
No. 22 – 305

IN THE

Supreme Court of the United States

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 THE RESPONDENT

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QUESTIONS PRESENTED

- I. Whether law enforcement's warrantless insertion of a key into a semi-transparent storage locker, located in a common area within a residential apartment complex, is an unreasonable search under the Fourth Amendment.
- II. Whether Petitioner's Sixth Amendment rights attached at the time of his conversation with an undercover law enforcement agent, despite formal proceedings, by way of formal charge, preliminary hearing, indictment, information, or arraignment, not having been initiated against him.
- III. Whether grand jury testimony is admissible, under Federal Rule of Evidence 804(b)(1), when the testimony does not satisfy the similar motive element using a fact-based interpretation.

OPINIONS BELOW

The United States Court of Appeals for the Fourteenth Circuit's Opinion appears in the Record at pages 54-64.

CONSTITUTIONAL PROVISIONS

The first issue addresses the application of the Fourth Amendment's assurance against unreasonable searches and the second issue turns on the attachment of the Sixth Amendment's right to counsel. *See App., infra*, a.

The Fourth Amendment, in relevant part, provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

STATUTORY AND REGULATORY PROVISIONS

The third issue on certiorari deals with the application and interpretation of the following Federal Rules of Evidence: 801, 802, 804, 807. *See App., infra*, a-b.

STATEMENT OF THE CASE

Factual History

Petitioner owned and operated Hoyt's Tavern, a restaurant and bar, in Boerum City, Boerum. R. at 55. In September 2020, the Internal Revenue Service ("IRS") informed the Federal Bureau of Investigation ("FBI") that Hoyt's income was disproportionate for the size of the business. *Id.* The IRS believed the business was involved in illegal activity. *Id.* Hoyt's was the suspected location of an illegal gambling operation and Petitioner was suspected of helping run the operation. *Id.*

On the evening of January 26, 2021, Special Agents (“SA”) Sayed and Simonson went to Appellant’s apartment at Caplow Complex in Boerum City. R. at 6. Appellant was present and was informed of the FBI’s current investigation into Hoyt’s Tavern. *Id.* Appellant was asked by the agents if they could look around his apartment. *Id.* Appellant consented to the search of the apartment. *Id.* During the search, Simonson found a set of keys in one of Appellant’s bedrooms. *Id.* Simonson noticed a small gold key and an electronic key fob, both displaying the Caplow Complex logo. *Id.* Appellant was asked about the keys and said the keys were for storage units at his vacation him. *Id.* Simonson stated he was going to hold onto the keys during the search. *Id.* at 7.

Simonson then left the apartment and returned to the lobby. *Id.* Simonson asked the front desk attendant, Wilfred Roberts, if there was a storage area in the building. *Id.* Roberts directed Simonson to the storage area of the apartment complex. *Id.* Simonson, still holding the keys, tried the key fob in the door marked “Storage for Floors 7-15/PH.” *Id.* The door opened, revealing a large room with rows of large storage lockers. *Id.* The storage lockers, made of metal slats, were filled with sporting equipment, bicycles, luggage, boxes, and other small furnishings. *Id.*

The final row of lockers was labeled PH, denoting the penthouse row. *Id.* Only one of the lockers had a name plate on it. *Id.* Simonson began inserting the gold key into the locks of the lockers. *Id.* One of the lockers was partially covered with newspaper. *Id.* Simonson was able to see through the gaps in the newspaper boxes, books, a suitcase, and a safe within the locker. *Id.* Simonson tested the key in the locker of the partially covered locker and the key was a match. *Id.* While Simonson did insert the key into the lock, he neither turned the lock nor did he open the door to the locker. *Id.*

Simonson returned the Appellant's apartment and returned the keys before Sayed and Simonson left the apartment. *Id.* On the way out of the apartment complex the agents stopped at the front desk and Simonson asked Roberts how often tenants access their storage lockers. *Id.* Roberts informed them that storage locker access varies; some access the lockers a few times a week and other access them once a year. *Id.* Roberts was not able to recall how often Appellant accessed his locker. *Id.* at 8. There is a surveillance camera in the hallway leading to the storage areas, but the camera would not show individuals entering or exiting the storage room. *Id.* The agents obtained a search warrant for the locker and executed the warrant on January 27, 2021. *Id.* at 56. The search produced a thumb drive with gambling records as well as \$2.5 million in cash. *Id.*

Later in the evening on January 26, 2021, SA Ronald Ristroph conducted an approved undercover operation at Hoy's Tavern. *Id.* Ristroph had a conversation with Appellant, in which Appellant acknowledged that Gourmet Grocers was a shell company and that he had personally been involved in sending money overseas. *Id.* Appellant was then subsequently arrested, charged, arraigned, and held without bail. *Id.*

The government deposed Pavel, Hoag-Fordjour on January 8, 2021. *Id.* at 11. Hoag-Fordjour identified Appellant as an associate of Gourmet Grocers. *Id.* at 13. Lucy Washington testified in front of a grand jury on February 22, 2021. *Id.* at 22. Washington was a bartender at Hoyt's Tavern, while also managing the finances of the underground gambling operation. *Id.* at 23. Washington denied Appellant's involvement in and awareness of the gambling operation. *Id.* at 24-26. Washington passed away in a bicycle accident on June 21, 2021, and was unable to testify at Appellant's trial. *Id.* at 10.

Procedural History

Appellant was indicted by grand jury on February 24, 2021, on two charges: illegal gambling (18 U.S.C. § 1955) and laundering of monetary instruments (18 U.S.C. § 1956). *Id.* at 2. Appellant presented three motions to the trial court: (1) motion to suppress evidence found in Appellant's storage locker, (2) motion to suppress statements made during an undercover operation, and (3) motion to admit grand jury testimony of an unavailable witness. *Id.* at 29, 35, 50. The trial court denied all three motions. *Id.* at 35, 41, 53. Appellant was subsequently convicted of both charges on October 5, 2021. *Id.* at 4.

The Fourteenth Circuit affirmed the trial court's ruling on all three issues. *Id.* at 55. This Court granted a writ of certiorari on December 13, 2022. *Id.* at 65.

SUMMARY OF THE ARGUMENT

Petitioner's Fourth Amendment rights were not violated, because the insertion of a key into a lock did not constitute a search. Under *Katz*, Petitioner did not have a reasonable expectation of privacy in his semi-transparent locker—located fourteen floors below his apartment in a common area. Additionally, SA Simonson did not trespass into a constitutionally protected area by merely inserting the key into Petitioner's storage locker. Moreover, the locker is not worthy of increased protections, as it was located outside the curtilage of Petitioner's home. Therefore, no search occurred under the *Katz* or common law trespass test. Even if this Court concludes a search occurred, it was reasonable under the circumstances and minimally intrusive. The insertion of the key only verified that Petitioner owned the locker. Thus, because the touchstone of the Fourth Amendment is reasonableness, this Court should determine that this insertion of the key did not offend the Petitioner's rights.

Furthermore, Petitioner's right to counsel did not attach during his conversation with the undercover officer, because he was not subject to formal judicial proceedings. In *Kirby v. Illinois*,

this Court created a bright-line rule, holding that the Sixth Amendment right to counsel attaches only “at or after the initiation of adversary judicial proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” While circuits are split on the issue as to whether *Kirby* truly was a bright-line rule, the majority of circuits, including the Fourteenth Circuit, correctly recognize and apply it as such. Moreover, predicated the right to counsel on *Kirby*’s clear, bright-line rule is not only in line with this Court’s precedent, but is most consistent with the language of the Sixth Amendment, furthers the Amendment’s purpose of fairness, preserves investigatory procedures, and promotes judicial economy.

Finally, Washington’s grand jury testimony is inadmissible under Rule 804(b)(1) because the government’s motivation in presenting Washington at the grand jury, as opposed to its motivation at trial, is not similar. Circuits are split on the Rule’s similar motive requirement and apply different interpretations. The fact-based interpretation considers a number of specific factors—beyond whether the party was trying to prove guilt or innocence—when determining similar motive. This approach best serves the Rule’s purpose, promotes a system of trustworthy admissions, and facilitates prosecutorial discretion. Here, Washington’s grand jury testimony does not satisfy the requirements of 804(b)(1) because the testimony was only used as an investigative tool and the government lacked proper motivation to develop it.

ARGUMENT

I. THE INSERTION OF A KEY INTO PETITIONER’S LOCKER DID NOT VIOLATE THE FOURTH AMENDMENT, BECAUSE IT WAS NOT AN UNREASONABLE SEARCH UNDER KATZ OR COMMON LAW TRESPASS.

The Fourth Amendment protects “[t]he right of the people . . . against unreasonable searches and seizures.” U.S. Const. amend. IV. The Amendment precisely indicates the places and things encompassed by its protections: persons, houses, papers, and effects. *Florida v. Jardines*,

569 U.S. 1, 6 (2013); *see also* *Oliver v. United States*, 466 U.S. 170, 176 (1984). This protection “does not [] prevent all investigations conducted on private property,” *id.*, as “the Fourth Amendment’s basic test [is] objective reasonableness.” *Florida v. Jimeno*, 500 U.S. 248, 252 (1991).

A. The Officer’s Insertion of a Key Into the Petitioner’s Storage Unit is Not a Search Under the Fourth Amendment.

This Court has recognized two means of discerning whether a search has occurred: (1) when the individual manifests a “subjective expectation of privacy that society recognizes as reasonable,” *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *Katz v. United States*, 389 U.S. 347, 351 (1967)), and (2) “[w]hen ‘the Government obtains information by physically intruding’ on persons, houses, papers, or effects,” *Jardines*, 569 U.S. at 5 (quoting *United States v. Jones*, 565 U.S. 400, 407 n. 3 (2012)). If no search occurred, the individual is afforded no protection under the Fourth Amendment. *See* U.S. Const. amend. IV.

1. *Petitioner did not have a reasonable expectation of privacy in his semi-transparent storage locker.*

In *Katz v. United States*, this Court stated, “the Fourth Amendment protects people, not places[.]” 389 U.S. at 351. Subsequently, this Court has focused its Fourth Amendment jurisprudence not on the *Katz* reasoning itself—rather on Justice Harlan’s concurrence in *Katz*. *See e.g., Bond v. United States*, 529 U.S. 334 (2000); *California v. Ciraolo*, 476 U.S. 207 (1986); *Smith v. Maryland*, 442 U.S. 735 (1979). Justice Harlan asserted that when the government invades a person’s “reasonable expectation of privacy” they violate the person’s Fourth Amendment right against unreasonable searches and seizures. *Katz*, 389 U.S. at 360 (Harlan, J., concurring). In *United States v. Jones*, this Court clarified that the “*Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test.” 565 U.S. at 409.

The majority of circuits hold that a “resident lacks an objectively reasonable expectation of privacy in the common areas of a multi-unit apartment building with a locked exterior door.” *United States v. Correa*, 653 F.3d 187, 190–91 (3d Cir. 2011); *see also United States v. Nohara*, 3 F.3d 1239, 1242 (9th Cir. 1993); *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th Cir. 1991); *United States v. Barrios–Moriera*, 872 F.2d 12, 14–15 (2d Cir. 1989); *United States v. Miravalles*, 280 F.3d 1328, 1333 (11th Cir. 2002); *United States v. Hawkins*, 139 F.3d 29, 32–33 (1st Cir. 1998); *United States v. Brooks*, 645 F.3d 971, 976 (8th Cir. 2011). Here, Petitioner’s storage locker is fourteen floors below his apartment, in a “common area,” because multiple floors had access to walk freely around this area and could invite guests into this area.

In *Correa*, the Third Circuit held that “[g]iven the plethora of individuals who could access the common areas of the locked multi-unit apartment building and [the defendant’s] inability to control these areas, [the defendant] could not have reasonably expected his privacy to extend beyond his apartment door.” *Id.* at 191. There, the court rejected defendant’s argument that his Fourth Amendment rights were violated by officers trespassing in the common areas of the locked, multi-unit apartment building, saying it “misses the mark.” *Id.* at 192. The court reasoned, “any resident . . . could admit guests . . . into the common areas of the apartment building.” *Id.* at 191. The front door provided security, not privacy. *Id.* The common areas were public spaces and not entitled to Fourth Amendment protection. *Id.*

Additionally, even if this Court were to ignore the circuits’ general consensus that common areas are not afforded privacy protections, here, Petitioner still failed to exhibit a reasonable expectation of privacy. Petitioner failed to properly conceal his locker’s contents from the view of individuals walking the common area—thwarting any reasonable expectation of privacy in the semi-transparent locker. While the Petitioner exhibited some effort to conceal the front part of his

locker, he failed to completely cover the front slats and left the sides of the locker completely exposed. Thus, the locker's contents were readily observable by SA Simonson. *See* R. at 7. SA Simonson was able to see "[t]hrough slim gaps in the newspaper, boxes, books, a safe, and a dusty suitcase[.]" *Id.*

"As a general proposition, the police may see what may be seen 'from a public vantage point where [they have] a right to be,' [and], like the public," are free to inspect if their view is unobstructed. *Florida v. Riley*, 488 U.S. 445, 449–50 (1989). In *Riley*, the Court stated that the defendant "no doubt intended and expected that his greenhouse would not be open to public inspection," and took precautions to protect against ground-level observation. *Id.* However, the Court held that the Defendant had no reasonable expectation of privacy in this area, "[b]ecause the sides and roof of his greenhouse were left partially open," exposing "what was growing in the greenhouse [] to viewing from the air." *Id.* at 450.

Here, Petitioner, much like the defendant in *Riley*, did not fully cover his storage locker from legal public observation. Therefore, Petitioner's actions were insufficient to create a reasonable expectation of privacy in a public, common area. Such a holding would be in line with this Court's case law flowing from *Katz*. *See id.*; *Ciraolo*, 476 U.S. at 212–14 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."); *Correa*, 653 F.3d at 191 (same).

2. *The insertion of a key is not a physical intrusion under common law trespass, because Petitioner's locker falls outside the curtilage of his apartment and the action reveals minimal information.*

The Fourth Amendment's common law trespass "protects against trespassory searches only with regard to those items ('persons, houses, papers, and effects') that it enumerates." *Jones*, 565 U.S. at 411 n. 8; *see also Jardines*, 569 U.S. at 5. Under the common law trespass test, a search

occurs “[w]hen ‘the Government obtains information by physically intruding’” into a constitutionally protected area. *Jardines*, 569 U.S. at 5 (quoting *Jones*, 565 U.S. at 407 n. 3). This Court has elaborated that “when it comes to the Fourth Amendment, the home is first among equals.” *Id.* at 6. Unlicensed intrusions into a home’s curtilage are treated “as part of the home itself for Fourth Amendment purposes.” *Id.* (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

- a. *Petitioner’s storage locker is not curtilage worthy of enhanced protection under the Fourth Amendment, because it is not immediately surrounding nor intimately linked to his home.*

Spaces are protected as curtilage when the area is “intimately linked to the home, both physically and psychologically.” *Id.* (quoting *Ciraolo*, 476 U.S. at 213). To find Petitioner’s storage locker worthy of the same protection as his home, this Court would be required to take a strained view of *Dunn* and disrupt this Court’s well-established jurisprudence.

This Court in *United States v. Dunn* developed a factor test to determine curtilage, which included: (1) “proximity of the area to the home;” (2) “whether the area is within an enclosure surrounding the home;” (3) “the nature and 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.” 480 U.S. 294, 301 (1987). In *Dunn*, officers made a warrantless entry onto defendant’s ranch. *Id.* at 297. The officers crossed over multiple fences before standing between the defendant’s residence and barn. *Id.* at 297-98. The officers approached the barn and used flashlights to look through the windows where they found incriminating evidence. *Id.* at 298. This Court held the barn was not curtilage and no search occurred because “the officers *never entered the barn, nor did they enter any other structure* on [defendant’s] premises.” *Id.* at 304 (emphasis added).

In making its holding, the *Dunn* Court handed down factors that must be considered when assessing curtilage. Here, the first factor pertaining to the proximity of the “claimed curtilage” and the home weighs greatly against Petitioner. In *Dunn*, the first factor “support[ed] no inference that the barn,” which was 60 yards from the house, “should be treated as an adjunct of the house.” *Id.* at 302. In the present case, Petitioner’s locker is separated from his apartment by fourteen floors. Even if Petitioner’s apartment is directly above the storage unit, it is likely that the distance between them is approximately 65 yards (~196 feet).¹ Thus, Petitioner’s storage locker is even farther away from his house than the barn was in *Dunn*.

The second factor—whether the area is within an enclosure surrounding the home—clearly weighs against the Petitioner, as the locker is not located within the enclosure of his house. This Court in *Dunn* stated that the barn was “quite separate from the residence,” as it was not within the fence that surrounded the house. *Id.* Similarly, Petitioner’s locker is located outside his apartment, fourteen floors below, within a common area.

The third factor evaluates the nature and uses of the property searched. The third factor is a more neutral factor. Nonetheless, it does not help Petitioner’s cause. The *Dunn* Court asserted the third factor weighed against the defendant, who was unloading acid into the barn, and held that the barn’s use could not be characterized as an activity so associated with the home to be deemed part of the home. *Id.* at 302-03. Similarly, storage is not a use so associated with a home to treat it as the home. To hold differently would place every storage unit on the same footing as a person’s “castle.”

The fourth and final factor—the steps taken by the resident to protect the area from observation—also weighs against finding Petitioner’s locker to be curtilage. Importantly, the *Dunn*

¹ See <https://theskydeck.com/how-tall-is-a-storey-in-feet/> (accessed last Feb. 5 2023) (“Building storey height varies widely from just under the 14-foot average to well above it.”).

Court construed the fourth factor against the defendant, holding he “did little to protect the barn area from observation” and that the interior fences on defendant’s property did not “prevent persons from observing what lay inside the enclosed areas.” *Id.* at 303. Analogously, Petitioner did not cover the sides of his locker at all, nor did he properly conceal the front of his locker with the newspaper. The lack of protection allowed any resident of the building, guest, or passerby to see the contents of Petitioner’s locker—including SA Simonson.

The *Dunn* Court “ha[d] little difficulty in concluding that [the defendant’s barn] lay outside the curtilage of [his] ranch house” and held the barn was not “so intimately tied to the home itself that it should be placed under the home’s ‘umbrella’ of Fourth Amendment protection.” *Id.* at 301. Thus, like in *Dunn*, this Court should “have little difficulty” in finding Petitioner’s storage locker lays outside the curtilage of his fifteenth-floor apartment. *Id.* at 301.

b. *SA Simonson did not physically intrude into the Petitioner’s constitutionally protected area by merely inserting the key into the storage unit’s lock.*

“When ‘the Government obtains information by physically intruding’ on persons, houses, papers, or effects, ‘a “search” within the original meaning of the Fourth Amendment’ has ‘undoubtedly occurred.’” *Jardines*, 569 U.S. at 5 (quoting *Jones*, 565 U.S. at 407 n. 3). “[T]he term ‘effects’ [in the Fourth Amendment] is less inclusive than property” because the “Framers would have understood the term ‘effects’ to be limited to personal, rather than real, property.” *Oliver*, 466 U.S. at 177 n. 7; *see also Allinder v. Ohio*, 808 F.2d 1180, 1186 (6th Cir. 1987) (holding that beehives are “personal property since they are movable and at times are moved[,]” and “as such they fall within the definition of effects.”).

Currently, circuits are split as to whether a search occurs and whether a search is unreasonable when law enforcement test keys in locks in various settings. Jacob Hill, *Constitutional Law-Fourth Amendment-Warrantless Key-Test Searches in Residential Door*

Locks, 45 U. Ark. Little Rock L. Rev. 121, 130–31 (2022). The Sixth Circuit has held that the insertion of a key does not constitute a search under the Fourth Amendment. See e.g., *United States v. DeBardeleben*, 740 F.2d 440, 445 (6th Cir. 1984); *United States v. Salgado*, 250 F.3d 438, 456–57 (6th Cir. 2001). “[T]he mere insertion of a key into a lock, by an officer who lawfully possesses the key and is in a location where he has a right to be, to determine whether the key operates the lock, is not a search.” *Salgado*, 250 F.3d at 456.

Petitioner relies on the First Circuit’s recent case of *United States v. Bain*. R. at 29. However, *Bain* works against Petitioner’s case, as the court there neglected to overrule two previous holdings that are more analogous to the case currently before this Court. 874 F.3d 1, 16 (1st Cir. 2017) (holding that “our statements in *Lyons* and *Hawkins* 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”); cf. *United States v. Lyons*, 898 F.2d 210, 212 (1st Cir. 1990) (holding “the insertion of the key into [a storage compartment lock] did not constitute a search at all” because the “unenclosed areas of the basement of this apartment building were such common areas”); *United States v. Hawkins*, 139 F.3d 29, 32–33 (1st Cir. 1998) (holding “[t]he unenclosed areas of the basement of this apartment building were such common areas” similar to *Lyons*). In refusing to overturn *Lyons* and *Hawkins* (which were decided using reasonable expectation of privacy) in *Bain* (which used common law trespass), the court indicated that the previous cases would pass under the *Jones* trespass test. The court merely distinguished testing a key in a lock outside the home or its curtilage from testing a key on a personal effect.

Here, like in *Salgado*, this Court should hold that an officer in lawful possession of a key may test the key in an area he is lawfully present. However, if the Court agrees with *Bain*, which gave enhanced protection to the front door of the home, this Court should still hold the insertion

of a key into Petitioner's storage locker, fourteen floors below his apartment, did not constitute a search. Because Petitioner's storage locker is not curtilage worthy of enhanced protections, unlike the defendant's front door in *Bain*, this Court should find that no search occurred.

B. Alternatively, Even if the Officer's Insertion of a Key Into the Defendant's Storage Unit is a Search it is Not an Unreasonable One.

The basic principle of the Fourth Amendment is that searches and seizures inside a home without a warrant are presumptively unreasonable. *Kentucky v. King*, 563 U.S. 452, 459 (2011) (citing *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). However, this Court has “also recognized that this presumption may be overcome in some circumstances because ‘the ultimate touchstone of the Fourth Amendment is “reasonableness.”’” *Id.* (quoting *Brigham City*, 547 U.S. at 403). Thus, “[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable.” *Illinois v. McArthur*, 531 U.S. 326, 330 (2001).

The reasonableness of a search is determined “by balancing the government's legitimate interests against the intrusion on the individual's Fourth Amendment rights.” *Id.* at 331. The balancing test assesses both the privacy interests and the law enforcement interests involved. *See generally Arizona v. Hicks*, 480 U.S. 321 (1987). Further, this Court's “calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.” *King*, 563 U.S. at 466 (quoting *Graham v. Connor*, 490 U.S. 386, 396–97 (1989)).

Even if the Court finds that Petitioner has a protected interest in the keyhole to his storage locker, this Court should determine that the interest is minimal and that SA Simonson's actions were calculated to be as least intrusive as possible. *Bain* is the only semi-similar case to have found

that the insertion of a key resulted in a search and that it was unreasonable. The First Circuit, in *Bain* asserted: “*Jardines* treats unlicensed intrusions into the home's curtilage as intrusions into the home,” triggering the unreasonable search presumption. *Bain*, 874 F.3d at 16.

However, as shown above, Petitioner's locker fails to satisfy the *Dunn* curtilage test. Therefore, the unreasonable search presumption should not apply, because the Petitioner's locker is not curtilage worthy of heightened Fourth Amendment protections. However, the majority of circuits would find SA Simonson's conduct was objectively reasonable. SA Simonson never physically stood or lingered in a constitutionally protected area. This is in stark contrast to *Jardines*, where the officers “had all four of their feet and all four of their [canine's paws] firmly planted on the constitutionally protected extension of [defendant's] home.” *Jardines*, 569 U.S. at 8. Instead, SA Simonson simply tried to identify which locker was Petitioner's, he never turned the key, nor did he open the door to the locker. The only information obtained from the insertion of the key was which locker belonged to Petitioner. Simonson had narrowed down the potential lockers, as he went to the storage lockers for the penthouse area. Thus, this Court should view Simonson's conduct through the lens of reasonableness, just as the majority of circuits do. *See generally, United States v. Moses*, 540 F.3d 263 (4th Cir. 2008); *Concepcion*, 942 F.2d 1170; *Salgado*, 250 F.3d 438; *Lyons*, 898 F.2d 210; *Hawkins*, 139 F.3d 29; *DeBardeleben*, 740 F.2d 440 (all holding that the insertion of a key into a lock did not violate the Fourth Amendment's prohibition of unreasonable, warrantless searches).

During the course of the investigation, a key witness fled the country after being served with a material witness notice. His exit was followed by the exit of multiple other individuals allegedly involved in the conspiracy. Notably, Ms. Roulette, the alleged head of the gambling operation, fled to Brooklania after being released on bail. Brooklania has no extradition agreement

with the United States. In light of the fleeing individuals and the lack of extradition power with Brooklania, it was reasonable for SA Simonson to insert the key into Petitioner's locker. In short, the government's legitimate interest in preventing Petitioner from fleeing the country outweighs the minimal intrusion.

II. DEFENDANT'S RIGHT TO COUNSEL WAS NOT TRIGGERED BY THE CONVERSATION WITH THE UNDERCOVER OFFICERS BECAUSE ADVERSARIAL JUDICIAL PROCEEDINGS HAD NOT BEEN INITIATED AGAINST HIM.

“The Sixth Amendment guarantees that ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.’” *United States v. Gouveia*, 467 U.S. 180, 187 (1984) (quoting U.S. Const. amend. VI). In guaranteeing assistance of counsel, the Sixth Amendment safeguards the fundamental rights of life and liberty, recognizing that in the adversarial system, the skills and knowledge of an attorney are essential to ensuring fair trials and just results. *See Gideon v. Wainwright*, 372 U.S. 335, 343 (1963); *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (“access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled.”). The right to counsel “embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.” *Gouveia*, 467 U.S. at 189. In short, “[t]he purpose of the Sixth Amendment right to counsel is to protect the unaided layman at *critical confrontations* with his adversary.” *Id.* (emphasis added).

In *Kirby v. Illinois*, the plurality created a bright-line rule, identifying the “critical stages” in which the Sixth Amendment right to counsel attaches: “at or after the initiation of adversary judicial proceedings—whether by way of formal charge, preliminary hearing, indictment,

information, or arraignment.” *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). The *Kirby* Court explained that the “initiation of judicial criminal proceedings is far from a mere formalism.” *Id.* at 689. Rather, it signifies the beginning of the adversarial system—when the government has firmly positioned itself against the defendant and committed itself to prosecute. *Id.* Only then is the defendant faced with the “intricacies of substantive and procedural criminal law” and the force of the government working against him. *Id.* “It is this point, therefore, that marks the commencement of the ‘criminal prosecutions’ to which alone the explicit guarantees of the Sixth Amendment are applicable.” *Id.* at 690.

A. Circuits are Split as to Whether *Kirby* Denoted a Bright-Line Rule and Whether the Sixth Amendment Right to Counsel Can Attach Prior to the Initiation of Formal Proceedings.

1. *A minority of circuits do not apply Kirby as a bright-line rule, and do not require that initiation of formal proceedings prior to the attachment of the right to counsel.*

Circuit courts are split on the issue as to whether the right to counsel can attach pre-indictment. A minority of courts—including the First, Third, Fourth, and Seventh Circuits—either in their holdings or in dicta have failed to recognize *Kirby* as a bright-line rule. *See Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995) (in dicta, stating the right could “possibility” attach before formal charges, indictment, or arraignment, when the government acts not as a fact-finder, but an adversary); *United States v. Burgess*, No. 96-4505, 1998 WL 141157, at *1 (4th Cir. Mar. 30, 1998) (noting this Court “refused to draw a line at indictment” in *Kirby*). Notably, the Third Circuit found that the right to counsel attached when the defendant was faced with the “prosecutorial forces of organized society.” *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892-93 (3d Cir. 1999). There, the defendant had been arrested and held in jail for a week, though he was not formally charged or arraigned. *Id.* In essence, the *Matteo* court focused only on the first prong of the *Kirby* test, finding that the defendant had been subject to “adversarial judicial

proceedings,” despite the fact that he had not been subject to any of the formal actions that *Kirby* delineates. *Id.* Taking a slightly different approach, the Seventh Circuit, in *United States v. Larkin*, held that absent formal charges or appearances before a judge, *Kirby* creates only a rebuttable presumption against the attachment of the right to counsel. *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992).

2. *The majority of circuits properly recognize and apply Kirby as a bright-line rule, attaching the right to counsel only after a formal charge, preliminary hearing, indictment, information, or arraignment.*

The majority of Circuits—the Fifth, Ninth, Tenth, Eleventh, Fourteenth and D.C. Circuits—properly apply *Kirby* as a bright-line rule, recognizing the attachment of the right to counsel only after one of the enumerated *Kirby* triggers takes place. *See, e.g., United States v. Heinz*, 983 F.2d 609, 612 (5th Cir. 1993); *United States v. Hayes*, 231 F.3d 663, 675 (9th Cir. 2000); *United States v. Lin Lyn Trading, Ltd.*, 149 F.3d 1112, 1117 (10th Cir. 1998); *United States v. Waldon*, 363 F.3d 1103, 1112 (11th Cir. 2004); *United States v. Sutton*, 801 F.2d 1346, 1365-66 (D.C. Cir. 1986). In *United States v. Moody*, the Sixth Circuit rejected the argument that the right to counsel had attached during the defendant’s pre-indictment plea negotiation. *United States v. Moody*, 206 F.3d 609, 614 (6th Cir. 2000). In doing so, the Circuit cited *Kirby* as a bright-line rule, making it “beyond [the Circuit’s] reach to modify.” *Id.*

Similarly, the Ninth Circuit, in *United States v. Hayes*, felt compelled to act within the confines of *Kirby*, holding that the right to counsel had not attached during a pre-indictment negotiation. *Hayes*, 231 F.3d at 669-71. In *Hayes*, the prosecution had sent the defendant a target letter, subpoenaed him to testify before a grand jury, and deposed a material witness. *Id.* In examining that language of the Sixth Amendment, the Circuit explained that the defendant was neither “prosecuted” nor “accused” at the time of his statements. *Id.* at 669. Quoting *Gouveia*, it

explained that “[w]hile members of the Court have differed as to the existence of the right to counsel in . . . some . . . cases, *all* of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings.” *Id.* (quoting *Gouveia*, 467 U.S. at 187–88) (emphasis in original). Such an interpretation was consistent with not only the literal language of the Amendment, but also with the “core purpose” of the right to counsel—to assure aid at trial “when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.” *Id.* (quoting *Gouveia*, 467 U.S. at 188–89).

In the present case, the Fourteenth Circuit correctly applied *Kirby* as a bright-line rule, holding: “it is undisputed that at the time of the conversation in question there had been no formal charge, preliminary hearing, arraignment, indictment, or information filed against the [Petitioner]. Thus, it is abundantly clear that the [Petitioner]’s right to counsel had not yet attached.” R. at 59. *Kirby* is best read as a bright-line rule because (1) this Court has invariably applied it as such, (2) it is most consistent with the language of the Sixth Amendment, (3) it is best suited to serve the underlying purpose of the Sixth Amendment: fairness, and (4) it preserves investigatory techniques and judicial economy.

B. Neglecting to Recognize *Kirby* as a Bright-Line Rule Would Disrupt This Court’s Precedent Both Before and After *Kirby*.

The bright-line rule, though first articulated in *Kirby*, is a reflection of how this Court has always addressed the attachment of the right to counsel, both pre- and post-*Kirby*. Originally, the *Kirby* rule was an abridgement of this Court’s precedent at the time. *Kirby*, 406 U.S. at 688 (citing *Hamilton v. Alabama*, 368 U.S. 52, 82 (1961) (arraignment); *Massiah v. United States*, 377 U.S. 201 (1964) (postindictment interrogation); *United States v. Wade*, 388 U.S. 218 (1967) (postindictment lineup); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (guilty plea)). In handing down the rule, the *Kirby* plurality declared that it flowed naturally from “a line of constitutional

cases in this Court stemming back to the Court’s landmark opinion in *Powell v. Alabama*.” *Kirby*, 406 U.S. at 688–89 (citations omitted). Since then, this Court has continued to apply *Kirby* unwaveringly, holding steadfast, and reiterating that the right to counsel attached only after the initiation of formal proceedings. *See e.g., Missouri v. Frye*, 566 U.S. 134, 140 (2012) (noting the *Kirby* rule is “well settled”); *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009); *Illinois v. Perkins*, 496 U.S. 292, 299 (1990); *Moore v. Illinois*, 434 U.S. 220, 228, (1977).

In *Gouveia*, this Court not only applied the bright-line rule, but also echoed the sentiment of *Kirby*, holding that “the right to counsel exists to protect the accused during *trial-type confrontations* with the prosecutor.” *Gouveia*, 467 U.S. at 190 (emphasis added). In his concurrence, Justice Stevens noted the existence of the bright-line rule, explaining that this Court had “foreclose[d] the possibility that the right to counsel might under some circumstances attach prior to the formal initiation of judicial proceedings.” *Id.* at 193 (Stevens, J., concurring).

Again, in *Moran v. Burbine*, this Court stated that the Sixth Amendment right to counsel “becomes applicable only when the government’s role shifts from investigation to accusation.” *Moran v. Burbine*, 475 U.S. 412, 430 (1986). There, this Court dismissed arguments that confessions elicited during a pre-charge, custodial interrogation triggered the right to counsel. *Id.* at 432. “[T]he possibility that the encounter may have important consequences at trial, standing alone, is insufficient to trigger the Sixth Amendment right to counsel.” *Id.* In short, this Court dismissed the proposition that custodial interrogations required a unique role, outside *Kirby*’s limits, and repeated, “until such time as the ‘government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified’ the Sixth Amendment right to counsel does not attach. *Id.* at 432 (quoting *Kirby*, 406 U.S. at 689).

C. The Bright-Line Rule is Most Consistent With the Language of the Sixth Amendment, Which Requires Both “Criminal Prosecution” and an “Accused” Individual Before the Attachment of Rights—Neither of Which May Come to be Without Formal Proceedings.

Petitioner’s right to counsel did not attach because he was not subject to “criminal prosecution” or “accused” within the meaning of the Sixth Amendment. This Court in *Gouveia*, explained that the *Kirby* rule was “consistent... with the literal language of the Amendment.” *Gouveia*, 467 U.S. at 188-89. After all, “prior to an indictment or information, if only law enforcement officers are pressing for an admission . . . it is hard[] to speak of a ‘criminal prosecution[]’ under the Amendment’s text, and hence also harder to speak of an ‘accused.’” Steven J. Mulroy, *The Bright Line's Dark Side: Pre-Charge Attachment of the Sixth Amendment Right to Counsel*, 92 Wash. L. Rev. 213, 237 (2017) [hereinafter *Mulroy*].

It is only after a prosecutor has decided to prosecute that “criminal prosecution” can readily be inferred. Black's Law Dictionary defines “prosecution” as a “criminal proceeding in which an accused person is tried,” *Prosecution*, BLACK'S LAW DICTIONARY (10th ed. 2014), which seems to require an initiation of formal proceedings. Even colloquially, the word “prosecution[]” does not normally indicate anything other than formal criminal proceedings.” *Mulroy, supra*, at 237. Black’s definition of “accused,” “someone who has been blamed for wrongdoing, especially a person who has been arrested and brought before a magistrate or who has been formally charged with a crime (as by indictment or information),” even more explicitly points to formal proceedings as a determining factor. *Accused*, BLACK'S LAW DICTIONARY (10th ed. 2014).

Breaking away from the bright-line rule, and finding the Petitioner’s right to counsel attached without any formal action from the government, would place this Court’s Sixth Amendment jurisprudence at odds with the plain language of the Amendment.

D. The Kirby Bright-Line Rule is Best Suited to Further the Core Purpose of the Sixth Amendment—Fairness—as it Provides Defendants With a Definitive Answer as to When Their Rights Attach and Ensures Attachment When Vital.

“A bright-line rule is a meaningful way to address the fairness . . . concerns the Supreme Court has when reviewing when the right to counsel constitutionally attaches.” Shane K. Rogers, *Providing Broader Sixth Amendment Protections: We Can Afford to Give Indigent Defendants More*, 9 Colum. J. Race & L. 323, 344 (2019) [hereinafter *Rogers*]. The premise of fairness underlines the majority of this Court’s Sixth Amendment case law, from *Gideon v. Wainwright* to *Powell v. Alabama*. *Gideon*, 372 U.S. 335; *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (recognizing criminal defendants’ right to counsel attaches at the beginning of judicial proceedings). This Court has time and again pointed to fairness as the touchstone of the Sixth Amendment, and crafted it as a tool to properly equip criminal defendants to defend themselves—to ensure that no criminal defendant is left to bring a knife to their proverbial gun fight with the government. *See Hayes*, 231 F.3d at 670–71 (“[a]ny secret interrogation of the defendant, *from and after the finding of the indictment*, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime.”) (emphasis in original).

As this Court stated in *Gouveia*, “[t]he ‘core purpose’ of the counsel guarantee is to assure aid at trial, ‘when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.’” *Gouveia*, 467 U.S. at 188 (quoting *United States v. Ash*, 413 U.S. 300, 309 (1973)). The bright-line rule effectively safeguards this value, for it is only upon the commencement of formal proceedings that the accused finds themselves battling against such things.

Additionally, the *Kirby* bright-line rule, as opposed to a standard based approach to the attachment of the right to counsel, states exactly when defendants can be sure they will have representation: upon “formal charge, preliminary hearing, indictment, information, or arraignment.” *Kirby*, 406 U.S. at 688. This “Court cannot reasonably expect [the government] to determine when to provide counsel on a case-by-case standard with fair results.” *Rogers, supra*, at 345. Moreover, looking retrospectively at whether counsel should have been present may leave defendants to face complex legal questions on their own. Discerning remedies would also be difficult because it is hard to predict how exactly the situation may have changed if an attorney had been present. *See id.*

E. Judicial Economy is Served by Clear, Easy to Administer Rules, Which Limit the Monetary and Temporal Costs of Decisions.

Because the Sixth Amendment plays a role in every single criminal prosecution, judicial economy calls for a bright-line rule that can be administered quickly and easily. Generally, bright-line rules proffer uniformity, predictably, and low decision costs. Michael Coenen, *Rules Against Rulification*, 124 Yale L.J. 644, 646 (2014). While they may come at the expense of rigidity, inflexibility, and arbitrary-seeming outcomes, judicial economy simply cannot withstand a standard-based approach to determining the right to counsel. Such an approach would require prosecutors to have “mini-trials” during their investigations, before an indictment is brought, to show that their actions were not adversarial in nature. *Rogers, supra*, at 346. Only a bright-line rule can eliminate this concern. *Id.*

The clarity of a bright-line rule is particularly important in the Sixth Amendment context. The government is already “obligat[ed] to provide counsel in a far-ranging number of cases after *Gideon* and *Argersinger*.” *Rogers, supra*, at 345; *see also Gideon*, 372 U.S. at 345 (interpreting the Sixth Amendment to require states provide the assistance of counsel to indigent defendants in

felony cases); *Argersinger v. Hamlin*, 407 U.S. 25, 30-31 (1971) (extending *Gideon* to include any crime which may result in imprisonment for six months or more). This Court must be clear about when this benefit must be provided.

In addressing the *Kirby* rule, lower “[c]ourts have observed that adopting a position that deviates from the bright-line rule would be a move away from certainty and clarity by blurring the lines of an otherwise steadfast rule.” Alexis Berglund, *Turner-Ing over A New Leaf: Pre-Charge Plea Negotiations As A Critical Stage for the Purposes of the Sixth Amendment Right to Counsel*, 59 B.C.L. Rev. E-Supplement 188, 201 (2018). The Ninth Circuit, in *United States v. Hayes*, declined to add pre-indictment proceedings to the bright-line rule, reasoning that the rule would no longer be “clean and clear.” *Hayes*, 231 F.3d at 675.

F. Breaking Away From the Bright-Line Rule Would Morph the Sixth Amendment Right to Counsel as it Now Exists Into a Check on Investigatory Procedures.

In *Kirby*, the Court refused to “import into a routine police investigation an absolute constitutional guarantee (the right to counsel) historically and rationally applicable only after the onset of formal prosecutorial proceedings.” *Kirby*, 406 U.S. at 690; *see also Rogers, supra*, n. 133 at 346 (“there are clear ethical rules showing that courts desire to protect routine investigation techniques while ethically regulating adversarial prosecutor contact.”). There, this Court acknowledged that there may be times when police abuse investigation procedures, and that such abuses “are not beyond the reach of the Constitution,” though they *were* out of the Sixth Amendment’s reach. *Id.* (pointing to the Fifth and Fourteenth Amendment Due Process Clauses). *Kirby* hinged itself on the “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.” *Id.* at 691.

“After Kirby, it is clear that “[t]he Court. . . relies on other doctrines and promulgated rules by the American Bar Association to ensure investigations are conducted in a fair manner. However, it denies that the Sixth Amendment provides doctrinal use.” *Rogers, supra*, at 346.

Here, the government admittedly engaged in actions that often happen only after an indictment is filed. R. at 63. However, as even the dissent noted in the Fourteenth Circuit’s opinion, “it [is] rare for the government to conduct itself in such a way.” Much like the Court noted in *Gouveia*, “the mere ‘possibility of prejudice [to a defendant] . . . is not itself [a] sufficient reason to wrench the Sixth Amendment from its proper context.’” *Gouveia*, 467 U.S. at 191 (quoting *United States v. Marion*, 404 U.S. 307, 321–322 (1971)). Petitioner’s right to counsel simply had not attached at the time that he conversed with the undercover agent. As such, it would “wrench” the Sixth Amendment from its foundation to use it as a bandage to cover an unavoidable procedural gap between investigation and prosecution.

III. GRAND JURY TESTIMONY IS INADMISSIBLE UNDER FEDERAL RULE OF EVIDENCE 804(B)(1), BECAUSE IT DOES NOT HAVE A SIMILAR MOTIVE.

Hearsay is an out of court statement used to prove the truth of the matter asserted. Fed. R. Evid. 801(c)(1)-(2). “The hearsay rule prohibits admission of certain statements made by a declarant other than while testifying at trial.” *United States v. Salerno*, 505 U.S. 317, 320 (1992). Generally, hearsay is not admissible; however, limited exceptions have been prescribed, either through federal statute, this Court, or the Federal Rules of Evidence. Fed. R. Evid. 802.

“When Congress enacted the prohibition against admission of hearsay in Rule 802, it placed 24 exceptions in Rule 803 and 5 additional exceptions in Rule 804.” *Salerno*, 505 U.S. at 322. One admissible form of hearsay, by way of Rule 804(b)(1), is former testimony from an unavailable declarant-witness. Fed. R. Evid. 804(b)(1). Admission under Rule 804(b)(1) is achieved after jumping through two hoops. Fed. R. Evid. 804(b)(1)(A)-(B).

First, the statement's proponent must prove the witness is unavailable. *Id.* Witness unavailability is well-settled and valid in five circumstances: (1) the witness asserts a privilege, (2) the witness refuses to testify despite judicial pressures, (3) the witness claims lack of memory, (4) the witness dies or is infirm, or (5) the witness is absent and the parties are unable to compel attendance at the hearing. Fed. R. Evid. 804 Advisory Committee Notes (1)-(5).

Second, after the declarant's unavailability has been established, the testimony must satisfy two requirements: (1) the testimony must have been given by "a witness at a trial, hearing, or lawful deposition," and (2) the testimony must now be "offered against a party who had . . . an opportunity and *similar motive* to develop it by direct, cross-, or redirect examination." Fed. R. Evid. 804(b)(1)(A)-(B) (emphasis added). All elements of 804(b)(1) must be satisfied for the exception to effectuate. *See Salerno*, 505 U.S. at 321 ("Nothing in the language of Rule 804(b)(1) suggests that a court may admit former testimony absent satisfaction of each of the Rule's elements."). This Court has indicated that all elements can be satisfied even when applied to grand jury testimony. *Id.*

However, this Court has yet to decide what is expressly meant by the "similar motive" language of Rule 804(b)(1). Brandon Berkowski, *Federal Rule of Evidence 804(b)(1)'s "Similar Motive" Test and the Admissibility of Grand Jury Testimony Against the Government*, 79 Fordham L. Rev. 1213, 1265 (2010) [hereinafter Berkowski]. The closest this Court has gotten to interpreting 804(b)(1)'s language was in *United States v. Salerno*. 505 U.S. 317. In *Salerno*, this Court considered the admissibility of grand jury testimony from two witnesses who asserted their Fifth Amendment right against self-incrimination. *Id.* at 319-20. The grand jury testimony, allegedly exculpatory, was asserted by the defendant to be admissible under hearsay exception

804(b)(1). *Id.* at 320. While this Court held the elements of 804(b)(1) must all be present, it neglected to clearly delineate the meaning of “similar motive.” *Id.* at 325.

A. Circuits Are Split on the Interpretation of Rule 804(b)(1) as to the Scope of Similar Motive.

Due to this Court’s lack of guidance on the “similar motive” requirement, circuits are split on the Rule’s interpretation. *See generally* William J. Horvath, *No More Splitting: Using A Factual Inquiry to Determine Similar Motive Under Federal Rule of Evidence 804(b)(1)*, 45 Val. U.L. Rev. 157 (2010) [hereinafter Horvath]. The circuits either follow a fact-based, narrow interpretation of similar motive, or they follow a broad, more lenient interpretation. *Id.* at 172, 175-76. To resolve this conflict, this Court must clearly articulate the requisite guideposts appropriate in evaluating similar motive. *See* Judith M. Mercier, *United States v. Salerno: An Examination of Rule 804(b)(1)*, 48 U. Miami L. Rev. 323, 341 (1993) [hereinafter Mercier] (“Rather than formulate a standard, the Supreme Court presently appears to prefer to let the courts of appeal ‘kick’ the rule around further.”).

1. *Some circuits correctly evaluate similar motive under a fact-based similar motive.*

The First, Second, and Fourteenth Circuits apply a fact-based, narrow interpretation of the similar motive requirement. *See United States v. DiNapoli*, 8 F.3d 909, 912-13 (2d Cir. 1993) (“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”); *see also United States v. Omar*, 104 F.3d 519, 524 (1st Cir. 1997) (looking at the intensity of the questioning, as well as the consideration of prosecutorial strategy). In these circuits, courts look beyond whether guilt or innocence hung in the balance. *Id.* at 914-15.

The Second Circuit in *United States v. DiNapoli* hinged the evaluation on “whether the party. . . had at a prior proceeding[,] an interest of substantially similar intensity to prove (or

disprove) the same side of a substantially similar issue.” *DiNapoli*, 8 F.3d at 914-15 (parens in original). The court rejected the defendant’s argument that the test was “simply whether at the two proceedings the questioner takes the same side of the same issue.” *Id.* at 913. In making its decision, the court considered a number of factors: the nature of the proceedings, the differing burdens of proof, and prosecutorial investigation and strategy. *Id.* The *DiNapoli* court ultimately concluded (between the different burdens of proof and the prosecutor’s discretion in investigating crimes) that the motive was not similar and did not satisfy the requirement under Rule 804(b)(1). *Id.* at 915. In short, the court found the “dissimilarity of motive [was] beyond dispute.” *Id.*

Likewise, the First Circuit, in *United States v. Omar*, found the prosecution did not operate with an analogous purpose in both hearings to satisfy the similar motive prong. 104 F.3d at 524. Principally, in regard to grand juries, the *Omar* court reasoned:

Grand juries present a different face. Often, the government neither aims to discredit the witness nor to vouch for him. The prosecutor may want to secure a small piece of evidence as part of an ongoing investigation or to compel an answer by an unwilling witness or to “freeze” the position of an adverse witness. In particular, discrediting a grand jury witness is rarely essential, because the government has a modest burden of proof, selects its own witnesses, and can usually call more of them at its leisure.

Id. at 523. While the *Omar* court recognized a potential fairness argument in support of admitting the grand jury testimony, it nevertheless held the evidence was inadmissible under Rule 804(b)(1). *Id.* However, the court acknowledged that the rules provide an alternative, “catch-all” exception for hearsay supported by guarantees of trustworthiness. *Id.* (recognizing Rule 807, formerly Rules 803(24) and 804(b)(5), as a valid alternative to 804(b)(1)). Presumably, though, parties are turned off by the guarantee of trustworthiness requirement—a central concern of hearsay—and opt to try for admission under 804(b)(1) instead.

2. *Other circuits erroneously apply a broad interpretation of the similar motive requirement.*

Alternatively, a few circuits—the Sixth, Ninth, and District of Columbia—have put forth a broad interpretation of the motive requirement and held a party need only a similar motive, not an identical one. *See e.g., United States v. Miller*, 904 F.2d 65, 68 (D.C. Cir. 1990) (finding the motive was about determining guilt or innocence); *United States v. Foster*, 128 F.3d 949, 956 (6th Cir. 1997) (reasoning motive at the grand jury was the same motive to be had at trial); *United States v. McFall*, 558 F.3d 951, 963 (9th Cir. 2009) (ditto). These courts look to whether the “testimony was to be directed to the same issue – the guilt or innocence,” without consideration for the differing burdens of proof, prosecutorial strategies and investigations, etc. *Miller*, 904 F.2d at 68.

B. This Court Should Adopt the Fact-Based Interpretation Used by the Fourteenth Circuit, Because it Comports With the Underlying Purpose of the Federal Rules of Evidence and Promotes Reliability in the Admission of Evidence.

The fact-based test better serves the Federal Rules of Evidence’s core value and promotes a system with consistent and reliable admissions. This test falls in line with the plain text of the Rule, credibility concerns of hearsay, and a want of prosecutorial discretion.

First, the plain reading of the Rule prompts the utilization of a narrow, fact-based interpretation. As Justice Thomas opined in *Salerno*: “Congress . . . presumably made a *careful* judgment as to what hearsay may come into evidence and what may not.” *Salerno*, 505 U.S. at 322 (emphasis added). In doing so, Congress sent a clear message: the Rules are to be narrowly applied. It is important to note that there are exceptions that the drafters of the Rules intentionally made applicable for broad usage. *See* Fed. R. Evid. 807 (permitting hearsay if the statement shows guarantees of trustworthiness and the probative value of the statement is unsurpassed). But, “as evidenced in *Salerno*, [this Court] views the requirement of applying the ‘plain meaning’ of the rule as superseding concerns of adversarial fairness.” *Mercier, supra* at 342. Rule 804(b)(1), when

read plainly, is not a broad, catch-all exception. “Congress made a deliberate decision regarding what should constitute acceptable exceptions to . . . the hearsay rule,” and this Court should respect that decision. *Id.* at 327 (citing *Salerno*, 505 U.S. at 322).

Second, 804(b)(1)’s narrow interpretation furthers the Rule’s purpose: witness and statement trustworthiness. *Horvath, supra* at 163. Obviously, fairness screams for admission of all exculpatory evidence. But as this Court has reasoned, courts “cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases.” *Salerno*, 505 U.S. at 322 (citing *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 524 (1989)). Ideally, each relevant witness would be presented at trial, questioned by both sides, and judged by the factfinder—but alas, such a utopian scene is out of reach. Situations unfold, witnesses become unavailable, and the hearsay rules come forth. The Rules maintain evidentiary standards—accuracy, completeness, and trustworthiness of the statement—which can only be maintained by the fact-based, narrow application of 804(b)(1).

Finally, this country’s historical use of prosecutorial discretion yearns for a fact-based, narrow application of the similar motive requirement, especially in situations involving grand juries. As courts have noted, grand juries present a lower burden of proof and permit the government to present any arrangement of witnesses to meet that burden. *See e.g., Omar*, 104 F.3d at 523. Adopting a broad reading of 804(b)(1) would functionally strip prosecutors of their discretion in the investigatory and pre-indictment stages. *Horvath, supra* at 188.

C. Washington’s Grand Jury Testimony Does Not Satisfy the 804(B)(1) Exception, Because the Government Did Not Have a Similar Motive at the Grand Jury.

Washington’s grand jury testimony does not satisfy the requirements of 804(b)(1). Again, this Court has said that all elements must be present for the exception to be effective. Petitioner fails to satisfy those elements here.

1. *Washington's grand jury testimony satisfies some, but not all, of the Rule 804(b)(1) requirements.*

Washington testified during the grand jury proceedings. Since the time of her testimony, her life came to a sudden end in a bicycle accident. Therefore, the testimony satisfies the unavailable and prior hearing requirements. Admittedly, Washington's former testimony comes close to admissibility, as *some* of the Rule 804(b)(1) requirements are satisfied. But, "close" does not equate to satisfaction and certainly does not justify the admission of hearsay evidence.

2. *The government did not have a similar motive in Washington's grand jury testimony.*

Evaluating the motive under a fact-intensive, narrow application of the Rule, the government's motivation in presenting Washington at the grand jury, as opposed to their interests in her trial testimony, can hardly be characterized as similar. First, and most importantly, the grand jury can be an investigative tool for prosecutors. The government used Washington's grand jury testimony to see what Petitioner may utilize in his defense. The government was not motivated to cross-examine Washington, because it was merely investigating her testimony.

Further, the government was undoubtedly already able to satisfy the burden to secure the indictment. By the time Washington testified at the grand jury, the government already had sufficient evidence to indict: the tip from the IRS, the thumb drive and cash found during the warranted search, and the statements made during the undercover conversation with Petitioner. The government not only lacked a similar motive to develop Washington's testimony through cross-examination, but also lacked any motivation to discredit or rebut her statements. Here, the grand jury was not used to secure an indictment. Rather, it was a preparation tool for the prosecution's trial case against Petitioner—just as it had been in other cases applying the fact-

based, narrow interpretation. *See Omar*, 104 F.3d at 524. Therefore, Washington's grand jury testimony is inadmissible under the Rules of Evidence.

CONCLUSION

For the aforementioned reasons, Respondent asks this Court to affirm the Fourteenth Circuit's decision in its entirety.

APPENDIX

1. The first issue concerns the Fourth Amendment. This Amendment provides:

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.

2. The second turns on the interpretation of the Sixth Amendment's right to counsel. The Amendment reads:

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.

3. The third issue turns on the application and interpretation of the following federal rules of evidence:

a. Federal Rules of Evidence 801(c):

(c) Hearsay. "Hearsay" means a statement that:

- (1) the declarant does not make while testifying at the current trial or hearing; and
- (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

Fed. R. Evid. 801(c).

b. Federal Rules of Evidence 802:

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;

- these rules; or
- other rules prescribed by the Supreme Court.

Fed. R. Evid. 802.

c. Federal Rules of Evidence 804(b)(1)

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

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

Fed. R. Evid. 804(b)(1).

d. Federal Rules of Evidence 807(a), (b)

(a) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:

(1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

(2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

(b) Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant's name— so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Fed. R. Evid. 807(a),(b).