No. 22-305

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS COLLINS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR RESPONDENT

Team R17
Counsel for Respondent

QUESTIONS PRESENTED

I. Whether inserting a key into the lock of a storage locker to identify ownership is an unreasonable search under the Fourth Amendment when a law enforcement agent merely fits the key in the lock without unlocking the locker or examining its contents.

II. Whether the Sixth Amendment right to counsel had attached when the defendant made noncustodial, preindictment statements to law enforcement during an investigative operation.

III. Whether the similar motive requirement under Federal Rule of Evidence 804(b)(1) is met for hearsay testimony given at a grandy jury proceeding but offered at a trial under a different standard of proof.

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The District Court's transcript and ruling on the Motions to Suppress appears in the record at 28–41. The District Court's transcript and ruling on the Motion to Admit Grand Jury Testimony appears in the record at 49–53. The judgment of the United States Court of Appeals for the Fourteenth Circuit, *Thomas Collins v. United States of America*, No. 22-173, was entered June 23, 2022 and appears in the record at 54–64.

STATUTORY AND CONSTITUTIONAL PROVISIONS

The text of the Fourth 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.

The text of the Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

The text of Rule 804(b)(1) of the Federal Rules of Evidence provides:

> (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).

STATEMENT OF THE CASE

The FBI began investigating Thomas Collins ("the defendant") and his business associate Roxie Roulette for illegal gambling and money laundering. (R. 43–44). The defendant owns Hoyt's Tavern, ostensibly a local restaurant in Boerum. (R. 44). Suspicions were triggered when the defendant started reporting excessively large amounts of money to the IRS. (R. 43–44). Upon hearing this from the IRS in September 2020, the FBI decided to investigate. (R. 43–44).

I. The FBI discovered that the defendant and Roulette were conducting a complex, multi-national illegal gambling and money laundering enterprise out of the defendant's tavern

Upon investigating, the FBI discovered that Roulette was facilitating illegal gambling out of the tavern's basement. (R. 44). Omar Sayed, the lead FBI investigator on the case, then discovered that the tavern's largest vendor, Gourmet Grocers, was a fraudulent shell company set up by Roulette. (R. 44). Someone was sending large payments through Gourmet Grocers to foreign actors—including to Pavel Hoag-Fourdjour, a foreign national funding the military in Brooklania. (R. 11, 44–45).

As employees of the tavern began leaving the country for Brooklania, the FBI quickened its investigation. (R. 45). Hoag-Fourdjour was also leaving for Brooklania. (R. 12). Because no extradition agreement exists between the U.S. and Brooklania, Sayed detained Hoag-Fourdjour at the airport. (R. 12, 45). Before letting him leave the country, the U.S. Attorney's Office deposed him per 18 U.S.C. § 3144. (R. 12). During the deposition on January 8, 2021, Hoag-Fourdjour admitted he received multiple $10,000 payments from Gourmet Grocers. (R. 12). He said he knew that the defendant and Roulette were associated with Gourmet Grocers. (R. 13).

The FBI then took further investigative steps at the end of January 2021. First, in speaking with the U.S. Attorney's Office, the FBI planned an undercover operation at the defendant's tavern on January 27. (R. 45). On January 21, the FBI sent a target letter to the defendant, indicating that

he was the subject of an investigation. (R. 45). On January 25, the FBI arrested Roulette, but upon being released on bail, she fled the country. (R. 46).

As part of their investigation into the defendant, Sayed and Agent Simonson visited the defendant at his fifteenth-floor apartment on January 26. (R. 6). The defendant buzzed them into the building and consented to a search of his apartment. (R. 6). Simonson found a set of keys with an electronic key fob with the apartment building's logo and a small, gold key. (R. 6). The defendant stated implausibly that the keys were for a storage unit in Colorado. (R. 6). The defendant did not object when Simonson stated that he was going to hold on to the keys. (R. 7). Simonson took the keys to the building's ground-floor storage lockers. (R. 7).

Wilfred Roberts, who was sitting at the front desk of the apartment lobby, directed Simonson to the building's storage lockers. (R. 7). The key fob opened the door marked "Storage for Floors 7–15/PH." (R. 7). Simonson tested the small, gold key in a locker that had been papered over with newspaper, partially concealing the contents. (R. 7). Newspaper only covered the door of the storage locker, leaving the sides uncovered. (R. 9). Simonson could see storage containers—like boxes and a safe—and a dusty suitcase inside. (R. 7). He tested the key, and it fit. (R. 7). He did not turn the key or open the door and returned the keys to the defendant before leaving the building. (R. 7). There is no information in the record about how often the defendant accesses the storage locker. (R. 7). The FBI later received and executed a search warrant for the storage locker and found a thumb drive containing gambling-operation records for the past five years and $2.5 million in cash. (R. 56).

Although FBI Agents, including Sayed, believed that the FBI had enough to arrest the defendant at this point, the FBI continued investigating and proceeded with their already-planned undercover operation the following day on January 27. (R. 47). During the undercover operation,

the defendant implicated himself in the illegal gambling and money laundering enterprise. (R. 16–19). The defendant was arrested after the undercover operation. (R. 47).

II. The defendant was then indicted and found guilty for illegal gambling and money laundering, and the defendant did not prevail on appeal

The US Attorney's Office then assembled a grand jury, which indicted the defendant. (R. 49–50). At the grand jury, the US Attorney presented testimony from Agents Sayed and Simonson, the transcript from Hoag-Fordjour's deposition, and the contents found in the defendant's storage on January 26. (R. 52). US Attorney Twerski also called Lucy Washington as a witness. (R. 21–22). Washington testified that she was a bartender at the defendant's tavern and that she was the "chief of staff" for the gambling operation in the tavern's basement. (R. 22). Washington testified that she managed the finances, oversaw the bookies and computer specialists, and did her best to "bring in new business." (R. 22).

She said the gambling operations were run through the tavern and that the defendant "practically lived there." (R. 23). When asked if she was aware that the defendant also laundered money through Gourmet Grocers, Washington responded that the defendant is a "nice guy" who would not do that and "is just too nice to tell his neighborhood friend (Roulette) to knock it off." (R. 26). After this, Twerski reminded Washington of her oath not to lie as well as the consequences for breaking that oath. (R. 27). Washington reiterated that she did not know if the defendant participated in the gambling ring. (R. 27). Later that year, Washington passed away. (R. 10).

Before trial, the defendant moved to suppress statements he made during the undercover operation, claiming that his right to counsel had attached at the time of the undercover operation. (R. 29). He also moved to suppress the "fruits" of inserting the key on the storage lock, claiming his Fourth Amendment rights were violated. (R. 29). The district court denied both motions to suppress. (R. 34–35, 41). The defendant's case then proceeded to a jury trial. (R. 4). During trial,

the defendant moved to admit Washington's grand jury testimony, specifically where she said that she was unaware of the defendant's involvement in the gambling ring. (R. 49). The district court excluded Washington's grand jury testimony, finding the prosecutor did not have a similar motive to develop the testimony as required by Rule 804(b)(1). (R. 52).

The jury then found the defendant guilty of illegal gambling and money laundering. (R. 4). The defendant appealed the conviction. (R. 54). The Fourteenth Circuit affirmed the district court on all issues raised. (R. 57–61). The defendant then filed a Petition for Writ of Certiorari, and on December 13, 2022, the Court entered an Order Granting Certiorari on three questions. (R. 65).

SUMMARY OF THE ARGUMENT

I. Fourth Amendment Claim

The Fourth Amendment protects individuals against unreasonable searches and seizures. There are two tests for determining whether a Fourth Amendment search occurred. First, there is a search when an individual has a subjective expectation of privacy that is objectively reasonable. Second, a search occurs when there is government interference with an individual's possessory interest to gain information. Here, the test of the key was not a search. The defendant did not have a reasonable expectation of privacy in the lock of his storage locker, because he only partially concealed the locker's contents, took no action to cover the lock, and did not object when Agent Simonson told the defendant that he would hang on to the key. Nor was there an interference with the defendant's possessory interest because the defendant did not own the lock of the storage locker and Simonson did not touch the defendant's effects in the storage locker.

Even if this court concludes that there was a search, it was reasonable. Under the minimal intrusion exception to the warrant requirement, a warrantless search is reasonable when the intrusion on an individual's privacy is minimal, and that minimal intrusion is outweighed by a legitimate law enforcement interest. That is the case here. Simonson only inserted a key into the

lock of a storage locker; he did not turn it or open the door. This minimal intrusion was outweighed by the law enforcement interest in quick identification of the defendant's storage locker, so the search was reasonable.

II. Sixth Amendment Claim

The Sixth Amendment provides "an accused" with the right to counsel "in a criminal prosecution." This Court held in *Kirby* that the right to counsel attaches only upon the initiation of adversarial judicial proceedings by way of formal charge, preliminary hearing, indictment, information, or arraignment. Most circuits have interpreted that as establishing a bright line rule where the right to counsel attaches only at one of those five stages. Subsequent precedent of this Court and the Sixth Amendment's text and history are consistent with this view. This Court should hold that the right to counsel attaches only at or after one of the five stages enumerated in *Kirby* and thus the right to counsel had not attached when the defendant made preindictment statements.

However, even if this Court holds that the right to counsel can at times be triggered before one of the five enumerated stages, this Court's precedent still forecloses the right to counsel attaching in this case. This Court's decision in *Gouveia* involved two defendants being "immediately suspected" of a crime and enduring a 19-month-long incarceration in an administrative prison. Yet, this Court found that the right to counsel had not attached. Here, the defendant was investigated for merely four to five months, was never brought in for formal questioning, and was only the target of the investigation for a few days before formal arrest. This Court should thus follow its ruling in *Gouveia* and hold that the right to counsel had not attached.

III. Rules of Evidence Claim

The Federal Rules of Evidence prohibit hearsay from being admitted at trial. Rule 804(b)(1) is one of the limited exceptions to the hearsay prohibition. This exception requires that

the party against whom the testimony is being offered must have previously had both the opportunity and "similar motive" to develop that testimony.

This Court should adopt the fact-specific approach to the similar motive requirement embraced by the First and Second Circuits because it is most in line with the Rule's plain meaning and with the reliability policy underlying the hearsay rules. Here, in applying the fact-specific approach, the district court properly excluded Washington's testimony because the government's motive to develop at the grand jury hearing did not match with its motive at trial. At the grand jury, the government felt that it had met its evidentiary burden and did not wish to disclose its trial strategy by discrediting Washington's testimony.

ARGUMENT

I. This Court should hold that inserting a key into the lock of a storage locker to identify ownership is not an unreasonable search under the Fourth Amendment when an officer merely fits the key in the lock without unlocking the locker or examining its contents

This Court should affirm the Fourteenth Circuit and hold that testing a key in the lock of a storage locker only to identify ownership of the locker is not an unreasonable search under the Fourth Amendment. The Fourth Amendment prohibits "unreasonable searches and seizures[.]" U.S. Const. amend IV. The Fourth Amendment "protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967). To determine whether a person's Fourth Amendment rights have been violated, courts first look at if there was a search. *Carpenter v. United States*, 138 S. Ct. 2206, 2215 n.2 (2018). If a search occurred, courts then determine if that search was reasonable. *Id.*

There are two relevant tests that this Court uses to determine whether a search occurred. Under *Katz*, a search occurs when an individual had a subjectively and objectively reasonable expectation of privacy. 389 U.S. at 361 (Harlan, J., concurring). This Court later clarified that the *Katz* test was a supplement to, rather than a replacement for, the trespass test for searches. *See*

United States v. Jones, 565 U.S. 400, 406–08 (2012); *id.* at 414 (Sotomayor, J., concurring). Under *Jones*, a search occurs if a government agent interferes with an individual's possessory interest in property in order to obtain information. *See id.* at 408 n.5 (majority opinion).

A search is presumptively unreasonable if law enforcement did not first obtain a warrant. *United States v. Karo*, 468 U.S. 705, 717 (1984). However, this presumption can be "overcome" because the touchstone of the inquiry is "reasonableness" not whether a warrant was issued. *Kentucky v. King*, 563 U.S. 452, 459 (2011). The minimal intrusion exception to the warrant requirement overcomes this presumption. *See Illinois v. McArthur*, 531 U.S. 326, 330 (2001); *see also New York v. Class*, 475 U.S. 106, 117–19 (1986) (finding that a minimally intrusive, warrantless search was reasonable). When there is a minimal intrusion into an individual's privacy, this Court balances the individual's privacy interests with the law-enforcement interest to determine if the search was reasonable. *Cf. McArthur*, 531 U.S. at 331 (balancing privacy and law-enforcement interests to determine reasonableness of a minimally-invasive seizure).

Here, there was no search because the defendant did not have a reasonable expectation of privacy in his storage locker and there was no interference with his possessory interest in the contents of the locker. Even if this Court concludes that there was a search, the search was reasonable under the minimal intrusion exception to the warrant requirement.

A. Inserting a key into a lock in the common area of an apartment building to test the key's fit is not a search under the Fourth Amendment

The lock on a storage locker located in a common area of an apartment building is not part of the curtilage of the apartment, so inserting a key into the lock merely to test the key's fit is not a search under either the *Katz* test or the *Jones* test. The lock on the storage locker is not part of the curtilage of the defendant's apartment under the factors this Court has articulated. *United States v. Dunn*, 480 U.S. 294, 301 (1987). The insertion of a key into a storage locker to test its fit is not

a search because (1) there is no reasonable expectation of privacy in the lock of a storage locker located in a common area of an apartment building and (2) inserting a key into the lock of a storage locker does not interfere with the defendant's possessory interest in the contents of the locker.

1. The storage locker is not part of the curtilage of the defendant's apartment

This Court should hold that the lock on the storage locker is not part of the curtilage of the defendant's apartment because the *Dunn* factors weigh against a finding of curtilage for an area so far removed from an apartment. The curtilage of a home is the area immediately surrounding the house and has the same Fourth Amendment protection as the home itself. *Florida v. Jardines*, 569 U.S. 1, 5–6 (2013). When determining whether an area is part of the curtilage of a home, the relevant inquiry is "whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection." *Dunn*, 480 U.S. at 301. Four factors inform this inquiry: (1) the proximity of the area to the home itself, (2) whether the area is within an enclosure that surrounds the home, (3) the way the resident uses the area, and (4) any steps that the resident took to protect the area from outside observation. *Id.* This Court has never held that curtilage exists in connection with a multi-unit dwelling, and in the circuit courts, "the overwhelming weight of authority" rejects a resident of a multi-dwelling building claiming curtilage protection beyond a resident's unit. Carol A. Chase, *Cops, Canines, and Curtilage: What* Jardines *Teaches and What It Leaves Unanswered*, 52 Hous. L. Rev. 1289, 1303, 1305 (2015).

The first *Dunn* factor weighs against a finding of curtilage when the area in question is remote from the apartment. *See United States v. Sweeney*, 821 F.3d 893, 902 (7th Cir. 2016). In contrast, courts have weighed the first factor in favor of a finding of curtilage when the area in question is very close to the apartment itself, such as the door to the apartment. *E.g.*, *United States v. Bain*, 874 F.3d 1, 14 (1st Cir. 2017); *see also Jardines*, 569 U.S. at 6 (stating that the curtilage

is the area "immediately surrounding" the home, such as a porch or "just outside the front window"). The second *Dunn* factor weighs against a finding of curtilage when there is no enclosure around the area that separates it from a common area in the apartment building. *See United States v. Perez*, 46 F.4th 691, 706 (8th Cir. 2022); *see also Sweeney*, 821 F.3d at 902 (finding that outer walls of an apartment building did not enclose the area privately with the apartment itself). The third *Dunn* factor weighs against a finding of curtilage when the use of the area is the same for all tenants of the apartment building. *Sweeney*, 821 F.3d at 902. In contrast, the third *Dunn* factor weighs in favor of a finding of curtilage when the area is for the tenant's personal use. *Perez*, 46 F.4th at 706; *see also United States v. Burston*, 806 F.3d 1123, 1127 (8th Cir. 2015) (finding that the third factor favored a finding of curtilage because the defendant set up a grill in the area). Finally, the fourth *Dunn* factor weighs against a finding of curtilage when the tenant failed to take steps to protect the area from outside observation. *United States v. Hopkins*, 824 F.3d 726, 732 (8th Cir. 2016); *United States v. Thomas*, 120 F.3d 564, 568, 572 (5th Cir. 1997) (finding that an area surrounded by a privacy fence was not curtilage because the gate was left open).

Here, the first three *Dunn* factors weigh heavily against a finding of curtilage. First, like with *Sweeney* and unlike the cases where the courts found there was curtilage, the storage area here is separated from the defendant's apartment by 15 floors. Second, as with *Sweeney* ant *Perez*, there is no enclosure that surrounds the defendant's apartment and the lock on the storage unit, while excluding everything else. The storage area is in a common area of the building that is accessible to other tenants. The lock is in the common storage area and accessible while one is in that common area. Third, like with *Sweeney*, the storage area here has a similar use for all tenants of the building—storage. There is no indication that the defendant uses the common areas of the storage, where the lock is located, for anything that other tenants of the building do not also use it

for. And there is nothing that suggests that the defendant uses the storage locker in a way that is "intimately tied" to his home. There is no evidence that he accesses the area frequently. In fact, the evidence—a dusty suitcase—suggests infrequent access.

The fourth factor is admittedly a closer call, but still ultimately weighs against a finding that the lock of the storage unit is part of the curtilage of the defendant's apartment. The defendant covered the front section of the storage locker with paper. However, there were gaps in the paper that revealed the contents. The locker's contents were also visible through the sides, which the defendant made no effort to cover up. He also made no effort to cover the lock itself. This is most like *Thomas*, where the area in question was surrounded by a privacy fence, but the gate was left open. This Court should follow the reasoning of the Fifth Circuit in *Thomas* and find that because the defendant did not take steps to protect the privacy of the lock itself, the fourth factor weighs against a finding of curtilage. And taking all four of the *Dunn* factors together, this Court should conclude that the lock of the storage locker is not part of the curtilage of the defendant's apartment.

2. The defendant has no objectively reasonable expectation of privacy in the lock on the outside of a storage locker that is located in a common area of a multi-unit dwelling

This Court should adopt the reasoning of the circuit courts that have held that insertion of a key into a lock to test fit does not violate a reasonable expectation of privacy. A search occurs when a government authority infringes on a person's subjective expectation of privacy when that expectation is "one that society is prepared to recognize as reasonable." *Katz*, 389 U.S. at 361 (Harlan, J., concurring). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Id.* at 351. When a tenant demonstrates that his expectation of privacy is in the contents of a storage locker, rather than the lock itself, there is no subjective expectation of privacy in the lock. *United States v. Lyons*, 898 F.2d 210, 213 (1st Cir. 1990). And circuit courts have held that there is no reasonable expectation of privacy in the

common areas of an apartment building, even when those areas are protected by a lock. *E.g.*, *United States v. Hawkins*, 138 F.3d 29, 32 (1st Cir. 1998); *United States v. Barrios-Moriera*, 872 F.2d 12, 14 (2d Cir. 1989).

In *Lyons*, the First Circuit considered whether the defendant had a subjective expectation of privacy in the lock to a storage unit. 898 F.2d at 213. The defendant testified during a suppression hearing that the storage area contained items that he expected would be private. *Id.* The court found that it was the contents of the storage unit that the defendant expected would remain private, rather than the lock itself. *Id.* Therefore, because the defendant did not have a subjective expectation of privacy in the lock of the storage unit, inserting a key into the lock was not a search. *Id.* And in *United States v. Salgado*, 250 F.3d 438, 456–57 (6th Cir. 2001), the Sixth Circuit held that because there was no reasonable expectation of privacy in the common hallway, where the locked apartment door was located and where anyone could pass through, inserting the key into the lock to test its fit was not a search. The contents of the area protected by the lock are not relevant to whether there was an objectively reasonable expectation of privacy. *Id.* at 456–57. In *United States v. Dillard*, 438 F.3d 675, 682 (6th Cir. 2006), the Sixth Circuit held that there was no reasonable expectation of privacy because the defendant did not lock his duplex's doors, and so did nothing to indicate that the officers were not welcome.

Here, the defendant did not have a subjective expectation of privacy in the lock of the storage locker. Although he covered the front of the locker with newspaper, he did nothing to cover the lock. Thus, like in *Lyons*, while he may have had a subjective expectation of privacy in the contents of the storage locker, he did not have a subjective expectation of privacy in the lock itself.

Also, any expectation of privacy would not be objectively reasonable. The lock is in a common area of his apartment building. There are storage lockers for all the apartments on the 7th

through 15th floors of the building. It does not matter that the storage area is protected by a locked door because anyone in the common area could see the defendant's locker. Like in *Salgado*, there is no reasonable expectation of privacy in the lock of a storage locker that is in a common area of an apartment building. Additionally, like the defendant in *Dillard*, the defendant here allowed Simonson to hold onto the keys to the storage room and locker without objection, thereby failing to indicate to Simonson that he was not welcome to use them. There was no search under *Katz*.

3. Inserting a key into the lock of the storage unit did not interfere with the defendant's possessory interest in the contents of the storage unit and was not a search under *Jones* and *Jardines*

A search can also occur when the government "physically occupie[s] private property for the purpose of obtaining information." *Jones*, 565 U.S. at 404. But not every government trespass onto private property is a search. *Id.* at 411 & n.8 (citing *Oliver v. United States*, 466 U.S. 170, 183 (1984) (finding that a police inspection of open fields that are private property is not a Fourth Amendment violation); *see also Sweeney*, 821 F.3d at 900. If the government enters the curtilage of a home to gather information without an implied license to do so, then a Fourth Amendment search has occurred. *Jardines*, 561 U.S. at 7.

When law enforcement is authorized to possess an item, there is no Fourth Amendment search under the *Jones* test. *United States v. Cowan*, 674 F.3d 947, 956 (8th Cir. 2012). In *Cowan*, a detective seized a key fob during a lawful frisk of the defendant and used it to locate the defendant's car. *Id.* at 951. The court found that the seizure was lawful. *Id.* at 953. The court distinguished *Jones* and found that because the detective was authorized to seize the key fob, there was no trespass and thus, no search. *See id.* at 956.

Additionally, when a defendant has no possessory interest in the item at the time the government interfered with it, there is no search under the *Jones* test. *See Jones*, 565 U.S. at 409. In *Sweeney*, the Seventh Circuit held that no search occurred in a common area of an apartment

building because the defendant had no right to exclude anyone from the area. 821 F.3d at 900. The court reasoned that any trespass would be against the building owner, not the defendant. *Id.* (discussing trespass to common areas of multi-unit buildings). And the *Sweeney* court found no search under the *Jardines* test either because the common area that the officers entered was not part of the home's curtilage. *Id.* at 899, 902; *see also United States v. Arboleda*, 633 F.2d 985 (2d Cir. 1980) (finding that tenants do not have Fourth Amendment protection in common areas).

Here, Simonson was authorized to hold onto the defendant's keys. Simonson found the keys after the defendant consented to a search of his apartment. After asking about the keys, Simonson said that he was going to hang onto them. The defendant did not object. Simonson did not use the key fob to obtain information because the door to the common storage area was already clearly marked. Thus, like the detective in *Cowan*, Simonson's possession of the key fob was not a trespass and could not be a search under *Jones*. And there was no trespass against the lock of the storage locker. The locker was in a common area of the basement. Although the defendant used the locker to store his items, he had no right to exclude anyone from common areas of the building. Thus, like with the defendant in *Sweeney*, officers did not trespass against the defendant when they tested the key in a lock located in a common area. Officers did not turn the key or open the door to the storage locker, and so did not interfere with the defendant's possessory interest in items inside the locker. There was no search under *Jones*. And because the lock is not part of the curtilage of the defendant's apartment, there was no search under *Jardines*.

B. Even if inserting a key into a lock to test the key's fit is a search, the search was reasonable under the minimal intrusion exception to the warrant requirement

If this Court finds that inserting a key into a lock to test the fit is a search, then it should also find that the search was reasonable under the Fourth Amendment. This Court should adopt a standard that lower courts have used—that if agents have reason to believe that the lock belongs

to the suspect when they tested the key in the lock without proceeding further, then the search is justified under the minimal intrusion exception to the warrant requirement.

The Fourth Amendment prohibits unreasonable searches. U.S. CONST. amend IV. "A warrant is not required to establish the reasonableness of *all* government searches." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). The government bears the burden of showing that a warrantless search was reasonable. *Vale v. Louisiana*, 399 U.S. 30, 34 (1970). Some exceptions to the warrant requirement do not require probable cause to be reasonable under the Fourth Amendment. *Id.*; *see also Maryland v. Buie*, 494 U.S. 325 (1990) (stating that there are contexts where "neither a warrant nor probable cause is required" for a reasonable search). The reasonableness of a search may be determined by balancing the individual's Fourth Amendment privacy interest against the legitimate law-enforcement interests served by the search. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). Because inserting a key into a lock minimally intrudes on an individual's privacy and serves an important law-enforcement interest, it is reasonable under the minimal intrusion exception to the warrant requirement. *Cf. United States v. Jacobsen*, 466 U.S. 109, 126 (1984) (finding that a minimal intrusion on a protected possessory interest was reasonable); *see also People v. Robinson*, 208 Cal. App. 4th 232, 249–50 (Cal. Ct. App. 2012) (discussing the minimal intrusion exception to the warrant requirement).

Circuit courts that have found that the insertion of the key in the lock was a reasonable warrantless search have done so because law-enforcement interest outweigh the minimal intrusion on the defendant's privacy interests. *E.g.*, *United States v. Concepcion*, 942 F.2d 1170, 1173 (7th Cir. 1991). In *Concepcion*, the Seventh Circuit found that inserting and turning a key in an apartment door lock was a search. *Id.* at 1171–72. But they found that the search was reasonable because it only revealed information about where the defendant lived, information that they could

have determined in other ways, such as following him or asking his landlord. *Id.* at 1173. Because the search was a minimal intrusion on the defendant's privacy interest, the agents did not need probable cause for the search. *See id.* The Seventh Circuit affirmed this reasoning in *United States v. Correa*, where it held that using garage door openers to identify the defendant's house was not an unreasonable search because the search only revealed an address. 908 F.3d 208, 219 (7th Cir. 2018). The Ninth Circuit has adopted a similar reasonableness analysis. *United States v. $109,179 in U.S. Currency*, 228 F.3d 1080, 1088 (9th Cir. 2000). There, the police wanted to identify the defendant and his vehicle because his statements about his car to officers were inconsistent. *See id.* at 1083, 1088. The court found that fitting a key into a car lock was a reasonable search because it did not inform the police about the car's contents and it was narrowly tailored to identify car ownership. *Id.*

But in *Bain*, the First Circuit concluded that the use of a key in a front door lock was an unreasonable search because law enforcement's interest did not outweigh the privacy interest. 874 F.3d at 19. The intrusion was not minimal because the government did not show that it had considered or pursued other ways of finding the information. *Id.* The court specifically distinguished *Lyons* and *Hawkins* because those cases involved locks on effects, which it found had a lower expectation of privacy than homes. *Id.* at 15, 17.

Here, there is a minimal intrusion on the defendant's privacy interests. The intrusion is even more minimal than the intrusion in *Concepcion*. There, the officer inserted the key into the defendant's apartment door and turned it. Here, Simonson only inserted the key into the lock of a storage locker, without turning it. Like with the defendant in *Currency*, the defendant's statements that the key ring was for a storage unit in Colorado was inconsistent because the key fob displayed the building's logo. Investigating whether the defendant had a storage locker that he had lied about

was a legitimate law-enforcement interest. And like in *Currency*, any search was narrowly tailored to reveal only whether the defendant had a storage locker. Thus, law-enforcement interests outweigh the minimal privacy intrusion. Like in *Concepcion*, a key-test search is reasonable here even without probable cause. And because the intrusion was so minimal, the search was reasonable even if this Court finds that the lock was within the curtilage of the apartment.[1]

The defendant primarily relies on *Bain* to argue that the insertion of the key was an unreasonable warrantless search. But *Bain* does not support this for two reasons. First, the *Bain* court failed to acknowledge, much less weigh, the "essential" law-enforcement interest in "readily administrable rules." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001); *see Bain*, 874 F.3d at 17–19. And it failed to consider the legitimate law enforcement interest in quickly identifying the defendant's locker. *See Robinson*, 208 Cal. App. 4th at 254 (describing the law enforcement interest in quickly identifying a suspect). Second, the *Bain* court distinguished key tests on storage lockers to key tests on apartment doors, finding the former to carry lower privacy interests. Here, unlike in *Bain*, the key test was on the lock of a storage locker, which even to the *Bain* court would carry a lower expectation of privacy. This lower expectation of privacy is outweighed by the law-enforcement interest in quickly identifying the storage locker, especially after the defendant's associate fled the country. Thus, this Court should affirm the Fourteenth Circuit and hold that the key test was not an unreasonable search.

II. This Court should hold that the Sixth Amendment's right to counsel had not attached when the defendant made noncustodial, preindictment statements to law enforcement.

The Sixth Amendment provides 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 (emphasis

[1] *Cf. Salgado*, 250 F.3d at 456 ("The information gained by . . . inserting a key into an apartment door is the same as that gained by inserting a key into a car door.").

added). This Court has held that the use of undercover agents or cooperating witnesses to obtain incriminating statements from potential defendants prior to the filing of charges is a permissible law enforcement technique. *See, e.g.*, *Illinois v. Perkins*, 496 U.S. 292, 300 (1990).

Here, this Court should affirm the Fourteenth Circuit and hold that the Sixth Amendment right had not attached when the defendant made pre-indictment, noncustodial statements to law enforcement. This is because (1) the Sixth Amendment right to counsel attaches only at one of the five stages enumerated in *Kirby* and (2) even if the Sixth Amendment right to counsel attaches before these five stages, the right still had not attached because the FBI were still firmly in the investigative stage when the defendant made non-custodial statements.

A. The Six Amendment right to counsel should attach only at one of the five stages enumerated in *Kirby* because such a bright line standard is consistent with this Court's precedent, circuit precedent, and the Sixth Amendment's text and history.

The "core purpose" of the right to counsel is to "assure aid at trial," not a blanket right cloaking every stage of the criminal process. *See United States v. Gouveia*, 467 U.S. 180, 188 (1984). Considering this, the right to counsel should only be triggered at formal charging, preliminary hearing, indictment, information, or arraignment. This standard is consistent with this Court's precedent, the Sixth Amendment's text and history, and the majority of the circuits.

1. This Court should reaffirm its precedents by holding that the right to counsel attaches only at one of the five stages enumerated in *Kirby*

This Court has long recognized that the Sixth Amendment right to counsel attaches only after the actual initiation of adversarial judicial proceedings against the defendant. *See Powell v. Alabama*, 287 U.S. 45, 57 (1932) (holding that the defendants had the right to counsel from the time of their arraignment until trial). This Court reaffirmed this principle in a plurality opinion, finding that "it has been firmly established that a person's" Sixth Amendment right to counsel attaches only at or after formal judicial proceedings have commenced. *Kirby v. Illinois*, 406 U.S.

682, 688 (1972). The plurality in *Kirby* went further by enumerating when formal judicial proceedings commence: at "formal charg[ing], preliminary hearing, indictment, information, or arraignment." *Id.* at 689.

Kirby's plurality opinion has subsequently been upheld by this Court. *See Rothgery v. Gillespie Cnty., Tex.*, 554 U.S. 191, 198 (2008); *Gouveia*, 467 U.S. at 188. Specifically, this Court in *Gouveia* declared that all of its right to counsel "cases have involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Gouveia*, 467 U.S. at 188 (quoting *Kirby*, 406 U.S. at 688–89). This strict enumeration of when the right attaches was affirmed most recently in *Rothgery*. There, this Court found that the Sixth Amendment right to counsel is "limited by its terms" and is "pegged" to the five stages enumerated in *Kirby*. *Rothgery*, 554 U.S. at 198.

The only time this Court has held that the right to counsel applies before indictment or arraignment is in *Escobedo v. Illinois*, 378 U.S. 478, 491 (1964). However, this Court later reversed course and held that "in retrospect" *Escobedo* was "not to vindicate the constitutional right to counsel" under the Sixth Amendment but rather to protect the privilege against self-incrimination under the Fifth Amendment. *Moran v. Burbine*, 475 U.S. 412, 429–30 (1986). This Court indicated that *Escobedo* provides "no support" for a Sixth Amendment claim. *Id.*

Post-*Escobedo*, this Court has strictly held that the Sixth Amendment right to counsel attaches no earlier than indictment or arraignment. For example, in *Gouveia*, the Court held that two prisoners suspected of murder did not have the right to counsel before arraignment or indictment, despite the prisoners being held in administrative holding cells for 19 months during the investigation. *Gouveia*, 467 U.S. at 191. There, the circuit court reasoned that a bright line delineation for the right to counsel could lead to the government intentionally delaying

proceedings, resulting in the deterioration of evidence. *Id.* The Court rejected that reasoning, finding that "[t]hose concerns, while certainly legitimate ones, are simply not concerns implicating the right to counsel." *Id.* at 191 (quoting *United States v. Marion*, 404 U.S. 307, 321–322 (1971)).

Likewise, in *Moran*, the defendant sought to exclude incriminating statements he made to law enforcement before arraignment or formal charges but without the presence of retained counsel. 475 U.S. at 416. This Court found no Sixth Amendment violation, stating that the "Sixth Amendment's intended function is not to. . . protect a suspect from the consequences of his own candor." *Id.* at 430.

Here, this Court should hold that the Sixth Amendment right to counsel had not attached during the undercover operation because the right to counsel is only triggered at or after formal charge, preliminary hearing, indictment, information, or arraignment. It is uncontested that the defendant made the challenged statements before any of these five stages. But the petitioner now asks this Court to reverse nearly a century of its precedent and hold what it has previously rejected: that the right to counsel applies *before* these five enumerated stages. This Court should pass on the petitioner's request and reaffirm its precedent.

This Court's language in *Gouveia* and *Rothgery* indicate that *Kirby*'s enumeration of when the right to counsel attaches is not merely illustrative but is exhaustive. This Court has "pegged" the initiation of adversarial judicial criminal proceedings to these five stages.

If this Court passed on extending the right to counsel to pre-indictment proceedings in the more extreme cases of *Gouveia* and *Moran*, it should also do so here. *Gouveia* and *Moran* involved considerably longer, more accusatory law enforcement tactics than the facts here. Here, the defendant and his establishment were investigated for only four to five months, rather than being locked away in administrative cells for 19 months, as in *Gouveia*. And here, law enforcement

engaged with the defendant in his tavern, as opposed to police eliciting statements from the defendant outside the presence of retained counsel at a police station, as in *Moran*. This Court should follow *Moran* and *Gouveia* and not extend the right to counsel to pre-indictment proceedings.

The reversal of *Escobedo* hits this point home. This Court went out of its way to clarify that *Escobedo* holds no precedential value in the Sixth Amendment context. *Escobedo* stands as an outlier in an otherwise unbroken chain of Supreme Court precedent. To hold for the defendant, this Court would have to reverse its reversal of *Escobedo*. Instead, this Court should reaffirm its longstanding precedent, affirm the lower court, and hold that the right to counsel attaches only at or after one of the five enumerated stages in *Kirby*.

2. The text and history of the Sixth Amendment also support a bright line rule as to when the Sixth Amendment right to counsel attaches.

"The literal language of the [Sixth] Amendment . . . requires the existence of both a 'criminal prosecutio[n]' and an 'accused.'" *Gouveia*, 467 U.S. at 188. The historical and the plain meaning of "criminal prosecution" indicates that the initiation of a prosecution begins at the filing of a formal charging document, like an indictment, and not earlier.

The historical meaning of a "criminal prosecution" cleanly cabins the initiation of a prosecution to a formal charging document or an indictment. Recently, Justice Thomas outlined the historical and original understanding of the Sixth Amendment. *See Rothgery*, 554 U.S. at 218 (Thomas, J., dissenting); *see also id.* at 213 (Roberts, C.J., concurring) ("Justice Thomas's analysis of the present issue is compelling"). There, Justice Thomas began with Blackstone's Commentaries, "whose works" the Court has deemed the "preeminent authority . . . for the founding generation." *See Alden v. Maine*, 527 U.S. 706, 715 (1999).

Blackstone organized the various stages of a "criminal proceeding" into twelve distinct parts. *Rothgery*, 554 U.S at 220 (Thomas, J., dissenting). A "prosecution" commenced only after arrest, commitment, and bail. *Id.* "Blackstone did not describe the entire criminal process as a 'prosecution,' but rather listed prosecution as the third step in a list of successive stages." *Id.* 220. Per Justice Thomas's analysis of Blackstone, the historical meaning of criminal prosecution emerges with "reasonable clarity" such that a prosecution starts "by filing a formal charging document—an indictment, presentment, or information." *Id.* at 221. The historical understanding of a "criminal prosecution" would not have included pre-indictment, pre-arraignment proceedings.

This historical meaning of "criminal prosecution" further informs the plain and ordinary meaning of the phrase as the Framers would have understood it. The fact that the Framers did not use the term "criminal proceeding" or "criminal case" in the Sixth Amendment is notable. As outlined above, "criminal proceeding" at the time was the catch-all term that included the entire criminal process—including events surrounding arrest. But the Framers did not use that phrase.

Also, the Framers could have used "criminal case" as they did in the Fifth Amendment if they wanted the right to attach before indictment. *See* U.S. Const. amend. V ("No person ... shall be compelled in any criminal case to be a witness against himself"). In fact, the Court has held that the Fifth Amendment right not to be compelled "in any criminal case" could be invoked before indictment. *Counselman v. Hitchcock,* 142 U.S. 547 (1892). In *Counselman*, the Court rejected the argument that there could be no "criminal case" prior to indictment, reasoning that a "criminal case" is broader than a "criminal prosecution." *Id*. at 563.

Here, the Court should follow the text and history of the Sixth Amendment and hold that that the right to counsel attaches only at or after the actual initiation of formal judicial proceedings. If the Framers had used either "criminal case" or "criminal proceeding" in the Sixth Amendment,

such words would have possibly triggered the right before indictment or arraignment. Instead, they chose the self-limiting phrase "criminal prosecution." That phrase's historical and plain meaning cleanly cabins the initiation of a prosecution to a formal charging document, like an indictment.

3. This Court should follow the nine-circuit majority and hold that the right to counsel attaches only at one of the five stages enumerated in *Kirby*

Nine circuits have held that the Sixth Amendment right to counsel attaches only upon the initiation of adversarial judicial criminal proceedings by way of formal charge, preliminary hearing, indictment, information, or arraignment. The Ninth Circuit delt with a strikingly similar case. *See United States v. Hayes*, 231 F.3d 663 (9th Cir. 2000), *cert. denied*, 532 U.S. 935 (2001). In *Hayes*, law enforcement investigated two professors (the defendant and an accomplice) for fraudulently selling passing grades to foreign students. *Id.* at 668. The accomplice began cooperating with the government and agreed to record a conversation he had with the defendant, who incriminated himself. *Id.* The defendant had not been indicted or arraigned. *Id.* Yet, per 18 U.S.C. § 3144, the district court had permitted the government to depose four foreign student-witnesses who were leaving the country. *Id.*

The Ninth Circuit en banc held that the right to counsel had not attached. *Id.* at 673. The circuit interpreted this Court's precedent as establishing a "bright line test" that the right to counsel attaches only at or after one of the five stages enumerated in *Kirby*. *Id.* at 672–73. The circuit stated, "we believe the Supreme Court meant what it said in *Ash,* that *Kirby* 'forecloses application of the Sixth Amendment to events before the initiation of adversary criminal proceedings.'" *Id.* at 673–74 (citing *United States v. Ash,* 413 U.S. 300, 303 n.3 (1973)).

Seven other circuits have held similarly—that the Court's precedent "clearly instructs" that the Sixth amendment right does not attach until one of the five stages enumerated in *Kirby*. *United States v. Montgomery*, 262 F.3d 233, 246 (4th Cir. 2001); *see United States v. Mapp*, 170 F.3d

328, 334 (2d Cir. 1999); *United States v. Heinz*, 983 F.2d 609, 612–13 (5th Cir. 1993); *United States v. Moody,* 206 F.3d 609 (6th Cir.2000), *cert. denied,* 531 U.S. 925 (2000); *United States v. Waits*, 919 F.3d 1090, 1094 (8th Cir. 2019); *United States v. Calhoun*, 796 F.3d 1251, 1254 (10th Cir. 2015); *Rogala v. D.C.,* 161 F.3d 44, 55 (D.C. Cir. 1998). In this case, the Fourteenth Circuit joined the majority of circuits, becoming the ninth circuit to join. (R. 58–59).

Only three circuits have clearly held that the Sixth Amendment right can be triggered before *Kirby*'s five enumerated stages—with these circuits focusing on the shift from investigatory to accusatory. The Third Circuit has held that the right may attach "when the accused is confronted, just as at trial, by the procedural system, or by his expert adversary," such that "the confrontation might well settle the accused's fate." *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892 (3d Cir. 1999). The Seventh and Eleventh Circuits have held that the Sixth Amendment right is triggered when "the government's role shifts from investigation to accusation" and the state becomes aligned against or focused on a singular person. *U.S. ex rel. Hall v. Lane*, 804 F.2d 79, 81–82 (7th Cir. 1986); *DeAngelo v. Wainwright*, 781 F.2d 1516, 1519 (11th Cir. 1986) (citing *Escobedo*, 378 U.S. at 485).

Here, the Court should follow the nine-circuit majority rule and hold that the Sixth Amendment right to counsel attaches only at or after one of the five stages enumerated in *Kirby*. This bright line test has not only been straightforward to apply by lower courts but is the only coherent rule to apply in the right-to-counsel context. The deficient tests outlined by the three minority circuits illustrate this.

The Third, Seventh, and Eleventh Circuits' standards are unworkable. These circuits focus on the "accusatory" nature of law enforcement's conduct—that once law enforcement have focused in on one suspect, the right to counsel is seemingly triggered. This is an unworkable

standard for at least two reasons. First, investigations often and quickly become centered around a singular suspect, as was the case in both *Moran* and *Gouveia*, *see supra*. This rule would essentially halt the investigative process anytime police have narrowed their suspects to a singular person—even in situations where there is insufficient evidence to establish probable cause. Second, an amorphous standard that focuses on the "accusatory" nature of the process leaves law enforcement and courts with little guidance on when the right to counsel actually attaches. This frustrates the Constitution's purpose of constraining government power—because law enforcement cannot conform their conduct to an unclear, mushy constitutional standard.

A focus on the "accusatory" nature of law enforcement's conduct does not square with the text of the Sixth Amendment. The Sixth Amendment does not merely say that "the accused shall enjoy the right" to counsel but imposes a further limitation—the existence of a "criminal prosecution." By focusing purely on the "accusatory" nature of the proceeding, a court is focusing on one of the Sixth Amendment's triggers, the "accused," to the disregard of the second trigger, a "criminal prosecution." The Court should reject these standards.

A bright line standard is consistent with this Court's precedent and with the text and history of the Sixth Amendment. Accordingly, this Court should follow the nine-circuit majority and hold that the Sixth Amendment right to counsel attaches only at or after one of the five stages enumerated in *Kirby*. Thus, the right to counsel had not attached when defendant incriminated himself during the undercover operation—before indictment or arrest.

B. Even if the Court were not to establish a bright line rule, this Court should hold that the Sixth Amendment right to counsel still had not attached because law enforcement were still in the investigative stage during the undercover operation

If this Court holds that the right to counsel can be triggered before indictment or arraignment, this Court's precedent still forecloses the right to counsel attaching in this case

because the FBI were still in the investigative stage during the undercover operation. To illustrate this, it is required to put a little more meat to the facts of *Gouveia*.

In *Gouveia*, an inmate was found stabbed to death in a prison, and the prison officials promptly began investigating. *Gouveia*, 467 U.S. at 182–83. This Court observed that: "Prison officials *immediately* suspected [the defendants] and placed them in the Administrative Detention." *Id.* at 183 (emphasis added). The defendants remained in the detention unit for 19 months without appointed counsel while the FBI and the prison officials continued to investigate them without formally indicting them. *Id.* This Court held that the Sixth Amendment right to counsel had not attached at any point during the 19-month investigation. *Id.* at 192–93.

Here, this Court should hold that the right to counsel had not attached because law enforcement were still in the investigative stage when the defendant made non-custodial, preindictment statements. The facts here are significantly less accusatory and adversarial than in *Gouveia*. There, law enforcement "immediately suspected" the defendants and placed them in administrative cells for 19 months. While, here, the defendant was investigated for four to five months, and it was not until the day before the undercover operation that some FBI agents felt that they even had enough to arrest the defendant. The defendant was never brought in for formal questioning but remained in his home and tavern at all moments that law enforcement engaged with him.

There is no evidence of an attempt by the FBI to vitiate the defendant's right to counsel by deliberately delaying commencement of adversary proceedings. Rather, the FBI continued in their factfinding role and proceeded with an already-planned undercover operation. The FBI remained firmly in their investigative role during the undercover operation.

Deposing a witness does not transform an investigation into a "criminal prosecution." At that point in the investigation, law enforcement did not know if there was going to be a trial or if the deposition testimony would even be relevant to a criminal case. The deposition was taken out of investigative necessity—to preserve evidence from a witness leaving the country.

This Court should follow *Gouveia* and hold that the defendant's right to counsel still had not attached because law enforcement were still in the investigative stage when the defendant made non-custodial, preindictment statements. The Court should thus affirm the Fourteenth Circuit.

III. This Court should hold that the district court properly excluded hearsay evidence because the government did not have a similar motive to develop grand jury testimony as it would have had at trial

This Court should affirm the Fourteenth Circuit's exclusion of Washington's grand jury testimony because Federal Rule of Evidence 804(b)(1)'s "similar motive" requirement was not satisfied. On appeal, this Court reviews questions of law *de novo*, but a district court's factual findings for clear error. *Cooper v. Harris*, 581 U.S. 285, 298 (2017); *Highmark Inc. v. Allcare Health Management System, Inc.*, 572 U.S. 559, 563 (2014).

Hearsay, an out-of-court statement offered for the truth of the matter asserted, is inadmissible at trial unless a prescribed exception applies. Fed. R. Evid. 801, 802. The rule against hearsay, and its limited exceptions, exist to ensure that only reliable statements are admitted at trial. *See Idaho v. Wright*, 497 U.S. 805, 817 (1990) (indicating that hearsay not falling within a "firmly rooted hearsay exception" is "presumptively" unreliable).

Rule 804(b)(1) is a narrow hearsay exception. The condition precedent of this exception is that the witness is unavailable to testify. Fed. R. Evid. 804(b)(1). After that is established, the Rule first requires that the unavailable witness has previously given the testimony at a trial, hearing, or lawful deposition. *Id.* Courts have recognized that testimony given at grand jury hearings can satisfy the Rule's first element. *See, e.g.*, *United States v. Salerno*, 505 U.S. 317, 321 (1992).

The Rule then requires that the opposing party had both the opportunity and the *similar motive to develop* the previously given testimony by either direct, cross, or redirect examination. *Id.* (emphasis added). This Court has explicitly stated that courts cannot alter evidentiary requirements but "must enforce the words [Congress] enacted." *United States v. Salerno*, 505 U.S. at 321. Thus, the Rule's "similar motive to develop" requirement must always be satisfied. *Id.*

Here, it is uncontested that Washington was unavailable as a witness and that her grand jury testimony qualifies as a prior proceeding. Still, her grand jury testimony was properly excluded because the government did not have the "similar motive to develop" her testimony when questioning her at the grand jury as it would at trial. Since *Salerno*, circuit courts have advanced different tests for determining the "similar motive" requirement. The present case calls for this Court to resolve that circuit split. This Court should adopt the fact-specific approach adopted by the First, Second, and Fourteenth Circuits as it is the approach most consistent with *Salerno* and with the policy fastening the rules on hearsay. In applying this fact-specific approach, this Court should hold that the district court property excluded Washington's grand jury testimony.

A. This Court should adopt the "fact-specific" approach to the similar motive requirement because such an approach is consistent with *Salerno* and with the reliability policy underlying the hearsay rules

"[T]he similar motive inquiry. . . is inherently a *factual* inquiry, depending in part on the similarity of the underlying issues and on the context of the grand jury questioning." *Salerno*, 505 U.S. at 326 (Blackmun, J. concurring) (emphasis in original). Since *Salerno*, the circuits have divided on the proper analysis for determining the "similar motive" requirement.

Some circuits view motive similarity as a fact-specific inquiry that turns on whether the questioner had a "substantially similar interest in asserting [the same] side of the issue in both proceedings." *United States v. DiNapoli*, 8 F.3d 909, 912 (2d. 1993); *accord United States v. Omar*, 104 F.3d 519, 523 (1st Cir. 1997) (applying a similar fact-specific test). The Fourteenth

Circuit in this case joined those circuits and adopted the "fact-specific" standard. (R. 60). Other circuits have declined to engage in deep factual analysis but instead focus on one question: was the testimony directed at the guilt or innocence of the defendant. *See United States v. Miller*, 904 F.2d 65, 68 (D.C. Cir. 1990); *accord United States v. McFall*, 558 F.3d 951, 963 (9th Cir. 2009).

The First and Second Circuits posit that the "similar motive" requirement is not simply met by the fact that the questioner takes the same side of the same issue. *DiNapoli*, 8 F.3d at 912. The First and Second Circuits find that the motive merely *to question* a witness is not the same as a motive to *develop* that witness's testimony through continued questioning. *See id.*

This does not mean a prosecutor's motive at a grand jury will never match with the motive at trial. *Id.* at 913–914. Nor should it mean they are always similar as some circuits have suggested. *See, e.g.*, *Miller*, 904 F.2d at 68 (holding that an unavailable witnesses' grand jury testimony was admissible at trial because in both proceedings their testimony was to be directed to the same issue: the defendant's guilt or innocence). In fact, it would be impossible for the prosecution to always or never possess a similar motive for questioning a particular witness about a particular topic. *See DiNapoli*, 8 F.3d at 913–14. The First Circuit has gone further and applied the fact-specific test to the specific portion of the testimony at issue, because "there might be a motive to develop some testimony of a witness but not other parts." *Omar*, 104 F.3d at 523.

Here, this Court should adopt the First, Second, and Fourteenth Circuits' fact-specific approach because it is more consistent with *Salerno* and with the reliability policy underlying the rules on hearsay. First, this Court in *Salerno* made clear that the text of the rule is the starting point for any evidentiary determination. The text of Rule 804 does not require a similar motive *to question* but a similar motive *to develop*. Unlike the DC Circuit's approach, the Second and First Circuits' approach appreciates and accounts for this textual distinction. The only way to determine

if a party had a similar motive *to develop* a witness's testimony is to do a deep factual analysis, determining whether the questioner had an interest in scrutinizing or examining a witness's particular testimony on a particular issue. Thus, the "similar motive" test should turn on whether the party had a substantially similar interest in *prevailing* on a specific issue at both proceedings.

The First and Second Circuits' approach also aligns with the policy of reliability that fastens the rules on hearsay. Hearsay is generally banned because out-of-court statements are easy to manufacture and manipulate to a specific side's benefit. Rule 804(b)(1) ensures a statement's reliability by requiring that the opposing side has the opportunity to question, scrutinize, and even discredit prior testimony. However, if the opposing side in a prior proceeding did not have any incentive or motive to actually question, scrutinize, or discredit that testimony, then the reliability of the statement collapses. Thus, it is incumbent on courts to determine on a case-by-case basis whether a prosecutor had a similar motive to develop the offered grand jury testimony. This case-by-case analysis serves as a filter separating the unreliable, self-serving statements from the sufficiently reliable ones.

Thus, in line with *Salerno* and the reliability policy fastening the ban on hearsay, this Court should hold that a determination of "similar motive" involving grand jury testimony should be situation-dependent and based on the specific facts surrounding the offered testimony.

B. The lower court's exclusion of Washington's testimony was proper because the government did not have a similar motive to develop her grand jury testimony as it would have had at trial

When proceedings have dissimilar contexts and purposes, the motive to develop testimony may also be dissimilar. *DiNapoli*, 8 F.3dd at 913. At a criminal trial, the prosecutor's stakes are high because the defendant's guilt must be proved beyond a reasonable doubt. *Id.* This may lead prosecutors to undermine exonerating testimony with intensity. *See id.* at 914. Conversely, grand jury proceedings are investigatory and meant to acquire a wide-ranging set of facts. *See id.* In grand

juries, "the government neither aims to discredit the witness nor to vouch for him," but may want to secure just a small piece of evidence as part of an ongoing investigation. *Omar*, 104 F.3d at 523.

Further, the standard of proof needed to indict at the grand jury stage is one of the lowest in the legal system: probable cause. *See DiNapoli*, 8 F.3dd at 914. Probable cause may have already been established by the time the exonerating testimony is given, leaving "the prosecutor with slight if any motive *to develop* the exonerating testimony [through further questioning] in order to persuade the grand jurors of its falsity." *Id.* (emphasis added). This is true even if the prosecutor shows skepticism when listening to a witness's answers. *Id.* "[D]iscrediting 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." *Omar*, 104 F.3d at 523.

In rejecting the admittance of grand jury testimony under Rule 804(b)(1), the First Circuit stated that "it is likely to be very difficult for defendants offering grand jury testimony to satisfy the 'opportunity and similar motive' test." *Id.* In fact, this is probably why some circuits have outright held that the rule should never apply to grand jury testimony. *E.g., United States v. Dent,* 984 F.2d 1453, 1462 (7th Cir.), *cert. denied,* 510 U.S. 858 (1993).

In *DiNapoli*, several organized crime figures were involved in a construction bid-rigging scheme. *DiNapoli*, 8 F.3dd at 910. During one of the grand jury proceedings, two witnesses associated with the construction companies testified. *Id.* at 911. Both denied awareness of the scheme. *Id.* The prosecutor, skeptical of the denials, pressed the witnesses with a few questions, but for strategic reasons did not fully confront them with contradicting evidence. *Id.* at 915.

The district court at trial excluded their grand jury testimony because the State did not have similar motives in both proceedings as required by Rule 804(b)(1). *Id.* The Second Circuit agreed, noting that if a fact is critical to a cause of action in the second proceeding, but the same fact was

only peripherally related in the first proceeding, then the questioner would not have a similar motive at both proceedings. *Id.* The circuit court also noted that the prosecutor had "no interest" in showing the testimony's falsity because the grand jury "had already been persuaded, at least by the low standard of probable cause," that the defendants had committed the crimes. *Id.* at 915. Also, the prosecutor did not want to disclose the identity of cooperating witnesses or the existence of wiretapped conversations, which would have been required to impeach the testimony. *Id.* The circuit court held that the questioner must have a "substantially similar degree of interest in prevailing on that issue" or developing it with "substantially similar intensity." *Id.* at 11, 14.

Here, this Court should hold that the government did not have a "similar motive" to develop Washington's grand jury testimony for three reasons. First, considering the minimal burden of proof, the government had little to no incentive to discredit Washington's testimony during the grand jury. As in *DiNapoli*, the government here presented significant evidence to the grand jury implicating the defendant. The included evidence was from the defendant's apartment and storage locker, which was a duffle bag containing $2.5 million dollars in cash and a thumb drive with the gambling operation's ledgers. The grand jury had the transcript from Hoag-Fordjour's deposition in which he stated he knew Roulette and the defendant were associated with Gourmet Grocers. Finally, the government also presented testimony from Agents Sayed and Simonson.

In the face of this overwhelming evidence against the defendant, and such a minimal burden of proof, the government had slight if any reason to develop Washington's testimony to the extent it would have had at trial. Even though the prosecutor reminded Washington of the consequences of perjury, and asked her a few follow-up questions, there was no need to undermine or discredit her testimony. The grand jurors did not need to be persuaded by its falsity. The defendant would have been indicted regardless under such a low burden of proof.

Second, Washington's testimony was needed to establish a limited piece of evidence—the existence of the illegal gambling and money laundering enterprise at the tavern. Her testimony was not used to connect the defendant to that enterprise—other witnesses and evidence accomplished that. Accordingly, the government had no interest in scrutinizing the witness's assertion that the defendant was not involved in the gambling enterprise, because her testimony was not necessary for that purpose.

Third, like in *DiNapoli*, this case involves complex, multi-player criminal syndicates. The prosecution would have had to reveal its trial strategy by discrediting Washington's testimony with other witnesses and evidence. It could have also led to additional participants, whose identities would have been revealed, fleeing the country, as Roulette ultimately did after her arrest. The government had certain concerns in mind during the preliminary grand jury stage. Such concerns would not have weighed on the government in the final trial stage.

Because of these three considerations, this Court should hold that the government did not have a "similar motive" to develop Washington's offered grand jury testimony. Thus, this Court should affirm the Fourteenth Circuit because the testimony was properly excluded.

CONCLUSION

The Fourteenth Circuit appropriately ruled in this case by looking to and applying this Court's precedent as well as the mandates of the Constitution and the Federal Rules of Evidence. This Court should thus affirm the Fourteenth Circuit and hold that the FBI did not conduct an unreasonable search, that the FBI did not violate the defendant's right to counsel, and that the district court properly excluded hearsay testimony.