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 STEVENS, dissenting.

Because I believe that the Government clearly had an "opportunity and similar motive" to develop by direct or cross-examination the grand jury testimony of Pasquale Bruno and Frederick DeMatteis, I would affirm the judgment of the Court of Appeals on the ground that the transcript of their grand jury testimony was admissible under the plain language of Federal Rule of Evidence 804(b)(1). As the Court explains, *ante,* at 1–2, the grand jury testimony of Bruno and DeMatteis was totally inconsistent with the Government's theory of the alleged RICO conspiracy to rig bids on large construction projects in Manhattan. Bruno and DeMatteis were principals in Cedar Park Construction Corporation (Cedar Park), which, according to the Government, was a member of the so-called "Club" of concrete companies that submitted rigged bids on construction projects in accordance with the orders of the Genovese Family of La Cosa Nostra. But notwithstanding the fact that they had been given grants of immunity, Bruno and DeMatteis repeatedly testified before the grand jury that they had not participated in either the Club or the alleged bid-rigging conspiracy. As the Court of Appeals explained, Cedar Park was "one of the largest contractors in the metropolitan New York City concrete industry," and it is arguable that without Cedar Park's participation, "there could be no `club' of concrete contractors." 937 F. 2d 797, 808 (CA2 1991). And without the "Club," the allegations of fraud in the construction industry—which "formed the

core of the RICO charges"—"simply dissolv[e]." *Ibid.*

It is therefore clear that before the grand jury the Government had precisely the same interest in establishing that Bruno and DeMatteis' testimony was false as it had at trial. Thus, when the prosecutors doubted Bruno and Dematteis' veracity before the grand jury—as they most assuredly did—they unquestionably had an "opportunity and similar motive to develop the testimony by direct, cross, or redirect examination" within the meaning of Rule 804(b)(1).[1]

The Government disagrees, asserting that it ``typically does not have the same motive to cross-examine hostile witnesses in the grand jury that it has to cross-examine them at trial." Brief for United States 11. This is so, the Government maintains, because (1) cross-examining the witness might indirectly undermine the secrecy of the grand jury proceedings,[2] (2) the Government might decide to

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[1]Rule 804(b)(1) provides:

"Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> ``(1) Former testimony.—Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."

[2]"If the government exposes the extent of its knowledge to an individual who, by his willingness to commit perjury, has shown himself to be allied with the investigation's targets, the effect may be to provide information to the targets that can be used to threaten witnesses, destroy evidence, fabricate a

discredit the witness through means other than cross-examination, and (3) the issues before the grand jury are typically quite different from those at trial. See *id.*, at 11–14; Reply Brief for United States 9–12. In my view, the first two reasons—even assuming that they are true—do not justify holding that the Government lacks a "similar motive" in the two proceedings. And although the third reason could justify the conclusion that the Government's motives are not "similar," it is not present on the facts of this case.

Even if one does not completely agree with Wigmore's assertion that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth,"[3] one must admit that in the Anglo-American legal system cross-examination is the principal means of undermining the credibility of a witness whose testimony is false or inaccurate.[4] For that reason, a party has a motive to

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defense, or otherwise obstruct the investigation." Brief for United States 12.

[3]5 J. Wigmore, Evidence §1367, p. 32 (J. Chadbourn rev. 1974).

[4]Indeed, the lack of an opportunity to cross-examine the absent declarant has been the principal justification for the Anglo-American tradition of excluding hearsay statements. See, *e.g.,* E. Cleary, McCormick on Evidence §245, p. 728 (3d ed. 1984); 5 Wigmore, §1367, at 32. This concern is diminished, however, when the party against whom the hearsay statement is offered had an opportunity to cross-examine the absent declarant at the time the statement was made. Accordingly, the common law developed an exception to the hearsay rule that permitted the introduction of prior testimony if the opponent had an adequate opportunity to cross-examine the declarant. See, *e.g., id.,* §1386, at 90. Rule 804(b)(1) codified, with a few changes, that

cross-examine any witness who, in her estimation, is giving false or inaccurate testimony about a fact that is material to the legal question at issue in the proceeding.

Of course, the party might decide—for tactical reasons or otherwise—not to engage in a rigorous cross-examination, or even in any cross-examination at all.[5] In such a case, however, I do not believe that it is accurate to say that the party lacked a similar motive to cross-examine the witness; instead, it is more accurate to say that the party had a similar motive to cross-examine the witness (*i.e.*, to undermine the false or misleading testimony) but chose not to act on that motive. Although the Rules of Evidence allow a party to make that choice about whether to engage in cross-examination, they also provide that she must accept the consequences of that decision—including the possibility that the testimony might be introduced against her in a subsequent proceeding.[6]

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common-law rule. See Advisory Committee's Notes on Fed. Rule Evid. 804(b)(1), 28 U. S. C. App., pp. 788–789.

[5]For example, the party might not want to run the risk of appearing to harass or upset a vulnerable witness—such as a young child or the victim of a terrible crime—with rigorous cross-examination if there are other, less confrontational means of undermining the suspect testimony.

[6]As the Advisory Committee explained, the question whether prior testimony should be admitted is, in essence, the question "whether fairness allows imposing, upon the party against whom now offered, the handling of a witness on the earlier occasion." *Id.,* at 788. When, as in this case, the testimony is offered against the party by whom it was previously offered, the party obviously did not have an opportunity to develop the testimony through *cross*–examination. But, the Advisory Committee

Thus neither the fact that the prosecutors might decline to cross-examine a grand jury witness whom they fear will talk to the target of the investigation nor the fact that they might choose to undermine the witness' credibility other than through rigorous cross-examination alters the fact that they had an opportunity and similar motive to challenge the allegedly false testimony through questioning before the grand jury. Although those might be reasons for declining to take advantage of the opportunity to cross-examine a witness, neither undermines the principal motive for engaging in cross-examination, *i.e.,* to shake the witness' allegedly false or misleading testimony. Indeed, other courts have found the "opportunity and similar motive" requirement of Rule 804(b)(1) satisfied—and hence the prior testimony admissible in a subsequent trial—in many similar situations.[7]

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recognized, the opportunity to engage in "direct and redirect examination of one's own witness [is] the equivalent of cross-examining an opponent's witness." *Id.,* at p. 789. In either case, as long as the party had a similar motive to develop the testimony in the prior proceeding, there is no unfairness in requiring the party against whom the testimony is now offered to accept her prior decision to develop or not develop the testimony fully. *Ibid.*

[7]See, *e.g., United States* v. *Miller,* 284 U. S. App. D.C. 254, 248, 904 F. 2d 65, 68 (1990) (prior grand jury testimony admissible against the Government because "as several circuits have recognized, the government had the same motive and opportunity to question [the witness] when it brought him before the grand jury as it does at trial. . . Before the grand jury and at trial, [the witness'] testimony was to be directed to the same issue—the guilt or innocence of [the defendants]"); *United States* v. *Pizarro,* 717 F. 2d 336, 349–350 (CA7 1983) (initial trial testimony of

That leaves the Government's third reason, its contention that it lacks a similar motive to question grand jury witnesses because the issues before the grand jury may not be the same issues that are important at trial. If that were true in a particular case, I would agree that the Government lacked a similar motive for developing the witness' grand jury testimony. Because the scope of questioning is necessarily limited by the scope of the legal and factual issues in a given proceeding, a party has little motive, and indeed may not be permitted, to ask questions about other issues. Thus if those other issues become important in a subsequent proceeding, the testimony from the prior proceeding may properly be excluded on the ground that the party against

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one defendant which exculpated the second defendant was admissible during the retrial of the second defendant even though the Government may have declined to cross-examine the first defendant about an issue for fear that it would have resulted in a severance of the trials of the two defendants); *United States* v. *Poland*, 659 F. 2d 884, 895–896 (CA9) (identification testimony of witness at suppression hearing admissible in subsequent trial because defendant would have a similar motive at both proceedings to show that the identification was unreliable), cert. denied, 454 U. S. 1059 (1981); *Glenn* v. *Dallman*, 635 F. 2d 1183, 1186–1187 (CA6 1980) (identification testimony of eyewitness at preliminary hearing admissible against defendant at trial even though defendant declined to cross-examine the witness fully), cert. denied, 454 U. S. 843 (1981); *United States* v. *Zurosky,* 614 F. 2d 779, 791–793 (CA1 1979) (suppression hearing testimony of co-defendant which inculpated defendant admissible against defendant at trial even though defendant declined to cross-examine co-defendant at the hearing), cert. denied, 446 U. S. 967 (1980).

whom it is offered lacked a similar motive for developing the testimony at the prior proceeding.[8]

That did not occur in this case, however. After reviewing the sealed transcripts of Bruno and DeMatteis' grand jury testimony, the Court of Appeals concluded that "[v]ery generally stated, their grand jury testimony denied any awareness of, let alone participation in," the "Club" of concrete contractors, the existence of which was crucial to the RICO counts dealing with fraud in the construction industry. 937 F. 2d, at 808.[9] Moreover, the transcripts reveal that the prosecutors did challenge some of the witnesses'

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[8]As Wigmore explained, the common law required identity of issues as a means of ensuring that the cross-examination in the two proceedings would have been directed at the same material points. 5 Wigmore, §1386, at 90. Rule 804(b)(1) slightly modified the prior testimony exception to the hearsay rule by substituting the "opportunity and similar motive" requirement for the identity-of-issues requirement. The drafters of the Rule reasoned that "[s]ince identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable." Advisory Committee's Notes on Rule 804 (b)(1), at 789. Nevertheless, for the reasons discussed in the text, "[i]n determining whether a similar motive to develop the testimony existed at the time of the elicitation of the former testimony the courts will search for some substantial identity of issues." 11 J. Moore, H. Bendix, Moore's Federal Practice §804.04[3], p. VIII-266 (2d ed. 1989).

[9]"Indeed," the Court of Appeals explained, "the central importance of the `club's' existence is probably why the government felt obligated to identify Bruno and DeMatteis as sources of exculpatory testimony under *Brady* v. *Maryland*." 937 F. 2d 797, 808 (CA2 1991).

denials of knowledge of criminal activity by questioning which included probing the basis of their statements and confronting them with contrary statements from other people.

I am therefore satisfied that the Government had an "opportunity and similar motive" to develop the grand jury testimony of witnesses Bruno and DeMatteis; consequently, the transcript of that testimony was admissible against the Government at respondents' trial under Rule 804(b)(1). For that reason, I would affirm the judgment of the Court of Appeals.