

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* SALERNO ET AL.

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

No. 91-872. Argued April 20, 1992—Decided June 19, 1992

The respondents were indicted on a variety of federal charges, including fraud and racketeering in connection with the allocation of construction contracts among a so-called "Club" of companies in exchange for a share of the proceeds. Witnesses DeMatteis and Bruno, owners of the Cedar Park Construction Corporation, testified before the grand jury under a grant of immunity that neither they nor Cedar Park had participated in the Club. At trial, however, the United States used other evidence to show that Cedar Park was a Club member. The respondents subpoenaed DeMatteis and Bruno, but they invoked their Fifth Amendment privilege against self-incrimination and refused to testify. The District Court denied the respondents' request to admit the transcripts of DeMatteis' and Bruno's grand jury testimony pursuant to Federal Rule of Evidence 804(b)(1)—which permits admission of an unavailable declarant's testimony from a former hearing if the party against whom it is now offered had a "similar motive to develop the testimony by direct, cross, or redirect examination"—reasoning that a prosecutor's motive in questioning a witness before the grand jury is different from his motive in conducting the trial. The respondents were convicted, but the Court of Appeals reversed, holding that the District Court had erred in excluding the grand jury testimony. It ruled that, to maintain "adversarial fairness," Rule 804(b)(1)'s similar motive element should evaporate when the government obtains immunized testimony in a grand jury proceeding from a witness who refuses to testify at trial.

Held:

1. Former testimony may not be introduced under Rule 804(b)(1) without a showing of "similar motive." Nothing in Rule 804(b)(1) suggests that a court may admit former testimony

absent satisfaction of each of the Rule's elements. The respondents err in arguing that the Rule contains an implicit limitation permitting the "similar motive" requirement to be waived in the interest of adversarial fairness. Also rejected is the respondents' argument that the United States forfeited its right to object to the testimony's admission when it introduced contradictory evidence about Cedar Park. Here, the United States never revealed what DeMatteis and Bruno said to the grand jury, but, rather, attempted to show Cedar Park's involvement using other evidence. In addition, the respondents mistakenly argue that adversarial fairness prohibits the suppression of exculpatory evidence produced in grand jury proceedings. *Dennis v. United States*, 384 U.S. 855, distinguished. Pp.3-7.

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2. This case is remanded for consideration of whether the United States had a "similar motive." Since the Court of Appeals erroneously concluded that the respondents did not have to demonstrate such a motive, it did not consider fully the parties' arguments on this issue. Pp. 7-8.
937 F.2d 797 and 952 F.2d 623, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, SCALIA, KENNEDY, and SOUTER, JJ., joined. BLACKMUN, J., filed a concurring opinion. STEVENS, J., filed a dissenting opinion.