IN THE
SUPREME COURT OF THE UNITED STATES

Case No. 22 – 305

THOMAS COLLINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT

BRIEF FOR PETITIONER, THE UNITED STATES OF AMERICA

Attorneys for the Respondent

QUESTIONS PRESENTED

I. Whether law enforcement's insertion of a key into the lock of a storage unit before acquiring a warrant is an unreasonable search under the Fourth Amendment, when the key is inserted solely to determine ownership of the locker and the contents of the locker are not observed?

II. Whether a defendant has a Sixth Amendment right to counsel during conversations with undercover law-enforcement agents during an ongoing investigation, before there has been a formal charge, preliminary hearing, indictment, information or arraignment?

III. Whether, under Federal Rule of Evidence 804(b)(1), a prosecutor's motive to discredit exculpatory testimony given by a witness during an investigatory grand jury proceeding while the Government's investigation is still ongoing is similar to the motive that a prosecutor has to discredit that same testimony during the guilt phase of the trial once the investigation is complete?

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CONSITUTIONAL PROVISIONS

The text of the following constitutional provisions is provided below:

The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

The Sixth Amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF THE FACTS

Thomas Collins was the co-leader of an illegal gambling ring in Boerum City, running the illegal gambling out of the basement of his business. (R. 44.) Collins, along with his co-leader Roxanne Roulette, laundered the proceeds of the illegal gambling through a shell corporation to an influential foreign power broker in the country of Brooklania named Pavel Hoag-Fordjour. (R.44–45.) Once in Brooklania, Collins' money was funneled to the military and authoritarian government regime of Brooklania to help maintain their grip on the country. *See* (R. 45.)

Following an FBI investigation into Collins' gambling ring, Collins was tried and convicted of conducting an illegal gambling business and money laundering on October 5 of 2021. (R. 4–5.)

The FBI began its investigation into Collins after receiving a tip from the IRS in September of 2020 that Collins' income was "excessive for [his] type of business." (R. 44.) Special agents placed the premises under surveillance and uncovered the existence of the gambling ring within. (*Id.*) Agents then began to examine the restaurant's financial records and traced payments between Collins' restaurant to a shell corporation created by Roulette and from Roulette's shell corporation to the power broker Hoag-Fordjour. (*Id.*)

Federal agents served Hoag-Fordjour with a material witness warrant on January 5, 2021, while Hoag-Fordjour was visiting Boerum City. (R. 45.) Investigators conducted a material witness deposition of Hoag-Fordjour but were required to release him before the investigation concluded. (*Id.*) Shortly after Hoag-Fordjour's release, a number of the bookies in Collins' gambling ring began to flee the country for Brooklania, which has no extradition agreement with the United States. (R. 45–46.) Recognizing the investigation was now on a timer, SA Sayed sent Collins a target letter on January 21 and began planning an undercover operation to gather more evidence of Collins' illegal activities. (R. 45.) Four days after sending the target letter to Collins, the FBI arrested Roulette to prevent her from fleeing the country along with the bookies. (R. 46.) Her detainment was brief, as a judge provided Roulette bail over the Government's strong objection and Roulette subsequently fled the country. (*Id.*)

I. Special Agent Sayed and Special Agent Simonson investigated Collins' apartment building to acquire evidence for a search warrant.

Special Agent (SA) Sayed and SA Simonson drove to Collins' Boerum City apartment building on January 26, 2021, to speak with Collins about the ongoing investigation into his gambling ring. (R. 6.) Upon arriving, Collins buzzed the agents into the building and met them at

the door of his fifteenth-floor penthouse apartment. (*Id.*) On the way up to Collins' apartment, SA Simonson observed that the apartment building had a communal storage area. (*Id.*) Upon arriving at Collins' door, agents reiterated to Collins that he was under investigation and asked for permission to search his apartment. (*Id.*) Collins consented to a search and agents swept the apartment, finding a set of keys marked with the logo of Collins' apartment building. (*Id.*) SA Sayed asked Collins if the keys were for his storage unit, to which Collins denied that they were. (*Id.*) Collins' denial spurred SA Simonson to verify the claim, heading down to the first floor to investigate the storage area while SA Sayed remained with Collins. (R. 7.)

After arriving on the ground floor, SA Simonson asked the front desk worker to take him to the ground floor storage area. (*Id.*) The desk worker agreed and showed SA Simonson the storage area. (*Id.*) The desk worker told SA Simonson that tenants used with varying frequency but that he was unaware of how often Collins accessed the room. (R. 7–8.) Inside, the storage area were rows upon rows of storage lockers containing a number of tenants' possessions. (R. 7.) One row was dedicated to the penthouse apartments. (*Id.*) SA Simonson approached the penthouse lockers, observing that one had a filled-in name plate, and began testing Collins' keys in the locks of the lockers. (*Id.*) The key did not fit inside the first or second locker, but did fit in the third locker. (*Id.*) This third locker, like the other lockers, had its front, left, and right walls made of a loose metal lattice that allowed for passersby to see inside the locker. *See* (R. 11.) Unlike the other lockers, the front of the third locker was covered in a layer of newspaper. (*Id.*) The sides of the third locker were left uncovered and the contents were left viewable to passersby. *See* (*id.*) Once SA Simonson inserted the key into the third locker's lock and confirmed that it fit, he removed the key without turning it or opening the door to the locker. (*Id.*) After learning that Collins' key fit the lock, SA Simonson and SA Sayed left the building

and acquired a search warrant for the locker. (R. 46.) Agents executed the warrant on the locker the next morning and discovered 2.5 million dollars in cash along with a thumb drive containing the gambling ring's ledgers. (R. 47.)

II. A month before indictment, Collins admitted incriminating evidence to undercover SA Ristroph during a conversation at Collins' business.

After uncovering the money and ledgers, investigators realized they had enough evidence to arrest Collins but that the case could be made stronger before taking the case before a jury. *See* (R. 47.) To solidify the case before trial, the FBI sent SA Ristroph into Collins' business posing as a friend of Roulette's from Brooklania. (R. 13, 16.) Once inside, the undercover agent struck up a conversation with Collins about the investigation. (*Id.*) Collins made several incriminating statements during the conversation, admitting to making the payments through the shell company to the Brooklania power broker Hoag-Fordjour. *See* (R. 19.) The conversation took place on January 27 of 2021—twenty-nine days before Collins was indicted. *See* (R. 15, 2.)

III. As the investigation continued, federal prosecutors held a grand jury hearing where one of Collins' employees testified to potentially exculpatory evidence.

In the weeks following the undercover operation, federal prosecutors sought a grand jury indictment against Collins. (R. 21.) The Government called Lucy Washington, a bartender at Collins' business, to testify about the illegal gambling ring's organization. (R. 22.) Washington testified that she was aware of the gambling ring and was involved in its operation, but that Roulette was the one running the business instead of Collins. *See* (R. 22.) She specifically testified that Collins had no knowledge of what was going on in the basement. (R. 24–25.) She also testified that Collins was unaware that Roulette's shell corporation was not real or that it was being used to launder money to Brooklania. (R. 26.) After reaffirming that Washington did

not believe Collins to be involved "in any way," the Government ended its examination. (R. 27.) Washington died several months later on June 21, 2021. (R. 10).

STATEMENT OF THE CASE

Collins was formally indicted by the grand jury on February 24, 2021. (R. 2.) Collins later filed a motion to suppress the evidence found in his storage locker and to suppress the incriminating statements he made to the undercover agent (R. 29.) On the Fourth Amendment issue, Collins argued that the search invaded the curtilage of his apartment and was unreasonable without a warrant. *See* (R. 30.) On the Sixth Amendment issue, Collins argued that adversarial proceedings had commenced because the Government's decisions to depose witnesses and search Collins' property demonstrated a commitment to prosecute. *See* (R. 36–37.) District Court Judge Cooper Cahill held oral arguments on September 20, 2021, and denied the motion to suppress in its entirety. (R. 35, 41.)

Collins filed a second motion on September 30, 2021, to admit the exculpatory statements made by Washington under Federal Rule of Evidence 804(b)(1). (R. 49–50.) Both parties agreed Washington was unavailable but contested that the Government had similar motive to impeach the statements. (R. 50–51.) Judge Cahill again denied Collins' motion. (R. 53.)

After the pretrial motions were completed, Collins was tried before a jury and found guilty on October 5, 2021, on one count of 18 U.S.C. § 1955 for conducting an illegal gambling business and one count of 18 U.S.C. § 1956 for money laundering. (R. 4–5.) On December 15, 2021, Collins was sentenced to ten years in federal prison. (R. 55, 57.)

Collins appealed his conviction to the Fourteenth Circuit on the same grounds that were argued at the trial court. (R. 55.) The Fourteenth Circuit affirmed the conviction on all three grounds on June 23, 2022. (R. 54–55.) Collins then appealed to this Court and was granted certiorari on all three issues on December 13 of 2022. (R. 65.)

SUMMARY OF ARGUMENT

SA Simonson's insertion of the key into Collins' lock was a reasonable search. A storage locker located in the common area of an apartment building does not harbor the intimate activities of the home. This makes Collins' lock subject to the lesser protections granted to effects instead of the heightened protections of the home. Inserting the key into the lock without opening the locker itself reveals only whether Collins was the owner of the locker, a privacy interest is minimal due to how easily it can be learned by other means. Conversely, the Government's interest in determining ownership of property so that a search warrant can be acquired is high. Balanced against each other, the relative interests in the information show that the insertion of the key into the lock was a reasonable search.

Collins' incriminating statements to SA Ristroph were entered into evidence properly and did not constitute a violation of Collins' Sixth Amendment right to counsel. The right to counsel attaches only after the initiation of adversary judicial proceedings by way of formal charge, preliminary hearing, indictment, information, or arraignment. Collins' statements were made weeks before his indictment. Therefore, adversary judicial proceedings had not commenced at the time of Collins made his incriminating statements.

Washington's grand jury statements were properly excluded from Collins' trial as hearsay. Rule 804(b)1) only allows prior grand jury testimony from an unavailable witness if the proponent can demonstrate the party who originally examined the witness had a similar motive at trial. The Government did not have a similar motive to impeach Washington at the grand jury proceeding as it would have at trial because the Government never attempted to intensely and completely impeach Washington due to the lower burden of proof at a grand jury and the sensitive nature of investigating organized crime.

ARGUMENT

I. Officers did not violate the Fourth Amendment by inserting the key into the keyhole for identification purposes because although there was a search, the search was reasonable.

The Fourth Amendment prohibits "unreasonable searches" of "persons, houses, papers, and effects." U.S. Const. amend. IV. Assessing whether the Fourth Amendment has been violated is a two-step process: "first, has there been a search or a seizure, and second, was it reasonable?" *United States v. Correa*, 908 F.3d 208, 217 (7th Cir. 2018) (citing *Carpenter v. United States*, 138 S. Ct. 2206, 2215 n.2 (2018); *Arizona v. Hicks*, 480 U.S. 321, 327 (1987)).

A search can occur in two ways: (1) a physical trespass to property or (2) the invasion of a space where a person has both a subjective and objectively reasonable expectation of privacy. *Florida v. Jardines*, 569 U.S. 1, 11 (2013). A physical trespass occurs when the government "engage[s] in physical intrusion of a constitutionally protected area in order to obtain information." *United States v. Jones*, 565 U.S. 400, 407 (2012).

In all cases, "the ultimate touchstone of the Fourth Amendment is reasonableness." *Lange v. California*, 141 S. Ct. 2011, 2017 (2021). Assessing reasonableness "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). The search of effects, however, is a much lesser invasion than the search of curtilage and more likely to be reasonable absent a warrant. *See Jardines*, 569 U.S. at 5–6. at 14 n.1 (Kagan, J., concurring) ("[W]e have held, over and over again, that people's expectations of privacy are much lower in their cars than in their homes.").

Here, a search did occur. By placing the key in the lock, SA Simonson did physically trespass upon Collins' property in an attempt to gain information. But this search was not *unreasonable*. The searched padlock was outside the curtilage of the home and was for the sole purpose of identifying ownership, rather than gaining access to storage locker. Confirming the

locker's ownership was necessary to obtain a warrant. Because of the minimal intrusion into Collins' privacy and law enforcement's significant need to confirm ownership, this Court should affirm the Fourteenth Circuit's ruling that there was no Fourth Amendment violation.

A. The storage locker is not a part of the curtilage of Collins' apartment because it is fifteen floors away from the apartment, is not included within the apartment itself, is a communal area, and is poorly protected against outside observation.

The "central component" in determining whether an area is within the curtilage of the home is "whether the area harbors the 'intimate activity associated with the sanctity of a man's home and the privacies of life.'" *United States v. Dunn*, 480 U.S. 294, 300 (1987) (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)) (internal quotations omitted). This inquiry is guided by four factors: (1) "the proximity of the area claimed to be curtilage to the home," (2) "whether the area is included within an enclosure surrounding the home," (3) "the nature of the uses to which the area is put," and (4) "the steps taken by the resident to protect the area from observation by people passing by." *Id.* at 301. These factors are not applied "mechanically"; they serve as "useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration" of whether the area is "intimately tied" to the home. *Id.*

An area located on a different floor than a defendant's apartment is insufficiently close to the home to satisfy the first *Dunn* factor. In *United States v. Trice*, the court found that a wall across from the defendant's apartment was in "close proximity" to the defendant because it was around ten feet from the defendant's door, which was "within the range that [courts] have held falls within Fourth Amendment protections." 966 F.3d 506, 515 (6th Cir. 2020) (noting other cases finding close proximity with distances of four to seven feet from the home). Comparatively, in *United States v. Sweeney*, the defendant lived on the second floor of a three-floor apartment building. 821 F.3d 893, 897 (7th Cir. 2016). This building also contained a basement beneath the

first floor, which officers searched without a warrant during their investigation. *Id.* at 987–88. The court concluded that the basement was "remote from the second-floor apartment" and searching it presented no danger of the police presence preventing the defendant from retreating to his apartment. *Id.* at 902. Because the basement was on a different floor than the defendant's apartment, the first *Dunn* factor weighed in favor of the government. *See id.* at 901–02.

An area is not enclosed within the home, under the second *Dunn* factor, if it is outside of the apartment unit's walls. As explained by the Seventh Circuit, "[u]nder *Dunn* . . . the question is not whether the area at issue [is] within the walls of the building, but whether it [is] enclosed and intimate to [the] apartment itself." *Sweeney*, 821 F.3d at 902. Although the basement in *Sweeney* was enclosed within the apartment building, the court concluded that it was not "enclosed" to the defendant's specific apartment. *Id.* Even a hallway directly outside an apartment door, much closer than a basement garage, is not "enclosed" to the apartment itself. *Trice*, 966 F.3d at 515. The Sixth Circuit quickly dismissed the defendant's argument to the contrary, concluding that a "common area open to the public" does not satisfy *Dunn*'s enclosure factor. *See id.*

Areas used for communal purposes fail to satisfy the third *Dunn* factor because they are not intimately linked to the defendant's own home. In *Sweeney*, the Seventh Circuit concluded that this factor requires that usage of the area be "tied to [the defendant's] *own* apartment" rather than a "location for utilities for *all* tenants," *See* 821 F.3d at 902 (emphasis added). Thus, the apartment complex's communal basement could not satisfy the third *Dunn* factor. *Id.* This finding was reiterated in *United States v. Correa*, where the court determined that a shared parking facility was not "intimately linked" to the defendant's specific condominium and thus failed to satisfy the third *Dunn* factor. 908 F.3d 208, 218 (7th Cir. 2018). The Fourth Circuit likewise concluded that a common area used for trash storage is not a place used in a manner

intimately linked to the home. *See United States v. Jackson*, 728 F.3d 367, 374 (4th Cir. 2013). The fact that it was a common area used by all residents of the apartment complex was "the most telling" factor in determining it was not a part of the curtilage. *See id.*

The fourth and final *Dunn* factor is not met when outsiders can look into an area despite some nominal attempt at concealing the interior. In *United States v. May-Shaw*, the defendant parked his car in a covered carport at his apartment complex's communal parking lot. 955 F.3d 563, 565 (6th Cir. 2020). But this covering was incomplete as officers were still able to see into the carport. *Id.* at 571. Because officers could still see inside, "it [was] apparent that May-Shaw did not take significant steps to protect the area from observation." *Id.* The Eighth Circuit came to a similar conclusion in *United States v. Brooks*, where the defendant lived in a multi-family complex with a fenced-off yard. 645 F.3d 971, 973 (8th Cir. 2011). The fence was three feet high and next to a public alleyway. *Id.* The court rejected the defendant's assertion that the backyard was his curtilage in part because it was visible from a public area, which "is inconsistent with the notion that [it] would be treated as an extension of the home itself." *Id.* at 976.

Collins' storage locker does not fall within his apartment's curtilage under the *Dunn* factor analysis. Applying the *Dunn* factors, all four weigh in favor of the Government.

First, Collins' storage locker was located fifteen floors beneath his apartment. *See* (R. 6–7.) This is a far cry from the ten feet present in *Trice*, where the court was willing to find close proximity. Rather, the distance here is seven times greater than the two-floor difference in *Sweeney*, a distance which the court deemed "remote." 821 F.3d 893 at 902. This distance also eliminates any policy concerns of the police search preventing Collins from retreating to his apartment, as mentioned in *Sweeny*. Because the storage locker is on a different floor than the defendant's apartment, the first *Dunn* factor weighs in favor of the Government.

Second, the storage locker is not enclosed to Collins' specific apartment. Because the *Dunn* analysis requires curtilage to be "enclosed" to the specific apartment, rather than more broadly enclosed within the apartment building's walls, *Sweeney*, 821 F.3d at 902, a storage area located on a separate floor cannot satisfy this factor. It sits outside the defendant's own four walls. *See* (R. 6–7.) Just as the hallway in *Trice* was not enclosed due to its status as a common area, so too must the storage area in this case be rejected as enclosed to Collins' apartment.

Third, the nature of a communal storage area is not intimate to Collins' own home. The communal nature of the area is "the most telling factor" in this analysis. *Jackson*, 728 F.3d at 374. Like the basement in *Sweeny*, the parking lot in *Correa*, and the trash area in *Jackson*, the storage area is used by "just about every resident in the building." *See* (R. 31.) Because of the storage area's communal nature, the third *Dunn* factor weighs in the Government's favor.

Fourth, Collins did not take meaningful steps to protect his storage locker from observation. While Collins did cover the front of his locker with a single layer of newspaper, he left the sides of the locker completely uncovered. (R. 9.) The sides of the locker are made of a loosely knit wire lattice, allowing any casual observer a clear view of the contents of the locker from the outside. *See id.* This is similar to the partially covered carport in *May-Shaw*, where passersby were also able to see inside. Because SA Simonson was able to see "boxes, books, a safe, and a dusty suitcase" inside the locker at a glance, *see* (R. 9), "it is apparent that [Collin's] did not take significant steps to protect the area from observation. *May-Shaw*, 955 F.3d at 571. And like the fenced-off backyard in *Brooks*, the ease of looking inside the storage locker "is inconsistent with the notion that [it] would be treated as an extension of the home itself." 645 F.3d at 976.

Because each of the *Dunn* factors weighs in favor of the Government, the storage area does not harbor the "intimate activity associated with the sanctity of a man's home and the privacies

of life." *Dunn*, 480 U.S. at 300 (quoting *Oliver*, 466 U.S. at 180). It is not a part of Collins' curtilage and thus not entitled to the heightened Fourth Amendment protections of the home.

B. The insertion of the key into Collins' storage container lock was not unreasonable because SA Simonson's search did not reveal the contents of the locker, there is a minimal privacy interest in ownership of a lock, and the Government has a strong interest in determining ownership to acquire search warrants.

"[T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." *Skinner v. Ry. Lab. Execs.'s Ass'n*, 489 U.S. 602, 619 (1989). Although warrants often serve as a convenient "proxy for reasonableness," they are not the only way of satisfying the reasonableness requirement. *United States v. Correa*, 908 F.3d 208, 217 (7th Cir. 2018) (citing *Riley v. California*, 573 U.S. 373, 381–82 (2014); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). The permissibility of a warrantless search "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *See Skinner*, 489 U.S. at 619. In balancing these competing needs, "[c]ourts must consider the scope of the particular intrusion, the manner in which it was conducted, [and] the justification for initiating it." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

The warrantless insertion of a key into a lock is reasonable in scope and manner when limited to solely determining ownership. In *United States v. Lyons*, police inserted a key into the lock of an individual storage locker to determine if the defendant had access to it. 898 F.2d 210, 212 (1st Cir. 1990). Police did not enter the locker or look inside, instead using the confirmed ownership to acquire a warrant. *Id.* at 213. The court concluded that the bulk of the defendant's privacy interest rested in the *contents* of the locker, not the padlock itself, and thus held that the insertion of a key into a lock is "so minimally intrusive" that it is not an unreasonable search. *Id.* at 213, 213 n.2. In *United States v. $109,179 in U.S. Currency* (*U.S. Currency*), the Ninth Circuit similarly analyzed the insertion of a key into a car door to determine which car belonged to the

defendant. 228 F.3d 1080, 1088 (9th Cir. 2000), *abrogated by United States v. Dixon*, 984 F.3d 814 (9th Cir. 2020).[1] The court found that inserting the key into the car's lock "revealed only that [the defendant] had access to the car" and did not provide any information about the car's contents. *Id.* Thus, the search was "narrowly tailored" and reasonable. *Id.* The Seventh Circuit echoed the these conclusions in *United States v. Correa*, where police took a remote garage door opener throughout a neighborhood, pressing the buttons until they located the garage it was paired with. 908 F.3d 208, 219 (7th Cir. 2018). Although pressing the buttons constituted a search, the search was reasonable because "these searches produced only an address, not any meaningful private information about the interior or contents of the garage." *See id.*

Defendants have a minimal privacy interest in types of information that could be readily determined in other ways. In *United States v. Concepcion*, police inserted a key into the door of an apartment to determine if a recently-arrested defendant owned it, determined that he did, and then acquired permission to search the apartment. 942 F.2d 1170, 1171 (7th Cir. 1991). The Seventh Circuit concluded that although this was a search, it was not unreasonable because "[w]here [the defendant] lived was something the agents could have ascertained in many other ways," such as asking his landlord, or placing the defendant under surveillance. *Id.* at 1173. His address was "no secret," making his privacy interest small enough to not even require probable cause. *Id.* The Sixth Circuit addressed similar facts in *United States v. DeBardeleben,* where police used a key to determine whether a particular car belonged to the defendant. 740 F.2d 440, 443 (6th Cir. 1984). The court concluded that people have a minimal expectation of privacy in

[1] The district court in *Dixon* mistakenly interpreted *U.S. Currency* to say that no search occurred when the key was inserted into the car based on a *Katz* analysis. *Dixon*, 984 F.3d at 818. The Ninth Circuit abrogated *U.S. Currency* to the extent that it could be interpreted as key insertion not being a search, recognizing that this Court's later holding in *United States v. Jones*, 565 U.S. 400 (2012), revived the physical trespass test. *Id.* at 816. This abrogation, however, did not repudiate *U.S. Currency*'s reasonableness analysis. *See id.*

whether they own a particular car because ownership can be easily ascertained by checking a license plate or cross-referencing a car's serial number with its registration. *See id.* at 444. Thus, simply identifying the car via the key was a "minimal intrusion." *Id.* at 445.

The reasoning of the Sixth and Seventh Circuits was disagreed with as a matter of policy under dissimilar facts by the First Circuit in *United States v. Bain*. *See* 874 F.3d 1, 18–19 (1st Cir. 2017). There, the First Circuit was faced with the insertion of a key into an apartment front door, which the court concluded was part of the apartment's curtilage. *See id.* at 16–17. After concluding the protections of the curtilage applied, the First Circuit reasoned that "[i]t would seem . . . that the ease of obtaining information elsewhere undercuts law enforcement's need to access *the home* more than it necessarily minimizes the nature of the intrusion into the home or its curtilage." *Id.* at 18. (emphasis added). The Government is not aware, however, of any circuits disagreeing with the reasoning of the Sixth or Seventh Circuit outside of the curtilage context. *See* Kit Kinports, *The Origins and Legacy of the Fourth Amendment Reasonableness-Balancing Model*, 71 Case W. Res. L. Rev. 157, 228–230 (2020) (collecting cases).

Crucially, a search of an effect is much more likely to be reasonable than the search of a home. As explained by the First Circuit in *Bain*, locks are "effects" for the purposes of Fourth Amendment inquiries. 874 F.3d at 15 (citing *Oliver v. United States*, 466 U.S. 170, 177 (1984)). Effects present "much lower" privacy interests then the home. *Id.* at 15–16 (citing *Florida v. Jardines*, 569 U.S. 1, 14 n.1 (2013) (Kagan, J., concurring)). The First Circuit recognized the importance of this distinction, concluding that "our statements in *Lyons* . . . concerning the insertion of keys into padlocks on storage containers do not control whether testing a key on the lock to a home is a search" and did not repudiate *Lyon*'s reasoning. *Id.* at 16.

Finally, law enforcement has a strong and justified interest in identifying the owner of property so that a search warrant can be acquired. In *Lyons*, the police had taken the defendant's keys during a search incident to arrest. 898 F.2d at 211–12. Separately, the police learned that the defendant had been seen at a storage locker business, where police knew one of the defendant's associates rented a storage locker. *Id.* at 212. The police needed to confirm that the defendant had access to that locker in order to acquire a search warrant. *See id.* at 212–13. The court held that this investigatory need outweighed the defendant's privacy interest. *See id.* at 213.

Similar facts were presented in *DeBardeleben*, where law enforcement seized the defendant's car keys incident to arrest. 740 F.2d at 442. The defendant used his car in the commission of his crime and law enforcement wanted to search it. *Id.* Law enforcement knew the defendant had left his car in a parking lot near the crime scene but were unsure of which car it was. *Id.* The police needed to determine which car was the defendant's in order to acquire a search warrant. *See id.* at 443 n.1. The court held that inserting the key into the car to determine ownership was "justified by a 'founded suspicion'[2] and by the legitimate crime investigation." *Id.* at 445.

The Ninth Circuit applied the same reasoning in *U.S. Currency*, where the police sought to determine which car the drug-dealing defendant had driven to the site of a drug deal. 228 F.3d at 1083. Echoing *DeBardeleben*, the court concluded that "less than probable cause" is required to determine ownership via key insertion and that there was a "strong governmental interest[]" in investigating crimes. *See id.* at 1088, 1088 n.50. This interest outweighed the "minimal expectation of privacy" in the lock and so the search did not violate the Fourth Amendment. *Id.*

[2] A "founded suspicion" is synonymous with a "reasonable suspicion" and judged by the same standard of specific and articulable facts. *See United States v. Cortez*, 449 U.S. 411, 417 (1981) (referencing the "articulable reasons" and "particularized and objective basis" standard for a founded suspicion).

Applied to the insertion of the key into of Collins' storage locker, the balancing test shows that SA Simonson's search was not unreasonable.

First, the scope of the search was limited to identifying Collins as the owner of the locker. When SA Simonson inserted Collins' key into the lock, he neither unlocked it nor opened the locker; he merely confirmed that it fit. (R. 7.) This search was narrowly tailored, much like the searches in *U.S. Currency* and *Correa*, where the law enforcement searches were upheld because they revealed only that the defendant had access to the car and garage, respectively, rather than any information about what those areas contained. This case is most directly comparable to *Lyons*—officers inserted a key into a storage locker's padlock to confirm the defendant's access to the locker and acquired a warrant before proceeding further. Just as this was a minimal intrusion in *Lyons* and compliant with the Fourth Amendment, so it should be here.

Second, knowledge of Collins' ownership of the storage locker could have been readily acquired other ways, lowering his privacy interest in that information. Much like the defendant's door in *Concepcion*, SA Simonson could have asked Collins' landlord or the front desk worker about which locker belonged to Collins. *See* (R. 7.) This information is no secret, as other lockers had nameplates attached. (*Id.*) These nameplates are comparable to the license plates of *DeBardeleben*, which demonstrated that information that is commonly provided is of minimal privacy value. The First Circuit's policy concerns expressed in *Bain* carry little weight here, as this case does not involve the curtilage of the home. The home is entitled to heightened protections and so the specific investigatory tactics used by law enforcement should be subject to greater scrutiny. But when dealing with effects, such scrutiny is not warranted, as recognized by the First Circuit in *Lyons* where the exact same tactic was permissible on a storage locker.

Applying the First Circuit's logic, just as the statements of *Lyons* did not control the search of a home's lock, the statements of *Bain* cannot control the search of a storage locker's lock.

Third, SA Simonson had founded suspicion that Collins' locker contained evidence of his illegal activities, and confirming his ownership of the locker was necessary to acquire a search warrant. At the time of the key insertion, the FBI's investigation had revealed that Collins was in charge of an illegal sports gambling operation and that Collins' associates were fleeing the country to escape prosecution. *See* (R. 44–46.) These specific facts create a reasonable inference that Collins, as the leader of the illegal operation, would have incriminating evidence in his apartment's storage locker, satisfying the founded suspicion standard of *DeBardeleben* and *U.S. Currency*. As for the weight of the law enforcement interest, SA Simonson could not get a warrant to search every single locker in the storage area, much like *DeBardeleben*, where law enforcement could not get a warrant for every car in the parking lot. Determining which locker he needed to get a warrant for was a valid and important part of his investigation, as it was for the cars in *DeBardeleben* and *U.S. Currency*. This government interest was further strengthened by the time concerns of the investigation, as Collins' co-conspirator had fled the country just one day before SA Sayed and SA Simonson visited Collins' building on January 26. *See* (R. 6, 46.) Ensuring that Collins' property was searched before Collins was able to destroy evidence or flee the country himself substantially increases the weight of the Government's interest here.

Because the scope of the search was so limited, the only privacy interest that SA Simonson's search implicated was ownership of the locker. This interest is minimal and does not outweigh the strong government interest in determining who owns a locker in order to obtain a warrant, particularly given the recent flight of other potential defendants in the case. Accordingly, the search was not unreasonable and did not violate the Fourth Amendment.

II. Collins had no Sixth Amendment right to counsel during his conversation with SA Ristroph because adversary judicial proceedings had not been initiated by way of formal charge, preliminary hearing, indictment, information, or arraignment.

This Court should affirm the Fourteenth Circuit's holding that Collins' statements to SA Ristroph were properly admitted at trial since Collins' Sixth Amendment right to counsel had not attached. (R. 59.) The Sixth Amendment provides that "[i]n all criminal *prosecutions*, the *accused* shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. (emphasis added). However, the Sixth Amendment does more than just provide counsel's aid at trial. In *Massiah v. United States*, this Court held the Sixth Amendment also prohibits prosecutors from using a defendant's incriminating statements elicited outside of counsel's presence after criminal prosecution has begun. 377 U.S. 201, 206 (1964).

Massiah applies when: (1) the right to counsel has attached at the time of the alleged infringement, (2) the informant acted as a "government agent," and (3) the informant engaged in "deliberate elicitation" of incriminating information from the defendant. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892 (3d Cir. 1999) (citing *Maine v. Moulton*, 474 U.S. 159, 170–71 (1985)). Notably, the *Massiah* test does not ask if the investigation is a trial-like confrontation or "critical stage," but rather only looks at whether the right to counsel had attached at the time of the alleged infringement. *Id.* The Government does not contest that the second and third prongs of *Massiah* were satisfied in this case. The only issue before this Court is whether Collins' right to counsel had attached when he spoke with SA Ristroph.

This Court has consistently held that the right to counsel does not attach until the initiation of "adversary judicial proceedings" by way of formal charge, preliminary hearing, indictment, information, or arraignment. *E.g.*, *Kirby*, 406 U.S. at 689; *United States v. Gouveia*, 467 U.S. 180, 185 (1984); *Rothgery v. Gillespie Cnty. Tex.*, 554 U.S. 191, 198 (2008). Despite what

Collins asserts, *see* (R. 38), no circuit court has ever held that the right to counsel applies before the initiation of one of the five events listed in *Kirby*. Similarly, none of the events that occurred before Collins' conversation with SA Ristroph are the same as or analogous to any of the five *Kirby* events. Therefore, this Court should affirm the Fourteenth Circuit's holding that Collins' right to counsel had not attached. (R. 59.)

A. The Sixth Amendment right to counsel only attaches after the initiation of adversary judicial proceedings by way of formal charge, preliminary hearing, indictment, information, or arraignment.

Through a line of cases starting with *Powell v. Alabama*, 287 U.S. 45 (1932), this Court has consistently and firmly held that the Sixth Amendment right to counsel only attaches at or after the initiation of adversary judicial proceedings against the defendant. *E.g.*, *Kirby v. Illinois*, 406 U.S. 682, 688 (1972).[3] Adversary judicial proceedings commence by way of "formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 689. These five *Kirby* events form a bright line rule for when the Sixth Amendment right to counsel attaches. *United States v. Gouveia*, 467 U.S. 180, 193 (Stevens, J., concurring) ("Today the Court seems to adopt a broader rule, stating that 'the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant.'"). The consistency in upholding this bright line rule is also reflected in the lower courts. Any perceived circuit split is merely illusory as not a single circuit court has held the right to counsel attaches prior to one of the five events listed by *Kirby*.

No circuit has ever held that the right to counsel applies before the initiation of adversary judicial proceedings through a *Kirby* event. *E.g.*, *United States v. Heinz*, 983 F.2d 609, 612 (5th Cir. 1993). The cases most often cited for the proposition that a circuit split exists, *Roberts v.*

[3] The only apparent exception to this bright line rule is *Escobedo v. Illinois*, 378 U.S. 478 (1964). However, in *Moran v. Burbine*, this Court explicitly repudiated *Escobedo* as a Sixth Amendment case. 475 U.S. 412, 429 (1986) ("[S]ubsequent decisions foreclose any reliance on *Escobedo* . . . for the proposition that the Sixth Amendment . . . applies prior to the initiation of adversary judicial proceedings.").

Maine, 48 F.3d 1287 (1st Cir. 1995); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877 (3d Cir. 1999); and *United States v. Larkin*, 978 F.2d 964 (7th Cir. 1992); only claim the right to counsel may attach prior to the initiation of adversary judicial proceedings *in dicta*. In each instance, these courts' holdings fell squarely within this Court's bright line rule. In *Roberts*, the First Circuit held that Robert's right to counsel did not attach during a blood alcohol test because no formal charges had been brought. 48 F.3d at 1290. In *Matteo*, the Third Circuit held that Matteo's right to counsel had attached when he gave incriminating statements because he had been arraigned. 171 F.3d at 893. In *Larkin*, the Seventh Circuit held that Larkin had no right to counsel during his police lineup because he had not yet been indicted. 978 F.2d at 969. Furthermore, more recent cases from the these circuits show that they have abandoned the dicta of *Roberts*, *Matteo*, and *Larkin* as their cases apply this Court's bright line rule without question. *See United States v. Boskic*, 545 F.3d 69, 81 (1st Cir. 2008); *United States v. Diehl-Armstrong*, 504 F. App'x 152, 156 (3d Cir. 2012); *Watson v. Hulick*, 481 F.3d 537, 542 (7th Cir. 2007).

This Court's strict adherence to the bright line rule for almost fifty years is not only properly followed by every circuit but is also consistent with the text and purpose of the Sixth Amendment. The plain text of the Constitution requires both a "criminal prosecution" and an "accused" before the right to counsel applies. U.S. Const. amend. VI.; *Gouveia*, 467 U.S. at 188. Prior to commencement of adversary judicial criminal proceedings through a *Kirby* event, a criminal prosecution has not begun. *Texas v. Cobb*, 532 U.S. 162, 167–68 (2001). Without a criminal prosecution, there may be suspects but there is no accused as the word is understood in the Sixth Amendment context. *See Moran v. Burbine*, 475 U.S. 412, 430 (1986).

The bright line rule also reflects the purpose of the Sixth Amendment. As the Court explained in *United States v. Ash*, the historical understanding of Sixth Amendment was that

assistance from counsel was restricted to trial where the accused was confronted with both the intricacies of law and the advocacy of the prosecutor. 413 U.S. 300, 309 (1973). Over time, this Court expanded the reach of the Sixth Amendment to certain pre-trial situations. *Gouveia,* 467 U.S. at 188–89. However, despite the evolution of the right to counsel's application, the Court has stood firm that these trial-like situations, or critical stages, happen after attachment; thus, the two should be treated separately.. *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 211 (2008). This distinction matters because the Sixth Amendment is not an all-encompassing "protective cloak". *Moran*, 475 U.S. at 430. It instead strikes the appropriate constitutional balance between "the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime." *Kirby,* 406 U.S. at 691

Kirby's bright line rule that the right to counsel attaches only after the initiation of adversary judicial proceedings by way of formal charge; preliminary hearing; indictment; information; or arraignment, has been consistently applied by this court for almost fifty years. Since *Kirby,* every circuit court has consistently applied this bright line rule, not once holding that the right counsel attached before any of the five *Kirby* events. This includes the Fourteenth Circuit, who correctly applied the bright line rule to Collins' case. (R. 59.)

B. Collins' right to counsel had not attached when he spoke with SA Ristroph because there had not yet been a formal charge, preliminary hearing, indictment, information, or arraignment.

The Fourteenth Circuit correctly determined that *Massiah* did not apply to this case since Collins' Sixth Amendment right to counsel had not attached at the time of his conversation with SA Ristroph. The *Massiah* doctrine requires that the right to counsel must have attached at the time of the alleged constitutional infringement. *Maine v. Moulton*, 474 U.S. 159, 176 (1985). The right to counsel only attaches at the initiation of adversary judicial proceedings by way a *Kirby*

event. *Kirby v. Illinois*, 406 U.S. 682, 688–89 (1972). The right to counsel is offense specific, meaning it only attaches to each offense upon formal charge, even if an accused remains a suspect in another case. *See McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991).

The attachment question is not to be confused with the critical stage question. Some aspects of the right to counsel involve not only whether the right has attached, but also whether when the infringement occurs is considered a critical stage of the trial. *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 211 (2008). The *Rothgery* Court cautioned against conflating the attachment question with the critical stage question. *Id.* The attachment question asks whether adversary judicial proceedings have begun by way of a *Kirby* event. *See id*. In comparison, the critical stage question asks whether the situation the defendant finds themselves in post-attachment is trial-like. *See United States v. Gouveia*, 467 U.S. 180, 189 (1984).

An example of the bright line rule in action is *United States. v. Hoffa*, 385 U.S. 293 (1966). During Jimmie Hoffa's trial for violations of the Taft-Hartley Act, he attempted to bribe jury members. *Id.* at 294–95. The government placed an undercover informant in Hoffa's hotel room where Hoffa made several incriminating statements that were later used to indict and convict him for attempted bribery. *Id.* Hoffa argued that the incriminating statements should be suppressed because the government already had enough evidence to charge him and thus the delay was an attempt to bypass his Sixth Amendment rights under *Massiah*. *Id.* at 309.

This Court rejected that argument saying, "[t]here is no constitutional right to be arrested." *Id.* Accepting Hoffa's argument would require the police to guess at their peril if there was sufficient evidence to arrest, where acting too soon would risk a Fourth Amendment violation and waiting too long would violate the Sixth Amendment. *Id.* There is "no constitutional requirement to call a halt to a criminal investigation the moment they have the minimum

evidence to establish probable cause." *Id.* Improper delay in bringing a charge is best handled by the Fifth Amendment, Fourteenth Amendment, right to speedy trial, and statute of limitations—not the right to counsel. *See, e.g.*, *Gouveia*, 467 U.S. at 192; *Moran*, 475 U.S. at 433.

Much like this Court rejected the argument that a defendant has a constitutional right to be arrested, the Ninth Circuit has rejected the argument that a material witness deposition triggers the Sixth Amendment right to counsel. In *United States v. Hayes*, the Ninth Circuit dealt with the question of whether a Federal Rule of Criminal Procedure 15 deposition, taken before formal charges were brought against the defendant, served as the functional equivalent of a formal charge. 231 F.3d 663, 673 (9th Cir. 2000) (en banc). The Ninth Circuit determined that although Rule 15 depositions are contemplated for use at trial, they are not the trial itself. *Id.* The test is for right to counsel attachment is not trial-like situations. *Id.*

Since Collins had not been subjected to a *Kirby* event, his right to counsel had not attached. The conversation between SA Ristroph and Collins took place on January 27, 2021. (R. 15.) This was twenty-eight days prior to the indictment. (R. 2.) At the time of the conversation, Collins had not been formally charged, indicted, arraigned, received an information, or been to a preliminary hearing. (R. 61.) Therefore, adversarial proceedings had not commenced and there was neither a criminal prosecution nor an accused as required by the text of the Sixth Amendment.

Similarly, Collins' right to counsel did not attach despite his belief that the Government had enough evidence against him to arrest him. (R. 38.) Collins points to a sticky note found on an investigation report written after SA Sayed and SA Simonson searched his apartment and sent his target letter. (R. 8, 38.) However, this Court explicitly rejected this argument in *Hoffa*. Just like this Court told Hoffa, Collins had no constitutional right to be arrested. *See id.* Collins asks

this Court to put the police between Scylla and Charybdis, where acting too soon risks a Fourth Amendment violation, and waiting too long violates the Sixth Amendment.

Moreover, the Fourteenth Circuit's holding is undisturbed by Collins' arguments that at the time of his conversation with SA Ristroph, criminal prosecution had functionally begun due to the Government arresting and charging Roxanne Roulette; searching Collins' apartment and sending him a target letter; and conducting a witness deposition. (R. 36.) The formal charging of Roulette is inconsequential to determining whether Collins' right to counsel attached. The right to counsel is offense specific. *McNeil*, 501 U.S. at 175. Only Roulette had a right to counsel since she was the only person formally charged. Adversary judicial proceedings had not commenced against Collins, *compare* (R. 15) *with* (R. 2), thus he had no right to counsel himself.

The Government needs to conduct a thorough investigation, particularly when dealing with organized crime. A holding that the opinion of one law enforcement officer that enough evidence has been collected to arrest the defendant, written on a sticky note, (R. 8), is enough to trigger the Sixth Amendment right to counsel would not only upend decades of precedent but would also make law enforcement's job much more challenging with society as the loser, just as the *Hoffa* court noted. As this Court has noted time after time, impropriety prior to a formal charge is left to the Fifth Amendment, Fourteenth Amendment, right to speedy trial, and statute of limitations, not the right to counsel. Collins never raised a claim under any of these rights.

Finally, the fact that a Federal Rule of Criminal Procedure 15 deposition was taken prior to the indictment is inconsequential for the right to counsel analysis. The en banc decision from the Ninth Circuit in *Hayes* is persuasive on this point. "Trial-like situations" is the test for critical stages, not Sixth Amendment attachment. As this Court's case law clarifies, the attachment question is different than the critical stage question, and only the attachment question matters in

the *Massiah* analysis. While the taking of a deposition for use at trial is trial-like, it is not an adversary judicial proceeding. There may well never be a trial, let alone any formal charges. If all it takes is the preservation of evidence for use at trial to trigger the right to counsel, then the line between investigation and prosecution becomes meaningless. Practically all evidence that is collected is preserved for potential use at trial.

The Fourteenth Circuit correctly applied this Court's bright line rule on when the right to counsel attached. Adversary judicial proceedings had not been initiated by way of formal charge, preliminary hearing, indictment, information, or arraignment when Collins spoke with SA Ristroph. Since there had been no adversary judicial proceedings, the criminal prosecution had not commenced and Collins had not been formally accused. Thus, his Sixth Amendment rights had not attached. Accordingly, this Court should affirm the Fourteenth Circuit's opinion.

III. Washington's statements are not admissible pursuant to Federal Rule of Evidence 804(b)(1) because the Government did not have a similar motive during the grand jury to impeach Washington as it would have during the trial where it had more evidence and a higher burden of proof.

This Court should affirm the Fourteenth Circuit's holding that the district court did not abuse its discretion when excluding Washington's statements as inadmissible hearsay. Federal Rule of Evidence 802 prohibits the use of hearsay at trial unless it is permitted by statute, rules prescribed by the Supreme Court, or another Federal Rule of Evidence. Fed. R. Evid. 802. One such exception to the rule against hearsay can be found in Federal Rule of Evidence 804. Rule 804(b)(1) permits the admission of hearsay if the witness is: (1) unavailable; and (2) the statements are testimony that (A) was given as a witness at a previous trial, hearing, or deposition; and (B) is now offered against a party who had an opportunity and *similar motive* to develop it by direct, cross, or redirect examination. Fed. R. 804(b)(1). In *United States v.*

Salerno, this Court recognized that 804(b)(1) applies to grand jury testimony. 505 U.S. 317, 321, 28 (1992); *see also United States v. Omar*, 104 F.3d 519, 523 (1st Cir. 1997).

After *Salerno*, Rule 804(b)(1) establishes a four-element test for determining if prior grand jury testimony is admissible. First, the witness must be unavailable within the meaning of Federal Rule of Evidence 804(a). Second, the statements must be testimony given by a witness at a prior hearing. Third, the testimony must be offered against the party who had the opportunity to develop the testimony by direct, cross, or redirect examined the witness. Fourth, the party against whom the testimony is offered, must had the similar motive to develop the offered testimony by direct, cross, or redirect examination.

The Government agrees that the first three elements have been met. The witnesses in question, Washington, is dead and therefore unavailable pursuant to Rule 804(a)(4). Washington's testimony was given as a witness during the grand jury hearing on February 22, 2021. (R. 21.) The Government had the opportunity to direct examine Washington. (R. 21–27.) Therefore, the only element at issue in this case is whether the Government had the similar motive to develop the offered testimony at the grand jury as it would in trial.

This Court has never explained how to determine what "similar motive" means in the context of Rule 804(b)(1). Two interpretations have emerged at the circuit court level. The First, Second, Fifth, Fourteenth, and D.C. Circuits have all adopted a fact-based approach. *See Omar*, 104 F.3d 519 (1st Cir. 1997); *United States v. DiNapoli*, 8 F.3d 909, 914 (2d Cir. 1993); *Battle ex rel. Battle v. Mem'l Hosp. at Gulfport*, 228 F.3d 544, 552 (5th Cir. 2000); (R. 61.); *United States v. Carson*, 455 F.3d 336, 379–81 (D.C. Cir. 2006) (noting that a previous decision, *United States v. Miller*, 904 F.2d 65, 68 (D.C. Cir. 1990), did not establish a blanket rule like the Ninth and Sixth Circuits, but rather was a fact-based inquiry). The Sixth and Ninth Circuits have

adopted a blanket rule that a prosecutor's motive before the grand jury and at trial are always the same—proving the defendant's guilt. *See United States v. McFall*, 558 F.3d 951, 963 (9th Cir. 2009); *United States v. Foster*, 128 F.3d 949, 955 (6th Cir. 1997).

This Court should adopt the fact-based approach because the blanket rule effectively reads the words "similar motive" out of Rule 804. Furthermore, this Court should affirm the Fourteenth Circuit's holding that the Government did not have similar motive when directing Washington at the grand jury as it would have at trial.

A. This Court should adopt a fact-based approach to determining when a party has a similar motive under Rule 804(b)(1) because it gives full effect to the phrase "similar motive."

The surplusage canon guides courts to construe legal texts so that no clause, sentence, or word is superfluous, void, or insignificant. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). It is the duty of the court to give effect, if possible, to every clause and word of a legal text. *See United States v. Menasche*, 348 U.S. 528, 538–39 (1955); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174–76 (2012). This canon further cautions against reading words into legal texts. *Romag Fasteners, Inc v. Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020) ("Nor does this Court usually read into statutes words that aren't there."). Similarly, courts are not permitted to alter the text of evidentiary rules. As stated in *Salerno*, "[t]his Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases." *Salerno*, 505 U.S. at 322. Instead, Congress has explicitly created a system for the alternation of these rules separate from the court system. *See* 28 U.S.C. §§ 2073–74.

This Court has been clear that, as a general matter, Rule 804(b)(1) requires the proponent of the hearsay to prove that similar motive existed during the prior examination of the witness. *Salerno*, 505 U.S. at 321. *Salerno*'s requirement to prove similar motive applies to both civil and

criminal cases, as well as to defendants, plaintiffs, and the government. That is because Rule 804(b)(1) makes no distinction between party or type of case. When different standards apply to different types of cases or different parties, the Federal Rules of Evidence are sure to point that out. *See, e.g.*, Fed. R. Evid 404(a)(2) (detailing an exception to character evidence for criminal cases exclusively while also distinguishing different rules for different parties).

The fact-based approach to analyzing similar motive, as a majority of circuits have adopted it, gives full effect to the "similar motive" language that the *Salerno* Court deemed a mandatory element of the Rule 804(b)(1) hearsay exception. *See, e.g.*, *United States v. DiNapoli*, 8 F.3d 909, 913–14 (2d Cir. 1993) (citing *United States v. Salerno*, 505 U.S. 317, 324 (1992)). *Salerno* explicitly noted that courts must enforce the words that were enacted in the rule. 505 U.S. at 322. When interpreting the meaning of similar motive, Justice Blackmun paid special attention to the fact that "similar motive" does not mean "identical motive" and therefore determining what is a similar motive requires a factual inquiry. *Battle ex rel. Battle v. Mem'l Hosp. at Gulfport*, 228 F.3d 544, 552 (5th Cir. 2000) (citing *Salerno*, 505 U.S. at 326 (Blackmun, J., concurring)).

The blanket rule, conversely, states that because of the adversarial nature of the criminal justice system, a prosecutor tries to prove the guilt of the defendant in every grand jury and in every trial. *E.g.*, *United States v. McFall*, 558 F.3d 951, 962 (9th Cir. 2009). This effectively creates an irrebuttable presumption that the prosecution's motivations are always the same in trial as they were before the grand jury. *See id.* Thus, prior grand jury testimony from an unavailable witness is *always* admissible under Rule 804(b)(1). *See id.*

The fact-based approach adopted by a majority of the circuits and championed by Justice Blackmun gives full effect to Rule 804(b)(1) without reading words in or out of the rule, whereas the blanket rule adopted by the Sixth and Ninth Circuits violates the surplusage canon.

The blanket rule effectively creates an exception in criminal cases that may exclusively be used by the defendant to proving that similar motive exists. If a prosecutor's motive is always to prove guilt, a defendant never has to prove a similar motive exists because there would be an irrebuttable presumption that the prosecution's motive is the same. This exception is nowhere in the text of the Rule. Adopting the blanket rule can be seen as either effectively reading "similar motive" out of Rule 804(b)(1) or it would read into Rule 804(b)(1) an exception for defendants in criminal cases where none exists. Both interpretations violate the surplusage canon.

Additionally, the latter would also effectively side-step Congress' prescribed method of amending the Federal Rules of Evidence. 28 U.S.C. §§ 2073–74, outline how Congress intended amendments to the Federal Rules of Evidence to be created. Adopting the blanket rule, and its de facto exception to Rule 804(b)(1), would bypass Congress' intended process by replacing the rules committee, explanatory notes, and formal submission to Congress with unilateral action by the courts. *See id.* But "[t]his Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases." *Salerno*, 505 U.S. at 322.

The fact-based approach not only avoids reading an exception to Rule 804(b)(1) where none exists, it would also allow the words "similar motive" to be given full effect in all cases without any criminal or civil distinction. The Rule allows a judge to examine and compare the facts of the hearings, trials, or depositions and determine if the motive is similar and thus admissible. The Rule neither claims grand jury testimony is always or is never admissible, but rather looks at the facts of each case to determine admissibility. This puts Rule 804(b)(1) in line with many other rules that ask the trial judge to examine the facts of a specific case to determine admissibility rather than relying on blanket rules that deem certain types of evidence categorically admissible or inadmissible. *See Salerno*, 505 U.S. at 326 (Blackmun, J., concurring) ("like other inquiries

involving the admission of evidence, the similar-motive inquiry appropriately reflects narrow concerns of ensuring the reliability of evidence admitted at trial—not broad policy concerns").

B. The Government did not have a similar motive when direct examining Washington before the grand jury as it would have at trial because it did not want to reveal ongoing undercover investigations and had already met its burden for gaining an indictment.

The fact-based approach to determining whether a party had similar motive at a hearing or trial considers a non-dispositive list of factors. *See United States v. DiNapoli*, 8 F.3d 909, 914–15 (2d Cir. 1993). Three factors are considered most often by courts: (1) the nature of the two proceedings; (2) whether the party opposing the testimony had, at a prior proceeding, an interest of substantially similar intensity to (dis)prove the same side of a substantially similar issue; and (3) whether the party opposing the testimony undertook cross-examination. *Id.*

When evaluating whether the first factor, the nature of the two proceedings, courts often look at both what is at stake in the proceeding and the applicable burden of proof. *See DiNapoli*, 8 F.3d at 915; *United States v. Omar*, 104 F.3d 519, 523 (1st Cir. 1997). A grand jury is not the same type of proceeding as a trial because the purpose and burden of proof are different. *DiNapoli*, 8 F.3d at 913. At trial, a prosecutor is attempting to prove *beyond a reasonable doubt* that a defendant is guilty; at the grand jury, however, a prosecutor is determining if an indictment is warranted by a *preponderance of the evidence*. *Id.* Courts treat the purpose and burden of proof distinction as a significant one. *See DiNapoli* 8 F.3d at 915; *Omar*, 104 F.3d at 523. The low burden of proof at grand jury makes discrediting testimony at a grand jury rarely essential. *Omar*, 104 F.3d at 523. This is because only at trial do the arguments of the parties and positions towards the witnesses become clear-cut, and trial is the last chance to confront witnesses. *Id*.

To determine the second factor, if a party had the same intensity to prove or disprove the same side of a substantially similar issue, courts will look at what evidence was available and

whether impeachment would result in revealing sensitive investigative techniques. *See DiNapoli*, 8 F.3d at 915; *Omar*, 104 F.3d at 523. Even when a prosecutor "displays some skepticism about particular testimony," that does not mean the prosecutor's motive was similar at the grand jury as it would be at trial. *DiNapoli*, 8 F.3d at 913. Prosecutors may not have the motive to impeach because they want to have the witness embellish the lie for impeachment at trial, set the witness up for perjury prosecution, not reveal their trial strategy, or, because prior to indictment the investigation is ongoing, the prosecutor may not want to reveal the sources of their information such as undercover agents or wiretaps. *See id.*; *Omar*, 104 F.3d at 524. The Second Circuit has said that a prosecutor's careful limitation of questioning to matters already publicly disclosed, when undisclosed impeachment material is available, presents a "strong inference of dissimilarity." *DiNapoli*, 8 F.3d at 915.

The final factor, cross-examination, is determined by examining if party engaged in cross-examination had the opportunity to cross examine or conducted the functional equivalent of cross-examination. *See DiNapoli*, 8 F.3d at 914; *Battle ex rel. Battle v. Mem'l Hosp. at Gulfport*, 228 F.3d 544, 553 (5th Cir. 2000). Foregoing cross-examination is not persuasive evidence that no similar motive exists. *See Battle*, 228 F.3d at 553. Similarly, the mere fact that a cross-examination occurred does not automatically mean similar motive exists. *See id.* A similar motive may not exist if counsel can point to a single line of questioning that would have been added or different at trial. *See id.* In situations like grand jury, it does not matter if the party cannot cross examine the witness because they called the witness. *DiNapoli*, 8 F.3d at n. 4. The opportunity to direct examine your witness is the functional equivalent of cross-examination. *Id.*

The Government had no motivation to impeach Washington at the grand jury because it already had sufficient evidence for an indictment. (R. 60.) By the time Ms. Washington testified,

the Government had already presented testimony from SA Sayed and SA Simonson, the transcript from Collin's accomplice Hoag-Fordjour's deposition, and evidence from Collins' storage locker. (R. 52.) As the Fourteenth Circuit noted, "the Government had all but established probable cause by the time Washington testified at the grand jury . . . it is hard to imagine the government . . . spending more time with a witness than necessary to obtain an indictment." (R. 60.) By the time Washington testified, it was already more likely than not that Collins was involved in illegal gambling and money laundering. Because the burden was much lower than it would be at trial, there was no incentive for the Government to impeach because it was not essential to obtaining an indictment, as both the Fourteenth Circuit and the *Omar* court noted.

Additionally, the Government did not have the same intensity to impeach Washington as they would at trial. Notably, the Government did not introduce the information gathered from SA Ristroph, their undercover agent. (R. 52.) At the time, the Government was not ready to reveal this or other parts of its prosecutorial strategy. (*Id.*) Revealing SA Ristroph's testimony at the time was unappealing for several reasons. First, it would have given Washington a heads up on the Government's evidence and thereby giving her and Collins time to align their stories. Second, if the indictment was not issued, or the grand jury requested more evidence, SA Ristroph's cover would have been blown, making further investigation more difficult. Third, several of Collins' associates had already fled the country, (R. 56), and if Collins knew about the capture of his incriminating statements, he may have fled to Brooklania, a country that the U.S. does not have an extradition treaty with. (R. 46.)

Additionally, as the *DiNapoli* court and the Fourteenth Circuit noted, organized crime cases like this require sensitive investigatory techniques. Requiring the Government to reveal those techniques out of fear that Rule 804(b)(1) may be liberally applied hinders the Government's

ability to adequately fight organized crime. These concerns are alleviated by the time the Government gets to trial and has committed itself to prosecuting. The incentive to impeach Washington at trial would have been much greater with access to SA Ristroph's testimony.

Finally, the Government did not have a fair opportunity to cross examine Washington. If the Government could safely have used SA Ristroph's testimony at grand jury without impeding its undercover investigation, it could have asked an entire line of questions to get Washington to commit to her lie in specific detail. Then the Government could have called SA Ristroph to directly rebut it with Collins' own incriminating statements. However, as discussed in the previous paragraph, that opportunity was not available.

Ultimately, this Court should affirm the Fourteenth Circuit's holding that Washington's statements were inadmissible hearsay. Rule 804(b)(1) requires a factual analysis to determine similar motive. The district court—the court closest to the facts—evaluated the Government's motive and correctly determined that it was not similar. Accordingly, Washington's grand jury testimony was properly excluded.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully Submitted,
/s/ Team 21R
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