminal associates at that associate's own trial. United States v. Serna, 799 F.2d 842, 849-50 (2d Cir. 1986), *cert. denied*, 481 U.S. 1013 (1987), *overruled by* United States v. DiNapoli, 8 F.3d 909, 914 (2d Cir. 1993); *see also* 2 STEVEN A. SALTZBURG & MICHAEL M. MARTIN, FEDERAL RULES OF EVIDENCE MANUAL 411 (5th ed. 1990). The trial court in *Serna* conceded that the government "arguably had a motive to cross-examine" the cohort regarding his claim that he had not attended a particular meeting to which a government informant had testified, and that the informant's credibility had been at issue at the cohort's trial. *Serna*, 799 F.2d at 849. The Second Circuit found, however, that "since cross-examination was unlikely to shake [the cohort's] denial of such meeting, the prosecutor, wisely, we think, chose to focus his cross-examination" on other details. *Id.* The court further noted that the lower court had not erred in offering to admit the testimony, but only if the jury was informed that the cohort's jury had found him incredible, had returned a guilty verdict against him, and that, as a result, the cohort was serving a five-year prison sentence. *Id.* at 850. Finding that the conviction cast doubt on the cohort's testimony, the court found no abuse of discretion because the evidence could have been used to impeach the cohort under Rule 806 of the Federal Rules of Evidence. *Id.*

In *DiNapoli*, however, the court in a footnote rejected the implication in *Serna* that "lack of similar motive may be established simply because questioning available at a prior proceeding was not undertaken." 8 F.3d at 914 n.5. The court concluded that foregone lines of cross-examination were factors in, but not determinative of, similarity of motive. *Id.* at 914.

[159] MCCORMICK, *supra* note 120, § 304 at 317.

[160] 894 F.2d 895 (7th Cir.), *cert. denied*, 495 U.S. 939 (1990).

[161] *Id.* at 901.

[162] *Id.*; *see also*, United States v. Fischl, 16 F.3d 927 (8th Cir. 1994) (lower court did not abuse its discretion in excluding under Rule 804(b)(1) detention hearing testimony); United States v. Taplin, 954 F.2d 1256, 1259 (6th Cir. 1992) (defendant lacked a similar motive to examine coconspirator at suppression hearing because issue was whether coconspirator had standing to challenge search and not guilt or innocence of defendant and therefore prior testimony was improperly admitted); United States v. Wingate, 520 F.2d 309, 315-16 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976).

B. *The Admission of Grand Jury Testimony Under Rule 804(b)(1)*

The admission of grand jury testimony as an exception to the hearsay rule under the Federal Rules of Evidence, either against a defendant or against the prosecution, is controversial.[163] Without much discussion, several courts have upheld the admission of grand jury testimony against the government under Rule 804(b)(1), or have suggested that its admission would be permissible under the rule.[164] For instance, in *Unit-*

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[163] A discussion of the admission of grand jury testimony against a defendant is beyond the scope of this Comment. *See generally*, Judd Burstein, *Admission of Unavailable Witness' Grand Jury Testimony: Can It Be Justified?*, 4 CARDOZO L. REV. 263, 263-64 (1983) (arguing that courts have improperly admitted grand jury testimony against defendants under Rule 804(b)(5), the residual exception, because that exception does not encompass grand jury testimony; grand jury testimony is a form of prior testimony, and, as such, should not be admitted against a defendant because the defendant has no opportunity to develop the testimony in the grand jury, as required under Rule 804(b)(1); moreover, the admission of grand jury testimony against a defendant violates the defendant's right to confrontation); 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, 432-33 (1986) (arguing that the admission of grand jury testimony against defendants under Rule 804(b)(5) subverts the categorical structure of the Federal Rules of Evidence); Lizbeth A. Turner, *Admission of Grand Jury Testimony Under the Residual Hearsay Exception*, 59 TUL. L. REV. 1033, 1034-35 (1985) (discussing the constitutional problems raised by the admission of grand jury testimony against defendants under Rule 804(b)(5)); Glen Weissenberger, *The Admissibility of Grand Jury Transcripts: Avoiding the Constitutional Issue*, 59 TUL. L. REV. 335, 337-39 (1984) (arguing that it is not necessary to reach the constitutional issue of whether the admission of grand jury testimony against a defendant under Rule 804(b)(5) violates his sixth amendment right to confrontation because "the residual exceptions are inappropriate vehicles for the admission of grand jury transcripts when offered against the accused").

[164] *See* United States v. Miller, 904 F.2d 65 (D.C. Cir. 1990) (defendants were entitled to admit grand jury testimony as former testimony under Rule 804(b)(1)); United States v. Lester, 749 F.2d 1288, 1301 (9th Cir. 1984) (holding that lower court did not err in excluding grand jury testimony, although finding that the "the government had ample opportunity to cross-examine" the witness in the grand jury); United States v. Young Bros., Inc., 728 F.2d 682, 691-92 (5th Cir.), *cert. denied*, 409 U.S. 881 (1984) (avoiding the "difficult question [of] whether the Rule 804(b)(1) definition of 'former testimony' includes grand jury testimony" by finding that any error in excluding the testimony was harmless); United States v. Klauber, 611 F.2d 512, 516-17 (4th Cir. 1979), *cert. denied*, 446 U.S. 908 (1980) (suggesting that admission of grand jury testimony would be proper because the government "had a full right to interrogate at the Grand jury proceedings"); United States v. Driscoll, 445 F. Supp. 864 (D.N.J. 1978) (declining to rule whether

ed States v. Miller,[165] the United States Court of Appeals for the District of Columbia Circuit, with sparse analysis, held that the lower court improperly excluded the grand jury testimony of a defense witness under Rule 804(b)(1). The court found that the government had the same motive and opportunity to examine the witness before the grand jury as it would have at trial, inasmuch as the issue before the grand jury—the guilt or innocence of the defendants—was the same as that at trial.[166]

Similarly, in *Feaster v. United States*,[167] the same court of appeals held that the lower court had improperly excluded the exculpatory grand jury testimony of an unavailable witness under the District of Columbia's prior-recorded-testimony exception, which contains an "opportunity to cross-examine" but not a "similar motive" requirement, because the prosecution had been given a sufficient opportunity to cross-examine the witness in the grand jury.[168] The court found that because the prosecutor's inquiry in the grand jury was focused on the defendant's guilt, the issues in the grand jury and at trial were the same.[169] The court rejected the lower court's reasoning that the "prosecutor did not assume an 'adversarial, inquiring, searching, and explicative approach'" in examining the witness, explaining that this standard was more exacting than the one required.[170] The court observed that the prosecutor's "actual questioning" before the grand jury "comported with the principal purpose of cross-examination," and that, even under Feder-

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grand jury testimony is admissible against the government; issue of admissibility not ripe until trial); United States v. Henry, 448 F. Supp. 819, 820-21 (D.N.J. 1978) (permitting introduction of grand jury testimony, but declining to fashion "a broad or general rule applicable in all instances.").

[165] 904 F.2d 65 (D.C. Cir. 1990).

[166] *Id.* at 68.

[167] 631 A.2d 400 (D.C. App. 1993).

[168] *Id.* at 406. Rule 804(b)(1) of the Federal Rules of Evidence does not apply in the District of Columbia. Instead, the court established that, in order for prior recorded testimony to be admitted, the proponent must establish that: "(1) the direct testimony of the declarant is unavailable; (2) the former testimony was given under oath or affirmation in a legal proceeding; (3) the issues in the two proceedings were substantially the same; and (4) the party against whom the testimony is now offered had the opportunity to cross-examine the declarant at the former proceeding." Skyers v. United States, 619 A.2d 931, 933-34 (D.C. 1993).

[169] *Feaster*, 631 A.2d at 406.

[170] *Id.*

al Rule of Evidence 804(b)(1), the testimony would likely have been admissible.[171]

When a defendant seeks to admit grand jury testimony, the prosecution typically can raise several arguments to demonstrate its lack of a similar motive and opportunity to cross-examine.[172] Several factors attendant to a grand jury proceeding may limit a prosecutor's motive to cross-examine an exonerating witness.[173] First, the prosecutor often will refrain from compromising the secrecy of the grand jury proceeding by confronting a witness with evidence that would reveal the identity of confidential sources or the status of an ongoing investigation.[174] Second, because a grand jury proceeding may take place during the preliminary phases of an investigation, the issues before the grand jury may be different from those at trial.[175] Third, the prosecutor may not possess all the evidence with which to impeach a witness because that evidence may only come to light during later phases of the investigation.[176] Fourth, because the prosecutor's burden in the grand jury is only to establish probable cause, a prosecutor who has met that burden will not have as strong a motive to cross-examine an exonerating grand jury witness as he would at trial, where the prosecutor must prove guilt beyond a reasonable doubt.[177] Finally, grand jury proceedings are nonadversarial in nature, and therefore lack the competitive climate which exists at trial, where the defendant, defense counsel and the prosecutor are all present.

Some commentators argue that grand jury testimony generally should not be admissible against the government absent a "showing that the government conducted a full grand jury

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[171] *Id.* at 406-07 (citing *Salerno II*, 974 F.2d at 237-41). The court further held that the lower court had improperly taken into consideration other factors that indicated that the testimony was unreliable, and that the lower court had "'impermissibly invaded the province of the jury in excluding the grand jury testimony.'" *Id.* at 408-09.

[172] For a discussion of the arguments made by the government in *United States v. DiNapoli* against the admission of the grand jury testimony in that case, see *infra* notes 195-98 and accompanying text.

[173] Daniel J. Capra, 'Salerno,' *Plain Meaning and the Supreme Court*, N.Y.L.J., July 17, 1992, at 3.

[174] Capra, *supra* note 173, at 3.

[175] Capra, *supra* note 173, at 3.

[176] Capra, *supra* note 173, at 3.

[177] Capra, *supra* note 173, at 3.

interrogation."[178] They argue that, absent such a showing, the testimony lacks the reliability which results from a prosecutor's motive to develop it thoroughly.[179]

While courts generally admit preliminary hearing testimony against defendants under Rule 804(b)(1),[180] the defendants' arguments against the admission of such testimony are strikingly similar to the government's arguments against the admission of grand jury testimony under the Rule.[181] In his dissent from the majority's opinion in *California v. Green*, in which the United States Supreme Court held that the admission of preliminary hearing testimony did not offend a defendant's right to confrontation, Justice Brennan argued that "[c]ross-examination at [a] [preliminary] hearing pales beside that which takes place at trial" because of the differences between the nature and purposes of the two proceedings.[182] First, because a prosecutor only must establish probable cause at a preliminary hearing, defense counsel has little motive to show that the testimony does not establish guilt, especially if that burden has been met.[183] Second, defense counsel will not wish to provide the prosecution with "gratis discovery" by extensively examining prosecution witnesses and thereby revealing the defense's trial strategy.[184] Finally, because preliminary hearings take place at the initial stages of a criminal prosecution, the defendant will rarely possess all of the evidence with which to impeach a

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[178] SALTZBURG & MARTIN, *supra* note 158, at 410.

[179] SALTZBURG & MARTIN, *supra* note 158, at 410.

[180] *See supra* notes 122-133 and accompanying text.

[181] Capra, *supra* note 173, at 3 ("if the courts are sympathetic to the prosecutor's plight at the grand jury, they should be equally sympathetic to the defendant's plight at the preliminary hearing"); Michael Martin, *Grand Jury Testimony Against the Government*, N.Y.L.J., Dec. 13, 1991, at 3 ("[T]he same factors . . . pointed to as calling for the 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.").

[182] 399 U.S. 149, 195, 197 (1970) (Brennan, J., dissenting).

[183] *Id.* at 197; *see also*, Martin, *supra* note 148, at 562 ("[W]hen the difficulties of conducting a thorough examination at that stage are considered . . . it is seen that the high burden placed on the defense [in demonstrating the weaknesses of the prosecution's probable cause case] may actually impede rather than stimulate elicitation of all the relevant facts, since it is less difficult and more effective to bring them out at another stage of the proceedings.").

[184] *Green*, 399 U.S. at 197 (Brennan, J., dissenting).

witness.[185]

While both the government and the defense arguments have merit, the extent to which these arguments militate against the admission of former testimony should depend upon whether the circumstances surrounding the prior proceeding, in fact, bear them out. As Justice Blackmun advised in his concurring opinion in *Salerno*, "Because 'similar motive' does not mean 'identical motive,' the similar-motive inquiry . . . is inherently a *factual* inquiry, depending in part on the similarity of the underlying issues and on the context of the grand jury [or preliminary hearing] questioning."[186] Thus, these arguments should carry no weight in the abstract; the opponent of the testimony must demonstrate that the relevant circumstances actually inhibited his cross-examination in the prior proceeding, and thereby deprived him of a meaningful opportunity to cross-examine the witness whose testimony the proponent now seeks to admit under Rule 804(b)(1).

In a rigorous dissenting opinion to the District of Columbia Circuit's decision in *United States v. Lynch*, Judge MacKinnon criticized the majority for concluding that preliminary hearings do not provide defendants with a meaningful opportunity to cross-examine, stating "[t]his argument might have some application in some cases, but has none here."[187] Judge MacKinnon found that the transcript revealed that the defendant had in fact engaged in extensive cross-examination at the hearing.[188] He further noted that exclusion would have been warranted had the defendant in fact lacked an adequate opportunity to cross-examine at the preliminary hearing. Because defense counsel had extensively cross-examined the

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[185] *See* Capra, *supra* note 173 at 3.

[186] United States v. Salerno, 112 S. Ct. 2503, 2509 (1992) (Blackmun, J., concurring).

[187] 499 F.2d 1011, 1033 (D.C. Cir. 1974) (MacKinnon, J., dissenting). This case was decided prior to the enactment of the Federal Rules of Evidence, which became effective in 1975. *See* FED. R. EVID. Introduction. The majority held that the admission of preliminary hearing testimony against the defendant had violated his right to confrontation because the government had failed to demonstrate that the witness was in fact unavailable to it at trial. *Lynch*, 499 F.2d at 1023-24. The majority noted that, at a preliminary hearing, a defendant is less likely to engage in as extensive a cross-examination than at trial because of the differing burdens of proof at the two proceedings. *Id.* at 1023.

[188] *Id.* at 1033 (MacKinnon, J., dissenting).

preliminary hearing witness, Judge MacKinnon concluded that, "this point resolve[d] into a straw argument."[189]

III. ANALYSIS

Examination of the decisions in *DiNapoli* and *Salerno* reveals that the panel and the en banc majority reached different results not solely because of different interpretations of Rule 804(b)(1)'s similar motive requirement, but due to other unstated concerns. On remand from the Supreme Court, the panel was largely unsympathetic to the government's arguments against admission of the testimony. This posture is consistent with its earlier *Salerno* opinion, in which it had refused to entertain the government's arguments based on lack of similar motive to exclude the testimony under Rule 804(b)(1).[190] A close reading of this opinion suggests that the panel was troubled not only by what it perceived as prosecutorial misconduct, but by the lower court's lack of even-handedness toward the parties.[191]

In contrast, an examination of Chief Judge Newman's en banc opinion indicates that the majority feared that the admission of exculpatory grand jury testimony in this case would cause the government, in future cases, to alter substantially its examination in the grand jury to mirror that which takes place at trial, and thus expand grand jury proceedings well beyond their present purposes.[192] The opinion explicitly states that the majority deemed *DiNapoli* appropriate for en banc review because it had "potentially broad implications for the administration of criminal justice."[193] Not surprisingly, the en banc majority was extremely deferential to the government's arguments against admission of the grand jury testimony. This deference is also apparent in Chief Judge Newman's dissent from the denial of the government's petition for rehearing en banc.[194] In that dissent, Chief Judge Newman expressed the

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[189] *Id.*

[190] *Salerno I*, 937 F.2d at 805-08.

[191] *See* Margaret A. Berger, *When, If Ever, Does Evidentiary Error Constitute Reversible Error*, 25 LOY. L.A. L. REV. 893 (1992).

[192] *DiNapoli*, 8 F.3d at 909-15; *see also* 2 SALTZBURG & CAPRA, *supra* note 31, at 410.

[193] *DiNapoli*, 8 F.3d at 910.

[194] United States v. Salerno, 952 F.2d 624 (2d Cir. 1991) (Newman, J., dissent-

apprehension that admission of the exculpatory grand jury testimony would greatly frustrate the government's development of evidence in the grand jury.[195]

A. *The Government's Arguments and the Second Circuit's Response*

The government made three arguments in support of its position that it generally lacks a motive to cross-examine exonerating grand jury witnesses which is similar to its motive to cross-examine at trial.[196] First, the government argued that the need to maintain the secrecy of grand jury proceedings limits its motive to cross-examine witnesses before the grand jury, and is distinct from any motive which it may have at trial.[197] Second, the government argued that it has little incentive to challenge a perjurious witness with "rigorous, on-the-spot" cross-examination because it can prosecute the witness for perjury, or recall the witness when the investigation supplies more evidence with which to challenge him.[198] Third, the government claimed that the issues before the grand jury and at trial may differ due to the different burdens of proof at the two proceedings.[199]

1. The Panel

The panel characterized the government's arguments as "long on policy considerations and generalities about grand jury practice, but short on specific facts."[200] It found that, even assuming that the government's arguments were true, consideration of them was "best left for another day," because the cross-examination in which the government had engaged rebutted the major premise of each argument.[201]

The panel's hostility to the government's position finds its

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ing).

[195] *Id.* at 625; *see also* SALTZBURG & MARTIN, *supra* note 158, at 410.

[196] *Salerno II*, 974 F.2d at 237-38.

[197] *Id.* at 237.

[198] *Id.*

[199] *Id.* at 238.

[200] *Id.* at 240.

[201] *Id.*

origins in the panel's earlier decision in *United States v. Salerno*, a decision to which Chief Judge Newman rigorously dissented, and which was ultimately reversed by the Supreme Court.[202] In that decision, the panel conceded that the government may not have had a similar motive to cross-examine the witnesses before the grand jury as it would have had at trial.[203] The panel, however, was willing to dispense entirely with Rule 804(b)(1)'s similar motive requirement in the name of adversarial fairness to the defendants.[204] It found that, because the government could have granted Bruno and DeMatteis use immunity at trial, they were available to the government, but unavailable to the defendants.[205] Inasmuch as the government had this option, the panel refused to permit the government to invoke Rule 804(b)(1)'s similar motive requirement to bar admission of the testimony.[206] It held that the lower court had erred in excluding the grand jury testimony, and reversed all of the defendants' convictions.[207]

In that opinion, the panel further stated that it was concerned by the government's opposition to the admission of the testimony where it had disclosed the exculpatory nature of the testimony to the defendants pursuant to *Brady v. Maryland*.[208] It remarked that "in resisting the admission of the grand jury transcripts, the government was not true to the letter and spirit of *Brady*."[209] The court, however, declined to reach the *Brady* issue.[210]

Moreover, in both its decision on remand and its earlier decision, the panel described the government's ex parte conference with the district court judge in detail, during which the government presented its arguments against the admission of the grand jury testimony.[211] These facts, were not, however, relevant to its ultimate holding in *Salerno*. In addition, the panel, in both of its opinions, emphasized that the prosecution

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[202] *Salerno I*, 937 F.2d 797 (2d Cir. 1991), *rev'd*, 112 S. Ct. 2503 (1992).
[203] *Id.* at 806.
[204] *Id.* at 806.
[205] *Id.* at 805.
[206] *Id.* at 806.
[207] *Id.* at 808, 813.
[208] *Salerno I*, 937 F.2d at 807.
[209] *Id.*
[210] *Id.*
[211] *Salerno II*, 974 F.2d at 237; *Salerno I*, 937 F.2d at 804.

is in control of grand jury proceedings, whose nature is generally adverse to the interests of an absent defendant.[212]

Thus, the panel's decisions reflect the view that the government should be saddled with the exculpatory evidence that results from its mistaken judgment that a grand jury witness is going to deliver incriminating testimony. In addition, the panel appears to have reversed the lower court, ostensibly upon an evidentiary ground, because it viewed both the government's and the lower court's conduct with suspicion.[213]

2. The Majority

In contrast, the majority was not only solicitous of the government's arguments, but its opinion essentially adopted the government's position against the admission of grand jury testimony. Acknowledging that the nature of a proceeding will affect an examiner's motive, it remarked, that a prosecutor is not always the opponent of a grand jury witness's testimony because at that stage of a criminal prosecution, the prosecutor is only developing evidence to get an indictment.[214]

The majority further noted that because the burden of proof in the grand jury is only to establish probable cause, when that burden is met, the government has slight incentive to examine exonerating witnesses because it is unlikely the grand jury will fail to indict.[215] In addition, the majority cred-

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[212] *Salerno I*, 937 F.2d at 807 (grand jury proceedings are "adverse to the interest[s] of defendant[s]"); *Salerno II*, 974 F.2d at 240 ("the nature of the grand jury proceeding is such that the government is the only party which may ever avail itself of [the] opportunity [to cross-examine]").

[213] *See* BERGER, *supra* note 191 at 893. Based on an examination of 30 cases decided in 1990, in which Courts of Appeals reversed on the grounds of erroneous evidentiary rulings, Professor Berger concludes "that most reversals occur when counsel, particularly prosecutors, or the court are acting unfairly." BERGER, *supra* note 191, at 893. With regard to prosecutorial misconduct, Professor Berger states that, although it cannot be determined to what extent this factor plays a role, the amount of space devoted to disapproving remarks concerning the prosecution's conduct in these cases indicates "that these cases have been singled out for reversal not merely because of evidentiary mistake but in hopes of reforming the prosecution's attitude." BERGER, *supra* note 191, at 893. With regard to judicial misconduct, Professor Berger argues that some of the cases further suggest that the Courts of Appeals viewed the lower courts rulings as unfair because they favored one party over another. BERGER, *supra* note 191, at 905.

[214] *DiNapoli*, 8 F.3d at 912-13.

[215] *Id.* at 913.

ited the government's argument that it will refrain from fully cross-examining an exonerating grand jury witness to preserve the secrecy of the grand jury proceedings, stating "[t]here is an important public interest in not disclosing prematurely the existence of surveillance techniques."[216]

Although the majority rejected the government's argument that it typically does not have a similar motive to develop grand jury testimony as it does trial testimony, and announced that its test was "fact specific,"[217] the majority was persuaded by the government's arguments—despite the extensive cross-examination evident from the grand jury transcripts.

Chief Judge Newman's dissent from the denial of the government's petition for rehearing en banc in *United States v. Salerno*[218] presages his opinion in *DiNapoli*. It is in this dissenting opinion that the eventual majority's concerns are most evident. Chief Judge Newman first remarked that the panel had erroneously reversed the "outcome of a 13-month criminal trial" based on its maverick ruling that the government's option to confer use immunity on the grand jury witnesses rendered them available to the government for purposes of Rule 804(b)(1).[219] Chief Judge Newman was not only critical of the content of panel's holding, but was dismayed by its wasteful impact, which overturned a thirteen-month, complicated RICO prosecution that had consumed immense amounts of both prosecutorial and judicial resources.

Chief Judge Newman, in defending the district court's ruling, further pointed out that the lower court had excluded testimony that the "Government believes was false."[220] This belief, as previously shown, ought not to bolster the district court's ruling, because, in determining similarity of motive, it is irrelevant what the government believes or whether the testimony is indeed false. Instead, Chief Judge Newman's dissent provides further support for the view that the majority ruled as it did, in part, because it believed that the grand jury testimony was incredible.

Chief Judge Newman also voiced the fear that the panel's

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[216] *Id.*
[217] *Id.* at 914.
[218] United States v. Salerno, 952 F.2d 624 (2d Cir. 1991).
[219] *Id.* at 624-25.
[220] *Id.* at 625.

ruling would seriously impede the "Government's development of evidence in the grand jury."[221] He explained that if the government subpoenas a witness who gives exculpatory testimony, which the government may legitimately do,[222] the government must suffer the admission of that testimony at trial.[223] Chief Judge Newman rejected the argument that the government has an adequate opportunity to cross-examine exonerating grand jury witnesses.[224] He argued that the government may not know that the testimony is false, nor will it possess the best evidence with which to impeach the testimony during the preliminary phases of an investigation. Finally, the government may not wish to compromise the secrecy of the grand jury proceeding.[225]

Chief Judge Newman characterized the panel's ruling as "a course fraught with serious implications for the conduct of grand jury investigations."[226] He feared that the panel's ruling would force the government to treat exonerating grand jury witnesses as trial witnesses, thereby significantly altering the government's posture in the grand jury and the nature of grand jury proceedings in general. He thus viewed the construction of Rule 804(b)(1)'s similar-motive requirement in the context of grand jury proceedings as implicating broad policy issues affecting grand jury proceedings in general.[227]

In sum, the en banc majority and the panel were motivated by concerns other than whether the grand jury testimony in this case met the admissibility requirements of Rule 804(b)(1). The majority considered the detrimental impact which the admission of grand jury testimony would have upon the government's conduct in the grand jury. The panel, on the other hand, appeared to have reversed the defendants' convictions based upon its perception that the prosecution and the trial court had acted unfairly. Neither of these concerns is

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[221] *Id.*

[222] *Id.* at 625 (the government may wish to call witnesses other than those who are certain to give helpful testimony "both to investigate undeveloped matters and to freeze a hostile or wavering witness's testimony").

[223] *Id.*

[224] *Salerno*, 952 F.2d at 626.

[225] *Id.*

[226] *Id.*

[227] *Id.*

relevant, however, to a determination of whether evidence is admissible as an exception to the hearsay rule. Rather, the primary concern in determining the admissibility of hearsay is whether it is sufficiently reliable.[228]

B. *The Tests to Determine Similarity of Motive*

The test articulated by the panel for determining similarity of motive is more consistent with the purpose of Rule 804(b)(1)'s similar motive requirement than the majority's. Furthermore, the result reached by the panel was ultimately correct in light of the Rule's text and interpretations of its meaning. The majority's test, on the other hand, is more stringent than that required by the Rule. The majority's application of its test to the facts of this case does not show that the government lacked a similar motive, but rather that the grand jury testimony was probably false, and not simply unreliable.

The panel explained that a court, in determining similarity of motive, "should look first to what examination *in fact* occurred at the prior proceeding, in order to determine whether the prior examination was 'the equivalent of what would now be done if the opportunity [to examine] were presented.'"[229] The panel's test thus focuses upon the transcript of the prior examination to determine whether it was the "rough equivalent" of what would occur at the current proceeding.[230] By emphasizing the actual examination in which the party had engaged, the panel correctly focuses upon the characteristic which renders former testimony reliable—cross-examination.[231] As the Supreme Court discussed in *Ohio v. Roberts*, prior testimony which has been subjected to the equivalent of cross-examination is sufficiently reliable to afford the trier of

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[228] *See* United States v. Salerno, 112 S. Ct. 2503, 2509 (1992) (Blackmun, J., concurring) (similar-motive requirement ensures the reliability of former testimony, and does not encompass policy arguments favoring either the government or the accused); Ohio v. Roberts, 448 U.S. 56, 66, 73 (1980) (previously cross-examined preliminary hearing testimony bore adequate indicia of reliability).

[229] *Salerno II*, 974 F.2d at 239 (quoting FED. R. EVID. 804 advisory committee's note).

[230] *Id.* at 240.

[231] *See* WEINSTEIN & BERGER, *supra* note 98, ¶ 804(b)(1)[02] at 804-89; Weissenberger, *supra* note 119, at 1096.

fact a basis upon which to evaluate its truth or falsity.[232]

The panel went on to explain that if the examination in which the party actually engaged is not determinative of similarity of motive, the court should inquire whether "a reasonable examiner under the circumstances would have had a similar motive to examine the witness."[233] The panel explained that this objective test was intended to prohibit the exclusion of former testimony on the basis of a tactical decision not to cross-examine, rather than a bona fide lack of motive to cross-examine.[234]

As one prominent commentator has stated, in the context of the admission of preliminary hearing testimony, "parties have been, and should be, held responsible for previous strategic or tactical judgments and just plain poor lawyering."[235] This conclusion follows from the premise that Rule 804(b)(1) requires only a meaningful opportunity to cross-examine at the prior proceeding, rather than actual cross-examination, to admit former testimony.[236] In contrast, the majority's test imposes a much more exacting inquiry, one which transforms the text of Rule 804(b)(1) to read "same motive" instead of "similar motive." The majority articulated the test for similarity of motive as "whether the party resisting the offered testimony at the 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."[237]

The majority's repeated use of "substantially" in describing an examiner's motive in crediting or discrediting the testimony, and in describing the similarity of the issues in the two proceedings, inappropriately increases the burden placed on the proponent of former testimony. "Similar motive" does not mean "identical motive."[238] The similar motive inquiry, rather than requiring a precise, or even a substantial, identity of issues, instead requires "that the issues in the first proceeding,

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[232] 448 U.S. 56, 73 (1980).

[233] *Salerno II*, 974 F.2d at 239.

[234] *Id.*

[235] MCCORMICK, supra note 120, § 308 at 323.

[236] *See supra* note 127 and accompanying text.

[237] *DiNapoli*, 8 F.3d at 914-15.

[238] *See* United States v. Salerno, 112 S. Ct. 2503, 2509 (1992) (Blackmun, J., concurring); *DiNapoli*, 8 F.3d at 916 (Pratt, J., dissenting).

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."[239] Furthermore, as the Seventh Circuit explained in *United States ex rel. Haywood v. Wolff*,[240] the rule does not require that the prior examination be "as full and complete" as that permitted at trial.[241] Rather, the similar motive inquiry ensures that the party had an adequate opportunity to test the credibility of the testimony.

Moreover, the majority, in instructing courts as to which factors they should consider in determining similarity of motive, erroneously elevated the differences between the proceedings. The majority advised that a judge, when determining similarity of motive, should take into account the purposes of the proceedings and their burdens of proof, and, to a lesser degree, the cross-examination at the prior proceeding, "both what was undertaken and what was available but foregone."[242] In so doing, the majority simultaneously diminishes the significance of actual cross-examination and requires a court to consider "abstract notions of 'motive.'"[243] The best evidence of a party's motive at a prior proceeding is that party's conduct at that prior proceeding, as evidenced by the examination in which that party engaged.[244] By asking a court to compare the two proceedings first, and then to examine the record, the majority got it backwards. Arguments that a party lacked a similar motive based on the nature of the proceeding should be viewed in light of the examination actually undertaken. If the examination was slight, or non-existent, these arguments gain credence; if the examination is substantial, however, these arguments lose force. As Judge MacKinnon contended in *United States v. Lynch*, arguments that a party lacked an adequate opportunity to cross-examine based upon the nature of the prior proceeding "resolve[ ] into a straw argument" when extensive cross-examination appears on the face of

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[239] MCCORMICK, *supra* note 120, § 304 at 316.

[240] 658 F.2d 455, 461-62 (7th Cir.), *cert. denied*, 454 U.S. 1088 (1981).

[241] *Id.* at 461-62.

[242] *DiNapoli*, 909 F.3d at 915.

[243] *Salerno II*, 974 F.2d at 240.

[244] *Id.* at 239 ("actual conduct is a competent indicator of motive") (citations omitted).

the record.[245]

C. *Application of the Tests to the Facts of* DiNapoli

A review of the grand jury transcript reveals that the panel correctly concluded that the government had been afforded a meaningful opportunity to examine the witnesses in the grand jury, upon which it in fact acted.[246] First, the panel found that the government had extensively examined the witnesses regarding the existence of the "Club" of concrete contractors, and when faced with their denials, challenged them with wire-tapped conversations.[247]

The record of the grand jury proceeding fully supports this finding. Before the grand jury, the government contended that Cedar Park had paid a two-percent surcharge to the Genovese Family to participate in the "Club" of concrete contractors.[248] In response to the prosecutor's pointed questions, both Bruno and DeMatteis denied any awareness of the "Club" or of the two-percent surcharge.[249] In response to both witnesses' denials, the prosecutor read a portion of a tape recording of Ralph Scopo, the head of the Concrete and Cement Workers Union which had become public at a prior trial. This recording concerned Cedar Park's payment of the two-percent surcharge for one project, its failure to pay the surcharge for another project, and Bruno's subsequent retirement from Cedar Park.[250] Thus, the panel correctly found that the prosecutor had thoroughly examined the witnesses by employing one of the chief devices for cross-examination—impeachment.

Second, the panel found that the prosecutor had availed himself of other cross-examination techniques during his inquiry, including the use of ridicule, sarcasm, leading questions, and reminders to the witnesses of the penalties for perjury.[251] For instance, after reading DeMatteis a portion of the taped conversation, the prosecutor stated, "And you're telling us you

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[245] 499 F.2d 1011, 1033 (D.C. Cir. 1974) (MacKinnon, J., dissenting).
[246] *Salerno II*, 974 F.2d at 240.
[247] *Id.* at 240; *see supra* note 78 and accompanying text.
[248] *Id.* at 234.
[249] *Id.* at 234-36.
[250] *Id.* at 234-35.
[251] *Id.* at 241.

never discussed with . . . Bruno any payments of the two percent?"[252] When DeMatteis denied knowing Ralph Scopo, the prosecutor asked, "In all the years you're working in the construction industry, you never heard of Ralph Scopo?" and, "You don't know who the head of one of the major unions that represents your employees is?"[253] In response to Bruno's denials of paying the two-percent surcharge, the prosecutor asked, "That is your testimony under oath?" and stated, "I have explained to you the penalties for perjury previously."[254]

Third, the panel found that the issue before the grand jury and at trial was the existence of the "Club." Again, the transcript of the grand jury proceeding establishes that the prosecutor's questions were directed at whether the witnesses had knowledge of and had participated in the "Club." Thus, the panel properly rejected the government's arguments that it lacked a similar motive, based upon its claim that its motive before the grand jury is always significantly different from the one it has at trial. The government's questioning in the grand jury belied this claim.[255]

The majority, on the other hand, trivialized the cross-examination in which the government engaged. It relied instead on two facts which it found dispositive of dissimilarity of motive.[256] First, the court remarked that the defendants had already been indicted when Bruno and DeMatteis testified in the grand jury.[257] Thus, the majority reasoned, because the grand jurors had already believed that the "Club" existed and that the defendants had been a part of it, "[i]t [was] fanciful to think that the prosecutor would have had any substantial interest in showing the falsity of the witnesses' denial of the Club's existence just to persuade the grand jury to add one more project to the indictment."[258]

This claim is patently belied by the record. The prosecutor, in fact, attempted to show that the witnesses had been lying with regard to the existence of the "Club" by asking leading

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[252] *Salerno II*, 974 F.2d at 235.
[253] *Id.*
[254] *Id.* at 236.
[255] *Id.* at 241.
[256] *DiNapoli*, 8 F.3d at 915.
[257] *Id.*
[258] *Id.*

questions and by challenging them with the recording of Ralph Scopo controverting their testimony. Furthermore, it is not "fanciful" to think that the government was interested in adding new defendants or criminal activities to the existing indictment. As Judge Miner argued in his dissent, "[t]he government had an interest in plumbing the depths of the entire scheme to determine whether there might be additional projects or additional defendants within the purview of the existing indictment, as the majority all but concedes."[259]

Second, the majority asserted that prosecutor lacked a similar motive because the grand jurors had informed the prosecutor that they did not believe Bruno, stating, "a prosecutor has no interest in showing the falsity of testimony that a grand jury already disbelieves."[260] This reasoning is flawed based on the facts of the case. The grand jurors had not informed the prosecutor that they found Bruno's testimony incredible until *after* Bruno had testified. Thus, although this knowledge may have dissuaded the prosecutor from further examining Bruno, it could not have tainted the prosecutor's motive during the course of his examination of Bruno. Moreover, this information could not possibly have affected the prosecutor's examination of DeMatteis, since DeMatteis's testimony occurred nearly four months before that of Bruno.[261]

The majority further asserted that its finding of dissimilarity of motive was buttressed by the prosecutor's failure to respond to Bruno's offer to correct false answers given in his testimony. This fact, however, does not indicate that the prosecutor lacked a motive to cross-examine Bruno during the proceeding at which Bruno had testified, but rather, that the prosecutor declined to further examine Bruno.

The facts with respect to Bruno thus do not demonstrate that the prosecutor lacked a similar motive to examine him, but that Bruno's grand jury testimony was probably false. The majority's emphasis upon these facts suggests that it took into consideration Bruno's credibility in determining that the grand jury testimony was properly excluded.[262] However, the draft-

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[259] *Id.* at 917 (Miner, J., dissenting).

[260] *Id.* at 915.

[261] *See Salerno II*, 974 F.2d at 234-35 (DeMatteis testified before the grand jury on June 19, 1986, while Bruno testified on September 11, 1986).

[262] Bruno and DeMatteis may be viewed as "risky declarants." *See* Eleanor

ers of the Federal Rules explicitly rejected alternative theories which would have placed too much discretion in the hands of trial courts, including the discretion to exclude hearsay on the grounds that it is incredible.[263] The drafters endorsed the view that when a trial court excludes evidence on the grounds that it finds the evidence incredible, the trial court invades the province of the jury.[264] Moreover, the majority in essence imported an admissibility requirement to the text to Rule 804(b)(1), similar to the "circumstantial guarantee of trustworthiness" requirement contained in the residual exceptions, and thereby engaged in judicial revision of the hearsay rule.[265]

CONCLUSION

In his concurring opinion in *United States v. Salerno*, Justice Blackmun advised that "the similar-motive inquiry appropriately reflects narrow concerns of ensuring the reliability of evidence admitted at trial—not broad policy concerns favoring

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Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto By Judicial Decision?*, 76 MINN. L. REV. 473, 486-90 (1992) [hereinafter Swift, *Judicial Decision*]; Eleanor Swift, *Abolishing the Hearsay Rule*, 75 CAL. L. REV. 495, 508-13 (1987); *see also* Myrna S. Raeder, *Commentary: A Response to Professor Swift*, 76 MINN. L. REV. 507 (1992). Professor Swift coined the term "risky declarant," and defines it as a declarant who is motivated by self-serving interests and who makes statements which bear unacceptable sincerity risks. Swift, *Judicial Decision*, *supra*, at 486-87. Paradigmatic examples of risky declarants are civil tort plaintiffs and criminal defendants. Swift, *Judicial Decision*, *supra*, at 486-87. Based on her examination of cases applying Rules 803(1), (2) and (3), Professor Swift concludes that the hearsay rule has not been abolished in cases involving risky declarants. Swift, *Judicial Decision*, *supra*, at 474, 487-88. With respect to criminal defendants, she found that courts have been excluding the post-crime exculpatory statements made by these defendants based on their failure to satisfy the admissibility requirements of Rules 803(1), 803(2), and 803(3). Swift, *Judicial Decision*, *supra*, at 488. This Comment, however, argues that the grand jury testimony in this case indeed met the admissibility requirements of Rule 804(b)(1), but that the testimony was excluded in part because it was considered untrustworthy.

[263] *See supra* notes 107-109 and accompanying text.

[264] *See supra* notes 110-112 and accompanying text.

[265] *But see* Swift, *Judicial Decision*, supra note 262, at 491-92. Professor Swift argues that courts have been importing a circumstantial-guarantee-of-trustworthiness test in cases involving Rules 803(1)-(4) to admit, rather than to exclude hearsay, and are thereby subverting the categorical approach of the Federal Rules of Evidence. Swift, *Judicial Decision*, *supra* note 262, at 492. In contrast, this Comment contends that the en banc majority in *DiNapoli* imported sub rosa a trustworthiness factor to exclude, rather than to admit, hearsay which it considered to be incredible.

either the Government in the conduct of grand jury proceedings or the defendant in overcoming the refusal of witnesses to testify."[266] In construing Rule 804(b)(1)'s similar motive requirement in *DiNapoli*, the en banc majority was improperly concerned with the impact which the admission of exculpatory grand jury testimony would have on the government's conduct in the grand jury, and with the apparent falsity of Bruno's testimony. Its opinion in *DiNapoli* reaches a result which is emphatically pro-prosecution and which takes into account the credibility of the declarant, Bruno. This consideration is not permitted under the categorical scheme which the Federal Rules of Evidence have set forth.

For the reasons advanced by the government and other commentators,[267] the government will not extensively cross-examine witnesses in the grand jury because of the unique, nonadversarial nature of grand jury proceedings. However, in this case, the fact that the government actually cross-examined the witnesses demonstrates that it clearly had a motive and opportunity to do so. Thus, *DiNapoli* was a "bizarre case;" despite all of the inhibitors placed on a prosecutor's examination in the grand jury, the prosecutor in fact engaged in extensive cross-examination.

Because *DiNapoli* was an anomaly, the en banc majority's fears, while not unfounded, were overstated. The facts of *DiNapoli* will not recur frequently. Consequently, the admission of the grand jury testimony in this case would not have forced the type of tactical decisions on the government which the majority predicted. The similar motive requirement should protect the government from the admission of such testimony when the circumstances of the case, including the transcript of the grand jury testimony, reveal its lack of motive. But where, as here, the government in fact engaged in significant cross-examination in the grand jury, courts should, as in cases involving the admission of preliminary hearing testimony against defendants,[268] admit such testimony. Cross-examination en-

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[266] United States v. Salerno, 112 S. Ct. 2503, 2509 (1992) (Blackmun, J., concurring).

[267] *See* SALTZBURG & MARTIN, *supra* note 158, at 410.

[268] *See* Capra, *supra* note 173 at 3 (courts should be equally sympathetic to the defendants' plight in preliminary hearings as they are to the government's plight at the grand jury); Martin, *supra* note 181, at 3.

sures the reliability of former testimony and affords the fact-finder a basis upon which to evaluate its truth.

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