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COCONSPIRATOR STATEMENTS AND FORMER TESTIMONY IN NEW YORK AND FEDERAL COURTS WITH SOME COMMENTS ON CODIFICATION

Hon. George C. Pratt:

We move on at this point. Our next speaker is Professor Randolph Jonakait of New York Law School. His subject is the admissibility of coconspirator statements under New York and federal law. Federal law, I think he will tell you very soon, says they all come in. I suspect New York is more restrictive, but let's see.

Professor Randolph N. Jonakait:*

Thank you, Judge. It is unusual to be introduced by a judge. Usually, when I speak in the presence of judges they are saying, I have heard enough counselor, sit down.

Hon. George C. Pratt:

That comes later.

Professor Randolph N. Jonakait:

I. CODIFICATION

Before I get into my scheduled topic, I wish to comment briefly about evidentiary codification since that seems to be an emerging focus today. I have been identified as an opponent of the codification of New York's evidence law.¹ That is somewhat

* Professor Randolph N. Jonakait is a Professor at New York Law School.

1. Or at least Professor Salken has so identified me. See Barbara C. Salken, *To Codify or Not to Codify-That is the Question: A Study of New*

misleading. I did oppose the draft rules promulgated in the early eighties, but not simply because there was an attempt to codify. I did not like that particular proposed code. That draft closely followed the Federal Rules of Evidence. Much is wrong, I believe, with the Rules and how they have been interpreted.² I do not believe that the Federal Rules of Evidence should be the unbending model for New York.

The more recent draft, however, is different. It really is an attempt to codify New York law and gives more opportunity for future growth in evidence law.³ Many of my reasons for opposition have melted away.

Still, I believe that the benefits of codification are usually overstated. Seldom does a code truly give an answer to an important evidence issue. For example, a code can define hearsay, but I doubt that any of us can truly understand hearsay just from reading that definition. Instead, almost all of us need to go far beyond that definition, and we end up reading the same cases, treatises, and articles that we would read if no code existed.⁴ Perhaps we can never expect definitive answers to important evidentiary questions in any one place, but useful answers are more likely to be found in case law than in a code.

York's Efforts to Enact an Evidence Code, 58 BROOK. L. REV. 641, 696 n.332 (1992) (stating that "Jonakait . . . [is] a long time opponent of codification").

2. Some of my concerns are expressed in Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 TEX. L. REV. 745 (1990).

3. See, e.g., THE NEW YORK STATE LAW REVISION COMMISSION, A CODE OF EVIDENCE FOR THE STATE OF NEW YORK § 102 (1991). The proposed rule states in pertinent part:

This chapter shall not be construed to have changed settled decisional law or statutory principles of evidence unless there is an express and unequivocal indication of legislative intent to do so. That intent is not to be found simply because a provision of this chapter is phrased in language that is different from settled decisional law or statutes.

Id.

4. This is true not just for the hearsay definition, but for most of the evidentiary rules that are at the core of important disputes. Thus, while other crime evidence is highly litigated, the language of the applicable federal provision, Federal Rules of Evidence 404(b), does not give definitive answers to specific disputes.

A few words in defense of the New York Court of Appeals also seem in order. It is true that the court of appeals has not reformed some archaic evidentiary principles that a code would change. On the other hand, New York's highest court has produced path-breaking evidentiary decisions. Two brilliant examples quickly come to mind: *People v. Taylor*,⁵ which considers the admissibility of rape trauma syndrome evidence and *People v. Hughes*,⁶ which considers the admissibility of hypnotically-enhanced testimony. Both of these decisions have been widely discussed and followed in other jurisdictions.⁷ Perhaps, more to the point here is that if New York had adopted the proposed code based on the Federal Rules of Evidence when it was promulgated and interpreted it as the Supreme Court has interpreted the federal rules, then the New York Court of Appeals could not have decided *Hughes* as it did, and perhaps not *Taylor* either. A code can bring advances, but a code can also impede progress.

II. COCONSPIRATOR STATEMENTS

What I did come more prepared to speak about today, however, was two hearsay exceptions, how they differ between

5. 75 N.Y.2d 277, 552 N.E.2d 131, 552 N.Y.S.2d 883 (1990).

6. 59 N.Y.2d 523, 453 N.E.2d 484, 466 N.Y.S.2d 255 (1983).

7. See, e.g., *Harker v. Maryland*, 800 F.2d 437, 445 (4th Cir. 1986) (citing *People v. Hughes* as standing for proposition that hypnotically-enhanced testimony is inadmissible due to the fact that it is unreliable and damaging to the fact-finding process); *Clay v. Vose*, 599 F. Supp. 1505, 1518 (D. Mass. 1984) (suggesting that *People v. Hughes* provides the prevailing view that "[a] person under hypnosis is extremely susceptible to the suggestions he perceives are emanating from the hypnotist and thus such testimony from that person is unreliable"); *State v. Martens*, 629 N.E.2d 462, 467 (Ohio Ct. App. 1993) (finding the New York Court of Appeals decision in *People v. Taylor* to be persuasive with regard to the admissibility of expert testimony on rape trauma syndrome to explain the victim's reaction after the incident).

the courts of New York and the Second Circuit, and some of their interplay with the Sixth Amendment right of confrontation.⁸

Coconspirator statements are admissible in federal court when a defendant's coconspirator makes a statement during the conspiracy and in furtherance of it.⁹ The Supreme Court has held that an anti-bootstrapping provision cannot be read into this provision.¹⁰ Thus, in deciding whether a conspiracy existed and whether the declarant and the accused were members of it, the trial judge can consider the proffered statement itself.¹¹

While New York admits coconspirator statements when made during and in furtherance of a conspiracy, New York clearly differs from federal law by prohibiting bootstrapping. As the New York Court of Appeals has recently affirmed, a trial court cannot consider the challenged out-of-court statement in determining whether a conspiracy existed.¹²

New York diverges even further away from the federal coconspirator doctrine.¹³ In *People v. Sanders*,¹⁴ the New York Court of Appeals held that even though declarations of one coconspirator made in the course of and in furtherance of a

8. I have explored differences between New York and federal evidence law more comprehensively in RANDOLPH N. JONAKAIT ET AL., NEW YORK EVIDENTIARY FOUNDATIONS (1993 & Supp. 1994).

9. FED. R. EVID. 801(d)(2)(E). The rule provides: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." *Id.*

10. *See* *Bourjaily v. United States*, 483 U.S. 171, 181 (1987) (ruling that in accordance with the Federal Rules of Evidence, "a court, in making a preliminary factual determination under Rule 801(d)(2)(E), may examine the hearsay statements sought to be admitted").

11. *Id.*

12. *See* *People v. Bac Tran*, 80 N.Y.2d 170, 179, 603 N.E.2d 950, 955, 589 N.Y.S.2d 845, 850 (1992) (affirming that "the determination whether a prima facie case of conspiracy has been established must be made without recourse to the declarations sought to be introduced"); *see also* *People v. Salko*, 47 N.Y.2d 230, 391 N.E.2d 976, 417 N.Y.S.2d 894 (1979).

13. The following discussion about the New York coconspirator exception is largely drawn from the 1994 cumulative supplement to JONAKAIT ET AL., *supra* note 8, at 41-44.

14. 56 N.Y.2d 51, 436 N.E.2d 480, 451 N.Y.S.2d 30 (1982).

conspiracy may be admissible against all other coconspirators as an exception to the general rule against hearsay, the confrontation guarantee of the Sixth Amendment of the Federal Constitution¹⁵ and Article I, Section 6 of the New York Constitution¹⁶ may require additional elements before coconspirator statements can be admitted against a criminal defendant.¹⁷

The court relied on *Ohio v. Roberts*,¹⁸ which held that hearsay from a person not testifying at trial could be admitted into a criminal case, consistently with the Sixth Amendment's Confrontation Clause, only if the declarant was unavailable and the hearsay either fell into a well-established hearsay exception or otherwise had particularized guarantees of trustworthiness.¹⁹ *Sanders*, after referring to *Roberts*, stated:

Although the coconspirators' exception has been part of the settled law of this State for quite some time . . . we need not and do not adopt in this case a rule by which every extrajudicial statement qualifying under this exception to the hearsay rule is admissible at a criminal trial notwithstanding the constitutional right of confrontation.²⁰

Without specifically defining what limitations the confrontation guarantee does place on coconspirator statements in New York, the New York Court of Appeals held that the disputed hearsay at issue was properly admitted since the declarant was unavailable and the hearsay had appropriate indicia of reliability.²¹

15. U.S. CONST. amend. VI. The Confrontation Clause provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" *Id.*

16. N.Y. CONST. art. I, § 6. The provision states: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature of the cause of the accusation and be confronted with the witnesses against him." *Id.*

17. *Sanders*, 56 N.Y.2d at 64, 436 N.E.2d at 486, 451 N.Y.S.2d at 36.

18. 448 U.S. 56 (1980).

19. *Id.* at 66.

20. *Sanders*, 56 N.Y.2d at 64, 436 N.E.2d at 486, 451 N.Y.S.2d at 36.

21. *Id.* at 65, 436 N.E.2d at 487, 451 N.Y.S.2d at 37.

Two subsequent Supreme Court decisions cast doubt upon the force of *Sanders*. In *United States v. Inadi*²² the Supreme Court limited *Ohio v. Roberts*, holding that the unavailability of a non-testifying coconspirator need not be shown in order to admit coconspirator declarations.²³ *Bourjaily v. United States*²⁴ held that since coconspirator hearsay statements fall within a firmly established hearsay exception, a particularized showing of trustworthiness for coconspirator statements is not constitutionally required.²⁵ In other words, the Supreme Court has held that the framework of *Roberts*, relied upon by *Sanders*, does not apply to coconspirator statements.²⁶

Since the Federal Confrontation Clause now permits the admission of coconspirator statements without a showing of unavailability or a particularized showing of trustworthiness and since *Sanders* stated that no reasons had been advanced "which would cause us to recognize a state constitutional right of confrontation broader than the Sixth Amendment guarantee as interpreted by the Supreme Court,"²⁷ it might seem that the state confrontation clause does not require a showing of unavailability and particularized guarantees of trustworthiness. Even so, there are some indications that the state provision does place those particular restrictions on the admission of coconspirator statements. Thus, even after *Inadi* and *Bourjaily*, the New York Court of Appeals has still cited *Sanders* favorably in considering the constitutional standards for admitting hearsay other than coconspirator statements.²⁸

22. 475 U.S. 387 (1986).

23. *Id.* at 392-94 (explaining that *Roberts* "applies unavailability analysis to prior testimony . . . [and] cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable").

24. 483 U.S. 171 (1987).

25. *Id.* at 182.

26. *Id.*

27. *Sanders*, 56 N.Y.2d at 64-65, 436 N.E.2d at 486, 451 N.Y.S.2d at 36.

28. *See* *People v. Ayala*, 75 N.Y.2d 422, 432, 553 N.E.2d 960, 964, 554 N.Y.S.2d 412, 416 (1990) (finding a constitutional violation because admitted hearsay will not have the required indicia of reliability nor had unavailability been shown).

Furthermore, in a well thought-out opinion, the Appellate Division, First Department in *People v. Persico*,²⁹ concluded that the state constitution does place burdens on the admission of coconspirator statements that the federal constitution does not.³⁰ *Persico* first noted that the New York Court of Appeals has not repudiated *Sanders*.³¹ The court then concluded that “the co-conspirator exception to the hearsay rule rests upon the shakiest of theoretical foundations”³² and often admits unreliable hearsay.³³ *Persico* went on to hold that if the coconspirator declarant were available, the declarant must be produced for the statements to be admitted.³⁴ If the declarant is unavailable, coconspirator statements can only be admitted if they are first shown to be reliable.³⁵

Until the New York Court of Appeals reconsiders the questions raised in *Sanders*, the foundation necessary for the admission of coconspirator statements in New York remains unclear. A number of recent cases, however, have held that it was error for such hearsay to be admitted without a showing of unavailability or reliability.³⁶ Thus, the proponent of coconspirator hearsay in a New York state trial, in addition to establishing the requirements for a coconspirator statement under the Federal Rules of Evidence, that is, that the statement was made during and in furtherance of the conspiracy, would be safer producing the

29. 157 A.D.2d 339, 556 N.Y.S.2d 262 (1st Dep’t 1990).

30. *Id.* at 345, 556 N.Y.S.2d at 266.

31. *Id.*

32. *Id.* at 347, 556 N.Y.S.2d at 268.

33. *Id.* at 346, 556 N.Y.S.2d at 267.

34. *Id.* at 349, 556 N.Y.S.2d at 269.

35. *Id.*

36. *See, e.g.,* *People v. Porter*, 179 A.D.2d 1018, 580 N.Y.S.2d 117 (4th Dep’t 1992) (stating that the trial court erred in admitting the statement of a coconspirator when neither the reliability nor unavailability had been established); *People v. Warren*, 156 A.D.2d 972, 549 N.Y.S.2d 263 (4th Dep’t 1989) (stating that the court must decide whether the declarants are unavailable and whether the statements bear some indicia of reliability sufficient to justify admissibility).

coconspirator declarant or showing that the declarant is not available.

Furthermore, if the declarant is unavailable, the proponent should show that the hearsay, in addition to satisfying the elements of the coconspirator exception, also has special indicia of reliability. What the appropriate indicia are, however, is not clear. In *Sanders*, the New York Court of Appeals, in holding that the particular coconspirator hearsay before it had the necessary indicators of trustworthiness, listed five factors:

[The coconspirator] Brown's conversations with Goldberg were memorialized on tape. As a result, there was no question at trial that he actually uttered the statements in issue. Second, Brown had personal knowledge concerning the matters about which he spoke, and there is no possibility that his statements were based on faulty recollection. Third, at the time these statements were made, Brown had no motive to lie since he believed that he was speaking in confidence to a cohort engaged in a joint criminal enterprise Fourth, Brown's statements were independently corroborated, to some extent, by defendant's conversations with Goldberg, as well as by the events that [subsequently] transpired Finally, the fact that these extrajudicial statements directly implicated Brown in a joint criminal enterprise provides additional assurance of their trustworthiness.³⁷

Another subsequent United States Supreme Court case, however, casts into doubt whether all these factors can be used to support a showing of the necessary indicia of reliability. In *Idaho v. Wright*,³⁸ the Supreme Court reaffirmed that the Sixth Amendment's Confrontation Clause requires that hearsay, not falling within a firmly established hearsay exception, must have particularized guarantees of trustworthiness in order for it to be admitted against a criminal defendant.³⁹ The Court went on to conclude that the particularized guarantees of trustworthiness must

37. *Sanders*, 56 N.Y.2d at 65, 436 N.E.2d at 486, 451 N.Y.S.2d at 36. (citations omitted).

38. 497 U.S. 805 (1990).

39. *Id.* at 815.

be drawn from the totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief Thus, unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement.⁴⁰

The Court specifically held that corroboration could not be used to show that the hearsay had the necessary indicators of trustworthiness.⁴¹ *Sanders*, on the other hand, relied on corroboration as one of the factors that showed the hearsay was trustworthy.⁴² Furthermore, *Sanders* relied on the fact that the hearsay had been taped.⁴³ While that tends to show that the hearsay is accurately reported to the jury, it does not show that the hearsay is trustworthy and would not support admission under *Wright*.

Once again, until the New York Court of Appeals returns to the issues raised in *Sanders*, it is unclear what factors will satisfy a state-imposed indicia of reliability test for coconspirator statements if, indeed, the New York Constitution does impose such a requirement. Since it is unclear whether corroboration and taping are still indicia of reliability, the proponent of a coconspirator declaration should not rely on them to establish the necessary reliability. Instead, the proponent ought to show that the circumstances under which that particular out-of-court statement was made indicate that the statement was likely to be trustworthy. As *Sanders* indicates, the proponent may satisfy that burden by showing circumstances demonstrating that the particular declarant would not have had a faulty memory or perception and was unlikely to be lying.⁴⁴ Beyond that general

40. *Id.* at 820-21.

41. *Id.* at 823.

42. *Sanders*, 56 N.Y.2d at 65, 436 N.E.2d at 486, 451 N.Y.S.2d at 36.

43. *Id.*

44. *Id.*

conclusion, however, New York cases do not provide guidance on how that burden might be satisfied.

There is another distinction between coconspirator statements in New York and federal courts, and that is their relative use. Federal courts see them much more often than the state courts do.⁴⁵ This may be because conspiracy counts are included more often in federal indictments than in state ones, but attorneys should remember that conspiracy does not have to be charged for coconspirator statements to be used.⁴⁶ Indeed, this hearsay is admissible in civil as well as criminal cases.⁴⁷

Finally, it is noteworthy that both New York and the federal system admit coconspirator statements and reform efforts have not seriously sought to get rid of this doctrine. A convincing argument for the reliability of this hearsay has not been concocted. It was not even attempted for the Federal Rules of

45. See, e.g., U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 1992 485 (Kathleen Maguire et al. eds., 1993) (indicating that between 1980 and 1990, the crime of conspiracy was in a group of offenses that constituted between 36% and 67% of the total criminal matters prosecuted in U.S. District Courts); Paul Marcus, *Defending Conspiracy Cases: Mission Impossible?*, 16 TRIAL, Oct. 1980, at 61 (suggesting that severe problems persist in defending conspiracy cases, particularly in light of the frequency of the conspiracy charge at the federal level).

46. See *United States v. Durland*, 575 F.2d 1306, 1310 (10th Cir. 1978) (stating that "even though there is not a conspiracy charge, the [hearsay] evidence is admissible where existence of the conspiracy is independently established"); *United States v. Trowery*, 542 F.2d 623, 626 (3d Cir. 1976) (holding that "[t]he absence of a conspiracy count . . . is without legal significance in determining whether . . . [declarants' hearsay] statements were admissible against . . . [defendant]"); *United States v. Doulin*, 538 F.2d 466, 471 (2d Cir. 1976) (stating that the lack of a conspiracy charge in a case that involved admission of coconspirator hearsay statements "is of no import").

47. *Paul F. Newton & Co. v. Texas Commerce Bank*, 630 F.2d 1111, 1121 (5th Cir. 1980) (stating that although "the overwhelming majority of cases involving the admissibility of coconspirators' statements" involve criminal proceedings, "construction of the requirements of Rule 801 (d)(2)(E) was not based upon considerations unique to criminal actions"); *Securities and Exchange Commission v. Tome*, 638 F. Supp. 629, 633 (S.D.N.Y. 1986) ("Although the vast majority of cases discussing the coconspirator exclusion from the hearsay rule are criminal cases . . . it is clear that the rule is equally applicable to civil cases.").

Evidence.⁴⁸ One might expect, consequently, that codification reformers would be targeting this archaism for elimination. If there are such reform efforts, they have not generated much attention. Proposed evidence codes for New York have not suggested its abolition, and such elimination was never seriously considered in the Federal Rules.

The lack of reform efforts for coconspirator statements is even more striking when the biased nature of this doctrine is considered. Although this hearsay can be admitted in civil cases,

48. The drafters of the Federal Rules of Evidence did not justify the exemption of coconspirator statements from the hearsay prohibition on the grounds of reliability. "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. . . . No guarantee of trustworthiness is required in the case of an admission." FED. R. EVID. 801(d)(2) advisory committee's note. (citations omitted) (footnotes omitted). See David S. Davenport, *The Confrontation Clause and the Coconspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378, 1384 (1972) ("[T]he coconspirator exception has usually been supported by a variety of theories unrelated to the trustworthiness of the evidence itself."); see also Christopher B. Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 HOFSTRA L. REV. 323, 335 (1984) ("[M]odern commentators have suggested that the [coconspirator] exception exists largely because it is necessary as a means of convicting conspirators. Since conspiracies are dangerous to society and hard to prove at trial, a relaxation of the hearsay doctrine is required. Courts occasionally find something in this view.").

Sometimes an agency theory is suggested to support this hearsay, but the drafters of the Federal Rules of Evidence concluded that "the agency theory of conspiracy is at best a fiction" FED. R. EVID. 801(d)(2)(E) advisory committee's note; Note, *Federal Rule of Evidence 801(d)(2)(E) and the Confrontation Clause: Closing the Window of Admissibility for Coconspirator Hearsay*, 53 FORDHAM L. REV. 1291, 1296-98 (1985) This Note states that:

[A] fictional criminal agency theory is frequently used to justify [the] admissibility of alleged coconspirator's statements A more candid explanation for the coconspirator exception is that coconspirator statements are necessary tools for prosecuting conspiracies, which are inherently covert and therefore difficult to prove Trustworthiness problems with coconspirator statements . . . remain manifold.

Id.

it is most often used in criminal matters, and in criminal cases only one side can introduce this hearsay.

The coconspirator rule allows admissibility for a statement that "is offered against a party and is . . . a statement by a coconspirator *of a party* during the course and in furtherance of the conspiracy."⁴⁹ While a declarant could, of course, be a coconspirator of those working for the government, those government agents are not the party-opponent of the accused. The government is the party, and the government itself, as distinguished from its employee, cannot be a coconspirator. Thus, the declarant cannot be a coconspirator of the party-opponent of the criminal defendant. As a result, the defendant cannot introduce coconspirator admissions in a criminal case.⁵⁰

Perhaps, of course, it is the biased nature of this nonreliable hearsay that has assured its continuance. If similar declarations were admissible against the prosecutor, we might see a more meaningful attempt to reform this hearsay doctrine.

III. FORMER TESTIMONY

The recent Second Circuit decision, *United States v. DiNapoli*,⁵¹ raises many important issues including questions about the neutrality of the evidence rules, how immunity grants ought to be administered and used, and the power of the prosecutor to hide information from the jury. But in keeping with the themes here, I want to explore how it indicates that New York and the Second Circuit are diverging in the former testimony hearsay exception.

In *DiNapoli*, the United States Attorney, investigating a bid-rigging scheme in the Manhattan concrete construction industry, called before the grand jury two principals of a concrete construction corporation who others had identified as part of the

49. *Bourjaily*, 483 U.S. at 173.

50. Randolph N. Jonakait, *Biased Evidence Rules: A Framework for Judicial Analysis and Reform*, 67 UTAH L. REV. 87 (1992).

51. 8 F.3d 909 (2d Cir. 1993).

illegal scheme.⁵² Testifying before the grand jury, under a grant of immunity, the two denied knowledge of the scheme.⁵³

At trial, the defendants sought to call these two grand jury witnesses to present their exculpatory information.⁵⁴ The prosecutor, however, would not give them immunity for their trial testimony, and each, claiming a privilege against self-incrimination, would not testify.⁵⁵ The trial court then refused the defense motion to admit the grand jury testimony.⁵⁶

On appeal, the Second Circuit concluded that it did not have to decide whether the grand jury testimony was admissible as former testimony.⁵⁷ Whether or not the hearsay met the requisites of Federal Rule of Evidence 804(b)(1), the Second Circuit held it was admissible because the witnesses were available to the prosecution through a grant of immunity.⁵⁸

The Supreme Court, rejected this reasoning. The Court held that the grand jury testimony could be admitted only if the requirements of Rule 804(b)(1) were met.⁵⁹ The hearsay was not admissible simply because the prosecution could have made the declarants available with an immunity grant.⁶⁰ The Court remanded to the Second Circuit for a determination of whether the former testimony exception was satisfied.⁶¹

On remand, the Second Circuit held that the grand jury testimony fell within Rule 804(b)(1), and therefore it should have been admitted.⁶² This was not the end, however. In an unusual

52. *Id.* at 910-11.

53. *Id.* at 911.

54. *Id.*

55. *Id.*

56. *Id.*

57. *See* *United States v. Salerno*, 937 F.2d 797, 807 (2d Cir. 1991).

58. *Id.* at 806.

59. *United States v. Salerno*, 112 S. Ct. 2503, 2507 (1992).

60. *Id.*

61. *Id.* at 2509.

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

move, an en banc Second Circuit decided to hear the case and reversed the panel decision.⁶³

The en banc Second Circuit concluded that the grand jury testimony was not admissible, because the government's motive to develop the testimony at the grand jury was not "similar" to its motive to develop such testimony at the trial.⁶⁴ The similar motive requirement is not met, *DiNapoli* concluded, simply by showing that the party at the prior proceeding had the opportunity to develop the testimony and the issues at the two proceedings were substantially similar.⁶⁵ Instead, "[t]he proper approach . . . in assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding had, at a prior proceeding, an interest of similar intensity to prove (or disprove) the same side of a substantially similar issue."⁶⁶ Since the prosecution need only meet a probable cause burden at a grand jury proceeding, the prosecutor will not necessarily have the same motive in developing the testimony at the grand jury as at trial.⁶⁷ If probable cause is established from other sources, the prosecutor has little motivation to challenge the grand jury witness who presents exculpatory information.⁶⁸ This was true in the

63. *United States v. DiNapoli*, 8 F.3d 909, 915 (2d Cir. 1993) (en banc). Anthony Salerno, a convicted defendant, died during the pendency of the appeal.

64. *Id.* at 913-15. Under Rule 804(b)(1), former testimony is admissible if the declarant is unavailable and "the party against whom the testimony is now offered . . . had both an opportunity and a similar motive to cross-examine the witness." *Id.* at 910.

65. *Id.* at 912; cf. MCCORMICK ON EVIDENCE § 304, at 519 (John William Strong ed., 4th ed. 1992) (stating that "the courts look to the operative issue in the earlier proceeding, and if basically similar and if the opportunity to cross-examine was available, the prior testimony is admitted").

66. *DiNapoli*, 8 F.3d at 914-15.

67. *Id.* at 913.

68. *Id.* The court stated that:

At the grand jury, the prosecutor need establish only probable cause [B]y the time the exonerating testimony is given, such probable cause may have already been established to such an extent that there is no realistic likelihood that the grand jury will fail to indict. That circumstance alone will sometimes leave the prosecutor with slight if

DiNapoli grand jury, where the Second Circuit concluded that the motives of the prosecutor before the grand jury were not similar to the motives of the prosecutor at trial.⁶⁹ Therefore, the similar motive requirement of the former testimony hearsay exception had not been met, and thus, the hearsay was not admissible.⁷⁰

Interestingly, criminal defendants have made the same argument when claiming that the admission of testimony from preliminary hearings at trials violates the Sixth Amendment's Confrontation Clause.⁷¹ In essence, the defendant's arguments have been that because a defendant does not have the same motive to challenge witnesses at a preliminary hearing to determine probable cause, testimony from that preliminary hearing should not be constitutionally admitted at trial.⁷² Indeed,

any motive to develop the exonerating testimony in order to persuade the grand jurors of its falsity.

Id. If the Second Circuit is correct, one might ask why the witness presenting the exculpatory information was called if the purposes of the grand jury had already been satisfied.

69. *Id.* at 915.

70. *Id.* The court stated that:

[T]he prosecutor had no interest in showing that the denial [at the grand jury] of the [bid-rigging] Club's existence was false. The grand jury had already been persuaded, at least by the low standard of probable cause, to believe that the Club existed and that the defendants had participated in it to commit crimes.

Id.

71. U.S. CONST. amend. VI. The provision states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" *Id.*

72. *See, e.g.,* *Bell v. Director, Dep't of Corrections, State of Ill.*, 847 F.2d 399, 400 (7th Cir. 1988) (criminal defendant claiming confrontation clause violation due to admission at trial of unavailable witness' preliminary hearing testimony); *Haywood v. Wolff*, 658 F.2d 455, 457 (7th Cir. 1981) (criminal defendant claiming testimony of an unavailable witness should not have been admitted at trial on the ground that counsel was denied adequate opportunity to cross-examine the witness at preliminary hearing due to procedural restrictions imposed); *Gainer v. Jeffes*, 1989 WL 14076 (E.D. Pa. 1989) (focusing on a criminal defendant claiming that an unavailable witness' testimony should be excluded under the confrontation clause because counsel was denied effective cross-examination at preliminary hearing).

the defendants contended that there are affirmative reasons why they should not truly challenge the evidence at the preliminary hearing. True testing of the witnesses may not just waste time, but may actually be harmful to the defendant because it might reveal trial strategies thereby giving the witness and the prosecution otherwise unavailable opportunities to prepare for trial.⁷³

The Supreme Court, in the confrontation context, has rejected these arguments.⁷⁴ The Sixth Amendment is not violated by the admission of preliminary hearing testimony at a trial when the defendant had the opportunity to challenge the witness and undertook some questioning at the hearing even if the motive

73. *California v. Green*, 399 U.S. 149, 197 (1970) (Brennan, J., dissenting). As Justice Brennan stated:

Cross-examination at the hearing pales beside that which takes place at trial First, . . . the objective of the hearing is to establish the presence or absence of probable cause, not guilt or innocence proved beyond a reasonable doubt; thus, if evidence suffices to establish probable cause, defense counsel has little reason at the preliminary hearing to show that it does not conclusively establish guilt. . . . Second, neither defense nor prosecution is eager before trial to disclose its case by extensive examination at the preliminary hearing; thorough questioning of a prosecution witness by defense counsel may easily amount to a grant of gratis discovery to the State. Third, the schedules of neither court nor counsel can easily accommodate lengthy preliminary hearings. Fourth, . . . the defense and prosecution have generally had inadequate time before the hearing to prepare for extensive examination. Finally, though counsel were to engage in extensive questioning, a part of its force would never reach the trial factfinder, who would know the examination only second hand.

Id. (Brennan, J. dissenting).

74. See *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (holding that admission at trial of hearsay statements made during preliminary hearings, where the declarant was unavailable to testify at trial, does not violate the confrontation clause provided the statements bear some "indicia of reliability"); *Green*, 399 U.S. at 158 (holding that the confrontation clause is not violated by admitting declarant's hearsay statements made at a preliminary hearing as long as the declarant is testifying as a witness at the trial and subject to cross-examination).

then was not “similar,” as the Second Circuit now defines it, to the cross-examination motive at trial.⁷⁵

The prosecutor at the *DiNapoli* grand jury had the opportunity to challenge the exculpatory witnesses and, of course, did question them. Even so, their testimony was not admissible because of the similar intensity requirement. Thus, the Second Circuit’s former testimony requirement is narrower than the confrontation standard. The rules of evidence, of course, can be stricter than the Sixth Amendment requires, and that apparently is the route chosen by the Second Circuit for former testimony. This has implications beyond grand jury testimony. We should ascribe neutral principles to the court and should assume that the enunciated standard applies not just to organized crime defendants seeking to admit grand jury testimony, but to all former testimony. With the similar intensity test, preliminary hearing testimony, although admissible consistently with the confrontation clause, will now seldom be admissible at trial against criminal defendants in the Second Circuit.⁷⁶ Seldom, if ever, will the accused have a motive of similar intensity to cross-examine a witness at the hearing as he would have at trial.⁷⁷

75. *Green*, 399 U.S. at 165-66. As the Court stated: “Porter’s preliminary hearing testimony was admissible as far as the Constitution is concerned [R]espondent had every opportunity to cross-examine Porter [at the preliminary hearing] as to his statement [T]he right of cross-examination then afforded [at the preliminary hearing] provides substantial compliance with the purposes behind the confrontation requirement. . . .” *Id.*; accord *Roberts*, 448 U.S. at 56 (1980).

76. *United States v. DiNapoli*, 8 F.3d 909, 916 (2d Cir. 1993) (Pratt, J., dissenting). As Judge Pratt stated with respect to the majority decision finding no similar motive upon application of the similar intensity test:

[The majority] applies a gloss to the language of rule 804(b)(1) that would find a similar motive only when the party against whom the testimony is offered had “an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue.” . . . As a practical matter, the gloss effectively rewrites the rule from “similar motive” to “same motive.”

Id. (Pratt, J., dissenting).

77. *Id.* at 916 (dissenting opinion by Judge Pratt suggests that “[n]ot only is the majority’s test more stringent than the rule itself,” but it also may prove

New York, on the other hand, allows the admission of preliminary hearing testimony whenever the minimal requirements of the confrontation clause are satisfied.⁷⁸ All that is necessary in New York is the opportunity for cross-examination at a hearing which concerned the same subject as did the later trial.⁷⁹ There is no similar intensity requirement.

[S]ince parties, at times--for tactical or other reasons--may, as with a live witness at trial, choose not to cross-examine, it was only a fair opportunity to do so which had to have been provided when the former testimony was given. . . . The record . . . discloses that the right to cross-examine at the preliminary hearing was not frustrated in any meaningful way.⁸⁰

New York following the confrontation standard broadly admits preliminary hearing testimony from unavailable declarants. The Second Circuit, applying a different standard, seldomly admits preliminary hearing testimony. Once again, there is a difference, perhaps fueled by the confrontation clause, between the admission of hearsay in New York and federal courts.

But perhaps there is an even more important issue here. If *DiNapoli* is correct, and former testimony is only trustworthy when the similar intensity test is satisfied, then perhaps the Supreme Court's confrontation standard for former testimony is the wrong one. That issue, however, gets us far beyond our purposes here, and so is a story for another day.

difficult to administer due to it requiring the district judge to compare a prosecution "intensity of interest" at two different times).

78. See *People v. Arroyo*, 54 N.Y.2d 567, 431 N.E.2d 271, 446 N.Y.S.2d 910 (1982); *People v. Hayes*, 110 A.D.2d 1035, 489 N.Y.S.2d 19 (4th Dep't 1985); *People v. Okafor*, 130 Misc. 2d 536, 495 N.Y.S.2d 895 (Sup. Ct. Bronx County 1985).

79. *Arroyo*, 54 N.Y.2d at 574, 431 N.E.2d at 275-76, 446 N.Y.S.2d at 915 (finding preliminary hearing testimony is admissible at trial when there is "an opportunity for . . . cross-examination [and the preliminary hearing] . . . delved into substantially the same subject matter as did the trial on which it later was to be used").

80. *Id.* at 574-75, 431 N.E.2d at 276, 446 N.Y.S.2d at 915.

Hon. George C. Pratt:

Thank you, Professor Jonakait. You are very kind in characterizing the two opinions by the panel in the Second Circuit as brilliant opinions, but the Supreme Court did not like one of them, and not one of the other judges in the circuit, other than the original panel, liked the second opinion. I agree with you, the panel opinion was correct. However, it is not the law.

Professor Jonakait:

Who wrote those opinions?

Hon. George C. Pratt:

You are looking at him. I think this is fairly inferable from the opinions. The second time around, the concern was far less with the evidence aspects of the problem, than it was with the role of the prosecutor and the manner in which grand jury proceedings would be conducted.

The major complaint of the prosecutor in seeking en banc, was that if this rule of the panel were to be in effect, that the mere opportunity to cross-examine in the grand jury would be enough to make grand jury testimony admissible at the request of the defendants at trial. That would require the prosecutors to go much further in their grand jury investigations than they otherwise would do.

They come in, of course, they hide behind the secrecy of what they do in the grand jury, but they say when we go in, we are trying to do eighty-eight things at once. We have a witness before us, we have a few targets, we have a few other people in mind out there, we may or may not want to tip our cards at this point by asking this witness a particular question because that might tip off so and so out there and he would go hide some records and so forth. We are playing a mystical game here and nobody can understand it but us and, therefore, do not tie our hands.

I guess eight judges in our court agreed with that. Our concern was more with the fairness in the outcome of the proceeding. We followed the D.C. Circuit which says the motive in the grand jury should be the same motive that he has with the trial, and that is to find out what the truth is. They get the truth, let it all come in and let the jury make that decision. It is that particular philosophy, incidentally, that in my view is very significant with respect to the coconspirator statements and the differences between New York and federal practice.

The federal practice, it seems to me, has much greater faith in what happened at the trial, in what juries do. The rules are more liberal to get more information in front of the juries. In our appellate procedures, we only look at the final result, there are almost no interrogatory appeals.

In the state system you can look at it. I do not say this is the actual motivation, but you can look at a great many of the rules in the state system, both rules of evidence and rules of procedure, that the appellate judges want to control what the outcome is. If they can control what evidence goes in, make it more restrictive, they will limit what inferences the jury might reasonably draw. The same way if they can rule on a denial of a motion to dismiss in a civil case, they are controlling the trial judge.

To me, I tend to look at it as how much do you trust juries. There are a lot of people, like my law professors and colleagues at Yale, who think and refer to juries as twelve good hod carriers. I came out of law school thinking you can never trust a jury because they do not know what they are doing. In my own practice, it was rare that I ever got a jury. In fact, during my twenty years as a trial lawyer, I only tried four cases with a twelve-person panel.

When I went on the bench though, it was a rude awakening, a brilliant awakening, with how sensitive and conscientious and in many ways brilliant juries are. I have the utmost faith in what a jury will do given good trial lawyers who will develop a case at trial. I am getting carried away here and we should now move on.