SUPREME COURT OF THE UNITED STATES

No. 91–872

UNITED STATES, PETITIONER *v.* ANTHONY SALERNO ET AL.

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

[June 19, 1992]

JUSTICE THOMAS delivered the opinion of the Court.

Federal Rule of Evidence 804(b)(1) states an exception to the hearsay rule that allows a court, in certain instances, to admit the former testimony of an unavailable witness. We must decide in this case whether the Rule permits a criminal defendant to introduce the grand jury testimony of a witness who asserts the Fifth Amendment privilege at trial.

The seven respondents, Anthony Salerno, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward Halloran, Alvin O. Chattin, and Aniello Migliore, allegedly took part in the activities of a criminal organization known as the Genovese Family of La Cosa Nostra (Family) in New York City. In 1987, a federal grand jury in the Southern District of New York indicted the respondents and four others on the basis of these activities. The indictment charged the respondents with a variety of federal offenses, including 41 acts constituting a "pattern of illegal activity" in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §1962(b).

Sixteen of the alleged acts involved fraud in the New York construction industry in the 1980s. According to the indictment and evidence later admitted at trial, the Family used its influence over labor unions and its control over the supply of

concrete to rig bidding on large construction projects in Manhattan. The Family purportedly allocated contracts for these projects among a so-called “Club” of six concrete companies in exchange for a share of the proceeds.

Much of the case concerned the affairs of the Cedar Park Concrete Construction Corporation (Cedar Park). Two of the owners of this firm, Frederick DeMatteis and Pasquale Bruno, testified before the grand jury under a grant of immunity. In response to questions by the United States, they repeatedly stated that neither they nor Cedar Park had participated in the Club. At trial, however, the United States attempted to show that Cedar Park, in fact, had belonged to the Club by calling two contractors who had taken part in the scheme and by presenting intercepted conversations among the respondents. The United States also introduced documents indicating that the Family had an ownership interest in Cedar Park.

To counter the United States' evidence, the respondents subpoenaed DeMatteis and Bruno as witnesses in the hope that they would provide the same exculpatory testimony that they had presented to the grand jury. When both witnesses invoked their Fifth Amendment privilege against self-incrimination and refused to testify, the respondents asked the District Court to admit the transcripts of their grand jury testimony. Although this testimony constituted hearsay, see Rule 801(c), the respondents argued that it fell within the hearsay exception in Rule 804(b)(1) for former testimony of unavailable witnesses.

The District Court refused to admit the grand jury testimony. It observed that Rule 804(b)(1) permits admission of former testimony against a party at trial only when that party had a "similar motive to develop the testimony by direct, cross, or redirect examination." The District Court held that the United States did not have this motive, stating that the "motive of a prosecutor in questioning a witness before the grand jury in the investigatory stages of a case is far different from the motive of a prosecutor in conducting the trial." App. to Pet. for Cert. 51a. A jury subsequently convicted the respondents of the RICO counts and other federal offenses.

The United States Court of Appeals for the Second Circuit reversed, holding that the District Court had erred in excluding DeMatteis and Bruno's grand jury testimony. 937 F. 2d 797 (1991). Although the Court of Appeals recognized that "the government may have had no motive . . . to impeach . . . Bruno or DeMatteis" before the grand jury, it concluded that "the government's motive in examining the witnesses . . . was irrelevant." *Id.*, at 806. The Court of Appeals decided that, in order to maintain "adversarial fairness," Rule 804(b)(1)'s similar motive element should "evaporat[e]" when the government obtains immunized testimony in a grand jury proceeding from a witness who refuses to testify at trial. *Ibid.* We granted certiorari, 502 U. S. — (1992), and now reverse and remand.

The hearsay rule prohibits admission of certain statements made by a declarant other than while testifying at trial. See Rule 801(c) (hearsay definition), 802 (hearsay rule). The parties acknowledge that the hearsay rule, standing by itself, would have blocked introduction at trial of DeMatteis and Bruno's grand jury testimony. Rule 804(b)(1), however, establishes an exception to the hearsay rule for former testimony. This exception provides:

> "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> "(1) Former Testimony. – Testimony given as a witness at another hearing . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

We must decide whether the Court of Appeals properly interpreted Rule 804(b)(1) in this case.

The parties agree that DeMatteis and Bruno were

"unavailable" to the defense as witnesses, provided that they properly invoked the Fifth Amendment privilege and refused to testify. See Rule 804(a)(1). They also agree that DeMatteis and Bruno's grand jury testimony constituted "testimony given as . . . witness[es] at another hearing." They disagree, however, about whether the "similar motive" requirement in the final clause of Rule 804(b)(1) should have prevented admission of the testimony in this case.

Nothing in the language of Rule 804(b)(1) suggests that a court may admit former testimony absent satisfaction of each of the Rule's elements. The United States thus asserts that, unless it had a "similar motive," we must conclude that the District Court properly excluded DeMatteis and Bruno's testimony as hearsay. The respondents, in contrast, urge us not to read Rule 804(b)(1) in a "slavishly literal fashion." Brief for Respondents at 31. They contend that "adversarial fairness" prevents the United States from relying on the similar motive requirement in this case. We agree with the United States.

When Congress enacted the prohibition against admission of hearsay in Rule 802, it placed 24 exceptions in Rule 803 and 5 additional exceptions in Rule 804. Congress thus presumably made a careful judgment as to what hearsay may come into evidence and what may not. To respect its determination, we must enforce the words that it enacted. The respondents, as a result, had no right to introduce DeMatteis and Bruno's former testimony under Rule 804(b)(1) without showing a "similar motive." This Court cannot alter evidentiary rules merely because litigants might prefer different rules in a particular class of cases. See *Green* v. *Bock Laundry Machine Co.*, 490 U. S. 504, 524 (1989).

The respondents' argument for a different result takes several forms. They first assert that adversarial

fairness requires us to infer that Rule 804(b)(1) contains implicit limitations. They observe, for example, that the Advisory Committee Note to Rule 804 makes clear that the former testimony exception applies only to statements made under oath or affirmation, even though the Rule does not state this restriction explicitly. See Advisory Committee's Notes on Fed. Rule Evid. 804, 28 U. S. C. App., p.288, subd. (b), except. (1). The respondents maintain that we likewise may hold that Rule 804(b)(1) does not require a showing of similar motive in all instances.

The respondents' example does not persuade us to change our reading of Rule 804(b)(1). If the Rule applies only to sworn statements, it does so not because adversarial fairness implies a limitation, but simply because the word "testimony" refers only to statements made under oath or affirmation. See Black's Law Dictionary 1476 (6th ed. 1990). We see no way to interpret the text of Rule 804(b)(1) to mean that defendants sometimes do not have to show "similar motive."

The respondents also assert that courts often depart from the Rules of Evidence to prevent litigants from presenting only part of the truth. For example, citing *United States* v. *Miller*, 600 F. 2d 498 (CA5 1979), the respondents maintain that, although parties may enjoy various testimonial privileges, they can forfeit these privileges by "opening the door" to certain subjects. In the respondents' view, the United States is attempting to use the hearsay rule like a privilege to keep DeMatteis and Bruno's grand jury testimony away from the jury. They contend, however, that adversarial fairness requires us to conclude that United States forfeited its right to object to admission of the testimony when it introduced contradictory evidence about Cedar Park.

This argument also fails. Even assuming that we should treat the hearsay rule like the rules governing testimonial privileges, we would not conclude that a

forfeiture occurred here. Parties may forfeit a privilege by exposing privileged evidence, but do not forfeit one merely by taking a position that the evidence might contradict. See 8 J. Wigmore, Evidence §2327, p. 636 (McNaughton rev. 1961); M. Larkin, Federal Testimonial Privileges §2.06, pp. 2–103, 2–104, 2–120 (1991). In *Miller*, for example, the court held that a litigant, "after giving the jury his version of a privileged communication, [could not] prevent the cross-examiner from utilizing *the communication itself* to get at the truth." 600 F. 2d, at 501 (emphasis added). In this case, by contrast, the United States never presented to the jury any version of what DeMatteis and Bruno had said in the grand jury proceedings. Instead, it attempted to show Cedar Park's participation in the Club solely through other evidence available to the respondents. The United States never exposed the jury to anything analogous to a "privileged communication." The respondents' argument, accordingly, fails on its own terms.

The respondents finally argue that adversarial fairness may prohibit suppression of exculpatory evidence produced in grand jury proceedings. They note that, when this Court required disclosure of a grand jury transcript in *Dennis* v. *United States*, 384 U. S. 855 (1966), it stated that "it is rarely justifiable for the prosecution to have exclusive access" to relevant facts. *Id.*, at 873. They allege that the United States nevertheless uses the following tactics to develop evidence in a one-sided manner: If a witness inculpates a defendant during the grand jury proceedings, the United States immunizes him and calls him at trial; however, if the witness exculpates the defendant, as Bruno and DeMatteis each did here, the United States refuses to immunize him and attempts to exclude the testimony as hearsay.[1] The

[1]The respondents also suggest that, in the event that

respondents assert that dispensing with the "similar motive" requirement would limit these tactics.

We again fail to see how we may create an exception to Rule 804(b)(1). The *Dennis* case, unlike this one, did not involve a question about the admissibility of evidence. Rather, it concerned only the need to disclose a transcript to the defendants. See 384 U. S., at 873. Moreover, in *Dennis*, we did not hold that adversarial fairness required the United States to make the grand jury transcript available. Instead, we ordered disclosure under the specific language of Federal Rule of Criminal Procedure 6(e). See 384 U. S., at 869–870, 872. In this case, the language of Rule 804(b)(1) does not support the respondents. Indeed, the respondents specifically ask us to ignore it. Neither *Dennis* nor anything else that the respondents have cited provides us with this authority.

The question remains whether the United States had a "similar motive" in this case. The United States asserts that the District Court specifically found that it did not and that we should not review its factual determinations. It also argues that a prosecutor generally will not have the same motive to develop testimony in grand jury proceedings as he does at trial. A prosecutor, it explains, must maintain secrecy during the investigatory stages of the criminal process and therefore may not desire to confront grand jury witnesses with contradictory evidence. It further states that a prosecutor may not know, prior to indictment, which issues will have importance at trial and accordingly may fail to develop grand jury testimony effectively.

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a witness chooses to testify at trial without immunity, the United States can impeach him with his grand jury testimony. See Fed. Rules Evid. 607, 801(d)(1)(A).

The respondents disagree with both of the United States' arguments. They characterize the District Court's ruling as one of law, rather than fact, because the District Court essentially ruled that a prosecutor's motives at trial always differ from his motives in grand jury proceedings. The respondents contend further that the grand jury transcripts in this case actually show that the United States thoroughly attempted to impeach DeMatteis and Bruno. They add that, despite the United States' stated concern about maintaining secrecy, the United States revealed to DeMatteis and Bruno the identity of the major witnesses who testified against them at trial.

The Court of Appeals, as noted, erroneously concluded that the respondents did not have to demonstrate a similar motive in this case to make use of Rule 804(b)(1). It therefore declined to consider fully the arguments now presented by the parties about whether the United States had such a motive. Rather than to address this issue here in the first instance, we think it prudent to remand the case for further consideration. Cf. *Denton* v. *Hernandez*, 504 U. S. ——, —— (1992).

It is so ordered.