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United States Supreme Court Respondent's Brief.

UNITED STATES OF AMERICA, PETITIONER,
v.
Anthony SALERNO, ET AL.

No. 91-872.
October Term, 1991.

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

BRIEF FOR RESPONDENT

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***i PARTIES TO THE PROCEEDINGS**

In addition to the parties named in the caption, Vincent DiNapoli, Louis DiNapoli, Nicholas Auletta, Edward J. Halloran, Aniello Migliore, and Alvin O. Chattin were parties in the court of appeals. The petitioner has not sought review as to Auletta.

West Headnotes (1)

Criminal Law Opportunity for Cross-Examination

Was exculpatory grand jury testimony provided by witnesses who invoked their Fifth Amendment privilege against self-incrimination at trial, and thus were unavailable declarants, admissible in defendants' case? U.S.C.A. Const.Amend. 5; Fed.Rules Evid.Rule 804(b)(1), 28 U.S.C.A.

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CASES:

*1 STATEMENT OF RELEVANT FACTS AND PROCEEDINGS [1]

The Central Theme of the Government's Case

The central theme of this megatrial was alleged bid-rigging and kickbacks on major concrete superstructure jobs at New York building construction sites. After a fourteen-month trial, the jury deliberated over several days before reaching verdicts acquitting on some counts and convicting on most. A separate verdict ordered RICO forfeitures. The facts are summarized in Salerno II, at 799-803; see also the tabular summary of verdicts, at 814-815.

The government alleged that some defendants, principally Salerno and Vincent DiNapoli, created a club of contractors who rigged bids on ready-mix concrete superstructure jobs, and paid a percentage on each job to the defendants. The key factual issues at trial were: The existence of the "club", the identities of any companies that were members of it, whether complimentary bidding had taken place, whether Vincent ***2** DiNapoli and Salerno were involved in selecting successful bidders on concrete superstructure work, whether DiNapoli and Salerno had a hidden interest in Cedar Park Concrete, and whether concrete superstructure contractors paid the defendants a rake-off or "cut" on concrete superstructure contracts.

These issues were hotly disputed. The government had intercepted conversations that it claimed supported its theory; none of these interceptions captured the voice of respondent Vincent DiNapoli. The government offered, and the court admitted in evidence, statements by some contractors under Fed. R. Evid. 801(d)(2)(E) that "they had been informed ... that Cedar Park was a member" of the "club." [2] A hearsay document of questionable authenticity purported to show that some defendants had an interest in Cedar Park Concrete. [3]

During the relevant time period, Cedar Park was owned in major part by Frederick DeMatteis, a successful New York builder and developer, as a subsidiary or affiliate of his parent company. [4] Pasquale Bruno was also a major investor in Cedar Park, and ***3** was responsible for its day-to-day operation. Both of these men had first-hand knowledge of bidding practices on concrete superstructure work. Neither DeMatteis nor Bruno has ever been charged with any wrongdoing in connection with this case, including making any false statements.

Before trial, the government informed the defendants that Bruno and DeMatteis had testified before the grand jury under immunity and might have exculpatory information. Salerno II, at 804; Bahadar, at *26. [5]

The History of Indictments

The court of appeals noted that "there was an interesting relationship between [Salerno I] and the timing of the indictments in the case before us." Salerno II, at 800. The timing becomes critical when we review the dates on which DeMatteis and Bruno were called to the grand jury and given immunity at the government's specific request.

*March 13, 1986, the final (third superseding) indictment was returned in Salerno I.

*March 21, 1986, the first indictment in this case, Salerno II, was returned.

*June 3, 1986, Frederick DeMatteis was subpoenaed to the "April 1985 Special" grand jury (the same ***4** one before which he appeared on two later occasions and before which Bruno later appeared), was given immunity and began his testimony.

*June 12, 1986, DeMatteis returned to the grand jury at the government's insistence, with additional documents.

*June 19, 1986, DeMatteis was again called to the grand jury and interrogated. The three appearances total 280 transcript pages.

*September 8, 1986, the Salerno I trial began.

*September 11, 1986, Mr. Bruno appeared before the grand jury, was given immunity, and testified for most of a day.

*September 18, 1986, the first superseding indictment in Salerno II, was returned.

The jury verdict in Salerno I was January 13, 1987. Two days later, the second superseding indictment was returned in Salerno II. Trial in Salerno II was held on a third superseding indictment, returned April 7, 1987. In sum, by the time DeMatteis and Bruno appeared before the grand jury, the government and the public knew the identities of all relevant defendants, and the allegations against them. [6]

The government sought and obtained immunity for Bruno and DeMatteis, based on the statutory representations of United States Attorney Rudolph Giuliani, concurred in by an Assistant Attorney General, ***5** that their testimony "may be necessary to the public interest." DeMatteis, 6/3/86, p.27. [7]

The immunity grant for DeMatteis was read into the record on June 3, 1986, and gives him use immunity "before the grand jury ... and in any further proceedings resulting therefrom." DeMatteis, 6/3/86, p. 26[emphasis added]. The Bruno order does not appear in his transcript, but is presumably the same.

What DeMatteis and Bruno Said After The Government Gave Them Use Immunity Before the Grand Jury

On January 27, 1992, the court of appeals ordered:

> The government shall provide defendants' counsel with copies of the Grand Jury testimony of Frederick DeMatteis and Pasquale Bruno for their use in preparing for and arguing the appeal in the Supreme Court. Further disposition of the copies shall be subject to a further order of the Supreme Court.

The transcripts show that the government not only had the motive and opportunity to cross-examine DeMatteis and Bruno, but that it availed itself of that opportunity with precision and in detail. Moreover, the transcripts show that during its effort to impeach DeMatteis and Bruno, the government used and disclosed to both men "the ... scope of electronic surveillance" in the investigation. USB, at 12. Of course, given the procedural history of this case and Salerno ***6** I, recounted above, everybody was aware of "the status of the investigation," USB, at 12, and of the identities of at least many persons who were going to be witnesses and declarants in Salerno I.

DeMatteis's grand jury testimony reveals that he is and has for many years been a well-respected general contractor in the City of New York, and that his company has at various times owned concrete superstructure firms and ready-mix supply firms as

subsidiaries or affiliates. Mr. DeMatteis testified that he came into his father's construction business in 1945 when he got out of the Air Force and has been in it ever since.[8] "We went from a small construction firm in Brooklyn to one of the major construction firms in New York City and the metropolitan area. We were general contractors for a long period of time and then turned developers as well as general contractors." DeMatteis told the grand jury, under government questioning, that he and his companies had, between 1980 to 1985, controlling interests in Big Apple Concrete Company, Cedar Park Concrete Corporation, and Metro Concrete Corporation, as well as other entities involved in this case.

DeMatteis's grand jury subpoena called for corporate and individual records. He complied. In addition, during his testimony he was directed by the Grand Jury on no fewer than ten occasions to bring myriad other records related specifically to the matters at issue in this case.[9] From this cache of material, the ***7** government developed additional questions for his later appearances.

The AUSA repeatedly asked DeMatteis about the alleged role of organized crime figures in the construction industry, and in projects on which his company was a contractor. He repeatedly denied that any organized crime figures were involved in any way in his business.

Indeed, Mr. DeMatteis said "I said I would tolerate no outside interference. Otherwise we don't have a company."[10] DeMatteis said that he declined to have non-construction people involved as investors in his concrete company, including a prominent political figure and a New York lawyer who had introduced him to Paul Castellano. He told both of these people that they could not be investors. As he put it, "I wanted it to be a clean company."[11]

After interrogating Mr. DeMatteis for 200 pages about matters relevant to the main themes of its case, the Assistant United States Attorney homed in on alleged bid-rigging and payoffs. By this time, the government had ordered DeMatteis to produce all relevant bid files. Some examples:
Q Did anyone ever tell you directly or indirectly that you were not to bid on that job?

A If someone ever told me that Mr. Hellerer, that would make me do it. No, nobody ever did.[12]

***8** Q Did you ever become aware that Mr. Bruno [the e manager of and co-investor with DeMatteis in Cedar Park] was paying two percent on each of your jobs to organized crime?
A No, sir.

Q You never discussed that with Mr. Bruno?

A No way. No, sir.

Q Did you ever become aware that on the Libya House job it was paid?

A No.

Q Museum Towers?

A No.

Q Did you ever discuss it with anyone else?

A No.

Q You never discussed that with anyone else?

A No way.

Q That Cedar Park had to pay two percent?

A No way, and I don't believe that they did. [13]

The government was clearly not satisfied with DeMatteis's answers. Indeed, it began the June 19, 1986 session by reminding DeMatteis that he could be prosecuted for any false statements he had made under 18 U.S.C. § 1623. It then offered him the "opportunity" to recant any such false statements under § 1623(d). [14] DeMatteis did not change his testimony.

The AUSA then sought to impeach him:

> Q [By Assistant United States Attorney Hellerer] Mr. DeMatteis, I am going to read you a small part of a conversation that was intercepted ***9** pursuant to court order on August 14, 1984. Do you know a man by the name of Ralph Scopo?

The AUSA confronted DeMatteis with a quotation from a portion of a court-ordered electronic interception on which one of the speakers was allegedly the "co-schemer"-to use the words of the indictment-Ralph Scopo. In the conversation, Scopo referred to what the government claims to have been payoffs.

Even after the government disclosed this electronic surveillance, DeMatteis denied ever having discussed kickbacks with Mr. Bruno. Indeed, he said he had never discussed such payments with anyone, and had never heard of such payments. [15]

The government asked DeMatteis whether he knew defendant Vincent DiNapoli-alleged leader of the bid-rigging "club"-and he denied ever having met him. [16]

Mr. Bruno's September 11, 1986 testimony, given under use immunity, consumes 73 pages. Bruno described the entities with which he was connected over time, and the formation of Cedar Park as in effect a subsidiary of the DeMatteis organization. After relevant background interrogation, the questioning turned directly to the allegations in this indictment.

Bruno denied ever having spoken with Vincent DiNapoli "directly or indirectly," and swore he had never paid money "directly or indirectly" to Mr. ***10** DiNapoli. Bruno also denied that Cedar Park ever paid any money directly or indirectly to Mr. DiNapoli. [17]

The government pressed on:
Q Isn't it true that Mr. DiNapoli had a hidden interest in Cedar Park?

A No.

Q You're sure?

A Yes.

Q How are you sure?

A I don't know of one. Let's put it that way.

Q Did you ever meet a gentleman by the name of Anthony Salerno?

A No.

Q Did you ever hear of him?

A In the newspapers.

Q Did you ever talk to him-did you ever talk to anybody in the business about him other than the newspapers?

A No. [18]

Bruno testified that his only knowledge of an alleged "club" of concrete contractors was that he had read testimony in which others had said such a club existed. Before that, he "never heard" of a club, unless it was mentioned in the newspapers. Bruno never heard about concrete contractors being obliged to pay two percent of their contract price and never discussed that with anybody. [19] The interrogation continued:

***11** Q Never paid any money to anybody?
A That is correct. No.

Q You're not aware that Cedar Park ever paid any money to anybody?

A That is correct, yes.

Q Isn't it true that Cedar Park paid two percent on the Libya House job?

A No.

Q That is not true?

A No.

Q Did you ever have any discussions about paying any money on the Libya House job?

A Never.

Q With no one?

A No one.

Q Inside or outside Cedar Park?

A Right.

Q Did you ever talk to Ralph Scopo about it?

A No.

Q Vincent DiNapoli?

A No.

Q Any representatives of either of those gentlemen?

A No one. No.

Q It might interest you to know, Mr. Bruno, that Mr. Scopo has been intercepted under electronic surveillance saying that in fact you did pay two percent on the Libya House job.

A I can't help that.

Q You're saying that that is not true?

A That is correct. [20]

***12** Bruno also denied engaging in complimentary bidding [21] and ever being shaken down for money for a job. [22]

What the Second Circuit Held-And Did Not Hold

In the district court, Bruno and DeMatteis appeared and invoked the privilege against self-incrimination. The district judge denied defense motions even to see the grand jury testimony, and to admit it in evidence. She did so based in part on an ex parte, in camera submission from the government. On appeal, the court and government had access to the ex parte material and to the testimony, but neither the defendants nor their counsel did.

The Second Circuit, reversing the convictions, analyzed Federal Rule of Evidence 804 in light of its dominant purpose of preserving adversarial fairness. It held that it did not need to reach the question of "similar motive," because the government had already immunized these witnesses and was free to do so again. The witnesses were not unavailable to the government in this specific context.

The court of appeals also pointed to a number of instances in which the government and the trial judge had overridden the defendants' rights to a fair and impartial trial of these charges. [23] It cast doubt upon ***13** the fairness of a remand hearing

to inquire into judicial and prosecutorial interference with jury deliberations, but said it need not decide all the thorny issues presented by the record, saying "because such conduct would be so far beyond the bounds of permissible behavior by anyone connected with the courts, we do not expect that the issue will arise ever again." 937 F.2d at 813.

On rehearing, the court amended its decision to make clear that it was not considering the "availability" doctrine in any context other than Rule 804(b)(1). Four judges (Newman, Kearse, Mahoney and Walker) dissented from denial of rehearing en banc.

In an opinion, United States v. Bahadar, ___ F.2d (2d Cir. 1992), 1992 WL 9390, formally issued a day after certiorari was granted, the Second Circuit explained its holding in Salerno II. Judge Mahoney, who had been among the en banc dissenters, was on the panel and joined the opinion.

Judge Pratt began by acknowledging as he had in Salerno II that the grant of use immunity is predominantly an Executive Branch decision:
As we have repeatedly held, the fifth amendment does not require "that defense witness immunity must be ordered whenever it seems fair to grant it." United States v. Turkish, 623 F.2d 769, 777 (2d Cir.1980), cert. denied, 449 U.S. 1077 (1981). We have recently reaffirmed the long-standing principle that "[i]mmunity remains 'pre-eminently a function ***14** of the Executive Branch."' 1992 WL 9390, at *19.

As Judge Pratt noted, Salerno II reaffirms that "the government is in no way required to grant use immunity to a witness called by the defense; it is simply left with a series of choices" Bahadar, at *21, quoting Salerno II, at 807-08.

In rejecting Bahadar's claim that a statement against penal interest was wrongly excluded from evidence, Judge Pratt discussed the "unavailability" holding of Salerno II. Because the discussion casts light on the true issue presented by this record and the judgment below, we quote at some length:
[T]here has been some suggestion that United States v. Salerno might be read to support the proposition that "a witness is 'available' to the prosecution because use immunity can be conferred". See United States v. Salerno ... (Newman, J., dissenting from denial of rehearing in banc). Thus, so the argument goes, the government would be unable to invoke any of the rule 804(b) hearsay exceptions in criminal cases ....

Such an interpretation of United States v. Salerno would be an unrealistic reading of the rules of evidence, of the law of immunity, and of the Salerno decision itself. The discussion of rule 804(a)(1) in Salerno provided a background for our analysis of rule 804(b)(1), the former testimony exception, which was there in issue. Thus, on rehearing, the panel clearly limited its discussion of "availability" to the narrow circumstances presented under rule 804(b)(1). ...

***15** Of all of the hearsay exceptions in Fed.R.Evid. 804, former testimony is a special case. It is "the strongest hearsay", see Fed.R.Evid. 804 advisory committee's note, because "[c]ross-examination, oath, the solemnity of the occasion, and in the case of transcribed testimony the accuracy of reproduction of the words spoken, all combine to give former testimony a high degree of credibility." ... The other rule 804 hearsay exceptions (statement under belief of impending death, statement against interest, statement of personal or family history) lack these reliability enhancing factors.

In Salerno, ... [w]e rejected the government's "dissimilar motive" argument, discussing rule 804(a) merely as an introduction and aid to our construction of rule 804(b)(1). The government created the testimony of Bruno and DeMatteis in the first instance by granting them use immunity in front of the grand jury. But, when confronted with the possibility that the grand jury testimony might be admitted at trial, the government sought to rely on the "similar motive" requirement of rule 804(b)(1) as a shield to prevent admission of that testimony, even after it had identified Bruno and DeMatteis as "Brady witnesses". See Brady v. Maryland, 373 U.S. 83 (1963). Because the "similar motive" requirement is bottomed on rule 804(b)(1)'s overall goal

of preserving adversarial fairness, we concluded in Salerno that it could not be invoked by the government. Preservation of adversarial fairness for the ***16** government was neither needed nor intended in a situation where the government itself created the testimony in the first instance and where it, alone, could compel live testimony from the same witnesses at trial. We thus declined to allow the government to hide behind the protective "similar motive" shield that is written into rule 804(b)(1). ...

Other circuits have rejected the government's efforts to use the protective provisions of rule 804(b)(1) in identical circumstances. ... [24]

To summarize: our decision in Salerno, contrary to the fears of the in banc dissenters and the government, did not change the concept of "unavailability" as defined in Fed.R.Evid. 804(a)(1). When a fifth amendment privilege is properly asserted by a trial witness, that witness becomes "unavailable" for purposes of rendering potentially applicable all of the hearsay exceptions described in rule 804(b). ... Each of those exceptions, of course, has its own special requirements for admissibility. 1992 WL 9390, at *25-29.

***17 SUMMARY OF ARGUMENT**

1. The government had a "similar motive" to its trial objective to develop Bruno's and DeMatteis's testimony before the grand jury. The grand jury was considering, and eventually returned, a superseding indictment involving the same defendants and issues as in the trial. The government interrogated Bruno and DeMatteis for hundreds of pages of transcript. It confronted them with assertedly contradictory wire taps of alleged principals in the unlawful scheme. The record-as distinct from the hypothetical arguments presented in the government's brief-shows that F.R.Evid. 804(b)(1) was amply satisfied. Furthermore, the drafters of Rule 804(b)(1) rejected the proposition that former testimony may be excluded because of a party's tactical decisions on the nature and extent of cross-examination at the earlier proceeding. Former testimony is the most reliable form of hearsay, for it is under oath and subject to cross-examination.

Had the former testimony been received in evidence, F.R.Evid. 806 would have permitted the government to deploy all its credibility-attacking weapons. Rule 806 was expressly designed to eliminate the hardships of which the government claims when former testimony is admitted. On this record, the former testimony would have included cross-examination.

2. "Similar motive", like any other evidentiary principle that ordinarily permits a party to block admissibility of relevant evidence, may not be relied on when doing so violates adversarial fairness. This is what the Second Circuit held, and the principle finds ample support in federal evidence law.

In trials, a party cannot tell half a truth and hide the rest. A party cannot open the door to a subject ***18** and then bar the opponent from entering with evidence of its own. A party cannot rely on a rule of nonadmissibility, then present evidence that the otherwise inadmissible material would effectively contradict. This principle is central to the adversary process, and it has been applied over and over again by this Court and the lower federal courts. The principle of adversarial fairness often requires a court to admit evidence that would otherwise be barred by literal application of a rule of evidence.

In criminal cases, barring reliable exculpatory evidence offered by the defendant violates the due process and compulsory process clauses. This Court has applied this rule to hearsay evidence that did not even possess the safeguards of oath and cross-examination. The Second Circuit rightly held that if Rule 804(b)(1) were construed to bar the Bruno/DeMatteis former testimony, a serious constitutional issue would be presented for decision.

3. The government concedes that Bruno and DeMatteis were unavailable to the defense. The government had already once given them immunity, and at least the DeMatteis grant was facially broad enough to have permitted the government to cross-examine him at trial if it wished.

This Court has repeatedly held that, while the government may not be compelled to grant immunity to serve a private party's purpose, it must often choose between granting immunity and foregoing some important objective of its own, such as battling corruption.

Because the record of DeMatteis's and Bruno's actual grand jury appearances is so far from the hypothetical ***19** and suppositious arguments raised by the government, the writ should be dismissed as improvidently granted. If not, the judgment below should be affirmed.

ARGUMENT

We have briefed the issues in the same order as did the United States. The government concedes, USB, at 11:

1. Bruno's and DeMatteis's testimony was given “at another hearing,”

2. they testified as “witnesses;”

3. the United States, against whom “the testimony is now offered,” had “an opportunity” to “develop the testimony;” and

4. Bruno and DeMatteis were unavailable to the defense.

The government claims, however, that the witnesses were “unavailable” to it as well as to the defense. It denies that it had a “similar motive to develop the testimony” when it was given. USB, at 11.

A. The Government Had A “Similar Motive” To Develop The Grand Jury Testimony Before the Grand Jury.

The government's argument under this heading is long on generalities, but short on specifics. Since this is a concrete case in more ways than one, we begin with Justice Holmes's aphorism, “General propositions do not decide concrete cases.” Lochner v. New York, 198 U.S. 45, 76 (1905)(dissenting opinion).

***20** The government reminds us of grand jury secrecy. Yet the case it cites, Butterworth v. Smith, 494 U.S. 624 (1990), upholds the grand jury witness's right to disclose. Indeed, as Butterworth says, grand jury secrecy is not “a talisman that dissolves all constitutional protections,” citing United States v. Dionisio, 410 U.S. 1, 11 (1973).

More importantly, not one of the reasons for grand jury secrecy listed in Butterworth, and the cases on which it relies, is present here. See 494 U.S. at 630; see generally C. Wright, Federal Practice & Procedure, Criminal 2d, § 106, at 243 (citing to cases). By the time DeMatteis and Bruno testified, all the key parties and issues had been broadcast by the government in two indictments, one of which had been the subject of pretrial proceedings and was headed for-or in-trial. DeMatteis and Bruno themselves were listed on dozens of public documents as principals in Cedar Park and other relevant entities.

The government's next generality-that confronting witnesses in the grand jury and impeaching them risks disclosure of important governmental information, USB 11-12,-is demonstrably irrelevant to this case. The government did confront and did disclose. [25]

While ***21** it had the "option," USB 13, of calling DeMatteis and Bruno back to the grand jury, it never did so, and it is hard to think of a line of questioning it had not already pursued.

So far as prosecuting alleged grand jury perjury is concerned, USB 13, that rationale cuts in favor of admissibility. An immunized witness may escape punishment altogether for any past wrongs. See, e.g., United States v. Poindexter, 951 F.2d 369 (D.C. Cir. 1991). The only prospect of temporal punishment that tethers such a witness to the truth is of a prosecution for perjury, as provided in 18 U.S.C. § 6002. Yet, as Chief Justice Burger taught in Bronston v. United States, 409 U.S. 352 (1973), in order to prosecute a witness for perjury, the examiner must firmly tie him or her to the allegedly false story.

The government claims that "the issues before the grand jury at the time a witness has testified will not necessarily be the same as those presented during the trial." As an abstract matter, that assertion might be true, and courts-including the Second Circuit-have held former testimony inadmissible on that basis. See, e.g., United States v. Serna, 799 F.2d 842 (2d Cir. 1986), cert. denied, 481 U.S. 1013 (1987)(former testimony of unavailable alleged coconspirator not admissible on defendant's motion-issues different).

In this case, the government itself "created" the testimony, Bahadar, at *27, when the issues were clear. The government's timing and conduct make the similar motive requirement irrelevant here, just as the court of appeals held.[26] The existence of the bid-rigging ***22** conspiracy was an ultimate fact in the grand jury proceeding as well as at trial-if the grand jury credited Bruno and DeMatteis' testimony denying the existence of "the Club," then it presumably would not have handed down the superseding construction case indictments. In the concrete as opposed to the abstract, the government's motives in the grand jury and at trial were identical: to show that Bruno and DeMatteis were lying and that "the club" existed.

The admissibility of the Bruno/DeMatteis grand jury testimony under Rule 804(b)(1) thus presents an unexceptional application of a hoary evidentiary principle: where the issue at stake in the former proceeding's testimony was substantially the same as the issue for which the former testimony is offered at trial, and the party against whom it is offered had the opportunity to cross-examine the witness, the motives are "similar" and the hearsay comes in. 5 Wigmore, Evidence §§ 1386-1387 (Chadbourn rev. 1974); Cleary, McCormick on Evidence § 257, at 620-2 (3d ed. 1984).[27] This principle was incorporated and expanded when ***23** Congress enacted Rule 804(b)(1).[28] Notes of the Advisory Committee on 1972 Proposed Rules, 28 U.S.C.A. at 446-7; 4 Weinstein & Berger, Weinstein's Evidence 804(b)(1)[04], at 804- 85 - 804-88 (1991).

***24** The government wants Rule 804(b)(1) construed as presumptively excluding grand jury testimony. The Rule, its forerunners and the cases construing it all counsel against that position.[29] In one leading case, United States v. Miller, 904 F.2d 65 (D.C. Cir. 1990), the court of appeals reversed a conviction because the trial judge had failed to admit exculpatory grand jury testimony. Judge Silberman, joined by then-Judge Clarence Thomas, held that admissibility was "firmly rooted in our jurisprudence." Judge Silberman stated:

[A]s 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].

Miller, at 68 (citations and note omitted).[30]

The government's suppositious arguments about reasons for not doing an effective job in the grand jury misconceive the adversarial calculus of the hearsay exception at issue. The drafters of Rule 804(b)(1) specifically rejected the proposition that

former testimony may be excluded on the basis of a party's tactical decisions about the extent or manner of cross-examination at the prior proceeding.

> ***25** If the party against whom now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine. ... An even less appealing argument is presented when the failure to develop fully was the result of a deliberate choice.

Advisory Committee Notes to Proposed Rule 804.

Courts have not hesitated to hold defense counsel to their chosen cross-examination strategy at the prior proceeding, see e.g. United States v. Zurosky, 614 F.2d 779, 793 (1st Cir. 1979) ("Defense counsel made a tactical decision not to question Smith; this does not mean that they were denied an opportunity to do so"); Glenn v. Dallman, 635 F.2d 1183, 1187 (6th Cir. 1980) (habeas proceeding). The principle is equally applicable to the government's tactical cross-examination decisions. United States v. Pizarro, 717 F.2d 336, 349 (7th Cir. 1983) (reversing conviction based on failure to admit former testimony; a "self-imposed restriction" limiting the government's inquiry into certain subjects on cross-examination at prior trial "at best ... represented the government's selection of a trial strategy unrelated to any factor relevant to its substantive position in the case"); Odato v. Vargo, 677 F.Supp. 384, 387 (W.D.Pa. 1988).

Indeed, in the related Confrontation Clause context, this Court has repeatedly held former testimony from a defendant's preliminary probable cause hearing admissible against the defendant at trial, although as a matter of defense tactics it is typically in the defendant's interest to use such a hearing for discovery purposes rather than for impeachment. See ***26** Ohio v. Roberts, 448 U.S. 56 (1980); California v. Green, 399 U.S. 149 (1980). See also Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam) (defendant entitled only to "an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish" under Confrontation Clause). Rule 804(b)(1), correctly interpreted, saves courts the trouble of second-guessing lawyers' decisions to cross-examine or not. The opportunity is all that is required. [31]

Here, the proffered differences in the government's impeachment tactics in the grand jury are particularly unpersuasive because these same impeachment methods are available to the government at trial. Fed. R. Evid. 806 permits a party to attack the credibility of a hearsay declarant "by any evidence which would be admissible for those purposes if declarant had testified as a witness." The Advisory Committee contemplated that Rule 806 would be applied in conjunction with Rule 804(b)(1), noting-in connection with its elimination of traditional foundation requirements for the ***27** use of impeachment material-that "the expanded admissibility of former testimony and depositions under Rule 804(b)(1) calls for a correspondingly expanded approach to impeachment." Notes of Advisory Committee on Proposed Rules, 28 U.S.C.A. at 499; Weinstein & Berger, supra, 806[01], at 806-6 - 860-13; Pizarro, supra, 717 F.2d at 350 (reversing conviction based on exclusion of former testimony in part because government would have full opportunity to impeach declarant of former testimony under Rule 806). Indeed, one of the purposes served by the elimination of foundational requirements under Rule 806 is to provide the party against whom former testimony is admitted under Rule 804(b)(1) with the opportunity to rectify any defects or tactical omissions in the cross-examination at the prior proceeding. As Judge Weinstein points out, although the rationale for eliminating foundation requirements is weaker in the case of a party who had the requisite opportunity and motive to cross-examine at the prior proceeding (since such party is presumed to have had at the time the motive and opportunity to develop the required foundation), it is still the case that "there may be instances where cross-examination was deliberately limited because of other tactical considerations ... [o]r the prior testimony may stem from a preliminary hearing where cross-examination is rare." Weinstein & Berger, supra, at 806-8.

Rule 806 thus anticipates and negates the government's contention that its tactical decisions regarding the form, manner and timing of its impeachment of grand jury witnesses takes it out of the scope of Rule 804(b)(1). To the extent that the government finds it more expedient to impeach an allegedly perjurious ***28** witness in the grand jury by introducing contradictory evidence after the witness has left the stand, Rule 806 provides for the use of this same impeachment evidence at trial. Similarly, should the government choose to recall a grand jury witness "for further examination when the investigation produces more evidence with which to confront him," USB, at 13, either this same evidence or the transcript of the later testimony may be admissible for impeachment at trial under Rule 806. [32]

Finally, lurking behind the government's tactical view of the Rule 804(b)(1) "similar motive" requirement is an untenable and improper understanding of ***29** its role in the grand jury proceeding. At trial, the District Court rejected the admissibility of the Bruno/DeMatteis testimony based in part on its ex parte finding that the government's sealed affidavit "seriously undercut the truthfulness" of the testimony. (Pet. App. 51a.) The government rightly makes no attempt to defend this basis for exclusion, because the reliability of the declaration is not a factor in determining its admissibility under the exceptions of Rule 804(b): rather, it is the circumstances defined by the enumerated exceptions themselves that provide the necessary guarantees of reliability. Idaho v. Wright, 110 S.Ct. 3139, 3147 (1990); Ohio v. Roberts, supra, 448 U.S. at 67 ("Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception").

Nevertheless, the government would surreptitiously re-introduce the issue of the declarant's reliability in a particularly insidious form, by making the admissibility of former grand jury testimony turn on the government's unilateral view of the witness' credibility. Under its analysis, if the government, in its sole judgment, believes the witness is lying, then the testimony must be excluded by the trial court because the government will not have had the required motive to cross-examine. Indeed, the government suggests that it may wish to forego cross-examination entirely in favor of prosecuting the witness for perjury, although the result would be that the grand jury is left with unimpeached testimony that directly contravenes the government's view of the case. USB, at 13. Intrinsic to this reasoning is the proposition that the government's impetus to cross-examine a witness turns on its own evaluation of the witness' credibility, ***30** and not on any concern about what the grand jury's evaluation of the witness might be.

B. "Similar Motive", Like Any Other Evidentiary Principle That Ordinarily Permits A Party To Block Admissibility Of Relevant Evidence, May Not Be Relied On When Doing So Violates Adversarial Fairness.

1. Former Testimony Is Such Reliable Hearsay That Limitations On Its Use Are Strictly Construed.

Rule 804(b)(1) codifies a venerable rule. Wigmore thought it "a class of evidence where the requirements of the hearsay rule are complied with," hence not requiring an exception. Dean McCormick followed the majority view that it is simply a very reliable form of hearsay. C. McCormick, Evidence § 230 (1st ed. 1954), citing 5 Wigmore, Evidence 1370. See generally Motes v. United States, 178 U.S. 458, 471-73 (1900), cited with approval, Pointer v. Texas, 380U.S. 400, 407 (1965).

In addition to unavailability, with which we deal below, Rule 804(b)(1) requires that the former testimony possess every guarantee of trustworthiness required by the adversary system except presence in court. The oath, personal knowledge [33], and the opportunity for cross-examination, must all have been present. The justification for the former testimony exception, now as under pre-Rules caselaw, is necessity-among the most venerable of justifications for dispensing with viva voce testimony. Wigmore § 1364, at 23-24.

***31** The government derides what it claims to be departures from the literal words of Rule 804(b)(1). Yet Dean McCormick long ago remarked that interpretation of statutes and rules on former testimony are often relaxed by courts to admit reliable hearsay:

> Many of the exceptions to the hearsay rule have been developed almost solely through the judicial process, others have been widely regulated by statute, and the present exception is of the latter class. It will be impossible, however, in this brief work to describe the variations in the statutes of the different states. The usual approach, however, is that these statutes on former testimony are "declaratory" of the common law, so far as they go, and not the exclusive test of admissibility. Accordingly, if the evidence meets the common law requirements, it will usually come in even though the permissive provisions of the statute do not mention the particular common law doctrine which the evidence satisfies.

McCormick, Evidence § 230, at 481 (1st ed. 1954).

McCormick's view is borne out in practice. For example, the Rule does not in terms require that the former testimony have been under oath. Such a requirement is explicit in, for example, Rule 801(d)(1)(A). Yet, the government assumes, we concede, the Advisory Committee notes state, and the common law rule was and is, that the former testimony must have been given under oath. So much for the argument that the Rule must be read in a slavishly literal fashion, as distinct from in harmony with its common law ***32** origins. Bruno and DeMatteis were under oath in the grand jury.

In addition, Rule 804(b)(1) speaks of motive and opportunity to develop the prior testimony. Yet no modern court takes that standard literally. For example, courts routinely interpolate the requirement that a party have been represented at the earlier hearing by counsel. See cases collected in 4 Weinstein's Evidence ¶ 804(b)(1)[04].

Rule 804(b)(1), as proposed by the Advisory Committee, would have permitted admission of all former testimony if the party against whom it was offered had an opportunity to cross-examine. The "similar motive" language was limited to former testimony in a proceeding to which the present opponent had been a stranger. The House of Representatives amendment into the present form was concurred in by the Senate on the ground that "the difference between the two versions is not great." The various legislative histories and Advisory Committee Notes are collected in all the West Publishing annotated versions of the Federal Rules of Evidence.

2. All Rules Of Evidence That Permit A Party To Block Introduction Of Reliable Evidence Will Be Dispensed With As Irrelevant If The Party Seeks To Use the Rule As A Shield Against Full Disclosure Of A Half-Told Truth, That Is, If Adversarial Fairness Demands

The Second Circuit rested its decision on "adversarial fairness." The government rejects this rationale. In fact, the law of evidence-particularly in criminal cases-is imbued with the principle that a ***33** party's right to rely on a rule of exclusion is cut off when adversarial fairness demands it. [34]

For example, the Advisory Committee's proposed Federal Rules of Evidence included provisions for evidentiary privileges. These provisions were rejected by Congress in favor of Federal Rule of Evidence 501. Every one of those proposed rules was subject to an implied exception in the interest of adversarial fairness. These exceptions cannot be found in the text. 24 C. Wright & K. Graham, Federal Practice & Procedure, § 5506, at 562-63 (1986), and 1991 Supp. at 82-86.

The proposed attorney-client privilege had five exceptions. Yet courts and commentators agree that if a party seeks affirmatively to rely upon a lawyer's advice in furthering a litigation position, the adversarial fairness principle kicks in and permits the adversary to introduce other evidence that would otherwise be protected by the attorney-client privilege. In United States v. Miller, 600 F.2d 498 (5th Cir.), cert. denied, 444 U.S. 955 (1979), the defendant testified on direct examination to a

communication from his lawyer. Judge Tjoflat held that the defendant had opened the door by putting "his version of a privileged communication in evidence," and that the ***34** prosecutor could then utilize the entire communication "to get at the truth."

The physician-patient privilege ends when the patient puts physical condition in issue. 5 C. Wright & K. Graham, supra, § 5506.

The Fifth Amendment privilege may be lost by answering potentially incriminatory questions. This result may be called "waiver," but the witness need not be warned and need not make any intentional relinquishment of a known right. Rogers v. United States, 340 U.S. 367 (1951). A more sensible rationale is that the witness cannot cut off complete inquiry after having opened the subject. This is a function of adversarial fairness.

No more important privilege to the government can be found than "state secrets." Yet, in United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950), Judge Learned Hand said this:

> This [state secrets] privilege will often impose a grievous hardship, for it may deprive parties to civil actions, or even to criminal prosecutions of power to assert their rights or to defend themselves. That is a consequence of any evidentiary privilege. It is, however, one thing to allow the privileged person to suppress the evidence, and, toto coelo, another thing to allow him to fill a gap in his own evidence by recourse to what he suppresses. In United States v. Andolschek, we held that, when the Government chose to prosecute an individual for a crime, it was not free to deny him the right to meet the case made against him by introducing relevant ***35** documents, otherwise privileged. We said that the prosecution must decide whether the public prejudice of allowing the crime to go unpunished was greater than the disclosure of such "state secrets" as might be relevant to the defence. To that we adhere.

185 F.2d at 638.

In United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944), cited with approval in Dennis v. United States, 384 U.S. 855, 873, n.20 (1965), the trial judge had excluded relevant official reports offered by the defense. The government relied on a Treasury Department regulation that forbade production and introduction in evidence.

The Second Circuit acknowledged that "in Boske v. Comingore, 177 U.S. 459, the validity of a similar regulation was upheld." Thus, the case presented the identical dilemma as that which faced the Second Circuit here-a rule that might literally bar the evidence. Judge Learned Hand made short work of this problem:

> While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; ***36** it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully.

142 F.2d at 506

In Alderman v. United States, 394 U.S. 165 (1969), the Court was asked by the Department of Justice to permit in camera judicial examination of illegal wiretapped transcripts. This Court rejected that proposal, again relying on adversarial fairness.

Indeed, in a case joined for decision in Alderman, the records involved surveillance of Soviet nationals engaged in espionage. As Justice White wrote:

> Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident than in those cases, such as the ones at bar, where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by these records.

394 U.S. at 183-184.

The Court iterated in Alderman that the government could choose between disclosing and dismissing-again an unquestioned executive prerogative was recognized, but subjected to a condition.

The same considerations are reflected in Roviaro v. United States, 353 U.S. 53 (1957): the informer ***37** privilege must yield to the defense need for adversary inquiry into the circumstances of the alleged offense.

A defendant who takes the stand and testifies in conflict with a suppressed prior statement or item of physical evidence may be confronted with the suppressed matter. One principal rationale of these cases is to limit the impact of truth-suppressing rules in the interest of adversarial fairness. The defendant cannot use the exclusionary rule to "provide himself with a shield against contradiction of his untruths." Walder v. United States, 347 U.S. 62, 65 (1954). Four members of the Court thought in Jones v. Illinois, 493 U.S. 307 (1990) that the Walder principle should be expanded.

Rule 804(b)(1) must be read by the same canons, lest parties' sharp practices bury truths they have themselves created. [35] The last paragraph of 804(a) says that "the proponent" cannot take advantage of an unavailability obtained by his or her procurement or wrongdoing. [36] The rule is silent as to the role and ***38** responsibility of the opponent, and the court of appeals sensibly declined to go any further than the text required, and properly cited a general principle of statutory construction. [37]

3. The Government Should Not Be Able To Prevent Admission In Evidence Of Former Testimony Offered By A Defendant When It Has Created The Testimony Knowing Of Its Importance.

Salerno II, as explained in Bahadar, is limited to testimony the government "created." The most powerful considerations of adversarial fairness were set in motion by the government's tactics here. With indictments already in hand, and issues and defendants identified, the government chose to grant use immunity and interrogate on the basic issues. It at that time valued the testimony at a certain cost-the cost of complying with the use immunity statute.

Indeed, it may have been trying to head off defense use of DeMatteis and Bruno at trial, or to tie them to a story in accordance with its own theory. The government wants to have it both ways. Often, it will call witnesses before the grand jury to question them in secret without their lawyers present. If the witness appears at trial, regardless of who calls him, the government can then make substantive use of the grand ***39** jury testimony to impeach. Federal Rules of Evidence 607 and 801(d)(1)(A) make this possible. [38]

Now we see the government's proposed rule in context: If the grand jury witness gives testimony that inculpates the defendant, it will be admissible by the simple expedient of calling the witness at trial, or impeaching him if the defendant calls him. If the witness persists in giving exculpatory testimony, the government will bottle it up by resisting admission under Rule 804(b)(1).

This Court has warned the government that the grand jury-where witnesses come to testify in secret without counsel-may not be used to develop exculpatory evidence that may then be suppressed. As the Court said in Dennis, 384 U.S. at 873:

> In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations.

This principle has teeth. In United States v. Procter & Gamble Co., 356 U.S. 677 (1958), the Court held that if the government had used the grand jury to gather evidence for a civil case, and not for a potential indictment, this subversion of criminal procedure would require disclosure of the grand jury minutes to the defense. On remand, the district court ***40** found that the government had indeed engaged in this kind of misconduct. See C. Wright, Federal Practice& Procedure, Criminal 2d, § 109, at 277 nn. 6-8.

The lower federal courts have uniformly condemned use of the grand jury to gather evidence for a pending case. See generally United States v. Gibbons, 607 F.2d 1320, 1328 (10th Cir. 1979)(collecting cases). There is at least an aroma of that tactic in this case, given that these defendants had already been indicted when the grand jury was reconvened to hear the testimony first of DeMatteis then of Bruno.

4. The Second Circuit Adverted To, But Did Not Decide, The Constitutional Issue That Would Be Presented By Exclusion of Relevant Exculpatory Testimony.

In Salerno II, the court of appeals obeyed the "time-honored rule that we should not reach constitutional issues unless absolutely necessary." 937 F.2d at 807; see also Bahadar, 1992 WL 9390, at *19. Defendants had raised and preserved those issues.

This Court's decisions put the constitutional issue in sharp focus. The government is here saying that a rule of evidence should be interpreted to exclude evidence possessing the strongest possible guarantees of reliability-oath and cross-examination.

In Davis v. Alaska, 415 U.S. 308 (1974), defense counsel sought to ask a prosecution witness about his juvenile record, to show that the witness's juvenile probationary status gave him a motive to favor the prosecution. An Alaska statute seemingly forbade the disclosure. This Court held that the right of confrontation required the State to permit the inquiry.

In Chambers v. Mississippi, 410 U.S. 284 (1973), the Court refused to permit Mississippi to apply its ***41** hearsay rule to bar admission of reliable exculpatory hearsay. The rationale of these cases is discussed in P. Westen, The Cumpulsory Process Clause, 73 Mich. L. Rev. 71, 95 (1974); Note, Constitutional Restraints on the Exclusion of Evidence in the Defendant's Favor: The Implications of Davis v. Alaska, 73 Mich. L. Rev. 1465 (1975). [39]

C. The Court of Appeals Was Applying Well-Recognized Principles When It Held That DeMatteis and Bruno Were Not "Unavailable" To The Government, Which Had Already Immunized Them.

The Rule speaks of "unavailability." Unavailability to whom? Because the admission of the former testimony rests on "necessity," the proponent must generally show unavailability to himself of the live testimony. Compare Wigmore § 1414. For example, if a witness called by the government decides, through fear of or connivance with the defendant, not to testify, that witness is unavailable in the only way the rule requires, and a prior hearsay statement will be received. See 4 Weinstein & Berger, Federal Rules of Evidence ¶ 804(a) [01], at 804-36 n.8 and accompanying text.

The cases cited in the Weinstein-Berger treatise represent application of the same principle applied by the court of appeals in this case. The fearful or conniving witness is not unavailable to the defendant, ***42** who can with a few well-chosen words secure his testimony. The government's proposed double unavailability principle has no basis in the Federal Rules of Evidence, invites evidentiary gamesmanship in civil and criminal cases, and is redolent of the rigid "same case" and "same parties" limits ridiculed by every discerning commentator since Bentham and abolished by the Rule. [40]

The government complains that the Second Circuit has unfairly interfered with its prerogative to grant or deny immunity. Not so:

1. The Second Circuit has persuasively denied any such intention, in Salerno II and Bahadar. The court of appeals knows that immunity is an executive prerogative. That is not the issue here. The government had already granted DeMatteis and Bruno immunity, and the record shows that at least DeMatteis's immunity would have permitted the government to cross-examine him at trial. One may assume that Bruno's immunity was in the same form.

So the witnesses were not unavailable to the government, since the government had drafted papers that made them available. The government's tactical decision to argue against admissibility by claiming that ***43** the witnesses were unavailable is perhaps permissible, but like many other tactical choices it carries a price.

Even if one did not construe the immunity grants in accordance with their terms, the court of appeals' decision is still quite narrow, given that the government had already immunized them once. The fact that the government submitted an ex parte package deriding the witnesses and their testimony merely points up how little a cost they are being asked to pay. If they had all that evidence independent of the prior immunized testimony, they could prosecute DeMatteis and Bruno without difficulty.

2. As discussed above, the government's executive prerogatives are often cut off by the act of bringing a criminal charge.

3. The government greatly overstates the burden allegedly placed on it. This Court has repeatedly compelled the sovereign to choose between letting alleged wrongdoers go free and granting use immunity, for example, in Lefkowitz v. Cunningham, 431 U.S. 801 (1977). The Court, in an opinion by Chief Justice Burger, invalidated New York Election Law 22, which put the respondent Cunningham to the choice of waiving his Fifth Amendment privilege or forfeiting his party office when called to testify before a grand jury. The Court reaffirmed cases holding that the State is validly put to a choice between granting use immunity and foregoing its power to punish.

Conclusion

This case came here on the government's representation that the Second Circuit had issued a broad-based opinion that ignored the realities of prosecuting hard cases.

***44** Now the Second Circuit has again clarified, in Bahadar, just how sensible and narrow is its decision. Revelation of the DeMatteis and Bruno grand jury transcripts makes the government's factual arguments hypothetical at best.

The government concedes that grand jury testimony is frequently admitted in federal criminal trials, under Federal Rule of Evidence 804(b)(1) or 804(b)(5). The government says "We do not suggest that grand jury testimony will never be admissible against the government under Rule 804(b)(1). USB 14 n.5. Given that concession, it is difficult to see why the government thinks this case is worthy of review on certiorari. It would be hard to find a more compelling factual basis for admitting the former testimony. The writ should be dismissed as improvidently granted.

If the case is to be resolved on the merits, we respectfully submit that the court of appeals' decision should be affirmed.

Footnotes

* Counsel of Record

1 Relevant factual information and discussion is found in the following cases: an earlier case involving some of the same defendants and some similar allegations, United States v. Salerno, 868 F.2d 524 (2d Cir. 1989)["Salerno I"], relied on by the court of appeals for its factual discussion; an earlier appeal in this case, United States v. Ianiello, 866 F.2d 540 (2d Cir. 1989)["Ianiello"], in which the court of appeals remanded for a hearing on ex parte judicial and prosecutorial interference with the jury deliberations; the court of appeals opinion under review, United States v. Salerno, 937 F.2d 797 (2d Cir. 1991)["Salerno II"]; and a later opinion that further explains the basis of Salerno II, making clear that the issue the government seeks to have reviewed is not fairly presented by the opinion below, United States v. Bahadar, ___ F.2d ___ (2d Cir. 1992), 1992 WL 9390 ["Bahadar"].

2 Brief for the United States ["USB"]. at 4.

3 The defense attacked the admissibility of this document: the authenticating handwriting "expert" had been rejected as an expert in prior judicial proceedings, was trained as an accountant, was not a member of the professional societies of questioned document examiners, and had based her opinion mainly on a photocopy of the questioned document. See Tr. 9872-98; United States v. Wolfson, 297 F. Supp. 881 (S.D.N.Y. 1968), aff'd, 413 F.2d 804 (2d Cir. 1969)(rejecting testimony of this witness).

4 DeMatteis was also a principal in Metro Concrete for a period of time. See Salerno I. 868 F.2d at 542, and his own testimony.

5 In Salerno I, 868 F.2d at 542, the government had told defense counsel of Bruno and DeMatteis, but defense counsel in that case did not subpoena Bruno, did not seek admission of the grand jury testimony, did not establish that either man would invoke a privilege against self-incrimination, and did not establish that DeMatteis's testimony related to the same issue on which the defendants in that case were being tried. In this case, the defense indisputably fulfilled all these predicates.

6 Some volumes of Bruno & DeMatteis testimony are captioned "United States v. Salerno, et al"

7 Citations to the grand jury testimony of DeMatteis and Bruno are by name, the date of the appearance, and a page. The government's submission in opposition to admissibility was in camera, so we have no more precise identification of the testimony itself. The testimony is in sealed envelopes in the record.

8 DeMatteis, 6/3/86, p. 29.

9 DeMatteis, 6/3/86, pp. 35-36, 38, 81, 93, 108; 6/12/86, p.77; 6/19/86, pp. 49, 58 73.

10 DeMatteis, 6/12/86, p. 34.

11 DeMatteis, 6/12/86, p. 52.

12 DeMatteis, 6/19/86, pp. 32-33.

13 DeMatteis, 6/19/86, pp. 37-38.

14 DeMatteis, 6/19/86, pp. 4-5.

15 DeMatteis, 6/19/86, pp. 42-45. Of course, DeMatteis and Bruno were free to disclose to anyone what had happened before during their grand jury appearances. F. R. Crim. P. 6(e)(1), discussed in Butterworth v. Smith, 494 U.S. 624 (1990).

16 DeMatteis, 6/19/86, p.81.

17 Bruno, 9/11/86, p.43.

18 Bruno, 9/11/86, pp. 43-44

19 Bruno, 19/11/86, pp.50-51.

20 Bruno, 9/11/86, pp. 51-52.

21 Bruno, 9/11/86, pp. 28-30.

22 Bruno, 9/11/86, p.47.

23 The government states that the court of appeals did not reverse defendant Auletta's conviction based on the error as to him. This is true, but incomplete. The court of appeals found it "not necessary" to reach the issue, but said it might recur at a retrial. [Salerno II, at 811] The court of appeals did not reach many of the "sixteen" arguments raised by the eight appellants. [Salerno II, at 803] These points would be open for decision on remand if this Court reverses.

24 Citing United States v. Miller, 904 F.2d 65, 68 (D.C. Cir. 1990) ("Before the grand jury and at trial, [the witness's] testimony was to be directed to the same issue-the guilt or innocence of [the grand jury targets]."); United States v. Lester, 749 F.2d 1288, 1301 (9th Cir. 1984); United States v. Young Bros., Inc., 728 F.2d 682, 691 (5th Cir.), cert. denied, 469 U.S. 881 (1984); United States

v. Klauber, 611 F.2d 512, 516-17 (4th Cir. 1979), cert. denied, 446 U.S. 908 (1980). Cf. United States v. Vigoa, 656 F.Supp. 1499, 1505 (D.N.J. 1987), aff'd mem, 857 F.2d 1467 (3d Cir. 1988).

25 This fact makes it hard to understand why the government would tell this Court, USB 12, that "the prosecutor would have little to gain by confronting the witness with those tapes." If this is meant to suggest that the tapes were not used, it is untrue. If it is meant to say that tapes are never used, it is irrelevant. The existence of electronic surveillance is routinely disclosed to targets under 18 U.S.C. § 2518(8)(d).

The government's attack on Mr. Newman, USB 12 n.3, is unworthy. Newman's sole role was to refer Bruno to other counsel.

26 This Court can affirm the court of appeals' sensible result on a ground not relied on by that court. Washington v. Yakima Indian Nation, 439 U.S. 463, 476 n.20 (1979), including that the testimony is admissible under Rule 804(b)(5).

27 In the course of analyzing the irrelevancy of the government's motive, the Court of Appeals noted its equivocal agreement that "the government may have had no motive before the grand jury to impeach" Bruno and DeMatteis. Pet. App. 19a (emphasis added). The court provided no reasons for its "agreement," however, and given the context of this statement-consideration of the purposes served by the "similar motive" requirement-it appears that the court was simply accepting the government's position arguendo for purposes of demonstrating the irrelevance of motive. Id. at 20a.

28 The government's statement that the Advisory Committee rejected the "identity of issues" standard (the old common law test) in favor of the "opportunity" and "similar motive" requirements misconstrues the significance of this substitution. Gov. Br. 18 n.4 (citing Advisory Committee Notes). The Advisory Committee Notes make clear that Rule 804(b)(1) was drafted in terms of "similar motive" because the traditional "identity of issues" requirement was simply "a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity was presented," and this purpose was best served by making explicit the conditions under which this "equivalent handling" could be said to have occurred-i.e., where the party against whom the testimony was offered had the opportunity and a similar motive to develop the testimony. Id. ("identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness"); see also McCormick, supra 257. Thus, the Advisory Committee in no way "rejected" the "identity of issues" test in the sense of finding it misguided or premised on the wrong considerations. Quite the contrary: consistent with its overall intention to rationalize commonlaw hearsay doctrine and free it from artificial restrictions having no bearing on the reliability of declarations, the Committee sought to draft a rule that embodied the same values underlying the "identity of issues" standard while expanding its scope to serve these values in situations where the "identity of issues" test might not be met under its strict traditional interpretation. Accordingly, "identity of issues" remains a, perhaps the, critical factor in determining whether there was a similar motive under Rule 804(b)(1). Weinstein & Berger, Weinstein's Evidence 804(b)(1)[04], at 804-85 - 804-88 (1991); see also, e.g., United States v. Wingate, 520 F.2d 309, 316 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976) (finding no similar motive because issues differed at prior proceeding).

29 See, in addition to cases cited in Banadar, United States v. Henry, 448 F.Supp. 819 (D.N.J. 1978).

30 In the D.C. Circuit, a witness who waives the Fifth Amendment in the grand jury will usually be deemed to have waived it for the subsequent trial as well. See 904 F.2d at 65.

31 Consider a typical multidefendant civil antitrust case. Plaintiff notices the deposition of an officer of Defendant A. Counsel for Defendants A, B, C and D show up and "defend" the deposition by interposing objections. Often, they ask no questions. They count on being able to call the witness at trial, so the deposition will be used only for impeachment. After all, millions of dollars may be at stake in the litigation, and asking questions would only give away the defense strategy. As every civil lawyer knows, this all works just fine until Defendant A settles and won't make the witness (who we will suppose lives outside the civil subpoena range) available, or the witness dies, or maybe the witness decides to invoke the privilege against self-incrimination. The deposition is going to be admitted. 4 Weinstein's Evidence ¶ 804(b)(1) [02].

32 The government does not mention or address the availability of Rule 806. The District Court, however, did address and reject the defendants' Rule 806 arguments based on (1) its ex parte finding that the "truthfulness" of Bruno and DeMatteis' testimony was "seriously undercut" by the government; and (2) its belief that the use of the grand jury impeachment material at trial pursuant to Rule 806 would violate Fed. R. Crim.. P. 6, by requiring the disclosure of secret grand jury information. (Pet. App. 51a-52a). As we discuss further in the accompanying text infra, the District Court's first basis mistakenly substitutes its evaluation of the reliability of the hearsay declarants for the requirements of Rule 804(b)(1). Pizarro, supra, 717 F.2d at 350 (rejecting proposition that "the admissibility of previously cross-examined trial testimony turn[s] on a subsequent court's view of the unavailable declarant's reliability"). The District Court's second concern is misplaced in that much of the contradictory evidence presented to the grand jury, including surveillance tapes, will in most cases form part of the government's proof at trial and therefore be public apart from its use

in the grand jury. Given the government's control of the grand jury minutes, and the terms of Rule 6, this concern is fanciful. The government cannot seriously be saying that it can't cross-examine because it doesn't want to give away its secrets.

33 All hearsay declarants must have personal knowledge. See Advisory Committee Notes to Federal Rules of Evidence 803, 804.

34 Courts allow specific instances of conduct to be proved to attack credibility, despite the prohibition of Federal Rule of Evidence 608(b), under a "door-opening" theory. This again is the concept of adversarial fairness at work. 1 S. Saltzburg & M. Martin, Federal Rules of Evidence Manual 616-18 (5th ed. 1990). Indeed, Rule 806 impeachment need not satisfy Rule 608(b) requirements. United States v. Friedman, 854 F.2d 535, 570 n.8 (2d Cir. 1988), cert. denied, 490 U.S. 1004 (1989).

35 Federal Rule of Evidence 102 states:

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

These goals are served by decisions such as the present one, denying a party power to block reliable evidence by invoking a principle that his own conduct has made inappropriate.

36 This requirement is of constitutional dimension in criminal cases. See Motes v. United States, supra. In Motes, the hearsay was inadmissible because the government negligently let the witness escape custody and become unavailable. There was no showing of culpable wrongdoing. By a parity of reasoning, the court of appeals need not have found culpability by the government to hold the witness not unavailable to it.

37 In similar fashion, the state may not intimidate a witness and make him unavailable. Webb v. Texas, 409 U.S. 95 (1972). The state may not use hearsay until it tries even discretionary means to obtain live testimony. Compare Barber v. Page, 390 U.S. 719 (1968), with Ohio v. Roberts, 448 U.S. 56 (1980).

38 This tactical opportunity to use the "intimidating" power of the grand jury is underscored by 1 S. Saltzburg & M. Martin, Federal Rules of Evidence Manual 566-67 (5th ed. 1990).

39 As Professor Westen has shown, parity is a key concept in Sixth Amendment compulsory process/confrontation law. The government would clearly be able to use this kind of former testimony if a defendant's counsel had as energetically sought out and interrogated a witness under oath. See, e.g., Ohio v. Roberts, supra. See also Federal Rule of Evidence 804(b)(5).

40 In United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951), the Court upheld a regulation forbidding Department of Justice employees from producing official papers in response to subpoenas. Justice Frankfurter concurred because he assumed that such a holding was subject to an implicit condition that relevant evidence would be producible if the subpoena were served on a senior official such as the Attorney General. The alternative, he said, "would be to apply a fox-hunting theory of justice that ought to make Bentham's skeleton rattle." 340 U.S. at 473. Those words are relevant here.