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## *United States v. Salerno: An Examination of Rule 804(b)(1)*

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# *United States v. Salerno*: An Examination of Rule 804(b)(1)

I. INTRODUCTION .....	323
II. THE UNFOLDING OF THE CASE .....	325
III. RULE 804(b)(1) .....	328
IV. <i>SALERNO</i> : AN ANALYSIS .....	334
A. <i>Immunity and Unavailability in the Context of Adversarial Fairness</i> .....	334
B. <i>"Similar motive" in Salerno</i> .....	335
C. <i>The Supreme Court and a "Similar Motive" Test</i> .....	340
V. CONCLUSION .....	342

## I. INTRODUCTION

In *United States v. Salerno*,<sup>1</sup> several courts have recently subjected Rule 804(b)(1) of the Federal Rules of Evidence to exacting scrutiny. The defendants in *Salerno* asked the court to admit under Rule 804(b)(1) the grand jury testimony of two witnesses who refused to testify at trial.<sup>2</sup> Initially, the federal prosecutor called the two witnesses to testify about the existence of a bid-rigging scheme in the concrete industry in New York before the grand jury under a grant of immunity. When questioned by the government, the witnesses denied any involvement in or knowledge of a bid-rigging scheme.<sup>3</sup> At trial, when the government attempted to prove that such a scheme existed, the defendants called the two grand jury witnesses to the stand to weaken the government's theory. However, the witnesses refused to testify, invoking the Fifth Amendment privilege against self-incrimination.<sup>4</sup> Because a properly asserted privilege renders a declarant "unavailable" under Rule 804(a)(1),<sup>5</sup> the

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1. 937 F.2d 797 (2d Cir. 1991), *rev'd*, 112 S. Ct. 2503, *remand* 974 F.2d 231 (2d Cir. 1992), *vacated on reh'g en banc sub nom.* *United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993).

2. Federal Rule of Evidence 804(b)(1) provides:

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

(1) Former Testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

3. *United States v. Salerno*, 112 S. Ct. 2503, 2506 (1992).

4. *Id.* Because the government's grant of immunity applied only to testimony before the grand jury, the witnesses had not waived the right to assert the Fifth Amendment privilege against self-incrimination.

5. Federal Rule of Evidence 804(a) provides in pertinent part:

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant—

defendants looked to Rule 804(b)(1), arguing that grand jury testimony constituted admissible "former testimony."<sup>6</sup>

Rule 804(b)(1) represents an exception to the exclusion of hearsay.<sup>7</sup> The rule explicitly states that former testimony is not excluded by the hearsay rule "if 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."<sup>8</sup>

In *Salerno*, the district court judge excluded the grand jury testimony because she found that the government lacked the requisite "similar motive" to develop the testimony in the two proceedings.<sup>9</sup> On appeal, the United States Court of Appeals for the Second Circuit initially ruled that the "similar motive" prong of the Rule should "evaporate" in circumstances where the defendant in a criminal trial wishes to admit grand jury testimony of witnesses who have invoked the Fifth Amendment privilege against self-incrimination.<sup>10</sup> The Second Circuit reasoned that the witnesses were "available" to the government through a grant of immunity.<sup>11</sup> "The 'similar motive' requirement of rule 804(b)(1) protects the party to whom the witness is 'unavailable' in order to accord that party some degree of adversarial fairness . . ."<sup>12</sup> Because the Second Circuit perceived the witnesses as "available" to the government in these narrow circumstances, the court viewed adversarial fairness as superceding the "similar motive" requirement.<sup>13</sup>

The Supreme Court rejected the Second Circuit's conclusion that the defendants did not have to demonstrate a "similar motive" to fall under Rule 804(b)(1). The Court reversed and remanded the case for further consideration of the government's "similar motive" under Rule

(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; . . . .

6. See *infra* part III.

7. FED. R. EVID. 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.").

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

9. *United States v. Salerno*, 937 F.2d 797, 804 (2d Cir. 1991), *rev'd*, 112 S. Ct. 2503 (1992).

10. *Id.* at 806.

11. *Id.* "[T]he government's argument that it lacked the opportunity and similar motive to develop the testimony in front of the grand jury is irrelevant, because the declarants were not similarly unavailable to the government at trial." *Id.* at 808.

12. *Id.* at 806.

13. *Id.*

804(b)(1).<sup>14</sup> On remand, the Second Circuit fully considered the arguments by both parties and found that a "similar motive" existed.<sup>15</sup> However, on rehearing en banc the Second Circuit vacated its finding of similar motive and held that the district court properly excluded the grand jury testimony of the two witnesses.<sup>16</sup>

This Note discusses the precedential value and the significance of the interpretation of Rule 804(b)(1) by the Second Circuit and the Supreme Court in *United States v. Salerno*. Part II traces the history of the case. Part III examines Rule 804(b)(1) and the different interpretations given by the courts. Part IV explores the Second Circuit's application and analysis of Rule 804(b)(1) in *Salerno*. Finally, Part V proposes that courts should adopt the "reasonable examiner" approach when evaluating whether "similar motive" exists under Rule 804(b)(1). Such an objective approach should be adopted to preserve the core element of the rule: adversarial fairness.

## II. THE UNFOLDING OF THE CASE

*United States v. Salerno* has a long and complex history.<sup>17</sup> This enormous case involved bid-rigging in the concrete industry in New York.<sup>18</sup> The thirty-five count grand jury indictment charged the "Genovese Family" with using its influence over labor unions and its control of the concrete supply to rig bidding on construction projects.<sup>19</sup> The

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14. *United States v. Salerno*, 112 S. Ct. 2508, 2509 (1992).

15. *United States v. Salerno*, 974 F.2d 231, 241 (2d Cir. 1992).

16. *United States v. DiNapoli*, 8 F.3d 909, 915 (2d Cir. 1993).

17. The case began in 1987 with a thirty-five count indictment against eleven defendants. *United States v. Salerno*, 937 F.2d 797, 800-01 (2d Cir. 1991). Because of the complexities, this Note presents an abbreviated summary of the relevant background.

18. Prior to the indictment in this case, a shorter Racketeering Influenced Corrupt Organization Act (RICO) trial transpired in the Southern District of New York embodying many of the same facts. That trial, known as the "commission" case, "alleged a RICO enterprise known as the 'commission' of La Cosa Nostra." *Id.* at 800. The indictment alleged that the commission functioned as the definitive governing body over five New York families known as the "La Cosa Nostra" families (Genovese, Gambino, Colombo, Lucchese and Bonanno). *Id.*

The alleged activities of the commission included promoting and organizing "joint ventures of a criminal nature involving the families." *Id.* One alleged commission scheme was the concrete contractors' "club." In this scheme, only commission-approved concrete companies could take New York City concrete construction contracts worth more than two million dollars. Such a contractor would then be required to pay two percent of the contract price to the commission. *Id.*

19. *Id.* at 801-02. This case came to be known as the "construction" case. *Id.* at 801. Count One charged eleven defendants (Anthony Salerno, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward Halloran, Alvin O. Chattin, Aniello Migliore, Matthew Ianniello, John Tronolone, Milton Rockman, and Richard Costa) with a pattern of racketeering activity in contravention of the RICO conspiracy statute, 18 U.S.C. § 1962(d). *Id.* Count Two charged all eleven defendants with the "substantive crime of conducting and participating in the activities of the Genovese family in violation of 18 U.S.C. § 1962(c) (the substantive RICO count)." *Id.*

Family dispersed these contracts to a purported "Club" of concrete companies in exchange for a share of the proceeds.<sup>20</sup>

A significant portion of the case at trial involved the affairs of one of the "Club" members, the Cedar Park Concrete Construction Corporation.<sup>21</sup> During the grand jury proceeding, the government called two of the owners of Cedar Park, Pasquale Bruno and Frederick DeMatteis, to testify under a grant of immunity. Bruno and DeMatteis testified but repeatedly denied any participation in the Club.<sup>22</sup> When the government tried to show at trial that Cedar Park had belonged to the Club, the defendants countered by calling Bruno and DeMatteis to testify.<sup>23</sup> On the stand, both Bruno and DeMatteis invoked the Fifth Amendment privilege against self-incrimination and refused to testify.<sup>24</sup> Accordingly, the defendants asked the district court to admit the transcripts of the witnesses' grand jury testimony under Rule 804(b)(1) of the Federal Rules of Evidence.<sup>25</sup>

The district court refused to admit the testimony, holding that the United States did not have a "similar motive" to develop the testimony at the grand jury proceeding as it would have had at trial.<sup>26</sup> In reversing the district court's decision,<sup>27</sup> the Second Circuit noted that concerns about reliability and accuracy are absent when the "defendant wishes to introduce the grand jury testimony that the government used to obtain his indictment . . . ."<sup>28</sup> The government has all the advantages before the grand jury, and the proceedings are inherently unfavorable to the interest of defendants.<sup>29</sup> Because "Rule 804(b)(1) incorporates considerations of

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"Counts Three through Thirty-Five charged various of the defendants with mail fraud, conspiracy, extortion, illegal gambling, and extortionate credit extension." *Id.*

20. *Id.* at 802.

21. *United States v. Salerno*, 112 S. Ct. 2503, 2506.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* The trial judge "reasoned that the government's motive to examine a grand jury witness is 'far different from the motive of a prosecutor in conducting the trial.'" *United States v. Salerno*, 937 F.2d 797, 804 (2d Cir. 1991), *rev'd* 112 S.Ct. 2503 (1992) (citation omitted).

27. Although sixteen issues were raised on appeal, the Second Circuit concluded that the exclusion of the grand jury testimony "so tainted the entire trial that reversal and a new trial is required for all eight appealing defendants." *Salerno*, 937 F.2d at 804.

28. *Id.* at 807 (emphasis omitted). The Second Circuit found that the witnesses were available to the government at trial by a grant of immunity. Because the witnesses were only "unilaterally unavailable" and the government could have cross-examined them, the court refrained from endorsing exclusion of the testimony on the basis of fairness to the government. *Id.*

29. *Id.* Consider the following factors present at grand jury proceedings that favor the government over defendants: "the *ex parte* nature of the proceeding, the leading questions by the government, the absence of the defendant, the tendency of the witness to favor the government because of the grant of immunity, [and] the absence of confrontation." *Id.*

adversarial fairness into the evidentiary analysis,"<sup>30</sup> a defendant should be able to enter testimony against the government from a grand jury proceeding that favors the government and is inherently adverse to the defendant, without having to prove a "similar motive."<sup>31</sup> If the government wanted the witnesses to testify, it could have granted immunity to the witnesses at trial.

The Supreme Court, adhering to a strict textual interpretation, found error in the Second Circuit's application of Rule 804(b)(1) and reversed and remanded the case.<sup>32</sup> The Supreme Court held that each element of Rule 804(b)(1), including the "similar motive" element, must be satisfied before former testimony can be entered in evidence.<sup>33</sup> Justice Thomas noted that by enacting twenty-nine exceptions to the hearsay rule,<sup>34</sup> Congress made a deliberate decision regarding what should constitute acceptable exceptions to the general prohibition against admission of hearsay under Rule 802.<sup>35</sup> The Court further noted it must respect Congress's decision and enforce the language it enacted.<sup>36</sup> In remanding the case, the Supreme Court left to the Second Circuit the determination of whether the government had a "similar motive" to develop the testimony of the two grand jury witnesses.<sup>37</sup>

On remand, the Second Circuit applied the evidentiary standards announced by the Supreme Court and found that the government did have a "similar motive" as required under Rule 804(b)(1) and "that the district court abused its discretion by refusing to admit the grand jury testimony of witnesses Bruno and DeMatteis."<sup>38</sup> In late 1992, the Second Circuit granted a rehearing on the issue of whether the government had a "similar motive" to develop the testimony.<sup>39</sup>

In November 1993, the Second Circuit vacated its prior ruling and held that the government did not have a "similar motive" at the grand

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30. *Id.* at 806 (quoting *United States v. Vigoa*, 656 F. Supp. 1499, 1505 (D.N.J. 1987)).

31. *Id.* In contrast, it would clearly be unfair for the government to enter grand jury testimony against a defendant who had no part in developing the testimony.

32. *United States v. Salerno*, 112 S. Ct. 2503, 2509 (1992).

33. *Id.* at 2507.

34. Twenty-four exceptions are found in Rule 803 while five exceptions are found in Rule 804 of the Federal Rules of Evidence. FED. R. EVID. 803, 804.

35. *Salerno*, 112 S. Ct. at 2507.

36. *Id.*

37. *Id.* at 2509.

38. *United States v. Salerno*, 974 F.2d 231, 232 (2d Cir. 1992).

39. "Rehearing in banc is granted, limited to the issue . . . [of] whether with respect to Frederick DeMatteis and Pasquale Bruno, the Government had at trial a 'similar motive to develop the testimony by direct, cross, or redirect testimony,' within the meaning of Fed. R. Evid. 804(b)(1), compared to the motive it haad [sic] at the grand jury." *United States v. Salerno*, Docket No. 88-1464 (2d Cir. Nov. 25, 1992) (order granting rehearing as to "similar motive").

jury proceeding and at trial.<sup>40</sup> In reaching its decision to vacate, the court explained that the

proper approach . . . in assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an *interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue*. The nature of the two proceedings — both what is at stake and the applicable burden of proof — and, to a lesser extent, the cross-examination at the prior proceeding — both what was undertaken and what was available but forgone — will be relevant though not conclusive on the ultimate issue of similarity of motive.<sup>41</sup>

The dissent argued that the en banc majority applied a gloss to the language of Rule 804(b)(1) that effectively rewrites the rule from “similar motive” to “same motive.”<sup>42</sup>

### III. RULE 804(B)(1)

Both plaintiffs and defendants usually prefer live testimony over former testimony, but witnesses are not always available at the time of trial.<sup>43</sup> Rule 804(b)(1) of the Federal Rules of Evidence provides a hearsay exception that addresses such situations.<sup>44</sup>

Before a declarant’s former testimony can be admitted into evidence, Rule 804(b) imposes a threshold requirement that the declarant be “unavailable.” This requirement of “unavailability” safeguards fairness concerns. “Because former testimony is in actuality some other proceeding’s evidence . . . it appears to be fundamentally fair to admit it only when better evidence is unavailable.”<sup>45</sup> Although it failed to define

40. *United States v. DiNapoli*, 8 F.3d 909, 910 (2d Cir. 1993).

41. *Id.* at 914-15 (emphasis added).

42. *Id.* at 916 (Pratt, J., dissenting).

43. Witnesses may disappear, die, or even refuse to testify by claiming a Fifth Amendment privilege.

44. *See supra* note 2. Drafters of Rule 804(b)(1) extensively debated its content. Ultimately, Congress enacted a version of Federal Rule of Evidence 804(b)(1) that varied from the rule the Supreme Court promulgated. Glen Weissenberger, *The Former Testimony Hearsay Exception: A Study in Rulemaking, Judicial Revisionism, and the Separation of Powers*, 67 N.C. L. REV. 295, 298-99 (1989). The Supreme Court’s original version of this rule only required that “some litigant at a former hearing have had a similar motive, interest, and opportunity to develop the testimony.” *Id.* at 299.

The Rule as adopted also includes the term “predecessor in interest” for application in civil cases. FED. R. EVID. 804(b)(1). Congress’s inclusion of the terms “predecessor in interest” reflects a consideration of the fairness concerns in admitting former testimony in civil cases. Recognizing that former testimony of an unavailable witness cannot be cross-examined at trial, Congress placed significant weight on the fairness of entering the testimony. Weissenberger, *supra* note 43, at 302.

45. Weissenberger, *supra* note 44, at 302.

certain phrases in Rule 804(b)(1), Congress expressly listed the conditions that constitute "unavailability" in subsection (a).<sup>46</sup> Courts have consistently found that where a Fifth Amendment privilege is properly asserted by a witness, the unavailability requirement of Rule 804 is satisfied.<sup>47</sup>

Once the "unavailability" threshold is met, the requirements of subsection (1) of Rule 804(b) must then be satisfied. Courts vary in their interpretations of two phrases in subsection (1): "[t]estimony given as a witness at another hearing" and "opportunity and similar motive to develop the testimony."

In *United States v. Donlon*,<sup>48</sup> the First Circuit found that grand jury testimony does not fall within the definition of "testimony" under Rule 804(b)(1).<sup>49</sup> The court in *Donlon* said the Advisory Committee's note to Rule 804(b)(1) excluded grand jury testimony because cross-examination is not "potentially available."<sup>50</sup> This interpretation by the First Circuit blatantly ignores the actual language of the rule. By limiting the use of Rule 804(b)(1) only to those situations where "cross-examination" is available, the First Circuit improperly restricted the rule. The literal words of Rule 804(b)(1) allow former testimony where the party against whom the testimony is offered had an "opportunity and similar motive to develop the testimony by direct, cross or redirect examination." During grand jury proceedings, the government has broad latitude to develop testimony by direct examination.<sup>51</sup>

Although the *Donlon* court stated that prior grand jury testimony does not fall under Rule 804(b)(1), it upheld the district court's decision to admit the grand jury testimony of the defendant's wife under Rule 804(b)(5), the "catch-all" exception.<sup>52</sup> The First Circuit placed signifi-

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46. See *supra* note 5.

47. See, e.g., *United States v. Ramirez*, 990 F.2d 1264 (9th Cir. 1993) (acknowledging that an individual who refuses to testify under the Fifth Amendment privilege against self-incrimination is deemed unavailable); *United States v. Taplin*, 954 F.2d 1256, 1258 (6th Cir. 1992) (noting that "[t]he predicate of unavailability is satisfied" where at trial a witness invokes his Fifth Amendment privilege against self-incrimination); *United States v. Bahadar*, 954 F.2d 821, 828 (2d Cir. 1992) (stating that "[w]hen a Fifth Amendment privilege is properly asserted by a trial witness, that witness becomes 'unavailable' for purposes of rendering potentially applicable all of the hearsay exceptions described in rule 804(b)").

48. 909 F.2d 650 (1st Cir. 1990).

49. *Id.* at 653-54.

50. *Id.* at 654. In evaluating the limitations of the former testimony rule, the court held that the Advisory Committee made "clear that exception one was written in respect to *those kinds of proceedings for which cross-examination was potentially available*; and, grand jury proceedings do not fall within that category." *Id.*

51. See *supra* note 29.

52. *Donlon*, 909 F.2d at 654-55.



cant weight on the corroborating evidence in the record.<sup>53</sup> Subsequently, the Sixth Circuit noted in *United States v. Gomez-Lemos*<sup>54</sup> that the Supreme Court effectively overruled *Donlon* with its decision in *Idaho v. Wright*.<sup>55</sup>

Other courts have recognized that grand jury testimony does fall under Rule 804(b)(1). In *United States v. Henry*,<sup>56</sup> a district court held that grand jury testimony offered against the party that developed the testimony may be offered in evidence under Rule 804(b)(1).<sup>57</sup> Similarly, the Fourth Circuit in *United States v. Klauber*<sup>58</sup> wrote, "We can well imagine that the district judge might have admitted the Grand Jury testimony under Rule 804(b)(1) of the Federal Rules of Evidence."<sup>59</sup> Rather than simply speculating that grand jury testimony "may" be admitted as evidence, the court in *United States v. Miller*<sup>60</sup> ordered a new trial where the district court denied defense counsel's motion to admit the grand jury testimony of an "unavailable" witness.<sup>61</sup>

By far the most nebulous part of Rule 804(b)(1) is the "opportunity and similar motive" requirement. Because Congress left these phrases undefined, courts may vary in their interpretations of the meaning of the words. Prior to the adoption of the Federal Rules of Evidence, an "opportunity" under the "unavailable witness rule" had to be "full, substantial and meaningful in view of the realities of the situation."<sup>62</sup> Accordingly, prior testimony would be inadmissible at common law where there was a "naked opportunity" to cross-examine, without a sub-

53. *Id.* at 655. The evidence supporting the grand jury testimony included the following: The defendant's wife told the grand jury 1) where the defendant was living—at trial the defendant's lease was entered as evidence to support that testimony; and 2) that the defendant had other guns in the house—at trial a police officer noted that the defendant had himself admitted to having guns in the house. *Id.* at 654-55.

54. 939 F.2d 326 (6th Cir. 1991).

55. 497 U.S. 805 (1990). In *Wright*, the Court noted that "[h]earsay statements admitted under the residual exception . . . do not share the same tradition of reliability that supports the admissibility of statements under a firmly rooted hearsay exception." *Id.* at 817. Rather than placing weight on corroborating evidence to satisfy the Confrontation Clause of the Sixth Amendment, the "'particularized guarantees of trustworthiness'" must "be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." *Id.* at 820 (citation omitted).

56. 448 F. Supp. 819 (D.N.J. 1978).

57. *Id.* at 821.

58. 611 F.2d 512 (4th Cir. 1979).

59. *Id.* at 516.

60. 904 F.2d 65 (D.C. Cir. 1990).

61. *Id.* at 66.

62. *United States v. Franklin*, 235 F. Supp. 338, 341 (D.D.C. 1964) (holding that the government in a criminal trial may not admit the prior testimony of a co-defendant, given in his own behalf, where the defendant had a naked opportunity, but no real need or incentive, to thoroughly cross-examine his then co-defendant.). See also MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 804(b)(1) (3d ed. 1991).

stantive need or incentive to do so.<sup>63</sup>

Under Rule 804(b)(1), the courts have recognized a difference between "an opportunity for effective cross-examination" and "cross-examination that is effective."<sup>64</sup> Whether or not a party conducts a full cross-examination may depend on factors such as discovery, trial tactics, and the nature of the proceeding. In the early stages of discovery, a party may not possess sufficient information to conduct an effective cross-examination of a witness. That situation seemingly differs from a party's strategic decision to limit cross-examination. For example, the lack of effective cross-examination would not preclude the admissibility of the former testimony where a party had the opportunity to develop the prior testimony but chose to limit the examination of the witness as a part of trial strategy. Depending on the court's interpretation of "opportunity," even a decision at a preliminary hearing to forego cross-examination or a decision to restrict questioning at a deposition can be extremely risky. If a witness becomes "unavailable" at the time of trial, these forms of testimony may be entered as former testimony under Rule 804(b)(1). This factor is an important twist for lawyers to consider when formulating trial strategies.<sup>65</sup>

The importance of the consideration is underscored in *United States v. Pizarro*.<sup>66</sup> In *Pizarro*, the defendants, Pizarro, Rodriguez, and Lara, were charged with selling heroin to Drug Enforcement Administration agents working undercover.<sup>67</sup> At the first trial, all three defendants were convicted of the charges, but the Seventh Circuit reversed the convictions and ordered a new trial because the prosecutor's closing arguments included prejudicial remarks.<sup>68</sup> At the second trial, the jury again convicted the defendants, but, because the district court judge's comments to the jury after it convicted Lara and Rodriguez may have unintentionally induced a verdict against Pizarro, the district court itself declared a mistrial as to Pizarro.<sup>69</sup> During the second trial, Rodriguez testified and exculpated Pizarro by identifying another man as the source of the her-

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63. *Franklin*, 235 F. Supp. at 341.

64. *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)); see also, *United States v. Owens*, 484 U.S. 554, 559 (1988); *United States v. Salim*, 855 F.2d 944, 953 (2d Cir. 1988).

65. Defendants choosing to represent themselves must also be cognizant of the twists. In fact, an adequate opportunity for cross-examination has been deemed afforded to an accused who was not represented by counsel at a preliminary hearing, but who questioned the witness herself. See *People v. Hunley*, 21 N.W.2d 923, 924-925 (Mich. 1946).

66. 717 F.2d 336 (7th Cir. 1983).

67. *Id.* at 340.

68. *Id.*

69. *Id.*

oin.<sup>70</sup> Pizarro was again convicted at the third trial.<sup>71</sup> At the third trial, when Rodriguez refused to testify, Pizarro offered Rodriguez's testimony from the second trial as former testimony under Rule 804(b)(1).<sup>72</sup>

The district court denied the admission of Rodriguez's testimony, concluding that the government had been unable to fully develop Rodriguez's identification testimony.<sup>73</sup> The Seventh Circuit reversed and ordered a new trial because it found that the government had a "meaningful and real" opportunity to establish on cross-examination that Rodriguez was lying in his identification testimony during the second trial.<sup>74</sup> The government could not subsequently exclude Rodriguez's testimony by claiming it failed to fully develop the testimony because Rule 804(b)(1) "incorporates a concept of fairness" by "requiring only an opportunity and motivation."<sup>75</sup> The Seventh Circuit also rejected the government's argument that it could not inquire into a death threat against Rodriguez.<sup>76</sup> The Seventh Circuit found that the government had the opportunity to pursue such line of questioning but thereby refrained, placing a self-imposed restriction that precluded a lack of opportunity argument.<sup>77</sup>

Some courts have found that an "opportunity" exists in situations that facially appear to be "naked opportunities."<sup>78</sup> The most troubling "naked opportunity" situation is the preliminary hearing. Frequently, at the time of a preliminary hearing, both the defendant and the government are in the early stages of preparing their cases. The preliminary hearing has been characterized as "a truncated proceeding conducted in a relatively informal manner at the conclusion of which there can only be a finding of 'probable' cause as contrasted with the establishment of guilt beyond a reasonable doubt."<sup>79</sup> But an accused faced with the possibility of having preliminary hearing testimony entered at a subsequent

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70. *Id.* at 348.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 349.

75. *Id.* at 349 (citing 1 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 804(b)(1)[02] (1982)).

76. *Id.*

77. *Id.* at 349-50.

78. In his dissent in *Salerno*, Justice Stevens cited the following cases to illustrate situations where courts have found opportunity and similar motive: "*Glenn v. Dallman*, 635 F.2d 1183, 1186-87 ([6th Cir.] 1980) (identification testimony of eyewitness at preliminary hearing admissible against defendant at trial even though defendant declined to cross-examine the witness fully) . . . *United States v. Zurosky*, 614 F.2d 779, 791-93 ([1st Cir.] 1979) (suppression hearing testimony of co-defendant which inculpated defendant admissible against defendant at trial even though defendant declined to cross-examine co-defendant at the hearing)." *United States v. Salerno*, 112 S. Ct. 2503, 2511-12 n.7 (1992).

79. *State v. Mee*, 632 P.2d 663, 675 (Idaho 1981) (Shepard, J., dissenting).

trial under Rule 804(b)(1) must be “thoroughly prepared at the preliminary hearing.”<sup>80</sup> If the accused fails to fully cross-examine a witness, the prosecution could constructively use the preliminary hearing to develop “affidavits” that could potentially serve as evidence in a subsequent trial.<sup>81</sup> This would necessitate investigation and suppression motions prior to the hearing.<sup>82</sup> In liberally allowing the admission of preliminary hearing testimony under Rule 804(b)(1), courts have failed to consider the “realities” of the situation and ignored the adversarial fairness underpinnings of Rule 804(b)(1).<sup>83</sup>

The words “similar motive” connote a flexible concept. Because the Supreme Court has not defined this element of Rule 804(b)(1), the courts of appeals have been left to establish their own standards. In a civil action, the Ninth Circuit held that “similar” is not synonymous with “identical.”<sup>84</sup> The Sixth Circuit concluded that “[t]he traditional formulation of the similar motive requirement is that the two proceedings must reflect a ‘substantial identity of issues.’”<sup>85</sup> The identity of issues requirement ensures that the opposing party had incentive and a purposeful opportunity to cultivate testimony when first offered.<sup>86</sup> In *United States v. McDonald*,<sup>87</sup> the Fifth Circuit went so far as to recognize the possibility of admitting testimony from a prior civil case against the government in a later criminal case.<sup>88</sup>

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80. *Id.* at 676.

81. Without cross-examination by the defense, the prosecution could frame questions and elicit answers to create testimony in the form of an “affidavit.”

82. *Mee*, 632 P.2d at 676. Having extensive preliminary hearing proceedings would conflict with the policy of granting preliminary hearings early to protect the rights of the accused. *Id.* at 675.

83. The “realities” referred to include the early stage of preparation as well as the nature of the preliminary hearing. The preliminary hearing is a precursory proceeding not meant to fully duplicate the events of a trial. If investigation is not complete at the time of the preliminary hearing, it is contradictory to suggest that a defendant had an adequate “opportunity” for cross-examination.

84. *Murray v. Toyota Motor Distribs., Inc.*, 664 F.2d 1377, 1379 (9th Cir. 1981).

85. *United States v. Taplin*, 954 F.2d 1256, 1259 (6th Cir. 1992) (quoting 8 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 804.04[3] (2d ed. 1989)).

86. *See United States v. Wingate*, 520 F.2d 309, 316 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976). Obviously a party's incentive would differ if the issue at a prior proceeding involved a misdemeanor, yet a subsequent trial involved a capital felony. The same would be true for a case involving property damage of \$500 as compared to that of \$1,000,000.

87. 837 F.2d 1287 (5th Cir. 1988).

88. *Id.* at 1292-93 (“If a party in a civil case and the government in a later criminal case have sufficiently similar incentives to develop the testimony, we see no reason to conclude that the rule is necessarily and always unavailable to a criminal defendant.”). The *McDonald* court embraced the following factors enumerated by the Seventh Circuit: “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.” *Id.* at 1292 (citing *United States v. Feldman*, 761 F.2d 380, 385 (7th Cir. 1985) (quoting *Zenith Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1252 (E.D.Pa. 1980))).

The District of Columbia Circuit in *United States v. Miller*<sup>89</sup> found that the district court abused its discretion by excluding the admission of grand jury testimony at trial. The *Miller* court saw no reason why the government's position at the trial should differ from its position before the grand jury.<sup>90</sup> The "similar motive" of the government at both proceedings related to the guilt or innocence of the defendants.<sup>91</sup>

The Second Circuit acknowledged in *United States v. Wingate*<sup>92</sup> that the government may have dissimilar motives in different proceedings. In *Wingate*, the court held that the government did not have a similar motive to cross-examine the witness because the issue at the suppression hearing involved the voluntariness of a confession, while the issue at trial was the guilt or innocence of the defendant.<sup>93</sup> The former testimony that the defendant sought to admit in *United States v. Salerno* was grand jury testimony. A unique situation emerges where the government is the only party that developed the grand jury testimony and also is the party against whom the former testimony is offered.

#### IV. *SALERNO*: An Analysis

##### A. *Immunity and Unavailability in the Context of Adversarial Fairness*

In that *Salerno* involves the admissibility of grand jury testimony under Rule 804(b)(1), the first inquiry must consider whether the witnesses were "unavailable."<sup>94</sup> "Unavailability" under Rule 804(a) is satisfied when a witness properly invokes the Fifth Amendment.<sup>95</sup> Both Bruno and DeMatteis invoked the Fifth Amendment privilege at trial, but the Second Circuit raised some questions about their "unavailability" to the government under the circumstances of the case. The Second Circuit regarded the fact that the government could have made the witnesses available by granting immunity as a pivotal element.<sup>96</sup>

The Second Circuit found the situation in *Salerno* particularly troubling because the government developed the former testimony through a grant of immunity yet refused to grant immunity at trial

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89. 904 F.2d 65 (D.C. Cir. 1990).

90. *Id.* at 68 n.3.

91. *Id.* at 68.

92. 520 F.2d 309 (2nd Cir. 1975).

93. *Id.* at 316.

94. See *supra* notes 43-46 and accompanying text.

95. See *supra* note 46 and accompanying text.

96. *United States v. Salerno*, 937 F.2d 797, 806 (2d Cir. 1991), *rev'd*, 112 S. Ct. 2503, *remand* 974 F.2d 231 (2d Cir. 1992), *vacated on reh'g en banc sub nom. United States v. DiNapoli*, 8 F.3d 909 (2d Cir. 1993).

because the testimony favored the defense.<sup>97</sup> The Second Circuit acknowledged that the government is not required to grant use immunity, but the court felt that the government did have a choice.<sup>98</sup> The government could have prevented admission of the grand jury transcripts by allowing the witnesses to testify under a grant of immunity.<sup>99</sup> Alternatively, once the grand jury testimony had been admitted, the government could have 1) immunized the witnesses and questioned them about their testimony at the grand jury; or 2) not immunized the witnesses and waived the right to further live questioning.<sup>100</sup>

The government's failure to grant immunity to the witnesses at trial can be viewed as a trial strategy that does not preclude the admission of the former testimony. Similar to the risk borne by a defendant who decides to limit cross-examination of a witness at a prior proceeding, the government bears a risk in deciding whether or not to immunize a witness at trial to prevent the admission of former testimony. As the Second Circuit recognized, the government is not required to grant immunity in any situation, but the government should have to live with the ramifications of its decision on this issue.<sup>101</sup>

The Second Circuit also deemed the government's actions troubling because "after identifying Bruno and DeMatteis as exculpatory witnesses under Brady, the government then sought to make it impossible for the defendants to obtain the exculpating testimony."<sup>102</sup> The court even said that it would be a "semantic somersault" for the government to claim that it met the Brady obligation while simultaneously preventing the defendants from using or acquiring the evidence.<sup>103</sup> But the Second Circuit did not rest its decision on *Brady*,<sup>104</sup> instead basing the ruling on its interpretation of Rule 804(b)(1).<sup>105</sup>

### B. "Similar motive" in Salerno

The Second Circuit initially ruled that, in the interest of adversarial

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97. *Id.* at 809.

98. The government in fact had already made a choice by initially immunizing the two witnesses during the grand jury proceedings. The Second Circuit felt that "[t]o make a similar choice at trial is not too great a burden to cast on the government." *Id.*

99. *Id.*

100. *Id.* at 808.

101. In *Salerno*, the consequence of the government's failure to grant immunity would be the admission of the grand jury testimony. *Id.*

102. *Id.* at 807. The Court in *Brady* held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material . . . ." *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

103. *Salerno*, 937 F.2d at 807.

104. The court yielded to the "time-honored rule" that constitutional issues should not be reached unless absolutely necessary. *Id.*

105. *Id.*

fairness, the "similar motive" element of Rule 804(b)(1) should "evaporate" in the circumstances of *Salerno*.<sup>106</sup> The Supreme Court did not agree with that construction of Rule 804(b)(1), and, adhering to a strict textual reading of Rule 804(b)(1), reversed and remanded the case to the Second Circuit for application of the "similar motive" test.<sup>107</sup> The Supreme Court rejected the argument that "adversarial fairness may prohibit suppression of exculpatory evidence produced in grand jury proceedings."<sup>108</sup> The Court failed to see how it could create an exception to Rule 804(b)(1) and still be consistent with the plain language of the rule.<sup>109</sup> Because "similar motive" is not defined in the Federal Rules of Evidence, the phrase must be read with regard to its "plain meaning."<sup>110</sup>

On remand, the Second Circuit presented a detailed analytical review of Rule 804(b)(1) in the context of the circumstances in *Salerno*.<sup>111</sup> The Second Circuit began its analysis on remand by defining the terms "similar" and "motive." The court defined "similar" as "having characteristics in common" or "comparable" and "motive" as "something within a person . . . that incites him to action."<sup>112</sup> The Second Circuit noted that, consistent with its previous cases dealing with the "similar motive" requirement of Rule 804(b)(1), the first inquiry in determining similarity of motive considers whether what actually transpired at the prior proceeding parallels what would take place at the current proceeding.<sup>113</sup> If that inquiry is not definitive, the court should then apply an objective analysis to determine whether a "reasonable examiner under the circumstances would have had a similar motive to examine the witness."<sup>114</sup>

Consistent with its decision on remand, the Second Circuit on rehearing en banc noted that in determining whether similarity of motive exists, the nature of the proceedings and the cross-examination will be

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106. *Id.* at 806.

107. *United States v. Salerno*, 112 S. Ct. 2503, 2509 (1992).

108. *Id.* at 2508.

109. *Id.*

110. The Supreme Court has clearly stated that when terms are not defined in the Federal Rules of Evidence, courts must give them their "plain meaning," unless such meaning would lead to a preposterous or unconstitutional result. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509-10 (1989); *see also Bourjaily v. United States*, 483 U.S. 171, 178-79 (1987).

111. *United States v. Salerno*, 974 F.2d 231, 237-40 (2d Cir. 1992). Prior to the promulgation of the Federal Rules of Evidence, the Supreme Court recognized that in interpreting the rules of court, courts should consider the circumstances of the case. *Fallen v. United States*, 378 U.S. 139, 144 (1964). Yet in *Salerno*, the Supreme Court applied a strict statutory interpretation of a Federal Rule of Evidence.

112. *Salerno*, 974 F.2d at 238 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1475, 2120 (1971)).

113. *Id.* at 239.

114. *Id.*

relevant.<sup>115</sup> The court recognized that “[t]he situation is not necessarily the same where the two proceedings are different in significant respects, such as their purposes or the applicable burden of proof.”<sup>116</sup> “The inquiry as to similar motive must be fact specific.”<sup>117</sup>

In one respect this objective analysis coincides with the concept of not precluding the admission of former testimony by trial strategies invoked for that sole purpose. Yet the Second Circuit also seems to suggest that where a “reasonable examiner” would not have examined the witness, the former testimony will not be allowed in evidence.<sup>118</sup> This Second Circuit opinion has opened the door for a reasonable rather than strict interpretation of Rule 804(b)(1). Such an approach reflects a respect for the adversarial fairness core of the rule.

The importance of this “reasonable examiner” standard and its impact on the current state of the law can best be illustrated by application to specific cases. The clearest example involves preliminary hearing testimony. In *Glenn v. Dallman*,<sup>119</sup> the district court allowed the preliminary hearing testimony of an unavailable witness into evidence at trial.<sup>120</sup> At a trial hearing to determine the admissibility of that testimony, defendant’s counsel testified that “her cross examination of [the witness] at the preliminary hearing was narrow in scope, that it was conducted solely for the purpose of discovery with limited opportunity for preparation . . . .”<sup>121</sup> Nonetheless, the Sixth Circuit held that defense counsel has the opportunity for unlimited cross-examination at preliminary hearings.<sup>122</sup> Under a “reasonable examiner” standard, such a broad generalization would not suffice. The witness’ testimony would be

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115. See *supra* note 39 and accompanying text.

116. *United States v. DiNapoli*, 8 F.3d 909, 913 (2d Cir. 1993). Consider the impact of the Second Circuit’s holding in the context of civil proceedings. In the situation where a plaintiff deposes a defense witness, the defense attorney may not have a motive to cross-examine her own witness. If that witness becomes unavailable at the time of trial, that deposition should not be admitted as evidence under the Second Circuit’s holding. The deposition of a defense witness by the plaintiff may represent a significantly different proceeding than the testimony of the witness at trial. Additionally, the defense attorney may lack the requisite “similar motive” to cross-examine her own witness.

117. *Id.* at 914.

118. The Second Circuit hinted at this view in an earlier case. In *United States v. Serna*, 799 F.2d 842, 849-50 (2d Cir. 1986), the Second Circuit excluded the admission of former testimony where the “prosecutor had no real motive to fully explore [the witness’] earlier statements.” The Second Circuit clarified its decision in *Serna* by rejecting the notion that *Serna* “implies that lack of similar motive may be established simply because questioning available at a prior proceeding was not undertaken.” *United States v. DiNapoli*, 8 F.3d 909, 914 n.5 (2d Cir. 1993).

119. 635 F.2d 1183 (6th Cir. 1980).

120. *Id.* at 1184.

121. *Id.* at 1187.

122. *Id.* at 1185-86 (comparing *Havey v. Kropp*, 458 F.2d 1054 (6th Cir. 1972), with the district court’s opinion).



inadmissible at trial if a “reasonable examiner” would have conducted similarly limited cross-examination for discovery purposes only.<sup>123</sup> The “reasonable examiner” standard safeguards the adversarial fairness concerns of Rule 804(b)(1).

The “reasonable examiner” standard does not impose an undue burden on a party seeking to admit former testimony. Instead, it preserves adversarial fairness by focusing on the actual circumstances of the case and ensuring that the parties have a “similar motive” and a valid opportunity for effective cross-examination.<sup>124</sup> In *United States v. McClellan*,<sup>125</sup> the Seventh Circuit affirmed the district court’s decision to admit the defendant’s deceased ex-wife’s testimony from a prior bankruptcy proceeding.<sup>126</sup> The defendant argued that the cross-examination at the prior proceeding was not “‘vigorous’ enough to challenge the witness’ credibility.”<sup>127</sup> The court rejected this argument as misconceived because the query involved in Rule 804(b)(1) concerns the underlying motive—not the “vigorousness” of the cross-examination.<sup>128</sup> The record supported the fact that millions of dollars were at stake in the bankruptcy proceeding, and the defendant’s credibility suffered because of his ex-wife’s testimony. Accordingly, the court determined that sufficient motive existed for the defendant to impeach his ex-wife.<sup>129</sup> Applying the “reasonable examiner” standard to *McClellan* would most likely result in the same conclusion. At the bankruptcy proceeding, with millions of dollars at stake, a “reasonable examiner” would have had a strong motive to discredit the defendant’s ex-wife. Consequently, even under a “reasonable examiner” standard, the testimony of the deceased ex-wife would be admissible under Rule 804(b)(1). By applying this standard, courts could promote adversarial fairness without undergoing drastic change.<sup>130</sup>

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123. In applying the “reasonable examiner” standard, courts should consider factors such as the stage of the proceedings. Barring strategic tactics, cross-examining a witness in the early stages of the case would be less effective than cross-examining a witness after completing a full investigation. Courts should not apply the same standards for these two different situations.

124. The Second Circuit understood that, in addressing the question of “opportunity,” it had to decide whether the “opportunity was a ‘meaningful’ one, affording ‘full and fair’ examination which ‘thoroughly test[s]’ the validity of the witnesses’ testimony.” *United States v. Salerno*, 974 F.2d 231, 240 (2d Cir. 1992).

125. 868 F.2d 210 (7th Cir. 1989).

126. *Id.* at 215. At the time of the trial, the defendant’s wife had a brain tumor, which impaired her memory and reasoning. She died before the appeal was decided. *Id.* at 214.

127. *Id.* at 215.

128. *Id.*

129. *Id.*

130. Adopting the “reasonable examiner” standard dictates that courts may have to make an extra effort to apply a practical reality hindsight. Although the results in cases may not always differ even with this hindsight, the fairness inherent in the “reasonable examiner” standard justifies the extra effort.

In rehearing *Salerno en banc*, the Second Circuit noted that we do not accept the position . . . that the test of similarity of motive is simply whether at the two proceedings the questioner is on the same side of the issue. The test must turn not only on whether the questioner is on the same side of the issue at both proceedings, but also on whether the questioner had a substantially similar interest in asserting that side of the issue.<sup>131</sup>

A questioner will not be deemed to have a similar motive at two proceedings where a fact is pivotal to a cause of action at a second proceeding but merely peripherally related to a separate cause of action at a first proceeding.<sup>132</sup> Using the grand jury context as an example, the Second Circuit explained how the nature of proceedings affects the inquiry as to similar motive.<sup>133</sup>

If a prosecutor is using the grand jury to investigate possible crimes and identify possible criminals, it may be quite unrealistic to characterize the prosecutor as the “opponent” of a witness’s version. At a preliminary state of an investigation, the prosecutor is not trying to prove any side of any issue, but only to develop the facts to determine if an indictment is warranted.<sup>134</sup>

The low burden of proof (probable cause) at the grand jury stage does not presumptively create a motive to challenge an “opponents” testimony. In *DiNapoli*, the Second Circuit found that two independent circumstances dispelled similarity of motive by the government.<sup>135</sup>

First, the grand jury had already indicted the defendants and no putative defendant existed for whom probable cause was in issue.<sup>136</sup> In his dissent, Judge Pratt expressed concern about the majority’s

acceptance of and reliance on the prosecutor’s assertions that he already had an indictment against the defendants, that no new defendants were being contemplated at the time these witnesses were examined, and that, as a result, probable cause was not even an issue before the grand jury when Bruno and DeMatteis were testifying.<sup>137</sup>

If that were true, Judge Pratt’s concern is that the prosecutor improperly used the grand jury as a discovery device to develop mere evidence on an indictment he already had.<sup>138</sup> The law is well settled in the Second Circuit and elsewhere that “ [i]t is improper to utilize a grand jury for the sole or dominating purpose of preparing an already pending indict-

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131. *United States v. DiNapoli*, 8 F.3d 909, 912 (2d Cir. 1993).

132. *Id.*

133. *Id.* at 913.

134. *Id.*

135. *Id.* at 915.

136. *Id.*

137. *Id.* at 916.

138. *Id.*

ment for trial.’ ”<sup>139</sup> The government had an interest in investigating further to determine if there might be additional defendants, but it had not interest in showing the falsity of the witness’s denial of the Club’s existence.<sup>140</sup>

Second, the court found the record clearly showed that the grand jurors had indicated to the prosecutor their disbelief of the denial.<sup>141</sup> The court acknowledged that “[a] prosecutor has no interest in showing the falsity of testimony that a grand jury already disbelieves.”<sup>142</sup>

The Second Circuit acknowledged its inclination toward the “reasonable examiner” standard by recognizing that certain factors distinguish the grand jury context from the trial context, but not accepting the position, urged by the Government upon the Supreme Court, that a prosecutor “generally will not have the same motive to develop testimony in grand jury proceedings as he does at trial.”<sup>143</sup> The court noted that “the inquiry as to similar motive must be fact specific, and the grand jury context will sometimes, but not invariably, present circumstances that demonstrate the prosecutor’s lack of a similar motive.”<sup>144</sup>

The concern over courts finding “opportunities” in “naked opportunities”<sup>145</sup> evaporates with the application of the reasonable examiner standard. The Second Circuit has explicitly stated that the nature of the proceedings is a relevant factor in determining opportunity and similar motive.<sup>146</sup>

### C. *The Supreme Court and a “Similar Motive” Test*

Although the Supreme Court has never ruled on the interpretation of Rule 804(b)(1), lower courts have applied the Rule with varying results.<sup>147</sup> The trial judge in *Salerno* excluded the testimony of Bruno and DeMatteis, asserting that, generally, motives underlying questioning

139. *Id.* (citing *In re Grand Jury Subpoena Duces Tecum* Dated January 2, 1985 (Simels), 767 F.2d 26, 29 (2d Cir. 1985)).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 913-14.

144. *Id.* at 914.

145. *See supra* notes 77-82 and accompanying text.

146. *See supra* note 41 and accompanying text.

147. *See, e.g.*, *United States v. Donlon*, 909 F.2d 650, 653-54 (1st Cir. 1990) (interpreting the 804(b)(1) Advisory Committee Note as not intending Rule 804(b)(1) to apply to grand jury testimony because cross-examination is not available, and the exception was written for those proceedings); *United States v. Salim*, 855 F.2d 944, 954 (2d Cir. 1988) (finding criminal defendant’s opportunity for effective cross-examination is satisfied if defense is given “full and fair opportunity” to delve into and unmask the infirmities of testimony through cross-examination); *Murray v. Toyota Motor Distribs., Inc.*, 664 F.2d 1377, 1379 (9th Cir. 1982) (holding motive need not be identical, only “similar”).

before the grand jury differ from motives underlying questioning during trial.<sup>148</sup> Other courts have recognized that the government may have similar motives when questioning witnesses before the grand jury and at trial.<sup>149</sup>

The Supreme Court did not address the “similar motive” in *Salerno* because the Second Circuit had not addressed that element.<sup>150</sup> Indeed, the Court probably was concerned about the possible ramifications of establishing a “similar motive” definition. If the Court were to adopt a strict interpretation of the “similar motive” requirement, such a test could significantly impact any party’s ability to enter former testimony into evidence<sup>151</sup> by allowing trial strategies to play a part in preventing the admission of former testimony. A strict construction might also make it easier for parties to demonstrate that their “motives” at trial were not similar to those at the prior hearing. Such a construction would likely hurt the government more than the defense, because the government frequently is the party desiring to use former testimony in criminal cases. Thus, a strict construction would contradict the Court’s proclivity favoring the prosecution.<sup>152</sup> On the other hand, a liberal construction of the “similar motive” requirement might violate a party’s right effectively to examine a witness. Rather than formulate a standard, the Supreme Court presently appears to prefer to let the courts of appeal “kick” the rule around further.<sup>153</sup>

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148. The district judge stated that “the ‘motive of a prosecutor in questioning a witness before the grand jury in the investigatory stages of a case is far different from the motive of a prosecutor in conducting the trial.’ ” *United States v. Salerno*, 112 S. Ct. 2503, 2506 (1992).

149. *See, e.g.*, *United States v. Klauber*, 611 F.2d 512, 516-517 (4th Cir. 1979) (recognizing that grand jury testimony may be admissible against the government, where the government had the full right to interrogate at grand jury proceedings and, during trial, could call the witness to the stand and immunize him for the purposes of cross-examination); *United States v. Henry*, 448 F. Supp. 819, 821 (D.N.J. 1978) (finding that the defendant may offer in evidence grand jury testimony against the government).

150. *Salerno*, 112 S. Ct. at 2509.

151. Rule 804(b)(1) has been used by both the prosecution/plaintiff and the defense to enter various types of former testimony. *See, e.g.*, *United States v. Donlon*, 909 F.2d 650 (1st Cir. 1990) (allowing the government to bring in incriminating grand jury testimony of a woman who invoked spousal immunity at trial); *United States v. Miller*, 904 F.2d 65 (D.C. Cir. 1990) (allowing the admission of grand jury testimony against the government); *Mainland Indus., Inc. v. Standal’s Patents Ltd.*, 799 F.2d 746 (Fed. Cir. 1986) (allowing the jury to view video tape deposition was not an abuse of discretion).

152. The Rehnquist court has been characterized as “pro-prosecution” and distrustful of criminal defense attorneys. Jay Sterling Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 Wis. L. Rev. 1007, 1041 (1990).

153. The Fifth Circuit has stated its preference for the Seventh Circuit’s “similarity of motive” test. *United States v. McDonald*, 837 F.2d 1287, 1292 (5th Cir. 1988). In *McDonald*, the Fifth Circuit listed the following factors as those promoted by the Seventh Circuit in considering the “similar motive” test with respect to testimony in civil proceedings being used in criminal proceedings: “ (1) the type of proceeding in which the testimony is given, (2) trial strategy, (3)

## V. CONCLUSION

The dominant policy underlying the precise boundaries of Rule 804(b)(1) is adversarial fairness.<sup>154</sup> Because our judicial system is an adversarial one, federal courts' rulings should represent the underpinnings of an adversarial system. An equitable interpretation and application of Rule 804(b)(1) requires considerations of adversarial fairness. Yet, as evidenced in *Salerno*, the Supreme Court views the requirement of applying the "plain meaning" of the rule as superseding concerns of adversarial fairness.

The courts should modify the application of Rule 804(b)(1). The Second Circuit has opened the door to a possible formulation of Rule 804(b)(1) that would promote adversarial fairness, while satisfying the Supreme Court's requirement of applying the "plain meaning" of the Rule. The "reasonable examiner" standard satisfies the Supreme Court's strict interpretation requirement because it fits well within the nebulous meaning of Rule 804(b)(1)'s "opportunity and similar motive" language, yet respects the adversarial fairness underpinning the Rule. While such a standard requires subjective analysis, and courts may be hesitant to adopt a standard encouraging the application of practical reality, hindsight fairness concerns should outweigh the effort required by the courts to apply this standard.

JUDITH M. MERCIER

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the potential penalties or financial stakes, and 4) the number of issues and parties.'" *Id.* (quoting *United States v. Feldman*, 761 F.2d 380, 385 (7th Cir. 1985)).

154. *Weissenberger*, *supra* note 44, at 302.