Valparaiso University Law Review

Volume 45
Number 1 *Fall 2010*

*pp.*157-200

Fall 2010

No More Splitting: Using a Factual Inquiry to Determine Similar Motive Under Federal Rule of Evidence 804(b)(1)

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NO MORE SPLITTING: USING A FACTUAL INQUIRY TO DETERMINE SIMILAR MOTIVE UNDER FEDERAL RULE OF EVIDENCE 804(b)(1)

I. INTRODUCTION

After dropping out of high school, John Olinger opened a small home remodeling company in Northern Indiana.[1] John's company is not extremely lucrative; however, John's wife works as a secretary and their salaries combined amount to just enough to provide for their three teenage children and to pay their monthly mortgage.

John and his wife recently purchased a small two-bedroom home near Roosevelt High School so that their children would not have to attend Jackson High School. John and his wife did not want their children to attend Jackson because the school is infamous for having academic deficiencies, gang problems, and high drop-out rates. John insisted that his children attend Roosevelt because, as a high school drop-out, John did not want his children to follow in his path.

John and his family had a good life; however, on June 16, 2008, John's life took a turn for the worst. A grand jury indicted John and two others in the Northern District of Indiana for conspiracy to commit fraud, embezzlement, and extortion. If the jury convicts John, he faces ten to twenty years in prison, and he will miss out on being with his children during their critical years of development. Moreover, if John's family loses his income, his wife will not be able to make the mortgage payment and the family will likely move in with his sister, forcing his children to attend Jackson High School and live in a crowded house. Needless to say, if convicted, life for John, his wife, and his three children will take a dramatic shift.

Before John's trial began, the other two defendants accepted plea bargains with the government and agreed to cooperate with the government if necessary. During the trial, John called both of the defendants to testify, but each asserted his Fifth Amendment right not to testify. Subsequently, the prosecution called a witness who gave testimony incriminating John and portraying him as the mastermind behind the whole conspiracy. The witness's testimony contradicted the other two defendants' grand jury testimony, which admitted that John did not actively participate in the conspiracy, and that they were the brains behind the operation. John attempted to admit the grand jury testimony under Rule 804(b)(1); however, the district court held that the

[1] This fact pattern is a hypothetical created by the author.

exculpatory grand jury testimony did not satisfy the similar motive requirement of Rule 804(b)(1). Therefore, the district court did not allow John to use the testimony to persuade the jury of his innocence.

John and his attorney promptly appealed the district court's decision not to admit the exculpatory grand jury testimony. John argues that the prosecutor's motive during the grand jury proceeding and at trial did not differ because the prosecutor always had the same goal—to extract testimony incriminating John. On the other hand, the prosecutor argues that there was no similar motive during the grand jury proceeding because of the lower burden of proof and the ability to call only witnesses the prosecutor wants to examine. Furthermore, the prosecutor argues that there is no incentive to question a witness heavily during a grand jury proceeding because the prosecutor might not want to give up important information about an ongoing investigation, and if the prosecutor finds out the witness is lying, he can bring a perjury charge later. Both sides made all of these arguments in briefs before the Seventh Circuit and are awaiting the court's decision on how to interpret the similar motive element of Rule 804(b)(1).

Appellate courts are currently split on how to determine whether exculpatory grand jury testimony satisfies the similar motive requirement of Rule 804(b)(1). One of the approaches consistently finds that the government does not have a similar motive during a grand jury proceeding as it does at trial, while the other approach consistently finds that the government's motive during a grand jury proceeding is similar to its motive at trial. This Note proposes a set of factors for courts to examine when deciding whether to admit exculpatory grand jury testimony. First, Part II of this Note provides an introduction to the Federal Rules of Evidence and the background and purpose of the hearsay rule, followed by the former testimony exception of the hearsay rule and the two different approaches circuit courts take when deciding whether to admit exculpatory grand jury testimony.[2] Second, Part III discusses the positive and negative aspects of the different interpretations of similar motive.[3] Finally, Part IV proposes factors for courts to use as guidance to decide whether to admit exculpatory grand jury testimony.[4]

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[2] *See infra* Part II (giving a background to the Federal Rules of Evidence, the hearsay rule, former testimony exception, and the two different approaches courts take to determine whether to admit exculpatory grand jury testimony).

[3] *See infra* Part III (describing the positive and negative consequences of the two different approaches courts use to interpret similar motive).

[4] *See infra* Part IV (suggesting how the courts should decide whether to admit exculpatory grand jury testimony).

II. BACKGROUND

America's judicial system ensures due process and guarantees the right to a fair trial for everyone.[5] The laws are meant to apply equally to all, and ideally all courts should interpret laws the same way.[6] Part of receiving a fair trial includes the right to examine witnesses and present evidence, which is governed by the Federal Rules of Evidence in federal court.[7] The purpose of the Federal Rules of Evidence is to promote fairness and to provide consistency in determining what evidence is admissible during trial.[8] However, courts interpreting Rule 804(b)(1) are anything but consistent, and how the rule applies depends on which court is interpreting the rule.[9] First, Part II.A and Part II.B offer an

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5 *See* U.S. CONST. amend. VI (ensuring that the accused has an opportunity to confront and examine witnesses). The Sixth Amendment also guarantees the right to counsel and notice of the crime being charged. *Id.* The Fifth and Fourteenth Amendment guarantee that the accused receives due process before being convicted of a crime. U.S. CONST. amends. V, XIV. *See generally* Neb. Press Ass'n. v. Stuart, 427 U.S. 539, 616 (1976) (stating that the accused is innocent until proven guilty).

6 U.S. CONST. amend. XIV. *See generally Introduction*, THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11 (last visited Sept. 25, 2010) (attempting to create uniformity in laws amongst the states by creating Uniform and Model Acts). Uniformity in the law makes the legal life of businesses and people simpler because people know how the law will apply and what to expect. *Id.*

7 U.S. CONST. amend. VI. *See also* FED. R. EVID. 101 (stating that the Federal Rules of Evidence apply to proceedings in all courts of the United States, bankruptcy judges, and United States magistrate judges).

8 FED. R. EVID. 102. Judges must use the Federal Rules of Evidence to ensure fairness, prevent waste and delay, and promote the growth of the law so justice is served. *Id*.

9 FED. R. EVID. 804(b)(1). Rule 804(b)(1), commonly called the former testimony exception, makes normally inadmissible hearsay admissible. *Id.* Rules 804(b)(1) reads:

> (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.

Id. Compare United States v. Peterson, 100 F.3d 7, 12–13 (2d Cir. 1996) (rejecting the defendant's argument that his state grand jury testimony should not be admitted because the prosecutor's motive to cross-examine him was not the same during trial), *with* United States v. McFall, 558 F.3d 951, 963 (9th Cir. 2009) (holding that the government possessed the same motive during the grand jury as it did during trial because during each proceeding the government attempted to get testimony incriminating the defendant). *See, e.g.*, 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 304 (6th ed. 2006) (stating that the circuit courts appear to be in disagreement over whether grand jury exculpatory

introduction to the Federal Rules of Evidence and provide the purpose and background of the hearsay rule.[10] Second, Part II.B.1 introduces Rule 804(b)(1), the former testimony exception to the hearsay rule, and explains the rule.[11] Finally, Part II.B.2.a and Part II.B.2.b explore the two different approaches circuit courts take when a defendant attempts to admit exculpatory grand jury testimony under the former testimony exception.[12]

A. Introduction to the Federal Rules of Evidence

Every day in trials across the country, witnesses take the stand and testify about their knowledge or recollection of facts relevant to a disputed legal issue.[13] The ability to call witnesses during a lawsuit is one of the most crucial aspects of a fair trial.[14] Lawsuits are largely dependent upon facts, and many times the only way to prove a fact is with witness testimony.[15] However, witnesses testifying during a trial cannot tell their story any way they want.[16] Witnesses are often interrupted by lawyers arguing about legal admissibility issues, and then the judge may rule on the dispute and restrict the matters the witness may address in his testimony.[17]

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testimony meets Rule 804(b)(1)'s similar motive requirement) (internal quotation marks omitted).

10 *See infra* Part II.A. and Part II.B (discussing the Federal Rules of Evidence and providing a background to the hearsay rule).

11 *See infra* Part II.B.1 (providing an explanation of the former testimony exception to the hearsay rule).

12 *See infra* Part II.B.2.a and Part II.B.2.b (explaining the broad and narrow interpretations of Rule 804(b)(1)'s similar motive requirement).

13 DAVID P. LEONARD & VICTOR J. GOLD, EVIDENCE: A STRUCTURED APPROACH 2 (2d ed. 2008). The trial gives the parties a formal setting to express their differing views and opinions, while also resolving the conflict and attempting to achieve justice. *Id.*

14 *Id.* Lawyers constantly try to reveal witness testimony and other evidence favorable to their side, and if the testimony or evidence is not favorable, lawyers try to use the Federal Rules of Evidence to prevent the evidence from reaching the jury. *Id*.

15 *See* Maurice Possley, *A Witness's Role*, AMERICA.GOV (July 1, 2009), http://www.america.gov/st/usg-english/2009/July/20090706174632ebyessedo0.9546885.html (arguing that witness testimony is very important to deciding a case and witness testimony has the power to influence the emotions of a jury to persuade them how to decide the case).

16 LEONARD & GOLD, *supra* note 13, at 1.

17 *Id.* During trials:

> People who know what happened are not allowed simply to tell the story in the way they see fit. Instead, lawyers often rudely interrupt a witness's narrative to argue about arcane legal issues. At the end of these arguments the judge might instruct the witness not to talk about certain things or to talk about them in one way but not another, all without ever explaining why. The lawyers further control the telling

The purpose of witness testimony during trials is to discover the truth and get to the bottom of a disputed legal issue.[18] Consequently, witnesses are only permitted to testify about facts relevant to the underlying legal controversy.[19] Evidence is relevant if it has any tendency to increase or decrease the likelihood that a fact is true.[20] Just because evidence is relevant, however, does not necessarily mean the evidence is admissible.[21] Introducing evidence during a trial can be a very difficult process, but the Federal Rules generally favor admissibility

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> of the story by deciding what questions to ask. These questions rarely allow the witness to explain things the way she would like and often fail to tell the jurors what they want to know. After the witness responds to one lawyer's questions, the other lawyer typically attacks her answers and sometimes even her character.

Id.

[18] ROBERTO ARON & JONATHAN L. ROSNER, HOW TO PREPARE WITNESSES FOR TRIAL 4 (1985). The legal profession perpetuates the notion that trials are only used to determine the truth. *Id.* As a result, people often believe that the witnesses one calls share facts favorable to that party. *Id.*; *see also* LEONARD & GOLD, *supra* note 13, at 2. Trials give "parties the opportunity to present opposing views and opinions, maintaining peace and social order by providing a formal setting in which to engage in conflict, resolving those conflicts, achieving 'justice,' and testing the viability and scope of specific rules of law." LEONARD & GOLD, *supra* note 13, at 2.

[19] FED. R. EVID. 401. Rule 401 states that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*; *see also* FED. R. EVID. 402 (providing reasons why relevant evidence may not be admissible); FED. R. EVID. 403 (balancing probative values against the dangers of misleading the jury, unfair prejudice, or waste of time, and further stating that relevant evidence may not be admissible).

[20] FED. R. EVID. 401; *see also* EDWARD W. CLEARY, MCCORMICK ON EVIDENCE 544 (3d ed. 1984) (proposing that relevant evidence is evidence that advances the inquiry into the legal dispute). *See generally* Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 499–510 (1983) (discussing the history of Rule 403 and analyzing the rule).

[21] FED. R. EVID. 403. Relevant evidence can be excluded to avoid confusion, waste of time, or prejudice. *Id.*; *see also* GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 33–40 (2d ed. 1987) [hereinafter LILLY INTRODUCTION] (stating that relevant evidence can be inadmissible because of unfair prejudice, constitutional provisions, and statutory enactments). *See generally* United States v. Robinson, 544 F.2d 611, 618–19 (2d Cir. 1976) (holding that evidence of the accused possessing a gun when arrested for a bank robbery was unfairly prejudicial because the jury would likely view the accused as a dangerous person that should be in jail).

of evidence.[22] For the most part, the Federal Rules of Evidence govern whether evidence is admissible during a trial.[23]

On January 2, 1975, Congress enacted the Federal Rules of Evidence to govern the admissibility of evidence and to regulate how to present evidence to the trier of fact.[24] The purpose of the Federal Rules of Evidence is to secure fairness, conserve judicial resources, and prevent unnecessary waste.[25] The Federal Rules of Evidence encourage judges to use their discretion to promote the growth and development of evidence law.[26] The rules only apply to proceedings before courts of the United States, United States bankruptcy judges, and United States magistrate judges.[27] However, after Congress enacted the rules, over forty states

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[22] *See* Beech Air Craft Corp. v. Rainey, 488 U.S. 153, 169 (1988) (stating that the Federal Rules of Evidence contain a liberal thrust towards admissibility); *see also* FED. R. EVID. 401–403 (defining relevance broadly); LEONARD & GOLD, *supra* note 13, at 6 (discussing the theory that the more evidence is admitted, the more likely the goals of the Federal Rules of Evidence will be satisfied).

[23] *See* LEONARD & GOLD, *supra* note 13, at 3 ("[T]he adversary system and the rules of evidence are the mechanisms we use to strike the complex balance between truth and the competing goals of the trial process."). Attorneys often employ trial tactics and strategies to prevent the truth from coming out during trial, and the rules of evidence often prevent attorney's from doing so. *Id.* Additionally, "federal evidence law requires a great deal of interpretation, and many rules explicitly call upon the trial judge to exercise discretion." *Id.* at 6.

[24] Pub. L. No. 93-595, § 3, 88 Stat. 1926 (1975) (enacting the rules). Before Congress enacted the Federal Rules of Evidence, "all evidence rules were a product of common law." LEONARD & GOLD, *supra* note 13, at 5. For the most part, the Federal Rules of Evidence adopted the existing common law. *Id.* at 6. The common law rules of evidence contained more strict exclusionary rules and conventions than the Federal Rules of Evidence. *Id.* The Federal Rules take a relaxed approach and give the trial judge a great deal of responsibility. *Id.* There were four other attempts to codify evidence law before Congress enacted the Federal Rules of Evidence. CHRISTOPHER B. MUELLER ET AL., EVIDENCE: PRACTICE UNDER THE RULES 4 (3d ed. 2009).

[25] FED. R. EVID. 102. Rule 102 reads:

> These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

Id.; *see also* GRAHAM C. LILLY, PRINCIPLES OF EVIDENCE 1–2 (2006) [hereinafter LILLY EVIDENCE] (stating that the Federal Rules of Evidence controls what information the jury hears, expedites the trial, improves the quality of evidence introduced, and maintains a fair balance during trials).

[26] FED. R. EVID. 102; *see also* FED. R. EVID. 104(a) (giving the judge the responsibility of deciding preliminary questions of fact to determine if evidence is admissible). *See generally* DANIEL A. GRIFFITH, A VIEW FROM THEIR BENCH: EVIDENCE AND EXPERT TESTIMONY BEST PRACTICES 8 (2008) (suggesting that judges are gatekeepers who must ensure that evidence presented during a trial is trustworthy).

[27] FED. R. EVID. 101; *see also* FED. R. EVID. 1101 (giving the extent to which the Federal Rules of Evidence apply and exceptions to the rules).

adopted similar evidence rules to use in state courts.[28] Only a few states, such as Illinois, Massachusetts, and California, have not adopted a version of the federal rules.[29]

B. Hearsay Rule—Federal Rule of Evidence 801

In the states that have adopted a version of the Federal Rules of Evidence, one of the most well-known, frustrating, and convoluted evidence rules is the hearsay rule.[30] According to Rule 801, the hearsay rule defines as hearsay any "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[31] The general understanding is that hearsay occurs when a witness repeats information that he obtained from a second-hand source.[32] Not every statement by an out-of-court

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[28] LILLY EVIDENCE, *supra* note 25, at 2. Before Congress enacted the Federal Rules of Evidence, the majority of evidence law came from state and federal judicial decision. *Id.* As more states adopted the Federal Rules of Evidence, evidence law became code-based and American courts experienced greater uniformity. *Id.*

[29] MUELLER ET AL., *supra* note 24, at 4 n.2. As of 2009, forty-two states adopted evidence codes modeled after the Federal Rules of Evidence. *Id.* Even in the states that have not adopted the Federal Rules of Evidence, appellate decisions frequently cite them while adopting the underlying principles behind the Federal Rules of Evidence. *Id.* at 4.

[30] LEONARD & GOLD, *supra* note 13, at 135. "No evidence rule is as vexing to law students as the hearsay rule." *Id.*; *see also* Roger C. Park, *McCormick on Evidence and the Concept of Hearsay: A Critical Analysis Followed by Suggestions to Law Teachers*, 65 MINN. L. REV. 423, 424 (1981) (suggesting that students may favor the simplification of the hearsay rules that scholars advocate for when they become lawyers). *See generally* 5 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE 9 (3d ed. 1940) (stating that the idea of the hearsay rule developed in the 1500s, but the rule did not become completely developed until the early 1700s).

[31] FED. R. EVID. 801; *see also* IRVING YOUNGER ET AL., PRINCIPLES OF EVIDENCE 145–46 (3d ed. 1997) (discussing that the hearsay rule is extremely complex and scholars differ on how to define hearsay and even more so on how the hearsay rule should apply); Olin Guy Wellborn III, *The Definition of Hearsay in the Federal Rules of Evidence*, 61 TEX. L. REV. 49, 50–91 (1982) (breaking down the hearsay rule and explaining the rule in-depth); Carl C. Wheaton, *What Is Hearsay?*, 46 IOWA L. REV. 210, 210–11 (1961) (stating that there generally is not one accepted definition of hearsay and giving several evidence law scholars' definition of hearsay).

[32] LILLY INTRODUCTION, *supra* note 21, at 180. For an in-depth analysis on the reasoning and theory of the hearsay rule, see generally Craig R. Callen, *Hearsay and Informal Reasoning*, 47 VAND. L. REV. 43, 73–100 (1994); Richard D. Friedman, *Toward a Partial Economic, Game-Theoretic Analysis of Hearsay*, 76 MINN. L. REV. 723, 727–50 (1992); Roger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 54–88 (1987); Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CALIF. L. REV. 1339, 1341–90 (1987); Glen Weissenberger, *Reconstructing the Definition of Hearsay*, 57 OHIO ST. L.J. 1525, 1527–42 (1996).

declarant is hearsay.[33] The proponent of the statement must also offer the statement to prove the truth of the matter asserted.[34]

The purpose behind the hearsay rule is to ensure the accuracy of statements made out-of-court and to allow cross-examination of witnesses.[35] The Anglo-American tradition had three conditions that had to be met for witnesses to testify: (1) presence at trial, (2) cross-examination, and (3) an oath or affirmation.[36] The hearsay rule ensures compliance with these three conditions, and if one is missing, the statement is likely inadmissible because of its inherent unreliability.[37]

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[33] FED. R. EVID. 801(c); *see also* ROGER C. PARK ET AL., EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS 241 (1998) (illustrating that an out-of-court statement is not hearsay when the trier of fact does not need to rely on the credibility of the declarant.) For example, if the out-of-court statement "Help me!" is offered to prove the declarant was alive when he uttered the statement, the jury does not have to rely on the declarant's credibility because the statement is useful simply by the fact the declarant made the statement, not by the content or truthfulness of the statement. PARK ET AL., *supra* note 33, at 241–42.

[34] FED. R. EVID. 801(c); *see also* United States v. Leo Sure Chief, 438 F.3d 920, 925–26 (9th Cir. 2006) (finding that school documents were hearsay in an abuse trial to show the victim had behavioral problems); United States v. Sadler, 234 F.3d 368, 372 (8th Cir. 2000) (finding that the defendant's protest of innocence was hearsay if the defendant offered it to prove he "was in fact innocent").

[35] Wheaton, *supra* note 31, at 219–22. The reasons for the adoption of the hearsay rule include lack of opportunity to cross-examine, inability to observe demeanor evidence, and the lack of trust in the jury. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL STUDENT EDITION §§ 17.02[2]–.03[3] (6th ed. 2003). Without cross-examination, the trier of fact cannot observe testimonial infirmities and determine the credibility of a speaker. MICHAEL H. GRAHAM, MODERN STATE AND FEDERAL EVIDENCE: A COMPREHENSIVE REFERENCE TEXT 81 (1989). Hearsay is inadmissible because the declarant's statement is not subject to cross-examination, and the jury cannot assess the declarant's demeanor and credibility. *See, e.g.*, Chambers v. Mississippi, 410 U.S. 284, 292–94 (1973); State v. McVay, 622 P.2d 9, 12 (Ariz. 1980); State v. Freber, 366 So. 2d 426, 427–28 (Fla. 1978); Kelly v. State, 694 P.2d 126, 129–30 (Wyo. 1985); *see also* State v. Murray, 174 P.3d 407, 428 (Kan. 2008) (stating that when statements are offered to prove the truth of the matter asserted in the statement, the credibility of the declarant provides the basis for the inference). Thus, the declarant has to be available for cross-examination. *Murray*, 174 P.3d at 428.

[36] GLEN WEISSENBERGER, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY 400–01 (1999). At common law, the system excluded most evidence that failed to satisfy these three conditions. California v. Green, 399 U.S. 149, 154 (1970); *see also* FED. R. EVID. 804(b)(1) advisory committee's notes (suggesting that all hearsay lacks presence at trial and the court cannot evaluate the declarant's demeanor). *See generally* Anderson v. United States, 417 U.S. 211, 220 (1974) ("The primary justification for the exclusion of hearsay is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is introduced into evidence.").

[37] WEISSENBERGER, *supra* note 36, at 401; *see also* Michael H. Graham, *"Stickperson Hearsay": A Simplified Approach to Understanding the Rule Against Hearsay,* 1982 U. ILL. L. REV. 887, 888 ("When the statement is hearsay, the trier of fact is not in a position to assess the proper weight to be accorded the out-of-court statement . . . ."); I. Daniel Stewart, Jr., *Perception, Memory, and Hearsay: A Criticism of Present Law and the Proposed Federal Rules of*

The hearsay rule preserves the ability to evaluate a witness's perception, memory, narration, and sincerity.[38] When hearsay evidence is offered, the hearsay witness does not have any knowledge of the event the out-of-court declarant's statement concerns; therefore, the court can only explore the hearsay witness's demeanor and memory to determine whether the witness correctly heard the out-of-court declarant's statement.[39] Thus, when the court does not have any way to examine the reliability of the statement, the court considers the statement as hearsay.[40]

On the other hand, the hearsay rule is extremely broad and it can make valuable evidence inadmissible.[41] As a consequence of this predicament, Congress created numerous exceptions to the rule in order to make hearsay admissible under situations that supply guarantees of trustworthiness.[42] Many criticize this approach, arguing the rule is too complex, prevents the growth of evidence law, and does not differentiate

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Evidence, 1970 UTAH L. REV. 1, 22 (stating that cross-examination allows the court to test the accuracy of the witness's memory, perception, and communication).

38 PAUL R. RICE, BEST-KEPT SECRETS OF EVIDENCE LAW: 101 PRINCIPLES, PRACTICES, AND PITFALLS 47 (2001). *See generally* 4 CLIFFORD S. FISHMAN, JONES ON EVIDENCE: CIVIL AND CRIMINAL 209–10 (7th ed. 2000) (discussing the benefits of preserving the ability to evaluate a declarant's perception, narration, sincerity, and memory); Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 331–46 (1961) (discussing the hearsay rule and the uses of the rule).

39 PAUL R. RICE, EVIDENCE PRINCIPLES & PRACTICES: 150 THINGS YOU WERE NEVER TAUGHT, FORGOT, OR NEVER UNDERSTOOD 55 (2006). Hearsay testimony involves two truths: the fact that certain words were spoken and the substance of what the spoken words describe. *Id.* In addition, the original declarant's untested memory, sincerity, ambiguity, and perception give rise to the hearsay rule. *Id*. *See generally* Christopher B. Mueller, *Post-Modern Hearsay Reform: The Importance of Complexity*, 76 MINN. L. REV. 367, 391 (1992) (arguing that cross-examining a witness cannot make statements reliable, but rather cross-examination provides the opponent with an opportunity to test and challenge their stories so the trier of fact can evaluate them).

40 PAUL R. RICE & ROY A KATRIEL, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE 283 (2005); *see also* Moore v. United States, 429 U.S. 20, 21–22 (1976) (reversing a conviction for possession of heroin because the court considered the informant's statement that the defendant owned the apartment as hearsay, and the police did not have any other evidence that the defendant owned the apartment).

41 *See* LEONARD & GOLD, *supra* note 13, at 180 (arguing the hearsay rule makes some evidence inadmissible that is reliable and is useful for resolving disputes); WEISSENBERGER, *supra* note 36, at 401 (stating that the hearsay rule excludes a lot of relevant evidence because the evidence is inherently untrustworthy).

42 LEONARD & GOLD, *supra* note 13, at 5. The hearsay rule is too broad, and the rule makes some evidence inadmissible that is quite reliable. *Id.* at 180. A lot of hearsay is too useful and important to do without. *Id.* As a result, the Federal Rules of Evidence contain roughly thirty exceptions and eight exemptions to the hearsay rule. *Id.* Almost all of the states have adopted the hearsay exemptions and exceptions. *Id.*

between good and bad hearsay.[43] The only alternatives to the hearsay rule are to abolish the rule altogether and admit all hearsay, admit the hearsay with procedural safeguards if the hearsay has great probative value, or adjust the current exceptions.[44] In any event, the hearsay rule will never be flawless, and the courts must use the hearsay rule and all of the exceptions to the best of their ability to ensure fairness and to promote the growth of evidence law.[45]

1. Former Testimony Exception—Rule 804(b)(1)

One of the numerous exceptions that courts must use to ensure fairness and promote the growth of evidence law is the former testimony exception.[46] In order for the former testimony exception to apply, the

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[43] *See, e.g.*, Park, *supra* note 32, at 122 (discussing the hearsay rule and arguing that the currently existing structures against hearsay in criminal cases should not change). In civil cases, however, the hearsay rule should be liberalized to permit the court to consider additional evidence. *Id. See generally* Perry Wadsworth, Jr., *Constitutional Admissibility of Hearsay under the Confrontation Clause: Reliability Requirement for Hearsay Admitted under a Non-"Firmly Rooted" Exception* – Idaho v. Wright, 14 CAMPBELL L. REV. 347, 359 (1992) (arguing that in many cases, what a hearsay declarant says on cross-examination will not likely have a persuasive impact on the jury).

[44] FED. R. EVID. ART. VIII advisory committee's note; ANDREW L.-T. CHOO, HEARSAY AND CONFRONTATION IN CRIMINAL TRIALS 163–93 (1996); *see also* Park, *supra* note 32, at 122 (analyzing and discussing possible changes to the hearsay rule and concluding that further liberalization of the hearsay rule in civil cases is appropriate).

[45] *See supra* note 25 and accompanying text (stating that Rule 102 suggests judges should interpret the Federal Rules of Evidence to promote fairness, eliminate unjustifiable delay and expense, and to promote the growth of evidence law to determine the truth so proceedings can be justly determined).

[46] FED. R. EVID. 804(b)(1). The difference between a hearsay exception and exemption is that a hearsay exception is hearsay, but each exception to the hearsay rule has a feature that reduces the danger of admitting the hearsay. LILLY EVIDENCE, *supra* note 25, at 193–268. On the other hand, statements that fit under a hearsay exemption are not hearsay according to the Federal Rules of Evidence. *Id. at* 166–92; *see supra* note 9 (providing the text of Rule 804(b)(1)); *see also, e.g.*, FED. R. EVID. 803 (containing twenty-four exceptions to the hearsay rule that apply regardless of whether the declarant is available). Rule 804 contains a total of six exceptions to the hearsay rule that apply when a declarant is unavailable. FED. R. EVID. 804. Furthermore, Rule 807, the residual exception, applies to hearsay not covered under Rule 803 or 804 that has guarantees of trustworthiness when the court determines

> (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.

FED. R. EVID. 807. *See generally* LILLY EVIDENCE, *supra* note 25, at 248–56 (providing a discussion of the former testimony exception and illustrations of how the former testimony exception applies). The ability to admit hearsay testimony under Rule 804(b)(1) is similar to Rule 32(a)(3) of the Federal Rules of Civil Procedure, which allows an adverse party to

declarant must be unavailable.[47] Under Rule 804(b)(1), prior testimony is admissible so long as the "party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."[48] Offering

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use a deposition taken by the party's officer, managing agent, or director for any purpose. FED. R. CIV. P. 32(a)(3).

[47] FED. R. EVID. 804. Rule 804(a) reads:

> (a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant--
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> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of a statement has been unable to
>
> procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.
>
> 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.

Id. For a discussion of unavailability, see 29 AM. JUR. 2d *Evidence* §§ 695–703 (2008); WEISSENBERGER, *supra* note 36, at 556–64. *See generally* Jack R. Jelsema et al., *Hearsay Under the Proposed Federal Rules: A Discretionary Approach*, 15 WAYNE L. REV. 1077, 1101–05 (1969) (discussing the different situations that meet the unavailability requirement). Rule 804(b)(1) is not meant to bind a party to a position taken previously, such as collateral estoppel or res judicata. Glen Weissenberger, *Federal Rule of Evidence 804: Admissible Hearsay from an Unavailable Declarant*, 55 U. CIN. L. REV. 1079, 1101 (1987). Courts use Rule 804(b)(1) to preserve testimony from a person no longer available. *Id.*

[48] FED. R. EVID. 804(b)(1). The determination of whether former testimony is admissible is determined by the judge under Rule 104(a). FED. R. EVID. 104(a). Rule 104(a) reads:

> (a) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Id. The similar motive requirement makes a comparison between an examiner's motive at the prior proceeding to what his motive would be at the current proceeding. United States v. Salerno (*Salerno IV*), 974 F.2d 231, 239 (2d Cir. 1992). The Federal Rules of Evidence are interpreted using a plain meaning approach. *See, e.g.*, Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years – The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857, 864–68 (1992) (addressing how courts use the plain meaning to interpret the Federal Rules of Evidence); Edward Cleary,

testimony from a previous proceeding presents a hearsay problem because the declarant of the statement is not present at trial.[49] Therefore, the jury cannot observe the witness's demeanor, and the statement is hearsay.[50]

2. Opportunity and Similar Motive

Even though the jury cannot observe the witness's demeanor, the former testimony exception is justified by policies of trustworthiness and necessity.[51] Former testimony is trustworthy because at the previous proceeding, the declarant appeared under oath for examination and cross-examination.[52] It is highly likely that a witness's prior testimony is

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Preliminary Notes on Reading the Rules of Evidence, 57 NEB. L. REV. 908, 911–19 (1978) (discussing the plain meaning rule and how the rule relates to the Federal Rules of Evidence). *See generally* Caminetti v. United States, 242 U.S. 470, 485–86 (1917) (applying the plain meaning rule and ignoring the purpose of a statute). Similar motive is not defined in the Federal Rules of Evidence, so the plain meaning applies, unless the plain meaning leads to an unconstitutional result. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 510 (1989). The dictionary defines "similar" as "having characteristics in common," "comparable," and "very much alike." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2120 (2002). However, "similar" does not mean identical. Murray v. Toyota Motor Distrib. Inc., 664 F.2d 1377, 1379 (9th Cir. 1982). Moreover, "motive" is defined as "something within a person that incites him to action." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1475 (2002) (parenthetical omitted).

[49] FED. R. EVID. 804(b)(1) advisory committee's note. The witness previously appeared under oath and was subjected to cross-examination; therefore, under the former testimony exception, the only ideal condition missing is demeanor evidence from the declarant appearing at trial. *Id.* Former testimony is arguably the most reliable hearsay. *Id.*

[50] RICE & KATRIEL, *supra* note 40, at 391. Former testimony is considered to be especially reliable hearsay. *Id.* The only problem with former testimony is the inability to observe the demeanor of the witness. *Id.*; *see, e.g.*, United States v. Inadi, 475 U.S. 387, 394 (1986) (holding that the former testimony exception is unlike other hearsay exceptions and is simply a weak substitute for live testimony); 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 308 (6th ed. 2006). *See generally* Barefoot v. Estelle, 463 U.S. 880, 902 (1983) (stating that the purpose of the jury is to decipher between true and false testimony, no matter how important the matter is); 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) (arguing that the purpose of the jury is to make credibility determinations); Toni M. Massaro, *Peremptories or Peers? – Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 512–13 (1986) (discussing the importance juries serve and that juries protect citizens from abuses of power by the government).

[51] 4 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 487 (1977). *See generally* Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (discussing the importance of allowing the jury to make decisions to protect the defendant from corruption, overzealous prosecutors, and potentially biased judges); Whirley v. State, 450 So. 2d 836, 840–41 (Fla. 1984) (suggesting that the American society places an extreme importance on the right to be judged by peers).

[52] WEISSENBERGER, *supra* note 36, at 567; *see* FISHMAN, *supra* note 38, at 209 (arguing that to some people taking an oath causes them to testify honestly out of fear of being charged

accurate and reliable when the declarant testifies under the penalty of perjury.[53]

Furthermore, Rule 804(b)(1) is based upon the idea that a party who previously had an opportunity and motive to develop testimony should not be able to exclude the testimony because of the decision not to cross-examine or to cross-examine lightly.[54] The opportunity and similar motive element of Rule 804(b)(1) ensures that the party against whom testimony is being offered had a meaningful opportunity to sufficiently examine the witness and expose possible flaws in the testimony.[55] Moreover, as long as the motivation to examine a witness is substantially the same, a change of courts or argument will not render the former testimony inadmissible.[56] Rule 804(b)(1), however, does not apply when

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with perjury and that cross-examination shows potential biases, weaknesses, and ambiguities in the witness's testimony).

[53] *See* Ohio v. Roberts, 448 U.S. 56, 70 (1980) (allowing witness testimony because the court thought the witness participated in the functional equivalent of cross-examination); Mancusi v. Stubbs, 408 U.S. 204, 216 (1972) (finding testimony from a previous trial admissible because the respondent had a prior opportunity for cross-examination, and the testimony formed the basis for the murder conviction).

[54] GRAHAM, *supra* note 35, at 277. A tactical decision not to cross-examine a witness or to cross-examine lightly does not affect the adequacy of opportunity. *Id.*; *see also* California v. Green, 399 U.S. 149, 165 (1970) (holding that a witness's testimony is admissible when the testimony is given under circumstances closely resembling trial and the respondent had the opportunity to cross-examine the witness about his testimony).

[55] FED. R. EVID. 804(b)(1). Rule 804(b)(1)'s similar motive requirement "reflects narrow concerns of ensuring the reliability of evidence admitted at trial." United States v. Salerno (*Salerno III*), 505 U.S. 317, 326 (1992). Meaningful opportunity does not necessarily mean the party had to take advantage of the opportunity. *Id.* at 329–30. A party that examines a witness lightly risks the chance that the witness will become unavailable for trial, making the testimony from the examination admissible. GRAHAM, *supra* note 35, at 277–78; *see, e.g.*, United States v. Geiger, 263 F.3d 1034, 1038–39 (9th Cir. 2001) (holding that the district court properly admitted former testimony when the defendant possessed a similar motive to develop the witness's testimony and any failure to cross-examine the witness resulted not from a lack of opportunity but from defendant's ineffective use of that opportunity); *In re* Related Asbestos Cases, 543 F. Supp. 1142, 1148 (N.D. Cal. 1982) (holding that making a party suffer the consequences for foregoing cross-examination is fair).

[56] GRAHAM, *supra* note 35, at 275; *see, e.g.*, DeLuryea v. Winthrop Labs., 697 F.2d 222, 226–27 (8th Cir. 1983) (finding opportunity and similar motive satisfied when the plaintiff's counsel asked only one question to the doctor during a worker's compensation case). The plaintiff argued the cross-examination was limited because the only issue was whether the plaintiff's painkiller problem related to an injury on the job. *DeLuryea*, 697 F.2d at 226. The plaintiff argued the cross-examination was not meaningful in the context of the following products liability case. *Id.* The Eighth Circuit did not agree and held the doctor's testimony related to the same issue in both cases—proving the allegations of misconduct wrong. *Id.* at 226–27.; *cf.* United States v. Lanci, 669 F.2d 391, 394–95 (6th Cir. 1982) (denying the defendant's request to admit testimony previously given during a state criminal trial because the state did not have a similar motive to expose the facts surrounding the bribery of an FBI agent).

the motive of the party against whom the evidence is offered has substantially changed because of a cause of action change, added parties and issues, or an intervening indictment.[57]

The Federal Rules of Evidence do not define similar motive, but Rule 804(b)(1) only requires a similar motive, not an identical one.[58] The rule is meant to salvage the testimony of a witness for its apparent worth.[59] The opportunity and similar motive element of Rule 804(b)(1) can be problematic when tactical considerations are taken into account during prior testimony.[60] The party examining a witness may not want to show

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[57] WEINSTEIN & BERGER, *supra* note 35, at § 17.02[2]; *see also, e.g.*, United States v. Jackson-Randolph, 282 F.3d 369, 381–82 (6th Cir. 2002) (holding testimony at state agency hearing inadmissible during a criminal prosecution because the issues and motivations were substantially different); United States v. McDonald, 837 F.2d 1287, 1292–93 (5th Cir. 1988) (holding former testimony inadmissible when the defendant attempted to introduce a deposition taken by an insurance company because the government knew that the deponent would refuse to testify during trial; therefore, the testimony likely contained inaccuracies).

[58] FED. R. EVID. 804 advisory committee's note. To determine whether a similar motive exists, courts should first look at the examination that occurred during the prior proceeding and determine whether the party would conduct a similar examination now if given the chance. United States v. Salerno (*Salerno IV*), 974 F.2d 231, 239 (2d Cir. 1992). If that is not conclusive, the courts should ask "whether a reasonable examiner under the circumstances would have had a similar motive to examine the witness." *Id.*; *see also, e.g.*, United States v. Lombard, 72 F.3d 170, 188 (1st Cir. 1995) (finding that Rule 804(b)(1) requires a party to have a similar but not necessarily an identical motive to develop testimony); Supermarket of Marlinton v. Meadow Gold Dairies, 71 F.3d 119, 127 (4th Cir. 1995) (requiring a similar motive not a more stringent identical motive); United States v. Doyle, 621 F. Supp. 2d 337, 344 (W.D. Va. 2009) (holding that the defendant possessed a similar motive during a bond hearing as he would at trial).

[59] WEISSENBERGER, *supra* note 36, at 573; *see also* FISHMAN, *supra* note 38, at 501–33 (providing a thorough discussion of the former testimony exception and why the rule is helpful). *See generally* David Robinson, Jr., *From Fat Tony and Mat Ty the Horse to the Sad Case of A.T.: Defensive and Offensive Use of Hearsay Evidence in Criminal Cases*, 32 HOUS. L. REV. 895, 904–13 (1995) (discussing the former testimony exception and how courts apply the rule).

[60] *See* BROUN ET AL., *supra* note 9, § 304 (stating that the circuit courts appear to be in disagreement over whether exculpatory grand jury testimony meets Rule 804(b)(1)'s similar motive requirement) (internal quotation marks omitted); *see also* United States v. Taplin, 954 F.2d 1256, 1259 (6th Cir. 1992) (assessing similar motive requires the court to look at whether the two proceedings reflect a substantial identity of issues); Zenith Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1252 (E.D. Pa. 1980) (giving factors to use to assess similar motive: "(1) the type of proceeding in which the testimony is given, (2) trial strategy, (3) the potential penalties or financial stakes, and (4) the number of issues and parties.") (footnotes omitted). Critics argue that if a witness offers incriminating evidence against a defendant during a grand jury proceeding, the government grants him immunity and allows him to testify at trial. United States v. Salerno (*Salerno III*), 505 U.S. 317, 324 (1992). Conversely, if a witness gives testimony exonerating the defendant, the government does not grant him immunity and excludes the evidence as hearsay. *Id. See*

his plans for trial or the prosecutor may just want to show enough evidence to secure an indictment, which is why Judith M. Mercier suggested courts adopt a "reasonable examiner" approach to determine whether a similar motive existed.[61] Depending on the circumstances, lawyers taking testimony at a proceeding before trial may have different motivations and concerns that they would not have if they could examine the witness during trial.[62] Because of the differences in motivation to cross-examine a witness during a grand jury proceeding and during trial, there is a split within the circuit courts on how to interpret Rule 804(b)(1).[63]

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generally FED. R. EVID. 806 (allowing the government to impeach the declarant of a hearsay statement at trial if the court admits hearsay testimony).

[61] *See* United States v. Omar, 104 F.3d 519, 522–24 (1st Cir. 1997). During the grand jury proceeding, the government does not seek to discredit the witness. *Id.* at 523. The government may want to establish evidence for part of an ongoing investigation. *Id.* Moreover, discrediting a grand jury witness is hardly necessary because of the lower burden of proof and the government's ability to call its own witnesses. *Id.*; *see also* Judith M. Mercier, United States v. Salerno*: An Examination of Rule 804(b)(1)*, 48 U. MIAMI L. REV. 323, 342 (1993) (suggesting that the courts should adopt a reasonable examiner approach to Rule 804(b)(1), in which a court evaluates whether a reasonable examiner in the situation would have possessed a similar motive to examine the witness).

[62] *See, e.g.*, United States v. Powell, 894 F.2d 895, 901–02 (7th Cir. 1990) (concluding that the government did not have a similar motive during the witness's guilty plea hearing because the government's motive in examining is to ensure that the plea is voluntary, which is not the same as at a trial); *cf.* United States v. Poland, 659 F.2d 884, 896 (9th Cir. 1981) (holding identification testimony during a previous hearing admissible after the identification witness died because the defendant had the same motive during the hearing as he would have at trial). *See generally* SUSAN W. BRENNER & GREGORY G. LOCKHART, FEDERAL GRAND JURY: A GUIDE TO LAW AND PRACTICE 186–233 (1996) (discussing the history of the grand jury system and examining the importance of maintaining the secrecy of grand jury proceedings); MARVIN E. FRANKEL & GARY P. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 23–24 (1977) (arguing that the secrecy of grand jury proceedings is important to protect those accused of a crime that may be innocent and to encourage witnesses to come forward and testify truthfully).

[63] *See, e.g.*, Valerie A. DePalma, *Evidence:* United States v. DiNapoli*: Admission of Exculpatory Grand Jury Testimony Against the Government Under Federal Rule of Evidence 804(b)(1)*, 61 BROOK. L. REV. 543, 546–77 (1995) (analyzing the *United States v. DiNapoli* decision and former testimony exception); Randolph N. Jonakait, *Text, Texts, or Ad Hoc Determinations: Interpretation of the Federal Rules of Evidence*, 71 IND. L.J. 551, 591 (1996) (arguing that the interpretation of the evidence rules should be text centered); 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, 441–42 (1986) (discussing grand jury testimony as former testimony); Lizbeth A. Turner, *Admission of Grand Jury Testimony Under the Residual Hearsay Exception*, 59 TUL. L. REV. 1033, 1070 (1985) (arguing that courts should not exclude admission of all grand jury testimony of an unavailable witness, and routinely admitting former testimony would undermine the defendant's ability to confront witnesses); Glen Weissenberger, *The Former Testimony Hearsay Exception: A Study in Rulemaking, Judicial Revisionism, and the Separation of Powers*, 67

a. Broad Interpretation of "Similar Motive"

On one side of the split, some federal courts use a broad interpretation of the similar motive element of Rule 804(b)(1) to find that the government has the same motive to develop a witness's testimony during a grand jury proceeding as it does at trial.[64] For example, in *United States v. Miller*, the defendants attempted to call a defense witness who testified before the grand jury, but the witness asserted his Fifth Amendment right not to testify.[65] Next, the defendants attempted to have the testimony admitted under Rule 804(b)(1), but the trial court determined the government did not have a similar motive during the trial as it did during the grand jury proceeding.[66] After the court denied the use of the exculpatory grand jury testimony, the jury convicted both of the defendants.[67]

On appeal, the D.C. Circuit held that the district court wrongly excluded the evidence because the government had a similar motive to question the defense witness during the grand jury proceeding and at trial.[68] The government had a similar motive because in both situations

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N.C. L. REV. 295, 335–36 (1989) (suggesting that the Supreme Court should address how to interpret Rule 804(b)(1)).

[64] *See* United States v. Avants, 367 F.3d 433, 443–45 (5th Cir. 2004) (holding that the testimony from a 1966 preliminary hearing was admissible under 804(b)(1) in a 2003 prosecution for the same offense because the defendant's motive was always to discredit a witness providing testimony to convict him); Battle v. Mem'l Hosp., 228 F.3d 544, 552–53 (5th Cir. 2000) (holding that the defendants possessed a similar motive to question the plaintiffs' witness during a deposition and at trial because the defendants had the same interest to prove the witness's testimony to be inaccurate, even though the defendants argued that their motive during the deposition was only to understand plaintiffs' case). *See generally* Glen Weissenberger, *The Admissibility of Grand Jury Transcripts: Avoiding the Constitutional Issue*, 59 TUL. L. REV. 335, 344–49 (1984) (discussing the intended use of Rule 804(b)(1)) [hereinafter Weissenberger, *Transcripts*].

[65] 904 F.2d 65, 66–68 (D.C. Cir. 1990). The court found Matazarro's unavailability undeniable so long as Matazarro could properly assert his Fifth Amendment rights. *Id.* at 68; *see also* United States v. Young Bros., Inc., 728 F.2d 682, 690 (5th Cir. 1984); *In re* Corrugated Container Antitrust Litigation, 661 F.2d 1145, 1158 (7th Cir. 1981) (discussing when a witness is unavailable). *See generally* R. H. HELMHOLZ ET AL., THE PRIVILEGE AGAINST SELF-INCRIMINATION (1997) (providing the history of the Fifth Amendment's right against self-incrimination).

[66] *Miller*, 904 F.2d at 66–68.

[67] *Id.* The jury convicted Miller and Ross for wire fraud and aiding and abetting wire fraud. *Id.* at 65.

[68] *Id.* at 68; *see also, e.g.*, United States v. Lester, 749 F.2d 1288, 1301 (9th Cir. 1984) (noting that the trial judge erroneously excluded grand jury testimony because the government had a prior opportunity to question the witness during the grand jury proceeding); *Young Bros., Inc.*, 728 F.2d at 691 (stating that the concern for adversarial fairness in Rule 804(b)(1) is not in controversy when the government had the opportunity to question the witness during the grand jury proceeding); United States v. Klauber, 611 F.2d 512, 516–17 (4th Cir.

the prosecutor focused on the same issue—whether the defendants were guilty or innocent.[69] Thus, the D.C. Circuit interpreted Rule 804(b)(1) broadly by only examining whether the government focused on extracting incriminating testimony during the two proceedings and admitting the testimony.[70]

Similarly, in *United States v. Foster*, the Drug Enforcement Agency conducted an investigation on suspected drug dealers.[71] A witness later testified three times in front of a grand jury that the defendant did not sell drugs.[72] The grand jury eventually indicted the defendant, and during the trial, the defendant tried to admit the witness's grand jury

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1979) (holding the government had a similar motive and opportunity to question witnesses before a grand jury as it would have during trial).

[69] *Miller*, 904 F.2d at 68. The D.C. Circuit also noted that the grand jury testimony largely corroborated the appellants' testimony, and the testimony could have influenced the jury and resulted in an acquittal for the defendants. *Id.* Thus, the district court abused its discretion by excluding the testimony. *Id.*; *see also* Green v. Georgia, 442 U.S. 95, 97 (1979) (holding that the defendant's right to due process required the admission of the statement of a co-defendant that the prosecution sought to exclude as hearsay); Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (holding that due process requires that the accused in a criminal trial has the right to a fair opportunity to defend and present his case, and that the defendant's right to call witnesses to support his case is essential to due process); Feaster v. United States, 631 A.2d 400, 411–12 (D.C. Cir. 1993) (holding that the district court violated the defendant's Sixth Amendment right to present a defense by excluding the transcript of an unavailable witness's grand jury testimony).

[70] *Miller*, 904 F.2d at 68; *see also* United States v. Carson, 455 F.3d 336, 379–80 (D.C. Cir. 2006) (holding that the district courts should apply a fact-specific inquiry to examine whether prosecutors have a similar motive to develop testimony at a grand jury proceeding as they would during trial, and the district court did not abuse its discretion by finding that the government did not have similar motive to develop testimony during the trial as it did during the grand jury proceeding).

[71] 128 F.3d 949, 951–52 (6th Cir. 1997). The Drug Enforcement Administration ("DEA") investigated Reda Ghazaleh and Osama Shalash for dealing drugs. *Id.* at 950. The DEA discovered Foster did business with Ghazaleh and Shalash after observing Foster receive a package from Shalash. *Id.* The government eventually indicted Shalash, and he claimed he sold Foster cocaine six times. *Id.* Subsequently, the police executed a search warrant on Timothy Williams, another suspected drug dealer. *Id.* at 950–51. During the search, the police discovered cocaine, guns, large amounts of cash, and Foster was present carrying over $3000. *Id.* at 951. The police executed another search warrant at Foster's home. *Id.* The search revealed documents showing Foster, whose only source of documented income was a small amount that he earned while working at a Marriott Hotel as a houseman, made several large purchases. *Id.* Foster purchased everything with cash, and Foster did not file an income tax return in 1993 and 1994. *Id.* In 1993, Foster purchased a 1986 Mercedes for $13,500, a 1989 BMW for $23,263, and a 1987 Ford for $2650. *Id.* The following year Foster purchased a 1985 Cadillac for $14,207, a 1987 Ford Bronco for $5000, a house lease for $6500, furniture for $1039, and car insurance for $1793. *Id.* Foster also had $2402 in a savings account. *Id.*

[72] *Id.* Williams testified before the grand jury three times that Foster did not sell drugs and that Foster would not have been at Williams's home if he knew Williams sold drugs. *Id.* Williams stated that on the day the DEA searched his home, Foster just stopped by. *Id.*

testimony under Rule 804(b)(1), but the court found the testimony inadmissible.[73] The defendant appealed, arguing the government had the same motive during the grand jury proceeding as it did at trial.[74] The Sixth Circuit held the government had a similar motive and opportunity to develop Williams' testimony before the grand jury as at trial.[75] During both proceedings, the government's motive was to develop incriminating testimony to prove the defendant's guilt; therefore, the government had a similar motive under Rule 804(b)(1).[76] Thus, in *Foster*, the Sixth Circuit adopted a broad interpretation of the similar motive element of Rule 804(b)(1).[77]

Most recently, in *United States v. McFall*, McFall and three others were prosecuted for attempted extortion, witness tampering, conspiracy to commit extortion, and honest services mail fraud.[78] Before the trial, the other three defendants accepted plea agreements and agreed to cooperate with the government; however, the prosecutor never called upon the defendants to testify at trial.[79] McFall attempted to call on the defendants to testify during the trial, but each invoked his Fifth

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73 *Id.* at 951–52.

74 *Id.* at 955.

75 *Id.* at 955–56. The Sixth Circuit stated that the Fourth, Fifth, Ninth, and D.C. Circuit courts all rule that the government has a similar motive to develop a witness's testimony at trial as it does during a grand jury proceeding. *Id.* at 955; *see* United States v. Lester, 749 F.2d 1288, 1301 (9th Cir. 1984) (finding the government had the same motive at trial as it did during the grand jury proceeding); United States v. Young Bros, Inc., 728 F.2d 682, 691 (5th Cir. 1984) (discussing that the concern for adversarial fairness in Rule 804(b)(1) is not present when the government already had an opportunity to examine a witness during a grand jury proceeding); United States v. Klauber, 611 F.2d 512, 516–17 (4th Cir. 1979) (stating that when a prosecutor has an opportunity to question a witness during a grand jury proceeding, Rule 804(b)(1) applies, and the testimony is admissible).

76 *Foster*, 128 F.3d at 956. Foster faced a substantial sentence if convicted, and the court wrongly excluded the grand jury testimony from the jurors. *Id.* The grand jury testimony might not have led to an acquittal, but the testimony benefited Foster. *Id.* Additionally, the government only had circumstantial evidence, and the defendant should have been able to present the witness's testimony denying the defendant dealt drugs. *Id.*; *see also* Kotteakos v. United States, 328 U.S. 750, 765 (1946) ("[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.").

77 *Foster*, 128 F.3d at 956–57. *But see* United States v. Carson, 455 F.3d 336, 379–80 (D.C. Cir. 2006) (finding that district courts should apply a fact-specific inquiry to determine whether the government has a similar motive to develop the testimony during a grand jury proceeding as it does at trial). The trial court made a sufficient inquiry and did not abuse its discretion by finding that the government's motive to develop testimony was not the same in front of the grand jury as it was during trial. *Id.*

78 558 F.3d 951, 953 (9th Cir. 2009). The prosecution alleged that the defendants used the County Supervisor to promote private economic interests. *Id.* at 953–54.

79 *Id.* at 954.

Amendment right not to testify.[80] The government later called a new witness who gave testimony incriminating McFall.[81] McFall attempted to use Rule 804(b)(1) to admit the other defendant's grand jury testimony, which referred to the testimony of the government's witness as "ridiculous," but the district court held the testimony was inadmissible hearsay.[82]

McFall appealed and argued that the district court wrongly excluded the grand jury testimony.[83] The Ninth Circuit agreed with the D.C. and Sixth Circuit's interpretation of similar motive and found that the district court wrongly excluded the evidence because Rule 804(b)(1) does not require an identical quantum of motivation.[84] The government's purpose of questioning Sawyer before the grand jury was to extract testimony that the defendants conspired to commit extortion—the same motive the government possessed at trial.[85] Thus, the Ninth Circuit adopted a broad interpretation of Rule 804(b)(1).[86]

b. Narrow Interpretation of "Similar Motive"

Alternatively, some federal courts have a narrow interpretation of the similar motive element of Rule 804(b)(1) and often find that a prosecutor's motives are not substantially similar because prosecutors do not have any interest in showing a witness's testimony to be false before

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80 *Id.*

81 *Id.* The government called Levy, a lobbyist, to testify, and Levy stated that "Sawyer made extortionate threats on McFall's behalf during a telephone conversation to which Levy and Sawyer were the only parties." *Id.* at 961.

82 *Id.* The court also noted that the government did not need to take advantage of all opportunities to examine Sawyer in front of the grand jury. *Id.* Rule 804(b)(1) only requires that the prosecution had the motive to do so. *Id.*; *see* United States v. Geiger, 263 F.3d 1034, 1039 (9th Cir. 2001) ("Any failure to cross-examine Churchill resulted not from lack of opportunity but from the defense attorney's utilization of that opportunity."); *see also* Delaware v. Fensterer, 474 U.S. 15, 20 (1985) ("[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."); Ohio v. Roberts, 448 U.S. 56, 73 n.12 (1980) (discussing that if the defense's only chance to cross-examine a witness is at a preliminary hearing, there does not need to be an examination of effectiveness, unless an extraordinary case exists where the defense counsel did not provide adequate representation at the prior proceeding). *See generally* FISHMAN, *supra* note 38, at 290–303 (discussing the hearsay rule and the Confrontation Clause of the Sixth Amendment).

83 *McFall*, 558 F.3d at 960.

84 *Id.* at 963. The government's purpose in the grand jury proceeding and its purpose at trial were the same—drawing out testimony to secure a conviction against McFall for conspiring to commit extortion. *Id.*

85 *Id.*

86 *Id.*

a grand jury.[87] For instance, in *United States v. DiNapoli*, several defendants were accused of running a bid-rigging scheme for concrete construction jobs.[88] A grand jury returned an indictment against all of the defendants; however, the grand jury continued investigating to identify other construction projects affected and other participants in the scheme.[89] Two witnesses testified before the grand jury that they did not know about the bid-rigging scheme.[90] The prosecutor was skeptical of each witness's testimony, but the prosecutor refrained from confronting either with evidence because the prosecutor did not want to give away the identification of witnesses cooperating with the government or wiretapped conversations.[91]

During the trial, the defendants attempted to call the two witnesses to testify, but both asserted their Fifth Amendment rights against self-

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[87] *See* United States v. Omar, 104 F.3d 519, 523–24 (1st Cir. 1997) (adopting a narrow interpretation of Rule 804(b)(1) to find former testimony inadmissible because the government does not have the same motivation to discredit and question a witness during a grand jury proceeding as it does during trial); United States v. DiNapoli, 8 F.3d 909, 913–15 (2d Cir. 1993) (using a narrow interpretation of Rule 804(b)(1) and stating that assessing similar motive goes beyond the simple determination of whether the government takes the same side on the same issue).

[88] *DiNapoli*, 8 F.3d at 910–11. The evidence showed the existence of a "Club" consisting of six concrete construction companies. *Id.* at 910. From 1980 to 1985, the companies rigged bids on "nearly every high-rise construction project in Manhattan involving more than $2 million of concrete work." *Id.* The Genovese family and other organized crime figures participated in the scheme. *Id.*

[89] *Id.* The indictment alleged certain aspects of criminal activity. *Id.*

[90] *Id.* at 911. The two witnesses were Frederick DeMatteis and Pasquale Bruno. *Id.* DeMatteis appeared before the grand jury three times. *Id.* During the first two appearances, the government asked DeMatteis background questions and questions about the construction industry. *Id.* During the third appearance, DeMatteis denied being instructed not to bid on projects and being aware of a two percent arrangement. *Id.* The prosecutor only briefly cross-examined DeMatteis because he did not want to give up vital information. *Id.* Additionally, Bruno denied being aware of the "Club" and the two percent arrangement. *Id.* The prosecutor only briefly cross-examined Bruno, and the grand jury expressed concern to the prosecutor that Bruno did not answer questions truthfully. *Id.*

[91] *Id.* The prosecutor did not want to disclose the identity of undisclosed witnesses cooperating with the government or wiretapped conversations that did not corroborate DeMatteis's testimony. *Id.* In his dissent in *United States v. Salerno* (*Salerno III*), 505 U.S. 317, 329 (1992), Justice Stevens argued that when the government refuses to examine a grand jury witness because of an ongoing investigation, it is inaccurate to say the government did not have a similar motive to examine the witness. The more accurate statement is that the government had a similar motive but decided not to pursue that motive. *Salerno III*, 505 U.S. at 329. Failing to examine a witness because of an ongoing investigation is a reason to forego cross-examination, but that does not undermine the fact that the government possessed an opportunity and similar motive. *Id.* at 330.

incrimination.[92] The district court refused to admit the testimony under Rule 804(b)(1) and the Second Circuit agreed.[93] The Second Circuit held that determining whether a similar opportunity and motive exists requires the evaluation of three different factors.[94] First, courts must look at "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."[95] Second, courts must assess the prior cross-examination by looking at what was available but not pursued.[96] Finally, courts must examine what is at stake and the burden of proof.[97] Here, the Second Circuit held the prosecutor did not have a similar motive because the grand jury already indicted the defendants.[98] Thus, the Second Circuit

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92 *DiNapoli*, 8 F.3d at 911. The district court judge held that generally a prosecutor's motive during the investigatory stages of a case is different than the prosecutor's motive during trial; therefore, Rule 804(b)(1) was not satisfied. *Id.*; *see* U.S. CONST. amend. V. ("No person shall be . . . compelled in any criminal case to be a witness against himself . . . .").

93 *DiNapoli*, 8 F.3d at 911, 915. The Second Circuit originally held that the district court erred by excluding the grand jury testimony and ordered a new trial. United States v. Salerno (*Salerno I*), 937 F.2d 797, 806–07 (2d Cir. 1991). However, on remand from the Supreme Court, the Second Circuit adopted a narrow interpretation of Rule 804(b)(1) and held that the grand jury testimony did not satisfy the rule's requirements. *DiNapoli*, 8 F.3d at 915.

94 *DiNapoli*, 8 F.3d at 914–15. Some judges believe that evidence given before a grand jury is not necessarily reliable because the testimony is not subject to vigorous cross-examination and the witness may lie because he usually appears under a grant of immunity. *See* United States v. Thevis, 665 F.2d 616, 629 (5th Cir. 1982); United States v. West, 574 F.2d 1131, 1138–39 (4th Cir. 1978).

95 *DiNapoli*, 8 F.3d at 914–15; *see also, e.g.*, State v. Farquharson, 731 N.W.2d 797, 803 (Mich. Ct. App. 2007) (using the factors listed in *DiNapoli* to determine whether a similar motive is present).

96 *DiNapoli*, 8 F.3d at 914–15. To a lesser extent, the court should also look at the cross-examination during the earlier proceeding and take into account "what was undertaken and what was available but forgone." *Id.* at 915. These factors are relevant on the issue of similar motive, but the factors are not conclusive. *Id.* "[E]xaminers will [always] be able to suggest lines of questioning that were not pursued at a prior proceeding." *Id.* at 914. The unused ways of challenging testimony are relevant to the "similar motive" inquiry, but unused methods are only a single factor to consider. *Id.*

97 *Id.* at 914–15; *see also, e.g.*, Michael M. Martin, *The Former-Testimony Exception in the Proposed Federal Rules of Evidence*, 57 IOWA L. REV. 547, 562–65 (1972) (analyzing factors, such as the purpose of and the burden of proof at a previous proceeding, and the possible effect on the motive to develop testimony).

98 *DiNapoli*, 8 F.3d at 914–15. "First, . . . there existed no putative defendant as to whom probable cause was in issue." *Id.* at 915. Second, the Second Circuit held

> the prosecutor had no interest in showing that the denial of the Club's existence was false. The grand jury had already been persuaded, at least by the low standard of probable cause, to believe that the Club existed and that the defendants had participated in it to commit crimes. It is fanciful to think that the prosecutor would have had any substantial interest in showing the falsity of the witnesses' denial of the

adopted a narrow interpretation of Rule 804(b)(1) because the court examined the prosecutor's motive at a fine level to determine whether the prosecutor had the same motive during the grand jury proceeding as he did during trial.[99]

> Club's existence just to persuade the grand jury to add one more project to the indictment.

Id. Finally, the grand jury told the prosecutor that they did not believe Bruno testified truthfully. *Id.* Therefore, the prosecutor did not have any interest in disproving the witnesses' testimony when the grand jury already thought the testimony was inaccurate. *Id.* The Second Circuit also discussed the various motives a prosecutor may have for asking questions to a grand jury witness that may be lying. *Id.* "The prosecutor might want to afford the witness a chance to embellish the lie, thereby strengthening the case for a subsequent perjury prosecution. Or the prosecutor might want to provoke the witness into volunteering some critical new fact in the heat of an emphatic protestation of innocence." *Id.*

[99] *DiNapoli*, 8 F.3d at 912–14. In the dissent, Judge Miner, Judge Pratt, and Judge Altimari argued that the prosecutor had the same motive and opportunity. *Id.* at 916 (Miner, J., Pratt, J., & Altimari, J., dissenting). The dissent argued the majority applies

> a gloss to the language of the rule that would find a similar motive only when the party against whom the testimony is offered had an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue. As a practical matter, the gloss effectively rewrites the rule from similar motive to same motive.

Id. (citation omitted) (internal quotation markss omitted). The dissent argued the majority's application of Rule 804(b)(1) was stricter than the rule requires. *Id.* In addition, the dissent stated the following:

> [The majority's approach] could also prove to be extremely difficult to administer, for on its face [the] test would require the district judge to compare the intensity of interest that the prosecutor possessed before the grand jury with his intensity of interest at trial. Careful examination of those two states of the prosecutor's mind would require a district judge to conduct an evidentiary hearing not only into what information was available to the prosecutor at the two different times, but also into what he was thinking about that information at both of those times.

Id. (internal quotation marks omitted). The dissent also criticized the majority for accepting the prosecutor's argument that he already secured an indictment against the defendants and that the prosecutor did not think any more witnesses were going to be added when the witnesses were examined; therefore, probable cause was not an issue when DeMatteis and Bruno testified. *Id.* The dissent argued that

> [i]f all these things were true, then why was the prosecutor using the grand jury at all? Could it have been simply a discovery device to develop more evidence to present at trial on the indictment he already had? If that were the case, however, the prosecutor's continuing use of the grand jury would have been improper.

Id.; *see also* United States. v. R. Enters., Inc., 498 U.S. 292, 299 (1991) (discussing that prosecutors cannot use grand juries to go on "arbitrary fishing expeditions," and grand juries should not be used with an intent to harass); *In re* Grand Jury Subpoena Duces Tecum Dated January 2, 1985 (Simels), 767 F.2d 26, 29 (2d Cir. 1985) (holding prosecutors cannot use grand juries to prepare a pending indictment for trial). The dissent concluded by stating that the majority leaves the decision of whether Rule 804(b)(1) applies in the

Moreover, in *United States v. Omar*, a federal grand jury indicted two defendants for money laundering, bank larceny, and conspiracy.[100] A witness testified in front of the grand jury, denying both taking any money from the defendant and helping the defendant put cash into different bank accounts.[101] The witness died before trial, and when the defense sought to admit the witness's prior testimony under Rule 804(b)(1), the district court held that the evidence was inadmissible.[102]

On appeal, the First Circuit held that the government did not have a similar motive and opportunity during trial as it did during the grand jury proceeding.[103] The First Circuit held that the government likely wanted to protect key witnesses or go after the witness later to convict him of perjury.[104] The court noted that it is rarely essential to discredit a

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control of the prosecutor, which is "at odds with the main objective of going to trial—permitting the jury, not the prosecutor, to determine what is the truth." *DiNapoli*, 8 F.3d at 917.

100 United States v. Omar, 104 F.3d 519, 520 (1st Cir. 1997). Investigators believed that Ferrara and Omar robbed a Brinks armored truck of roughly $900,000. *Id.*

101 *Id.* at 521. During the grand jury proceeding, a friend of the defendants also testified that one of the defendants brought a trash bag full of money to her house on the night of the robbery. *Id.* The witness also stated the defendant bragged about using a gun during the robbery and that he buried some of the money. *Id.* The defense attorney cross-examined the witness and brought up the fact that the witness denied having any knowledge about the robbery during previous grand jury testimony. *Id.*

102 *Id.* Omar received a sentence of four years in prison, three years supervised release, and was forced to pay restitution of $908,750. *Id.*

103 *Id.* at 523–24. In *United States v. Donlon*, 909 F.2d 650, 654 (1st Cir. 1990), the First Circuit held Rule 804(b)(1) did not apply to testimony from grand juries. *Omar*, 104 F.3d at 523. However, the First Circuit decision is expressly overruled by the Supreme Court's decision in *United States v. Salerno* (*Salerno I*), 505 U.S. 317 (1992). In *Salerno I*, the Supreme Court held Rule 804(b)(1) applied to grand jury proceedings. 505 U.S. at 327. The Second Circuit adopted the same position on remand in *United States v. DiNapoli*, 8 F.3d 909, 914 (2d Cir. 1993). Furthermore, the First Circuit stated there is confusion within the circuits as to whether 804(b)(1) applies to grand juries. *Omar,* 104 F.3d at 523. Defendants may have a hard time satisfying the similar opportunity and motive test because some courts doubt whether Rule 804(b)(1) should apply to testimony from grand juries. *Id.*; *see also, e.g.*, United States v. Fernandez, 892 F.2d 976, 981 (11th Cir. 1989) (finding that grand jury testimony cannot satisfy the requirements of Rule 804(b)(1)); United States v. Dent, 984 F.2d 1453, 1462 (7th Cir. 1983) (holding that grand jury testimony does not fit within any of the hearsay exceptions in Rule 804).

104 *Omar*, 104 F.3d at 524. The First Circuit discussed that an argument to admit the grand jury witness's testimony because of fairness could be made. *Id.* The First Circuit noted that the testimony was important to the defendants' case. *Id.* The grand jury witness's testimony was self-serving and suspect, but the government could have easily undermined the testimony at trial through another witness's testimony. *Id.* Moreover, if every ruling based on 804(b)(1) is ad hoc, predicting the outcome is nearly impossible and courts have a hard time implementing policy. *Id.* "And rules themselves are debatable: one respected evidence code proposed that 'hearsay . . . is admissible if . . . the declarant . . . is unavailable.'" *Id.* (quoting ALI, MODEL CODE OF EVIDENCE RULE 503 (1942)). However, the Federal Rules of Evidence contain "a broad catch-all exception for

grand jury witness because of the lower burden of proof during the grand jury proceeding, and the government can call numerous witnesses and select its own witnesses.[105] Thus, the First Circuit used a narrow interpretation of Rule 804(b)(1).[106]

Rule 102 states that the purpose of the Federal Rules of Evidence is to secure fairness, conserve judicial resources, and prevent unnecessary waste.[107] The Federal Rules of Evidence provide a framework for consistent application of what evidence is admissible in court.[108] The two different interpretations of Rule 804(b)(1) are particularly troubling in criminal cases because a defendant's ability to present exculpatory grand jury evidence can depend on how the court interprets similar motive.[109]

III. ANALYSIS OF "SIMILAR MOTIVE" AND ITS POTENTIAL EFFECTS

Interpreting similar motive is not easy for courts because the Supreme Court has never given courts guidance on how to determine whether there is a similar motive, and the Federal Rules of Evidence do not define "similar motive."[110] Rule 804(b)(1) simply states that former testimony is admissible when the party against whom the testimony is offered had a prior opportunity and similar motive to develop the testimony by cross, direct, or redirect examination.[111] Thus, the appellate courts are left to choose the standards to use to determine what constitutes similar motive.[112] First, Part III.A.1 and Part III.A.2 explore

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hearsay supported by circumstantial guarantees of trustworthiness." *Omar*, 104 F.3d at 524 (internal quotation marks omitted).

105 United States v. Omar, 104 F.3d 519, 523 (1st Cir. 1997). Rule 804(b)(1) and the advisory committee's notes do not make clear how equivalent the opportunities to examine a witness need to be. *Id.* at 523 n.2. "There are obviously issues of degree and may be other variables (like fault) that bear upon the answer, which is probably best left to case-by-case development." *Id.*

106 *Id.* at 524.

107 *See supra* note 25 (providing the text for Rule 102).

108 *See supra* note 25 (providing the text for Rule 102).

109 *See supra* Part II.B.2.a and Part II.B.2.b (addressing the two different approaches the appellate courts take to determine whether former testimony is admissible).

110 *See supra* Part II.B.2 (describing the similar motive element of Rule 804(b)(1) and what courts look at to determine whether a similar motive is present); *see also* Weissenberger, *supra* note 63, at 335–36 (suggesting that the Supreme Court should provide guidance on how to interpret Rule 804(b)(1)).

111 *See supra* Part II.B.1 and Part II.B.2 (discussing Rule 804(b)(1) and how courts apply the rule).

112 *See supra* Part II.B.2.a and Part II.B.2.b (discussing the two different approaches the appellate courts take to determine whether former testimony is admissible).

the effects of a broad interpretation of Rule 804(b)(1)'s similar motive.[113] Second, Part III.B.1 and Part III.B.2 address the effects of a narrow interpretation of Rule 804(b)(1)'s similar motive.[114] Finally, Part III.C.1 and Part III.C.2 address the effects of adding a "reasonable examiner" standard to Rule 804(b)(1).[115]

A. Broad Interpretation of "Similar Motive"

A broad interpretation of Rule 804(b)(1) finds that the government has a similar motive to develop a witness's testimony during grand jury proceedings as it does at trial because the prosecutor attempts to extract testimony to indict the defendant and prove that the defendant is guilty during both proceedings.[116] Therefore, former testimony from the grand jury proceeding is admissible.[117] A broad interpretation does not examine the government's motives in-depth but instead focuses on whether the prosecutor's motive during the grand jury proceeding and at trial is to extract testimony to determine whether the defendant is guilty.[118] There are several benefits to using a broad interpretation of Rule 804(b)(1)'s similar motive requirement.[119]

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[113] *See infra* Part III.A.1 and Part III.A.2 (analyzing the positive and negative effects of a broad interpretation of similar motive).

[114] *See infra* Part III.B.1 and Part III.B.2 (analyzing the positive and negative effects of a narrow interpretation of similar motive).

[115] *See infra* Part III.C.1 and Part III.C.2 (analyzing the positive and negative effects of adding a "reasonable examiner" standard to Rule 804(b)(1)).

[116] *See supra* Part II.B.2.a (discussing the broad interpretation of similar motive and how courts use it).

[117] *See supra* Part II.B.2.a (discussing the broad interpretation of similar motive and suggesting that the government has a similar motive during a grand jury proceeding and at trial so long as the government attempted to develop testimony incriminating the defendant).

[118] *Compare* United States v. Foster, 128 F.3d 949, 956 (6th Cir. 1997) (holding that the government had a similar motive during the grand jury proceeding as it did at trial because during both proceedings the government attempted to develop testimony incriminating the defendant), *with* United States v. DiNapoli, 8 F.3d 909, 914–15 (2d Cir. 1993) (using a narrow interpretation of Rule 804(b)(1) and stating that assessing similar motive goes beyond the simple determination of whether the government takes the same side on the same issue). In order for there to be a similar motive, the government must "have a substantially similar degree of interest in prevailing" on the related issues at both proceedings. *DiNapoli*, 8 F.3d at 912.

[119] *See infra* Part III.A.1 (providing the positive aspects of a broad interpretation of similar motive).

1. Positive Aspects of a Broad Interpretation

The biggest benefit to using a broad interpretation is that it is easy to assess and produces consistent outcomes.[120] The broad interpretation does not require courts to assess different factors, such as a prosecutor's trial strategy and tactics, different burdens of proof between proceedings, the government's ability to call its own witnesses, and whether an investigation is ongoing.[121] Courts and defendants know what to expect with a broad interpretation of similar motive because former testimony from a grand jury proceeding is admissible so long as the prosecutor possessed a motivation to extract testimony aimed at the defendant's guilt or innocence.[122] Thus, a broad interpretation of similar motive would produce consistent outcomes, and defendants could not argue that the court treated them unfairly or that they did not receive a fair trial.[123]

Moreover, a broad interpretation of similar motive favors the accused in criminal cases because defendants can admit former testimony without any hassle; consequently, the courts conserve judicial resources.[124] Courts would not waste judicial resources deliberating on whether former testimony is admissible because the courts would apply a simple test to determine whether to admit former testimony.[125] Liberal

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120 *See supra* Part II.B.2.a (discussing appellate court cases using a broad interpretation of similar motive and that the inquiry requires the courts to consider if the government's purpose during both proceedings focused on whether the defendant was guilty or innocent).

121 *See supra* note 64 (introducing cases using a broad interpretation of similar motive). *But see supra* note 87 (discussing cases using a narrow interpretation of similar motive).

122 *See supra* note 6 (explaining the importance of uniformity of the laws and consistent application so that people know what to expect).

123 *See* Green v. Georgia, 442 U.S. 95, 95–97 (1979) (holding that the court violated the defendant's right to due process by not admitting the statement of a co-defendant that the prosecution wanted to exclude as hearsay); Chambers v. Mississippi, 410 U.S. 284, 294 (1973) (holding that the accused in a criminal trial must have the chance to defend and present his case, and the right to call witnesses to support his case is essential to due process); Feaster v. United States, 631 A.2d 400, 410–12 (D.C. Cir. 1993) (concluding that the district court violated the defendant's Sixth Amendment right to present a defense by excluding the transcript of an unavailable witness's grand jury testimony).

124 *See supra* note 118 (discussing a case illustrating a broad interpretation of similar motive and a case illustrating a narrow interpretation).

125 United States v. DiNapoli, 8 F.3d 909, 916 (2d Cir. 1993). Judge Pratt argued in his dissent that the majority's narrow interpretation of similar motive would present a difficult challenge for the courts to administer because the judge would have "to compare the 'intensity of the interest' that the prosecutor possessed before the grand jury with his 'intensity of interest' at the trial." *Id.* Examining what is going through a prosecutor's mind during the grand jury proceeding and at trial forces the courts to conduct an evidentiary hearing to assess the information available to the prosecutor and what the prosecutor thought about the information during the grand jury proceeding and at trial. *Id.*

admission of former testimony would also satisfy the Federal Rules of Evidence's "liberal thrust" towards admissibility.[126] In addition, allowing defendants to admit more former testimony would ensure the courts do not violate defendants' due process rights because the court would not prevent the defendants from introducing exculpatory grand jury testimony that could reduce their sentences or prove their innocence.[127]

Introducing exculpatory grand jury testimony to the jury ensures that the defendant is provided with the proper chance to present evidence before being convicted.[128] This is essentially another safeguard to prevent the court from wrongfully convicting a defendant.[129] If the defendant is allowed to present former testimony, he cannot argue that the court wrongfully convicted him because he could not present exculpatory grand jury testimony.[130] A broad interpretation of similar motive essentially favors the defendant in a criminal trial while providing another safeguard to ensure the defendant receives due process and is not wrongfully convicted.[131]

A broad interpretation would also allow more evidence to reach the jury and would allow the jury to make the final determination on how

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126 *See* Beech Air Craft Corp. v. Rainey, 488 U.S. 153, 169 (1988) (stating that the Federal Rules of Evidence contain a "liberal thrust" towards admissibility); *see also* FED. R. EVID. 401–403 (defining relevance broadly). *See generally*, LEONARD & GOLD, *supra* note 13, at 6 (discussing the theory that the more evidence admitted, the more likely the goals of the Federal Rules of Evidence will be satisfied).

127 *See* United States v. Foster, 128 F.3d 949, 956 (6th Cir. 1997) (reversing the district court's decision that the prosecutor did not have a similar motive during trial as it did during a grand jury proceeding and allowing the defendant to introduce exculpatory grand jury testimony); *see also supra* note 69 (suggesting that courts cannot apply the hearsay rule mechanistically to defeat the ends of justice and to deprive a defendant of his right to present a defense).

128 *See supra* notes 84, 85 and accompanying text (discussing that the court held the prosecution had a similar motive at trial as it did during the grand jury proceeding so the defendant could admit the exculpatory grand jury testimony).

129 *DiNapoli*, 8 F.3d at 917. The dissent concluded by stating that the majority leaves the decision of whether Rule 804(b)(1) applies in the control of the prosecutor, which is "at odds with the main objective of going to trial—permitting the jury, not the prosecutor, to determine what is the truth." *Id.*

130 *See* United States v. Geiger, 263 F.3d 1034, 1039 (9th Cir. 2001) (admitting prior testimony of an arresting officer from a suppression hearing under 804(b)(1)). The court found that the legal and factual issues in the state and federal suppression hearing showed that the defendant had a similar, if not identical motive during the proceedings. *Id.*

131 *See* United States v. Lester, 749 F.2d 1288, 1301 (9th Cir. 1984) (holding that the government has the same motive during trial as it did during the grand jury proceeding; therefore, the court allowed the defendant to introduce the former testimony to the jury to defend his case); United States v. Klauber, 611 F.2d 512, 516–17 (4th Cir. 1979) (stating that when a prosecutor has a chance to question a witness during a grand jury proceeding, the testimony is admissible under Rule 804(b)(1)).

much weight to give the former testimony.[132] Allowing more evidence to reach the jury will protect defendants from abuses of power by the government.[133] Providing the jury with the opportunity to assess how much credibility to give former testimony is more likely to discover the truth than a process conducted by the judge.[134] The right to a trial by jury in criminal cases and being judged by one's peers is a fundamental part of the American justice system, and the broad interpretation of similar motive allows the jury to assess how credible the former testimony is.[135] Allowing the jury to assess how much weight to give former testimony is consistent with one of the purposes of juries—to make credibility determinations.[136]

In addition to letting the jury assess how much weight to give former testimony, a broad interpretation of similar motive favors the defendant in a criminal trial by giving the prosecutor less power, because the prosecutor cannot refuse to immunize a witness and then exclude his exculpatory grand jury testimony as hearsay.[137] A broad interpretation of similar motive takes the power of controlling whether grand jury testimony is admissible away from the prosecutor and puts the prosecutor on the same level as the defendant with regards to admitting

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132 *See* Barefoot v. Estelle, 463 U.S. 880, 902 (1983). A broad approach is consistent with the "fundamental premise of our entire system of criminal jurisprudence that the purpose of the jury is to sort out the true testimony from the false, the important matters from the unimportant matters . . . when called upon to do so." *Id.*

133 Massaro, *supra* note 50, at 512–13. Being judged by a jury is more likely to serve the defendant's best interest because the input of all the jurors' opinions will reduce the chances of short-sighted, unfair, or erroneous decisions. *Id.* at 511. A fact-finding process done by multiple people will discover the "truth" before a process that is only conducted by one person. *Id.* The jurors inject the community's desire and the community's conscience. *Id.* at 512. The jurors can protect the defendant from abuses of power by the judge. *Id.* at 511.

134 *Id.* at 511–12. "If this theoretical underpinning is correct, the jury is especially valuable in the criminal case, because decisions about guilt or innocence reflect subjective value judgments that have tremendous implications for the accused." *Id.*

135 Duncan v. Louisiana, 391 U.S. 145, 149 (1968); *see also* Whirley v. State, 450 So. 2d 836, 840–41 (Fla. 1984) (suggesting that American society places an extreme importance on the right to be judged by peers).

136 *See* Chadbourn, *supra* note 50, at 947 (suggesting that the jury's duty is to make credibility determinations).

137 United States v. Salerno (*Salerno III*), 505 U.S. 317, 324 (1992). The defendants in *Salerno* argued that if a witness gives inculpatory grand jury testimony the government grants immunity and examines the witness at trial. *Id.* Alternatively, if the witness gives exculpatory testimony, the government refuses to grant immunity and argues the testimony is hearsay. *Id.* In addition, if the witness testifies without immunity, the government has the power to impeach the witness with his grand jury testimony under Rule 801(d)(1)(A). *See generally* FED. R. EVID. 806 (giving the government the ability to impeach a hearsay declarant if hearsay testimony is admitted).

former testimony.[138] Additionally, using a broad interpretation of similar motive will prevent the prosecutor from potentially going on arbitrary fishing expeditions during grand jury proceedings because the testimony may be used to hurt the prosecutor's case during trial if the defendant can easily admit the testimony under Rule 804(b)(1).[139] Therefore, the broad interpretation of similar motive takes power away from the prosecutor that he can use to the detriment of the defendant.[140]

2. Negative Aspects of a Broad Interpretation

Contrarily, the broad interpretation of similar motive has some negative effects because former testimony that is hearsay is easily admitted.[141] Hearsay testimony is often unreliable because the jury cannot observe the witness's demeanor and the witness is not present for cross-examination.[142] One of the goals of the Federal Rules of Evidence is to increase the accuracy and reliability of evidence that is admissible, but a broad interpretation of similar motive does not increase the reliability of evidence reaching the jury.[143] Therefore, if courts admit

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[138] United States v. Salerno (*Salerno IV*), 974 F.2d 231, 232 (2d Cir. 1992). Grand jury proceedings favor the government because of "the *ex parte* nature of the proceeding, the leading questions by the government, the absence of the defendant, the tendency of a witness to favor the government because of the grant of immunity, [and] the absence of confrontation." *Id.*

[139] *See* United States v. R. Enters., Inc., 498 U.S. 292, 299 (1991) (discussing that prosecutors cannot use grand juries to go on arbitrary fishing expeditions); *see also*, *e.g.*, *In re* Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985 (Simels), 767 F.2d 26, 29 (2d Cir. 1985) (holding that using a grand jury to prepare a pending indictment for trial is not acceptable).

[140] *See, e.g.*, United States v. DiNapoli, 8 F.3d 909, 914–15 (2d Cir. 1993) (allowing the judge to determine whether the government possessed a similar motive during the grand jury proceeding as it did at trial); *see also supra* notes 95–97 and accompanying text (discussing the factors the judge assessed to determine whether the prosecutor had a similar motive).

[141] *DiNapoli*, 8 F.3d at 916. Several judges believe grand jury testimony is not reliable; *see also, e.g.*, United States v. Thevis, 665 F.2d 616, 629 (5th Cir. 1982) (suggesting that evidence given before a grand jury does not help the evidence's reliability); United States v. West, 574 F.2d 1131, 1138–39 (4th Cir. 1978) (Widener, J., dissenting) (arguing that the majority overestimated the reliability of grand jury testimony).

[142] *See* Mercier, *supra* note 61, at 341 (suggesting that a narrow interpretation of similar motive could potentially violate the right to effectively examine a witness).

[143] Weissenberger, *supra* note 63, at 309 (discussing the trend towards an emphasis on trustworthiness as the goal of evidentiary rules). *Compare* United States v. McFall, 558 F.3d 951, 963 (9th Cir. 2009) (using a broad interpretation and allowing the defendant to admit former testimony by simply determining whether the prosecutor sought to extract incriminating testimony against the defendant during both proceedings), *with* United States v. Omar, 104 F.3d 519, 523–24 (1st Cir. 1997) (examining the prosecutor's motive in-depth and finding that the prosecutor's motive during the grand jury proceeding was not the same as it would be at trial).

former testimony easily, there is a risk that inaccurate former testimony will reach the jury and wrongly persuade the jurors.[144]

Furthermore, the prosecution often has different motives during a grand jury proceeding than at trial.[145] If exculpatory grand jury testimony is easily admitted against the government, the prosecutor will have to change his strategy for examining witnesses during grand jury proceedings.[146] This may not be fair to the prosecution because the prosecutor may not want to disclose information about an ongoing investigation.[147] Also, the prosecutor does not have any incentive to heavily cross-examine a perjurious witness because the prosecutor can charge the witness for perjury or call upon the witness later.[148] Thus, a broad interpretation of similar motive does not favor the government because the prosecutor may not have any incentive to develop a witness's testimony during a grand jury proceeding, and a broad interpretation of similar motive would not take that into account.[149]

Easily admitting former testimony will not give the prosecutor any incentive to examine a witness during a grand jury proceeding if he knows the testimony will be admissible at trial.[150] This may have a

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144 *See supra* notes 35–38 (addressing the dangers of admitting hearsay and allowing the jury to hear evidence that may not be reliable); *see also* Mercier, *supra* note 61, at 341 (noting that a broad interpretation of similar motive could pose a problem by preventing a party from using the right to effectively examine a witness).

145 *See Omar*, 104 F.3d at 523 (discussing that the government does not have the same motive to discredit and question a witness during a grand jury proceeding as it does during trial); *DiNapoli*, 8 F.3d at 913 (discussing that the government often treats a witness differently during a grand jury proceeding because the prosecutor does not want to disclose information about an ongoing investigation or the identity of informants).

146 United States v. Salerno (*Salerno IV*), 974 F.2d 231, 237–38 (2d Cir. 1992) (stating that a prosecutor may not seek to discredit a grand jury witness and that the issues before the grand jury will not necessarily be the same as those at trial). If the court consistently admits former testimony by adopting a broad interpretation, the prosecutor's strategy may change and he may examine the witness differently. *Id.*

147 *See DiNapoli*, 8 F.3d at 911 (averring that the prosecutor did not want to disclose the identity of witnesses cooperating with the government's investigation or wiretapped conversations that did not corroborate the witness's testimony).

148 *Salerno IV*, 974 F.2d at 237 (explaining that the prosecutor can excuse a perjurious witness and continue the grand jury investigation, while retaining the option of going after the witness later for perjury, or recall the witness later when the investigation produces more evidence with which to confront the witness).

149 *Compare* United States v. Avants, 367 F.3d 433, 443–44 (5th Cir. 2004) (examining only whether the defendant's motive at the grand jury hearing and at trial was to discredit a witness and holding that former testimony was admissible), *with* State v. Farquharson, 731 N.W.2d 797, 803 (Mich. Ct. App. 2007) (using the factors listed in *DiNapoli* to determine whether a similar motive is present).

150 DePalma, *supra* note 63, at 574. The prosecutor typically does not want to confront witnesses during grand jury proceedings with evidence that will reveal confidential sources or information about an ongoing investigation. *Id.*

chilling effect on the prosecutor during grand jury proceedings and make him change his strategy when examining a witness, which could have a negative effect on the government's investigatory ability.[151] The public and the government have a strong interest in punishing criminals and getting to the bottom of legal disputes, but using a broad interpretation of similar motive may cause the prosecutor to be cautious when he questions a witness during a grand jury proceeding because the testimony may resurface and hurt his case at trial.[152] A broad interpretation of similar motive may require the prosecutor to alter his strategy during the grand jury proceedings and may make the prosecutor's job of prosecuting criminals more difficult.[153] As a result of the burden placed on the prosecutor by using a broad interpretation of similar motive, some courts favor using a narrow interpretation.[154]

B. Narrow Interpretation of "Similar Motive"

Rather than using a broad interpretation of similar motive, some courts use a narrow interpretation of similar motive to determine whether the prosecutor's motive during a grand jury proceeding is the same as it would be at trial.[155] Like the broad interpretation of similar motive, the narrow interpretation has both positive and negative aspects

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[151] *Id.* Grand jury proceedings are non-adversarial in nature, and there is a lack of a competitive climate because the defendant and the defense counsel are not present. *Id.* The prosecutor only needs to establish probable cause, whereas during the trial the burden of proof is beyond a reasonable doubt. *Id.* If former testimony is easily admitted against the government, the prosecutor may hesitate to question witnesses or change strategy. *DiNapoli*, 8 F.3d at 915.

[152] United States v. Foster, 128 F.3d 949, 955–56 (6th Cir. 1997). A broad interpretation of similar motive does not take into account factors such as the different burdens of proof, the evidence available to the prosecutor, desire to maintain confidentiality of information pertaining to an ongoing investigation, lack of evidence, and the non-adversarial context of the grand jury proceeding. *See id.* (finding grand jury testimony admissible because the prosecutor had the same motive to develop a witness's testimony during both the grand jury hearing and at trial).

[153] *See id.* (adopting a broad interpretation of similar motive and stating that the witness's testimony could have had an impact on the verdict). A narrow interpretation of similar motive provides more protection to the prosecution from having former testimony admitted against it during trial. United States v. Carson, 455 F.3d 336, 379–80 (D.C. Cir. 2006). A broad interpretation only considers whether the prosecutor attempted to extract incriminating testimony, which allows the defendant to introduce exculpatory grand jury testimony more easily. United States v. McFall, 558 F.3d 951, 962–63 (9th Cir. 2009).

[154] *See supra* Part II.B.2.b (summarizing the narrow interpretation of similar motive).

[155] *See supra* note 70 (suggesting that the district courts should use a fact specific inquiry to determine whether the government possessed a similar motive).

to it.[156] The next sections discuss the positive and negative effects of a narrow interpretation.[157]

1. Positive Aspects of a Narrow Interpretation

The narrow interpretation of similar motive provides the greatest benefit to the prosecutor because defendants have a difficult time admitting exculpatory grand jury testimony under a narrow interpretation.[158] The narrow interpretation favors the prosecutor by increasing the chances that the prosecutor will successfully argue that the court should exclude former testimony as hearsay because the prosecution did not have a similar motive during the grand jury proceeding as it would at trial.[159] The narrow interpretation of similar motive recognizes the fact that prosecutors may not fully examine an exonerating grand jury witness because the prosecutor does not want to give up vital information about an ongoing investigation.[160] Keeping information about ongoing investigations confidential is also in the public's interest because society does not want prosecutors giving up vital information in court that could inhibit law enforcement investigations and make it harder to catch criminals.[161]

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156 *See infra* Part III.B.2 (showing some of the problems that arise when courts use a narrow interpretation of similar motive to assess similar motive).

157 *See infra* Part III.B.1 and Part III.B.2 (discussing the positive effects of a narrow interpretation, followed by the negative effects).

158 *See Carson*, 455 F.3d at 379–80 (suggesting that courts should use a fact specific inquiry to determine similar motive). Narrow interpretations require the court to look at factors, such as whether the party possessed a substantially similar motive, what is at stake, the burden of proof, and what lines of questioning occurred during the prior cross-examination before the court admits former testimony under Rule 804(b)(1). United States v. DiNapoli, 8 F.3d 909, 914–15 (2d Cir. 1993).

159 *See* Weissenberger, *supra* note 63, at 298. The narrow interpretation is more cautious and takes into account tactical considerations of attorneys representing their clients' interests. *Id.* Attorneys may use different strategies during the two proceedings, even though the issue may be the same. *Id*.

160 Weissenberger, *Transcripts*, *supra* note 64, at 344 (discussing the intended use of Rule 804(b)(1)). The Judiciary Committee of the House of Representatives, who created changes to Rule 804(b)(1), did not think it was fair to admit former testimony when a party's interests were not properly represented in the prior proceeding. *Id.* Therefore, one can argue that the Judiciary Committee intended for the prosecutor's interests to be taken into account before admitted former testimony from a grand jury proceeding. *Id.* at 344–46.

161 United States v. Salerno (*Salerno II*), 952 F.2d 624, 626 (2d Cir. 1991). The government will hesitate to cross-examine witnesses because there is a chance the cross-examination will reveal the identity and existence of confidential sources. *Id. See generally* BRENNER & LOCKHART, *supra* note 62, at 186–233 (stressing the importance of maintaining the secrecy of grand jury proceedings); FRANKEL & NAFTALIS, *supra* note 62, at 23–24 (arguing that the secrecy of grand jury proceedings is a good idea). The most important reasons for maintaining the secrecy of grand jury proceedings are

Additionally, in a grand jury proceeding, the prosecutor's only goal is to secure an indictment, and the burden of proof that must be met to secure an indictment during the grand jury proceeding is only probable cause.[162] When the prosecutor believes the probable cause burden is met, he does not have any reason to continue examining exonerating witnesses because he believes the grand jury will likely indict.[163] During grand jury proceedings, the prosecution may not possess the best evidence to impeach a witness that is lying, and the government may not even know the witness is lying until later.[164] The prosecutor does not have any incentive to strongly cross-examine a witness because if the witness is lying the prosecutor can bring a perjury charge against the witness later.[165] The narrow interpretation favors the government by protecting the prosecutor from these potential problems and does not make the prosecutor treat exonerating witnesses as trial witnesses.[166]

> (1) [t]o prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Id. (first alteration added).

162 *See supra* note 145 and accompanying text (suggesting that the government does not treat a witness the same during a grand jury proceeding as it would at trial).

163 *DiNapoli*, 8 F.3d at 912–13 (arguing that the prosecutor does not have as much at stake during a grand jury proceeding as he does at trial)

164 *See Salerno II*, 952 F.2d at 626 (discussing why a prosecutor may have a different motive during a grand jury proceeding than he would at trial).

165 *See* United States v. Salerno (*Salerno IV*), 974 F.2d 231, 237 (2d Cir. 1992) (finding that the prosecutor's motive during the grand jury proceeding is not the same as it is during trial). Prosecutors cannot confront a witness suspected of perjury with all the evidence it has, otherwise the prosecutor would risk exposing an ongoing investigation, the identity of informants, and evidence revealing the nature of investigation techniques being used. *Id.* The prosecutor does not have any motive to discredit the witness during the grand jury proceeding because the prosecutor can simply pursue a perjury charge later or examine the witness again when more evidence is available. *Id.* Moreover, discrediting a grand jury witness is usually unnecessary because of the lower burden of proof and the government's ability to call its own witness and additional witnesses at its leisure. United States v. Omar, 104 F.3d 519, 523 (1st Cir. 1997).

166 *See generally* Zenith Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1252 (E.D. Pa. 1980) (taking into account factors such as the type of prior proceeding, trial strategy, number of parties and issues, and the possible penalties or financial stakes to determine whether there is a similar motive). Assessing multiple factors ensures the party whom

The narrow interpretation also fulfills one of the goals of the hearsay rule by increasing the reliability and accuracy of evidence presented to the jury.[167] Hearsay is often unreliable because the jury cannot observe the witness's demeanor, and by using the narrow interpretation the likelihood that potentially unreliable hearsay will reach the jury decreases.[168] If courts easily admit former testimony, there is a risk that inaccurate former testimony will reach the jury and wrongly persuade the jurors.[169] Therefore, the narrow interpretation of similar motive helps prevent hearsay from reaching the jury.[170]

2. Negative Aspects of a Narrow Interpretation

Alternatively, the narrow interpretation also has some negative effects because the courts have to weigh many different factors to determine if there is a similar motive.[171] Under the narrow interpretation, the courts must assess broad factors, such 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."[172] Courts also should examine what is at stake, the burden of proof, and look at the prior examination to see what line of questioning was available to the prosecutor but not developed.[173] It is difficult to ascertain the

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former testimony is admitted against had a prior opportunity to develop the unavailable witness's testimony. *Id.*

167 *See supra* notes 35–40 and accompanying text (addressing the multiple ways in which the hearsay rule increases the reliability of evidence that reaches the jury).

168 *See supra* notes 35–39 and accompanying text (addressing the benefits of cross-examination and the benefits of allowing the jury to observe a witness subject to cross-examination).

169 *See supra* notes 49–50 (discussing how attempting to admit former testimony presents a hearsay problem for courts); *see also* Mercier, *supra* note 61, at 341 (arguing that a narrow interpretation of similar motive would make it easier to argue that a party's motive at trial is not similar to what it was during the grand jury proceeding).

170 *Compare* United States v. McFall, 558 F.3d 951, 963 (9th Cir. 2009) (using a broad interpretation of similar motive and allowing the defendant to introduce exculpatory grand jury testimony), *with Omar*, 104 F.3d at 521–24 (adopting a narrow interpretation of similar motive because during the grand jury proceeding the government likely wanted to protect the confidentiality of witnesses or go after the witness later for perjury).

171 *See supra* notes 95–97 and accompanying text (providing examples of factors courts should use to determine whether a similar motive is present).

172 United States v. DiNapoli, 8 F.3d 909, 914–15 (2d Cir. 1993); *see supra* notes 95–97 and accompanying text (listing the factors the court used).

173 *See supra* note 96 (stating that the factors are all relevant to whether a similar motive is present, but the factors are not conclusive).

prosecutor's tactical considerations and maneuvers, and examining these broad factors will be difficult and costly for the courts.[174]

The narrow interpretation of similar motive does not favor the defendant in a criminal trial because the narrow interpretation can lead to potential violations of a defendant's due process rights by excluding exculpatory grand jury testimony.[175] Preventing a defendant from admitting former testimony does not adequately ensure that the courts will not violate the defendant's due process rights because the court is more likely to exclude valuable evidence that could potentially violate the defendant's right to present a defense.[176] Accordingly, using a narrow interpretation of similar motive may lead to violations of due process rights because the defendant will not likely be able to present evidence that could exonerate him or lessen his sentence.[177]

Not letting defendants introduce exculpatory grand jury testimony by using a narrow interpretation of similar motive goes against the Federal Rules of Evidence's "liberal thrust" towards admissibility because the court will likely exclude former testimony.[178] The narrow interpretation prevents more evidence from reaching the jury and leaves the determination of admissibility up to the judge.[179] Moreover, the

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[174] *DiNapoli*, 8 F.3d at 916. *See supra* note 99 (quoting the *DiNapoli* dissent's argument that the administration of the majority's test could prove to be difficult).

[175] *See, e.g.*, Green v. Georgia, 442 U.S. 95, 97 (1979) (holding that the lower court violated the defendant's right to due process by excluding the statement of a co-defendant as hearsay); Chambers v. Mississippi, 410 U.S. 284, 294, 302 (1973) (holding that a defendant in a criminal trial has a right to defend and present his case, and "the hearsay rule may not be applied mechanistically to defeat the ends of justice"); Feaster v. United States, 631 A.2d 400, 411–12 (D.C. Cir. 1993) (holding that the defendant's Sixth Amendment right to present a defense required the court to admit a transcript of an unavailable witness's grand jury testimony). Offering testimony to support one's case is a right that is essential to receiving a fair trial. Morrissey v. Brewer, 408 U.S. 471, 488–89 (1972); Jenkins v. McKeithen, 395 U.S. 411, 428–29 (1969); Specht v. Patterson, 386 U.S. 605, 610 (1967); *In re* Oliver, 333 U.S. 257, 273 (1948).

[176] United States v. Omar, 104 F.3d 519, 523–24 (1st Cir. 1997) (using a narrow interpretation of similar motive); *see also supra* note 69 (discussing situations where the defendant's Sixth Amendment right to present a defense requires the admission of evidence that the court would normally exclude).

[177] *See supra* note 175 (discussing how courts cannot apply the hearsay rule mechanistically to prevent the defendant from introducing evidence in his defense).

[178] *See* LEONARD & GOLD, *supra* note 13, at 6 (suggesting that the Federal Rules of Evidence favor admissibility and admitting more evidence is more likely to satisfy the goals of the rules); *see also* FED. R. EVID. 401–403 (giving a broad definition of what evidence is relevant); Beech Air Craft Corp. v. Rainey, 488 U.S. 153, 169 (1988) (arguing that the Federal Rules of Evidence favor admissibility and have a "liberal thrust" towards admissibility).

[179] *See supra* Part II.B.2.b (providing illustrations of cases using the narrow interpretation to exclude exculpatory grand jury testimony); *see also supra* note 51 (discussing the importance of being judged by a jury of one's peers and letting the jury decide how much

narrow interpretation favors the prosecutor in a criminal trial by essentially allowing the prosecutor to decide whether former testimony is admissible because if a witness offers incriminating evidence against a defendant, the government may grant the witness immunity and allow him to testify at trial.[180] Conversely, if the testimony is exculpatory, the government attempts to exclude the testimony as hearsay.[181] This allows the prosecutor to essentially control whether former testimony is admissible, which goes against the main objective of going to trial—allowing the jury, not the prosecutor, to decide what the truth is.[182]

Preventing a defendant from admitting former testimony may not ensure that the defendant is provided with the proper chance to present evidence before being convicted.[183] Thus, a narrow interpretation of similar motive does not favor the defendant in a criminal trial because it takes away a potential safeguard to ensure that the defendant receives due process and is allowed to properly defend his case.[184]

C. Judith M. Mercier's Suggested Change to Rule 804(b)(1)

A possible revision to Rule 804(b)(1) that Judith M. Mercier suggested is to add a "reasonable examiner" standard.[185] The reasonable

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weight to give evidence in order to protect the defendant from corruption, overzealous prosecutors, and biased judges).

[180] United States v. Salerno (*Salerno III*), 505 U.S. 317, 324 (1992). The prosecutor can grant a witness use immunity if he offers incriminating evidence; however, the prosecutor can also refuse to grant immunity and attempt to exclude the testimony as hearsay if the witness gives exonerating testimony. *Id.*; *see also supra* note 99 (stating that the dissent in *United States v. DiNapoli* thought a narrow interpretation of similar motive rewrote Rule 804(b)(1) by changing similar motive to same motive and that the majority's approach essentially allows the prosecutor to decide whether the court will admit former testimony, which prevents the jury from determining the truth).

[181] *See supra* note 137 (describing how the prosecutor uses immunity to the disadvantage of the defendant).

[182] *See supra* notes 50–51, 133 (discussing the importance of the jury and the defendant's right to be judged by his peers); *see also supra* notes 22, 50 (suggesting that the Federal Rules of Evidence favor admissibility and letting the jury assess what is true).

[183] *See supra* note 69 (providing cases that show courts cannot apply the hearsay rule mechanistically to prevent the defendant from offering testimony to prove his innocence because being able to offer testimony is a right that is essential to receiving a fair trial).

[184] *See supra* note 51 (discussing the importance of allowing the jury to decide issues in order to protect the defendant from overzealous prosecutors and potentially biased judges); *see also supra* note 133 (arguing that a fact-finding process conducted by multiple people is more likely to discover the truth than a process conducted by only one person).

[185] *See* Mercier, *supra* note 61, at 337–42 (proposing that the courts should modify Rule 804(b)(1) by adding a "reasonable examiner" standard to conserve adversarial fairness). Judith M. Mercier is a practicing attorney at Holland & Knight in Florida. She received her J.D. from the University of Miami School of Law and has a B.S. in accounting from the University of Florida.

examiner standard ensures that the party against whom the testimony is offered possessed a similar motive to cross-examine the witness by requiring a subjective analysis to determine whether a reasonable examiner would have a similar motive to develop the witness's testimony by direct, cross, or redirect examination.[186] Like the broad and narrow interpretation of similar motive, adding reasonable examiner standard to Rule 804(b)(1) has both negative and positive effects on the judicial process.[187]

1. Positive Aspects of Adding a "Reasonable Examiner" Standard

One of the benefits to adding a reasonable examiner standard is that the American judicial system is an adversarial system, and adding a reasonable examiner standard to Rule 804(b)(1) further supports the adversarial system.[188] The reasonable examiner standard basically asks whether a reasonable examiner in the situation would possess a similar motive to develop the witness's testimony by direct, cross, or redirect examination to advocate for his client.[189] By assessing what a reasonable examiner would do, the reasonable examiner standard focuses on the circumstances in the case and ensures that the party possessed a similar motive and adequate opportunity to cross-examine the witness.[190] The reasonable examiner standard does not prevent former testimony from being admitted when a litigant previously decided not to vigorously examine a witness.[191]

2. Negative Aspects of a "Reasonable Examiner" Standard

In contrast, the reasonable examiner standard makes the similar motive determination more difficult for courts by adding another

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186 *See id*. at 342 (concluding that courts might hesitate to adopt the reasonable examiner standard because it requires a subjective analysis).

187 *See infra* Part III.C.1 and Part III.C.2 (discussing the positive and negative effects of adding a "reasonable examiner" standard to Rule 804(b)(1)).

188 *See* Mercier, *supra* note 61, at 338 (proposing that the reasonable examiner standard focuses on the circumstances in each case to ensure that courts do not admit former testimony against a party that did not have a similar motive or a prior opportunity for cross-examination).

189 *See id*. at 338–42 (providing a discussion of the reasonable examiner standard and illustrating how courts can use the standard to decide whether to admit former testimony under Rule 804(b)(1) to promote fairness).

190 *Id.*

191 United States v. Salerno (*Salerno IV*), 974 F.2d 231, 239 (2d Cir. 1992); *see also supra* note 54 (proposing that Rule 804(b)(1) only requires that the party possess a valid opportunity for cross-examination and whether the party took advantage of the opportunity is irrelevant).

element to consider when deciding whether former testimony is admissible under Rule 804(b)(1).[192] Not all lawyers think the same; therefore, some lawyers may make different choices or tactical decisions in certain situations.[193] This type of situation could make it difficult for courts to assess what a reasonable examiner would do under the circumstances.[194] Adding a reasonable examiner standard essentially adds another vague term to Rule 804(b)(1).[195] The reasonable examiner standard removes counsel's role as strategic decision-maker and forces courts to play lawyer; this does not help to determine when a similar motive is present but further confuses the rule.[196]

In summary, there are positive and negative consequences to each interpretation, and there is no simple solution.[197] Courts need to reach a compromise between the different approaches in order to balance the competing interests of the prosecutor and the defendant and to promote fairness and consistency.[198]

IV. CONTRIBUTION

Courts will continuously fail to promote fairness and consistency by using either a broad or narrow interpretation of similar motive.[199] A defendant's ability to introduce exculpatory grand jury testimony during a trial currently depends entirely on the circuit in which the case is

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192 *See* Mercier, *supra* note 61, at 342 (stating that the reasonable examiner standard fits within the vague meaning of Rule 804(b)(1)).

193 *See supra* note 99 (discussing that courts cannot easily determine what a lawyer is thinking or the strategies the lawyer employed and attempting to do so would require courts to conduct a burdensome evidentiary hearing).

194 *See supra* note 125 (discussing that examining what is going through a prosecutor's mind during the grand jury proceeding and at trial forces the courts to conduct an evidentiary hearing to assess the information available to the prosecutor, in addition to what the prosecutor thought about the information during the grand jury proceeding and at trial; therefore, figuring out the prosecutor's tactical decisions and thoughts will not be easy for courts to assess).

195 *See* Mercier, *supra* note 61, at 342 (stating that the "reasonable examiner" standard fits well with the nebulous meaning of opportunity and similar motive).

196 *See supra* note 125 (arguing that courts will have a hard time determining whether the prosecutor possessed a similar motive because it is not easy to determine what is going through the prosecutor's mind during a grand jury proceeding and at trial).

197 *See supra* Part III.A, III.B, and III.C (analyzing the positive and negative effects of the different approaches courts use to determine whether a criminal defendant can admit exculpatory grand jury testimony under Rule 804(b)(1)).

198 *See infra* Part IV (suggesting that courts should conduct a factual inquiry to determine whether the government possesses a similar motive); *see also supra* note 8 (noting that the purpose of the Federal Rules of Evidence is to promote fairness and consistency regarding evidence admitted during trials).

199 *See supra* Part III.A and Part III.B (analyzing the broad and narrow interpretations of similar motive and how courts use the different interpretations).

tried.[200] For example, if the defendant's trial is in the Sixth Circuit, the court will most likely allow the defendant to introduce exculpatory grand jury testimony under a broad interpretation of similar motive.[201] In contrast, if the defendant's trial is in the Second Circuit, the court will likely prohibit the defendant from admitting exculpatory grand jury testimony under a narrow interpretation of similar motive.[202]

The discord and inconsistency resulting from these two interpretations of Rule 804(b)(1)'s similar motive element is exactly what the Federal Rules of Evidence attempt to avoid.[203] Rule 102 of the Federal Rules of Evidence states that one of the goals of evidence law is to secure fairness and prevent unjustifiable expense and delay.[204] In order to promote fairness and consistency, courts should do away with the broad and narrow interpretations, and instead courts should conduct a factual inquiry by examining (1) what is at stake and the burden of proof; (2) the government's interest; (3) the previous cross-examination; and (4) the defendant's interest.

A. What is at Stake and the Burden of Proof

The first factor courts should examine is what is at stake and the burden of proof. This requires the court to take into account that during a grand jury proceeding, the prosecutor only needs to establish probable cause to secure an indictment, but during a criminal trial, the burden of proof is beyond a reasonable doubt.[205] Because of the difference in the burden of proof, the prosecutor may not have the same motive during a grand jury proceeding as he would at trial. On the other hand, the defendant's freedom is at stake in a criminal case, and the defendant may face a substantial amount of time in prison. Therefore, the use of exculpatory grand jury testimony is likely very important for the defendant.[206]

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[200] *See supra* Part II.B.2.a and II.B.2.b (discussing how circuit courts use a broad and narrow interpretation of similar motive to determine whether to admit exculpatory grand jury testimony).

[201] *See supra* notes 71–77 and accompanying text (summarizing the Sixth Circuit's decision to adopt a broad interpretation of similar motive in *United States v. Foster*).

[202] *See supra* notes 88–99 and accompanying text (summarizing the Second Circuit's decision to adopt a narrow interpretation of similar motive in *United States v. DiNapoli*).

[203] *See supra* note 8 (stating that courts must use the Federal Rules of Evidence to secure fairness and to reach just results).

[204] *See supra* note 25 (giving the text of Rule 102 and the purpose of the Federal Rules of Evidence).

[205] *See supra* note 105 (addressing the differences in the burden of proof during a grand jury proceeding and during a criminal trial).

[206] *See supra* notes 69, 175 (listing cases where courts state that giving the defendant the opportunity to offer testimony in his defense is essential to a fair trial).

B. Government's Interest

The court must also consider the government's interest in protecting witnesses and preserving the confidentiality of ongoing investigations. This also includes the fact that discrediting a grand jury witness is rarely important because the prosecutor can always charge a witness later for perjury. Courts should also consider the evidence available to the prosecutor because more evidence may become available later, and the courts do not want to have a chilling effect on prosecutors during grand jury proceedings by easily admitting all exculpatory grand jury testimony.

C. Previous Cross-Examination

Next, the courts should consider the previous cross-examination, focusing on the lines of questioning the prosecutor used and what lines of questioning were available to the prosecutor but not pursued.[207] Prosecutors can always argue they did not pursue certain lines of questioning during grand jury proceedings, and the courts should take that into consideration; however, the lines of questioning the prosecutor did not pursue are only one factor to consider. This factor will give the court a better idea of whether the prosecutor purposely avoided asking certain questions in order to protect the identity of witnesses or the confidentiality of ongoing investigations.

D. Defendant's Interest

Last, courts should assess the defendant's interest in presenting evidence to defend his case and protecting his constitutional right to present a defense.[208] The defendant in a criminal case may lose his freedom if he is convicted; therefore, the courts should ensure that the defendant has the opportunity to present evidence to support his case.[209] The Federal Rules of Evidence have a liberal thrust towards admissibility, and the jury traditionally assesses the truthfulness of

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[207] *See supra* note 96 (discussing how the court should examine the lines of questioning the prosecutor used or avoided during the grand jury proceeding).

[208] *See supra* notes 69, 175 (discussing the importance of preserving the defendants right to present a defense to exonerate himself).

[209] Chambers v. Mississippi, 410 U.S. 284, 294 (1973). In order for a defendant to receive a fair trial, the defendant must have the opportunity to examine witnesses and offer testimony. *See, e,g.*, Morrissey v. Brewer, 408 U.S. 471, 488–89 (1972); Jenkins v. McKeithen, 395 U.S. 411, 428–29 (1969); Specht v. Patterson, 386 U.S. 605, 610 (1967); *In re* Oliver, 333 U.S. 257, 273 (1948). Courts should not apply the hearsay rule or the former testimony exception mechanistically to defeat the ends of justice. *Chambers*, 410 U.S. at 302–03.

facts.[210] Thus, courts should generally favor allowing defendants to present exculpatory grand jury testimony so the jury may determine how much weight to give the testimony and whether the testimony is credible.

In brief, all of these factors are relevant to whether a prosecutor has a similar motive during a grand jury proceeding and at trial, but none of the factors alone are conclusive. The courts should assess these factors on a case-by-case basis to determine whether the government possessed a similar motive. If the federal courts adopt these factors, decisions will be more consistent.

In addition to examining these factors, courts should place the burden on the government to justify exclusion of grand jury testimony. Courts should favor admitting exculpatory grand jury testimony in order to let the jury decide how much weight to give the testimony. Similar to the Federal Rules of Evidence and Rule 403, the similar motive element of Rule 804(b)(1) should favor admissibility and a finding of similar motive.[211] Courts do not want to prevent prosecutors from using grand juries or hesitating to question witnesses during grand jury proceedings, but protecting the constitutional rights of the defendants and preserving their ability to present a defense warrants the extra burden that the prosecutor may face.[212] Therefore, an interpretation of similar motive that favors admitting exculpatory grand jury testimony satisfies the plain meaning rule and is more likely to satisfy the goals of the Federal Rules of Evidence without producing an unconstitutional result.[213]

Citizens lose faith in the justice system when courts apply laws and rules inconsistently. The public, prosecutors, and defendants all expect laws to apply consistently regardless of the circuit trying the case. When

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[210] *See supra* notes 51, 178 (suggesting that the Federal Rules of Evidence generally favor admitting evidence and that the American society thinks allowing the jury to determine the truth is very important in order to protect defendants from potentially overzealous prosecutors and biased judges).

[211] *See supra* notes 22, 126 (suggesting that the Federal Rules of Evidence favor admissibility and that the Federal Rules suggest that a broad interpretation of relevant evidence is best because more evidence is admitted under a broad interpretation).

[212] *See supra* notes 150–51 and accompanying text (suggesting that prosecutors will not ask witnesses certain questions during grand jury proceedings if the prosecutor knows the testimony is admissible at trial); *see also* Chambers v. Mississippi, 410 U.S. 284, 302–03 (1973) (holding that courts cannot use the hearsay rule to defeat the ends of justice and that sometimes a defendant's constitutional rights warrant admitting hearsay testimony).

[213] *See supra* note 48 (addressing the plain meaning rule and how courts can use the rule to interpret the Federal Rules of Evidence, while also explaining that how the dictionary defines the term similar as having characteristics in common, but similar does not mean identical).

courts apply laws consistently, the public knows what to expect and no one can argue the court treated them unfairly or that the court prevented them from defending and presenting their case.[214] Until there is a consistent interpretation of Rule 804(b)(1)'s similar motive element, the public, prosecutors, and defendants will continue to guess whether the court will use a narrow or broad interpretation of similar motive and courts will continuously waste resources litigating which approach to use.

V. CONCLUSION

Without any guidance from the Supreme Court on how to interpret Rule 804(b)(1)'s similar motive element, the split amongst the circuit courts will likely continue to worsen. Completely excluding or routinely admitting exculpatory grand jury testimony does not serve the interests of the justice system or the Federal Rules of Evidence. The fairest approach between the two extremes is for the courts to assess factors on a case-by-case basis to determine whether the government possessed a similar motive and to provide predictability.

Currently, John and his attorney await the Seventh Circuit's decision on whether the exculpatory grand jury testimony is admissible. John appears extremely nervous and his heart is racing because he understands the ramifications the court's decision will have on his life. If courts stopped relying on a broad or narrow interpretation of similar motive, John's nervousness and worries would disappear because the court would analyze: (1) what is at stake and the burden of proof, (2) the government's interest, (3) the previous cross-examination; and (4) the defendant's interest to determine whether to admit the exculpatory grand jury testimony.

By analyzing these factors, courts will become more consistent at determining whether there is a similar motive, while also protecting the interests of the defendant and the prosecutor. Further, the prosecution will no longer have the ability to control whether exculpatory grand jury testimony is admissible because the prosecutor cannot grant immunity and then attempt to exclude the testimony as hearsay. If the Seventh Circuit adopted these factors, the court would ensure that John's constitutional right to present evidence in his defense is protected, while

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[214] *See supra* Part II.B.2.a and II.B.2.b (discussing how circuit courts use a broad and narrow interpretation of similar motive to determine whether to admit exculpatory grand jury testimony and the cases supporting each interpretation).

also protecting the prosecutor's interest in prosecuting criminals and preventing the disclosure of information about ongoing investigations.

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