UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

Appeal No. 84-5164

THE SYNANON CHURCH, INC.,

Appellant,

v.

UNITED STATES OF AMERICA

Appellee.

Appeal from the District Court
of the District of Columbia

APPELLANT'S BRIEF

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QUESTIONS PRESENTED

1. Whether, under the doctrine of Collateral Estoppel, after the Court of Appeals of the District of Columbia refused to affirm an alternative holding of the Superior Court of the District of Columbia as to Synanon's destruction of evidence, Synanon in the instant case is precluded from litigating that unaffirmed destruction of evidence finding.

2. Whether the dismissal by the court below on the ground of fraud on the district court should be reversed because it was based in large part on an invalid application of collateral estoppel.

3. Whether dismissal by the court below on the ground of fraud on the district court should be reversed because it was based in part on findings of fraudulent acts in the district court that are not supported by the record.

4. Whether the order below finding that evidence found to be destroyed was relevant to an issue before the court below, was not merely cumulative, and its loss was prejudicial to the Government.

5. Whether the court below could hold validly that there was a violation of Rules 16(f) and 41(b) of the Federal Rules of Civil Procedure without finding specifically (a) what portions of its order were not fulfilled by the 2,501 pages of documents furnished in response to its order, (b) that the unfulfilled portions of the order dealt with documents relevant to the issues

efore the district court, would not be merely cumulative, and heir absence would be prejudicial to the Government, and (c) hat no lesser sanction than dismissal would suffice.

Related Cases

he following related cases are known to Counsel:

Synanon Foundation, Inc. v. Bernstein, Superior Court of the District of Columbia, Civil Action No. 7189-78, decided October, 12, 1983, contained in Appendix to this Brief at p. 26.

Synanon Foundation, Inc. v. Bernstein (Synanon I), 503 A.2d 1254 (C.A.D.C. 1986), contained in Appendix to this Brief at p. 54.

In re Sealed Case, 244 U.S.App.D.C. 11, 754 F.2d 395 (1985).

In re Sealed Case, 85-5015 (D.C. Cir. March 19, 1985).

In re Sealed Case, 85-5825 (D.C. Cir. Sept. 9, 1985).

Synanon Foundation, Inc. v. Bernstein (Synanon II), D.C.C.A., No. 84-1635, decided November 4, 1986, three copies of which have been lodged with this Court.

Certificate of Counsel

The Synanon Church v. United States of America, No. 84-5164.

Certificate Required by Rule 8(c) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit:

The undersigned, counsel of record for The Synanon Church certifies that the following listed parties and amici (if any) appeared below:

The Synanon Church, a California nonprofit religious corporation, Appellant, which has no parent, subsidiary or affiliate known to counsel, after diligent inquiry, to have any stock in the hands of the public, except as follows:

The Synanon Church is a major shareholder of a California corporation, By-Pass Four, Inc., P.O. Box 266, Badger, California 93603, shares of which are owned by members of the public.

The United States of America, Appellee

These representations are made in order that judges of this Court, inter alia, may evaluate possible disqualification or recusal.

Sherman L. Cohn, Esquire
Attorney of Record for
The Synanon Church, Appellant

STATEMENT OF THE CASE

Nature of the Case; Proceedings and Disposition Below. By etter dated May 19, 1982, the Internal Revenue Service ("IRS") evoked recognition of The Synanon Church as a tax-exempt organi- ation under Section 501(c)(3) of the Internal Revenue Code for he two fiscal years ending August 31, 1977, and August 31, 1978, recognition which previously had been accorded Synanon. Syna- on thereupon commenced this declaratory judgment action, under he provisions of 26 U.S.C. 7428, seeking a judicial reinstate- ent of its tax-exempt status.

On February 9, 1984, District Judge Charles Richey dismissed his action, holding that Synanon had committed fraud on the Dis- rict Court.[1] Judge Richey's ruling was based upon the ollateral estoppel effect of holdings by Judge Braman of the istrict of Columbia Superior Court that Synanon had committed raud upon the Superior Court and that Synanon had destroyed ertain material sought in discovery in that court. Judge raman's holding was made in the case of Synanon v. Bernstein, ivil Action 7189-78 (decided October 12, 1983), affirmed, 503 .2d 1254 (1986). Judge Richey held that, because Judge Braman ad found that Synanon had destroyed certain material sought in iscovery, Synanon was collaterally estopped from arguing in the

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App. 1. Record Excerpts material included in the appendix to this Brief is cited as "App. __." Not all record material cited is included in the appendix. Record material not included in the appendix is cited to the original document.

istrict Court that it had not destroyed that material. oreover, Judge Richey found that Synanon had made certain isstatements to the District Court.

A timely appeal to this Court was filed on March 12, 1984.

Statement of the Relevant Facts. Synanon, a California onprofit religious corporation, was organized and incorporated n 1958 by Charles E. Dederich, for various charitable, scientific, educational, and religious purposes including the rehailitation of drug addicts and related research and public eduation.[2]

In 1960, its application for tax-exempt status was granted beause it was "organized and operated exclusively for charitable urposes" and therefore qualified under 26 U.S.C. 501(c)(3) for xemption as a charitable and educational organization. (Brandin ep. Ex. 3, p. 3, App. 117) Section 501(c)(3) provides for the xclusion from taxation of:

> Corporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation . . . and which does not participate in, or intervene in . . . any political campaign on behalf of any candidate for public office.

In March 1979, the IRS advised Synanon that an audit of its ctivities would soon commence. (Brandin dep. Ex. 2, App. 115)[3]

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2 Brandin dep. Ex. 3, p. 3, App. 117. In 1975, Synanon amended its charter to provide that it was a "religious" organization in addition to being organized and operated "exclusively for charitable purposes." (Brandin dep. Ex. 1, p. 1, App. 114)

ynanon was advised that the purpose of the audit was "to deter-ine if the activities you are engaged in are in furtherance of he purpose for which you were granted recognition of exemption nder section 501(c)(3) . . . and to determine your liability, if ny, for unrelated business taxable income . . . ." Id. This udit was first conducted by Les Brandin, an exempt organization pecialist of the IRS. Mr. Brandin visited Synanon many times, erhaps as many as 45 times, over a 13-month period, commencing n or about March 30, 1979. (Dep. 34-35, 57, 71, 254-55, App. 4-95, 96, 98, 108-09)

During those thirteen months, Mr. Brandin reviewed documents nd interviewed personnel at several of Synanon's locations. Dep. 70, App. 97) Mr. Brandin made clear in his deposition that very document that he requested was furnished, that every person e wished to interview, he was able to, and that every aspect of ynanon's operation that he wished to examine, he was able to xamine. The following colloquy during his deposition makes this lear:

> Q. . . . [D]id you receive all the documents from Synanon that you requested?
> A. I requested documents from Synanon and I was provided with those documents.
> Q. Were there any documents that you requested from Synanon that you did not receive?
> . . . .
> A. . . . [T]he answer is no. I received the documents that I requested.

This was the fourth audit conducted of Synanon. Previous audits were conducted from the fiscal years ending August 31, 1963-64, 1965-66, 1969-71. Each of the previous audits resulted in a finding that there should be "no change" in Synanon's tax-exempt status. Aff. of Carder 5/9/83, p. 17; P's Motion for SJ, Vol. XVI, Ex. 6096-6102.

Q. Now, were you able to talk to anyone who is a resident of Synanon that you requested to talk to?

A. Yes.

Q. Was there any aspect of the operation of Synanon that you wished to examine that you were prevented from examining?

A. No.

)ep. 72-73, App. 99-100)[4]

Mr. Brandin concluded, based upon his thirteen month audit, that ynanon should retain its tax-exempt status: "Based on the informa- ion that I reviewed, as evidenced by my work paper file, the organi- ation was tax exempt under 501(c)3; it should retain its tax exempt tatus." (Dep. 72, App. 99) Mr. Brandin prepared a report for review y his superiors, which stated that, "Based on the examination of the rganization's books and records and pertinent documents, Synanon eets the organization test. None of the net earnings are inured to he benefit of any private individual." (Dep. 83, App. 101)

In June 1980, Mr. Brandin was removed from the Synanon matter and

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During examination by a Government attorney, Mr. Brandin was asked about many documents and tapes. Mr. Brandin testified that he had not previously known of those documents or tapes. Dep. 172-266. But at no time did he contradict his earlier testimony that he received every document that he asked for. Perhaps most significantly, Mr. Brandin, when asked by Government counsel, "Did you ever ask for any Synanon tapes specifically to listen to?" answered, "No. . . . I wasn't concerned with the tapes, only to the extent that they existed and that it was a physical piece of property." Dep. 224, App. 107. Mr. Brandin also testified that his only interest in the tapes was to be sure that they physically existed and that they were accessible to and could be used by the people at Synanon. Dep. 256-57, App. 110-11. Later, in response to a question from Synanon counsel, Mr. Brandin made it clear that, while he saw the tapes physically in existence, "I'll be perfectly honest with you, I didn't want to hear any of the tapes because to me what was on the tapes, whatever was on the tapes, had no value. . . . So I said play and this is typical, I said well give me an early one, maybe give me a middle one and give me a recent one." Dep. 278-79, App. 112-13.

eplaced by another tax exemption specialist, a Mr. Chui. (Dep. 142, pp. 102) Mr. Brandin was advised by Mr. Stepner, his immediate upervisor that a Mr. Kajiki, a still higher level supervisor, equested that Mr. Stepner remove Mr. Brandin from the Synanon case. Dep. 144, App. 104) Mr. Stepner further told Mr. Brandin that he was eing removed from the case because of his final report which ecommended that there be no change in Synanon's tax-exempt status. Dep. 143, 145-46, App. 103, 105-06)

By letter dated May 19, 1982, the IRS revoked Synanon's tax-exempt tatus for the two fiscal years ending August 31, 1977, and August 31, 978. (App. 91) The reason stated was the following:

> Your net earnings inure to the benefit of private individuals. The provision of such net earnings to private individuals further serves a private rather than a public interest. Due to the conduct of certain activities, you are also not operated exclusively for any exempt purpose.

On August 16, 1982, Synanon commenced this declaratory ction seeking reinstatement of its tax-exempt status.

The Bernstein case.[5] Meanwhile, on July 11, 1978, Synanon ad filed an action in the Superior Court for the District of olumbia against Stuart A. Bernstein and others (hereinafter

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[5] The opinion of Judge Braman of the Superior Court, issued October 12, 1983, in the Bernstein case can be found beginning at App. 26. The District of Columbia Court of Appeals opinion can be found beginning at App. 54. In his October 12, 1983, decision, Judge Braman awarded attorneys' fees and costs against Synanon. On November 9, 1984, Judge Braman issued a second opinion awarding those attorneys' fees and costs. That award was affirmed in large part, though reversed in some part, by the District of Columbia Court of Appeals on November 4, 1986 (No. 84-1635). Three copies of that opinion are being lodged with the Clerk of this Court for the convenience of the Court.

ernstein"), arising out of a contract by which Synanon pur-
ased from Bernstein certain real property known as the "Boston
use" in the District of Columbia. Synanon alleged that Bern-
ein, personally and/or through agents had fraudulently induced
nanon to enter into a contract that it would not have entered
to but for the fraud and to incur costs that it otherwise would
t have incurred. Synanon rescinded the contract, returned the
operty, and sued for the return of its $250,000 deposit, for
e recovery of the costs that it had incurred, and for punitive
mages. Bernstein counterclaimed on the theory that Synanon,
en it purchased the Boston House, failed to advise Bernstein
at it was a violent organization, after it had asserted that it
s non-violent.

After various discovery proceedings, including hearings on
tions to compel and for sanctions, Judge Braman of the Superior
urt found that Synanon had failed to turn over all of the tapes
d papers that were sought in discovery, that some tapes and
cuments, including computer records, were systematically and
eliberately destroyed by Synanon, and that officials of Synanon,
ncluding two in-house counsel, perjured themselves and/or made
isrepresentations to the Superior Court in the course of dis-
overy motions. The subject matter of items found to be destroy-
d was "violence, money, purchase of guns, legal terror tactics,
oly War, changing partners or love match," among others.[6] App.

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[6] There is indefiniteness as to exactly what Judge Braman found to have been destroyed. Elsewhere he stated the materials related to "violence, but also to money, to sexual subjects,
(Footnote continued)

2.

Judge Braman found that, under Bob Jones University v. nited States, 461 U.S. 574 (1983), these items were relevant to ether, under the public policy of the United States, Synanon uld be a non-profit corporation. Judge Braman went on to cide that, if Synanon's corporate policy contravened ndamental public policy, then it could not be a nonprofit ganization under the District of Columbia Zoning Regulations, d thus it could not use the Boston House for offices. esumably, Judge Braman also concluded that because, under this alysis, Synanon could not use the Boston House for offices, it lso could not own the Boston House.

Judge Braman further held that the conduct of Synanon's in-use counsel in the Superior Court constituted fraud upon the perior Court. And on October 12, 1983, Judge Braman dismissed ith prejudice Synanon's complaint against Bernstein.

Upon appeal, the District of Columbia Court of Appeals, on anuary 29, 1986, affirmed. The Court of Appeals, speaking hrough Judge Mack, deliberately limited its affirmance to the econd of Judge Braman's two grounds: the fraud on the Superior ourt. App. 55. In its opinion, after stating the facts, the ourt of Appeals set forth, separately, the two grounds of Judge raman's decision: the destruction of materials and the fraud on he Superior Court. Then the appellate court held:

(continued)
to guns, and other matters." App. 29.

> The trial court found that dismissal of the complaint was warranted on two independent grounds: first, that the plaintiff had abused the discovery process; and second, that the plaintiff had perpetrated a fraud upon the court. We affirm on the second ground without deciding the merits of the first.

pp. 55.

In a separate statement, the author of the majority opinion, dge Mack, made clear that the majority opinion was limited to affirmance on the ground of fraud on the Superior Court. dge Mack stated:

> The majority chooses not to reach the major question decided by the trial court -- its decision to grant the defendants' motion to dismiss the complaint based on Synanon's destruction of evidence. I do not think we can ignore the trial court's holding in this respect . . . .

pp. 74. Judge Mack then went on at great length disagreeing ith Judge Braman's alternative ground for dismissal based upon e destruction of evidence.

Judge Richey's Decision.[7] In the instant case, Judge ichey, on February 9, 1984 -- between the time of the decision f Judge Braman and that of the Court of Appeals -- dismissed ynanon's complaint "with prejudice for plaintiff's fraud upon e Court . . . ." App. 2. Judge Richey held that, because of dge Braman's decision, Synanon was "Collaterally Estopped From enying Its Systematic Destruction and Alteration of Records." pp. 8. Judge Richey concluded that "it was on the basis of that estruction . . . that Judge Braman decided to dismiss ernstein." App. 10. Based upon the doctrine of collateral

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Judge Richey's opinion can be found commencing at App. 1.

toppel, Judge Richey held that this "action must be dismissed e to plaintiff's wilful, systematic, and extensive destruction d alteration of documents and tapes relevant to a determination Synanon's tax-exempt status." App. 7-8.

Turning to the issue of "fraud upon the Court," Judge Richey gan his reasoning on the basis that material relating to sub- cts sub judice were found by Judge Braman to have been "delib- ately destroyed." App. 13-14. Judge Richey then went on to nd that Synanon had continued the fraud in the court below by e following actions:

> -- filing the lawsuit after having destroyed evidence (again relying on Judge Braman's findings);
>
> -- seeking an admission from the Government under Rule 36 of the Federal Rules of Civil Procedure that "no relevant information had been denied the IRS" in its audit of Synanon;
>
> -- statements to the court below by Synanon's in-house counsel that, in its audit, the IRS was never denied access to any material;
>
> -- the failure of Synanon "to acknowledge" in response to two orders of the district court (of August 17 and October 21, 1983) "its scheme of targeted destruction and concealment of materials perceived to be damaging" and to "account[] for destruction if the materials were no longer extant."

pp. 14-15. Judge Richey found the power to dismiss under the nherent power of the court to dismiss for fraud. Judge Richey ent on to find that "dismissal would also be justified under ules 16(f) or 41(b) for Synanon's failure to obey its orders of ugust 17 and October 21, 1983." App. 17.

This appeal followed.

ARGUMENT

Introduction and Summary

It is significant, at the outset, to clarify what is at issue and what is not. This appeal is not concerned with whether Synanon does more good than harm or more harm than good. Nor is this appeal concerned with whether Synanon or its officers have in fact committed acts of violence or whether any such act was or was not justified. Nor is this appeal concerned with whether Synanon or its officers in fact destroyed or altered tapes and computer records. Nor is this appeal concerned with whether the IRS properly withdrew Synanon's recognition under Section 501 (c)(3) of the Internal Revenue Code. None of these issues were tried below; if this Court reverses, these issues will be ripe for consideration in the trial court.

Judge Richey dismissed the action before him on the ground that fraud had been committed on the District Court. That decision rests essentially upon Judge Richey's holding that under the doctrine of collateral estoppel Synanon was estopped from contesting Judge Braman's findings that Synanon had destroyed and/or altered tapes and computer records that, Judge Braman further found, were material to the issue of nonprofit status under Section 501(c)(3) of the Internal Revenue Code through the operation of the doctrine set forth in Bob Jones University v. United States, 461 U.S. 574 (1983).

Judge Richey's holding cannot stand. In affirming Judge Braman, the District of Columbia Court of Appeals significantly

rrowed his findings. While Judge Braman held that the case fore him should be dismissed upon either of two independent ounds, i.e., fraud on the Superior Court and destruction of pes, etc., the Court of Appeals affirmed solely upon the first ound. The majority of the appellate court deliberately did not ss upon the destruction of evidence ground. Under well-settled inciples of law, the findings of Judge Braman that were not firmed on appeal cannot be given collateral estoppel effect. is generally recognized that, when a trial court decides a tter upon two grounds, and an appellate court affirms on only e of those grounds, the collateral estoppel effect of the re- lting judgment is limited to the ground on which the trial urt was affirmed.

Judge Richey's decision that there was fraud upon the Dis- ict Court did not rest -- and could not have rested -- upon aud upon the Superior Court. Rather, it rested essentially on the collateral estoppel effect given by Judge Richey to dge Braman's findings of destruction of evidence. As those ndings were deliberately not affirmed by the Court of Appeals, ey can not be given collateral estoppel effect. Judge Richey und that the collaterally estopped destruction of evidence was ttressed by the bringing of the current law suit, by a Rule 36 mission request, by two statements made by Synanon's in-house unsel, and by the failure of Synanon to admit, in response to o orders by Judge Richey, that it in fact had destroyed evi- nce. Once the collaterally estopped facts are removed, the maining acts found to be wrong by Judge Richey are not enough

themselves to stand, as a matter of law, as a fraud upon the urt rendering dismissal appropriate. Moreover, the Rule 36 mission request and the two statements of in-house counsel nnot be fraudulent in view of the sworn statements of IRS ditor Brandin that are fully supportive of that request and the atements of counsel.

Moreover, Judge Braman's findings that Synanon is not a non-ofit organization under Section 501(c)(3) of the Internal Reve-e Code clearly cannot be given collateral estoppel effect. rst, Judge Braman, a state-level trial judge, has no competence make determinations under the federal Internal Revenue Code. condly, whether or not Synanon qualifies under Section 501)(3) is immaterial to a determination of whether it qualifies a nonprofit organization under the District of Columbia local ning regulations. Thus, evidence that may be relevant to the ning determination does not necessarily have any relevance to e 501(c)(3) determination. Thirdly, the effect given by Judge aman and then in turn by Judge Richey, in dicta, to the Bob nes decision is entirely misplaced. This case is not Bob nes. Bob Jones authorizes neither the IRS, nor a state-level ial judge, nor a district judge to declare the public policy of e United States under the Internal Revenue Code. This is so rticularly in the absence of a revenue ruling and the strong d consistent views of the Congress and the Supreme Court which rmed a crucial part of the Bob Jones analysis. Further, what-er validity the Section 501(c)(3) findings of Judge Braman may ve had were removed by the deliberate refusal of the Court of

peals to affirm on those grounds.

Finally, whatever destruction of evidence occurred was done cause of cases other than this case. The current case was not en commenced when the destruction of evidence was asserted to ve occurred. While the IRS audit had occurred, there is no nding by Judge Braman and there is no evidence that any de- ruction was aimed at that audit, and the IRS auditor has testi- ed that any material he asked for he was furnished. In this rcumstance, if the decision below be affirmed, it means that nanon will be denied its day in court to prove its entitlement Section 501(c)(3) recognition because of destruction of evi- nce that was not found to be relevant to this case and, indeed, at was never even asked for in this case. Thus, for the first me we would have as a practical effect a rule that, once a per- n is found to have done something bad, the courts of justice e forever closed to him. That is not, and cannot be, the law.

I.

AS JUDGE BRAMAN'S FINDING CONCERNING DESTRUCTION OF EVIDENCE WAS NOT AFFIRMED ON APPEAL, IT CANNOT BE GIVEN COLLATERAL ESTOPPEL EFFECT AND THE DISTRICT COURT'S HOLDING OF FRAUD ON THE DISTRICT COURT MUST BE REVERSED

When a trial court decides on two separate grounds, and an appellate court affirms on one ground only, collateral estoppel effect is given solely to the ground affirmed and no collateral estoppel effect is given to the ground not affirmed.

This case concerns, not the doctrine of res judicata, but e doctrine of collateral estoppel. The distinction between the o is well established and has been long recognized. See Crom-

ll v. County of Sac, 94 U.S. 351, 352 (1876). The former constitutes a bar to a second suit between the same parties on the me cause of action or claim, a situation which obviously does t apply to this case. In collateral estoppel, on the other nd, the second action is upon a different claim or demand; it perates as an estoppel only as to those matters in issue or ints controverted, upon the determination which the finding or rdict [in the first case] was rendered." Id. at 353. As this urt, speaking through Judge Leventhal put it in Tutt v. Doby, 8 U.S.App.D.C. 171, 459 F.2d 1195 (1972): "the doctrine of llateral estoppel . . . prohibits parties who have litigated e cause of action from relitigating in a second and different use of action matters of fact which were, or necessarily must ve been, determined in the first litigation." 459 F.2d at 97; Restatement of the Law of Judgments, Second §27 (1982); velopments in the Law--Res Judicata, 65 Harv. L. Rev. 818, 840 952).

The doctrine of collateral estoppel is subject to one mitation that is central to this appeal: the factual decision ich it is sought to have collaterally estopped must have been ssential to [the] judgment" in the first case. Norton v. rney, 266 U.S. 511, 517 (1925); American Employers Ins. Co. v. erican Security Bank, 241 U.S.App.D.C. 379, 384, 747 F.2d 1493, 98 (1984); Stebbins v. Keystone Ins. Co., 156 U.S.App.D.C. 326, 2, 481 F.2d 501, 507 (1973); Eastern Foundation Co. v. Cresll, 154 U.S.App.D.C. 240, 475 F.2d 351 (1973); Halpern v. hwartz, 426 F.2d 102, 105 (2d Cir. 1970); Fibreboard Paper

ods. Co. v. Machinists Local 1304, 344 F.2d 300, 306 (9th Cir. 65); Restatement of the Law of Judgments, Second § 27, comment (1982). This Court, again speaking through Judge Leventhal, rmed the essentiality requirement a "general principle limiting llateral estoppel . . . ." Stebbins v. Keystone Ins. Co., 156 S.App.D.C. 326, 332, 481 F.2d 501, 507 (1973). And it has been nerally accepted. See Block v. Commissioner, 99 U.S. 686, 693 878); Segal v. American Tel. & Tel. Co., 606 F.2d 842, 845, n. (9th Cir. 1979); James and Hazard, Civil Procedure §11.19, pp. 9-71 (1977) ("Determination of Matter or Point Must Have Been cessary to the Result"); Austin W. Scott, Collateral Estoppel Judgment, 56 Harv. L. Rev. 1, 10-11 (1942) ("the question is ether the determination is essential to the judgment"); lasky, Collateral Estoppel--Effects of Prior Litigation, 39 wa L.Rev. 217, 222 ("decided of necessity in a prior action"), 4 ("actually essential to the prior decision"), but see 224, n. (1954); Developments in the Law--Res Judicata 818, 840, 846 952).

More particularly, this case centers upon an application of e essentiality limitation upon collateral estoppel that appears be universally accepted, including by this Court: when a ial court decides a matter upon two alternative grounds, either which is sufficient to sustain the judgment, and an appellate urt affirms on only one of those grounds, collateral estoppel limited to the ground of affirmance. Thus, in the words of dge Leventhal of this Court: "when a judgment specifically sted on alternative grounds is appealed, only those issues

pressly considered by the appellate court can be used, as the sis for a plea of collateral estoppel." Stebbins v. Keystone s. Co., 156 U.S.App.D.C. 326, 332 n.13, 481 F.2d 501, 507 n.13 973).

Other courts are in complete agreement. As Judge Augustus nd put it a half century ago,

> To treat as controlling the findings of a trial court where the appellate court upsets or disregards them and renders a decision of affirmance on different grounds furnishes parties to other litigations affected by the decision a false guide. . . . [W]ith all due respect we cannot subscribe to such a formal treatment of the situation.

ran Towing & Transp. Co. v. Navigazione Libera Triestina, 92 2d 37, 40 (2d Cir. 1937). And this has been the generally cepted view. International Refugee Organization v. Republic S. Corp., 189 F.2d 858, 862 (4th Cir. 1951) ("the I.R.O. by pealing from the finding had done everything within its power have it reviewed; and, since we decided the case without ciding that issue, the I.R.O. should not be held bound by the nding."); Breen v. Centex Corp., 695 F.2d 907, 915-16 (5th Cir. 83); Hicks v. Quaker Oats Co., 662 F.2d 1158, 1168 (5th Cir. 68) ("if a judgment is appealed, collateral estoppel only works to those issues specifically passed upon by the appellate urt"); Martin v. Henley, 452 F.2d 295, 300 (9th Cir. 1971) ("If court of first instance . . . bases its judgment on alternative ounds, and the reviewing court affirms the judgment on only one the two grounds, refusing to consider the other, the second ound is no longer conclusively established"); Hannahville In- an Community v. United States, 180 Ct.Cl. 477, 485 (1967) ("ac-

rding to the great weight of judicial and scholarly opinion, en a lower court's decision on a question of fact is challenged a proper appeal, and the appellate court does not pass upon at finding of fact in reaching its decision, the lower court's nding is not conclusive against the appellant in a subsequent it on a different cause of action"); Standard Oil Co. v. United ates, 231 Ct.Cl. 112, 685 F.2d 1337, 1342 (1982); Plastic ntainer Corp. v. Continental Plastics, 607 F.2d 885 (10th Cir. 79); Allegheny County v. Maryland Cas. Co., 146 F.2d 633, 637 d Cir. 1944); St. Joseph Union Depot Co. v. Chicago, R.I. & R., 89 Fed. 648 (8th Cir. 1898).[8] The commentators are also in reement. 1B Moore's Federal Practice par. 0.416[2], pp. 517-19 984):

> Thus, if the trial court rests its judgment on two grounds, each of which is independently adequate to

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[8] One case is sometimes cited to the contrary: Russell v. Russell, 134 Fed. 840 (3d Cir. 1905). See Hicks v. Quaker Oats, 662 F.2d 1158, 1169 n. 6 (5th Cir. 1981); Hannahville Indian Community v. United States, 180 Ct.Cl. 477, 485 (1967). However, closer analysis discloses that there is no conflict. While the cryptic language of the Third Circuit opinion can be read to provide collateral estoppel effect to a factual decision of the New Jersey court of first instance that was not a part of the affirmance in the first case, an examination of the fuller facts indicates that that is an erroneous reading. As the federal trial court (the Circuit Court for the District of New Jersey) in the case appealed to the Third Circuit makes clear, the second (federal) suit was between the same two parties and on the same cause of action, seeking the same relief, as the first (New Jersey) suit. 129 Fed. 434, 436-37 (1904). Compare with the first case, Russell v. Russell, 60 N.J.E. 282, 47 Atl. 37 (1900). When those facts are realized, it is clear that the Third Circuit is applying the doctrine of res judicata, not that of collateral estoppel. And, of course, under the doctrine of res judicata the entire cause of action is foreclosed in a subsequent suit, not just a factual issue necessarily litigated and decided.

> support it, the jūdgment is conclusive as to both; but i[f] the appellate court affirms on one ground without passing on the other, the second ground is no longer conclusively established under the collateral estoppel doctrine.

. at 518; Wright & Miller, Federal Practice & Procedure, § 21, p. 205 (1981) ("As to matters passed over by the appellate urt, however, preclusion is not available on the basis of the ial court decision. . . . The federal decisions agree that once appellate court has affirmed on one ground and passed over an- her, preclusion does not attach to the ground omitted from its cision"); Restatement, Judgments, Second § 27, comm. o (1982).

As the appellate court affirmed Judge Braman solely on his fraud-on-the-court holding, his alternative destruction-of-evidence holding cannot be given collateral estoppel effect.

When these principles are applied to the present case, the sult is manifest: collateral estoppel effect cannot be given a ground of decision by Judge Braman that the District of lumbia Court of Appeals deliberately and consciously refused to firm.

The majority of the Court of Appeals clearly stated that it ad Judge Braman as deciding against Synanon on two alternative ldings: one a holding "that Synanon's destruction of materials quested by the defendant through the discovery process rranted dismissal of the complaint"; the other "in addition" lding that "Synanon's in-house attorneys had perpetuated a aud on the court of sufficient magnitude to warrant dismissal the complaint." App. 70. The appellate court made clear that affirmed solely upon the second ground:

> The trial court found that dismissal of the complaint was warranted on two independent grounds: first, that the plaintiff had abused the discovery process; and second, that the plaintiff had perpetrated a fraud upon the court. We affirm on the second ground without deciding the merit of the first.

p. 55.

If there be any doubt, it is dispelled in a separate opinion itten by Judge Mack, the author of the majority, when she ates:

> The majority chooses not to reach the major question decided by the trial court -- its decision to grant the defendants' motion to dismiss the complaint based on Synanon's destruction of evidence. I do not think we can ignore the trial court's holding in this respect . . . .

p. 74. Judge Mack then went on to discuss at much length the oblems with Judge Braman's findings concerning destruction of idence.

The essential point is that the appellate court refused to firm the destruction of evidence holding of Judge Braman. And is was not a matter of oversight: it was a deliberate, con- ious decision to affirm on one ground -- fraud on the court -- d to leave the other, destruction of evidence, untouched.[9]

Under the law developed in Part I-A of this Argument, the sult is clear: the findings of Judge Braman going to the de- ruction of evidence cannot be given collateral estoppel effect.

It is of course true that, when Judge Richey rendered the dgment below, Judge Braman's decision had not yet been decided

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[9] The Court of Appeals, unanimously, reiterated in its recent attorneys' fees opinion that this was indeed its decision. See decision of November 4, 1986, in Synanon II at p. 6.

appeal. Clearly, collateral estoppel may be applied even ile an appeal is pending. Nixon v. Richey, 168 U.S.App.D.C. 2, 180 n.75, 513 F.2d 430, 438 n.75 (1975); Wright & Miller, deral Practice & Procedure § 4433, pp. 308-11 and cases cited 981). But, as this Court has noted, it may have been the bet- r part of discretion for Judge Richey to have awaited the deci- on of the District of Columbia Court of Appeals before acting, avoid "the complicated unravelling that might become neces- ry" should -- as did happen -- the Court of Appeals not affirm dge Braman's decision in all respects, In re Professional Air affic Controllers Organization, 226 U.S.App.D.C. 1, 6, 699 F.2d 9, 544 (1983).

However, once the Court of Appeals acted, the collateral toppel effect of Judge Braman's findings concerning destruction evidence evaporated. And it is up to this Court to decide is appeal without that collateral estoppel effect. This result s reached by the Supreme Court in Butler v. Eaton, 141 U.S. 240 891), a case quite like the present. There, as here, the lower urt gave preclusive effect to an extant judgment. There, as re, while an appeal was pending, the preclusive effect of the rlier judgment was removed by appellate action. There, Justice adley, speaking for the Court, asked rhetorically: "Why, then, ould not we reverse the judgment which we know of record has come erroneous . . . ?" 141 U.S. at 244. Finding no reason y not, the Court did so.

This principle has been applied in recent cases by the strict of Columbia Court of Appeals in Adams v. Jonathan

odner Co., 475 A.2d 393, 397 (1984), and by other courts. g., Ornellas v. Oakley, 618 F.2d 1351 (9th Cir. 1980); ternational Tel. & Tel. v. General Tel. & Electronics Corp., 7 F.2d 1162 (4th Cir. 1975); DiGaetano v. Texas, 300 F.2d 895 d Cir. 1962); Wright & Miller, Federal Practice & Procedure § 33 p. 311 (1981).

Thus, while Judge Richey applied the doctrine of collateral toppel to the findings of Judge Braman concerning the destruc- on of evidence, the basis of that application is now gone, and is Court should reverse.

The other grounds found by Judge Richey to be supportive of fraud on the court are not supported by the record and, moreover, by themselves are insufficient to uphold a dismissal for fraud on the district court.

Judge Richey also found that there were three fraudulent ts committed in his Court. He did not hold that these acts one would be enough to constitute such fraud on the Court as to stify dismissal. Rather, he coupled them with the destruction evidence which he found through the operation of the doctrine collateral estoppel. The removal of the collateral estoppel fect should in itself require reversal. But, we respectfully bmit, the three fraudulent acts found by Judge Richey are them- lves without factual foundation.

Two of these acts concern whether the IRS agent who audited nanon had been furnished all of the information which he ught. It will be recalled that auditor Brandin stated, under th, that he in fact had been furnished everything that he asked

r. It bears a repetitive look at his exact language:

> Q. . . . [D]id you receive all the documents from Synanon that you requested?
> A. I requested documents from Synanon and I was provided with those documents.
> Q. Were there any documents that you requested from Synanon that you did not receive?
> . . . .
> A. . . . [T]he answer is no. I received the documents that I requested.
> Q. Now, were you able to talk to anyone who is a resident of Synanon that you requested to talk to?
> A. Yes.
> Q. Was there any aspect of the operation of Synanon that you wished to examine that you were prevented from examining?
> A. No.

ep. 72-73, App. 99-100).

Judge Richey held it to be a fraudulent act on the part of nanon to pose the following Request for Admission one year ior to Judge Braman's October 1983 decision:

> REQUEST FOR ADMISSSION NO. 6: That no single document or piece of information requested by Agents Brandin or Chui was ever denied to them by plaintiff.

p. 119. And Judge Richey held it to be fraudulent for Philip urdette, then in-house counsel for Synanon, to state in an fidavit in May 1983 (five months before Judge Braman's cision):

> 5. Les Brandin conducted the I.R.S. audit from March 30, 1979 through June 25, 1980. During this audit, Synanon provided to defendant all information requested about Synanon's organization and operations . . . .
> 6. Every request from the I.R.S. for information received a prompt and complete response. No relevant facts or documents were ever concealed or misrepresented.

p. 126. And in a status conference in March 1983 (some seven nths before Judge Braman's decision), Mr. Bourdette, in the

dst of a lengthy discussion with Judge Richey concerning mate-
al furnished to auditor Brandin stated: "There was never, ever
y situation where he was denied access to anything." App. 142.
is statement was made during a hearing regarding whether
nanon should be permitted to take the deposition of Mr.
andin. Status Call, March 21, 1983, pp. 11-32. Mr. Bourdette
s providing an offer of proof as to the anticipated testimony
Mr. Brandin - and, in fact, Mr. Brandin gave that testimony.
p, 72-73, App. 99-100.

We respectfully submit that, in view of Mr. Brandin's sworn
atements that he had been furnished everything he asked for,
e only way the request for admission or the statements of Mr.
urdette could be considered fraudulent would be if there is a
sitive duty on the part of a taxpayer to offer to an IRS audi-
r material that the IRS auditor does not ask for. Judge Richey
tes no authority for such a proposition. We respectfully sub-
t that there is none.

Moreover, Judge Richey found that the mere bringing of the
stant law suit was in itself a fraudulent act. Once again, it
clear from the record that Synanon had been audited on three
evious occasions, and each time IRS had found that no change in
nanon's 501(c)(3) status was warranted. It is also clear from
ditor Brandin's deposition that, after he had been furnished
l of the documents he asked for, after he had spoken to all of
e persons he desired to speak to, he found no reason to recom-
nd a change in Synanon's 501(c)(3) status. Indeed, he had rec-
mended that there be no change. In this situation, we respect-

lly submit, there is no basis for finding that the mere bring-
g of an action to contest the revocation of the 501(c)(3) re-
gnition was a fraudulent act.

As noted, Judge Richey found the admission request, the
atements of Mr. Bourdette, and the bringing of the suit as
audulent acts that occurred before his court. We respectfully
bmit that, upon examination of the record in this case, there
no basis for those findings.

Judge Richey apparently recognized that Judge Braman's
nding of destruction of evidence alone was not enough and that
ese matters that he found to have occurred before him were
sential to his finding of fraud on his court. Thus, their lack
support in the record requires a reversal of his holding even
ould, arguendo, the collateral estoppel effect of Judge
aman's non-affirmed holding be permitted to stand.

Finally, Judge Richey focused upon two orders of the court
low, one on August 17, 1983, and one on October 21, 1983. The
gust 17th order directed the production of eight separate
tegories of documents,[10] including "a complete and detailed

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[10] The full order directed the production of the following categories of documents and tapes:

1. All minutes of meetings of Synanon's Board of Directors or minutes of its Executive Committee or Foundation Business meetings in the form contained in pages 1-103 of Government Exhibit Volume I.

2. All Think Table Topic Summaries other than those seized from Charles E. Dederich at the time of his December, 1978 arrest and which are contained in Government Exhibit II.

3. All those many boxes of tape recordings of Synanon's executives and officials transported by Dan Sorkin, Steve Simon or any other person out of the

(Footnote continued)

cord and accounting of all tape recordings and related cuments and records destroyed or altered by Synanon, together th a full description of the contents of those tapes and the ents that they record."[11] App. 144. On August 30, 1983, anon responded. Synanon agreed to produce many of the cuments that were directed to be produced and stated that hers could not be found or did not exist. See App. 145-54.

On October 21, 1983, there was a status conference, request-

(continued)
State of California beginning in the Fall of 1978.

4. All those tape recordings which Synanon changed the label of, rather than destroy, together with a record of the former and current labels of each such recording. This includes, but is by no means limited to, the Formia game tapes, all or a portion of which are now relabeled "The Great Conversation."

5. A complete and detailed record and accounting of all tape recordings and related documents and records destroyed or altered by Synanon, together with a full description of the contents of those tapes and the events that they record. This includes, but by no means is limited to, the sensitive subject lists and sensitive subject logs described by Bette Fleishman in her declaration.

6. All of Douglas Robson's "incident reports" and monthly reports and any other similar reports.

7. All tape recordings, logs, and other records of the August 28, 1978 game where Charles E. Dederich ordered Percy Tickles to attack attorney Morantz.

8. All tape recordings, logs, and other records of the September, 1978 Board game where Charles E. Dederich ordered that Attorney Paul Morantz be "taken care of" and ordered the former Synanon resident Phil Ritter be "taken care of."

p. 143-44.

By this time, there was extant a Declaration by Bette Fleishman in which she stated that tapes, etc., had been destroyed, altered, transported, etc. A deposition of Bette Fleishman was taken a week after the August 17th order.

by counsel, to discuss the trial date that had been set for vember 9, 1983. Toward the end of this conference, Judge chey stated:

> It is the Court's understanding and it is the Court's order that you [Synanon] produce the information that was either secreted, hidden or otherwise treated in that manner, and then any and all destroyed materials for which you have an inventory or record, they are to be produced, if they haven't been produced, immediately and instanter.

p. 159. Four days later, Synanon filed a "Further Response of aintiff to Order of the Court To Produce." App. 160-65. This rther Response pointed out that, in response to the order of gust 17th, Synanon had produced 2,501 pages of documents to the vernment. It also pointed out the difficulty that it had in oducing any information on documents that Bette Fleishman had stified had been destroyed since, despite questioning into the tters, Synanon stated that she could not identify any tapes at had been destroyed.

Judge Richey held no factual hearing of his own into this tter, but took Judge Braman's findings, on the basis of collat- al estoppel, that tapes and/or documents that he had ordered to produced and were not produced in his Court. Nor did Judge chey hold any evidentiary hearing into whether any missing tape s material to the issues before him or whether the Government s in fact prejudiced by the absence of any tapes or other terial. Once again, reliance seemed to be placed upon the ndings of Judge Braman. And, of course, after the Court of peals decision of January 29, 1986, those findings are no nger subject to collateral estoppel effect. Moreover, Synanon

had been effectively precluded from developing any evidence to counter the allegations against it by Judge Richey's Order of January 18, 1983 staying all discovery in the case. Due process required far more before entry of an order dismissing the action.

If, arguendo, these problems were not present, we respectfully submit that the result should be no different. If all that Judge Richey can legitimately point to is the failure to obey in full what is really one discovery order, we respectfully submit that this hardly constitutes fraud on the Court warranting dismissal of the action.

II.

ASSUMING, ARGUENDO, THAT COLLATERAL ESTOPPEL EFFECT CAN BE GIVEN TO JUDGE BRAMAN'S ALTERNATIVE (NON-AFFIRMED) HOLDING OF DESTRUCTION OF EVIDENCE, IT CANNOT BE MADE A BASIS OF A DISMISSAL WITHOUT FINDINGS THAT THE EVIDENCE DESTROYED WAS RELEVANT TO AN ISSUE BEFORE THE DISTRICT COURT, THAT IT WAS NOT MERELY CUMULATIVE, AND THAT THE GOVERNMENT WAS SUBSTANTIALLY PREJUDICED; AS THERE WERE NO SUCH FINDINGS, THE DISMISSAL OF THIS CASE MUST BE REVERSED.

While we believe that the law is clear that the findings of Judge Braman concerning destruction of evidence cannot be given collateral estoppel effect, as those findings evaporated after the Court of Appeals failed to affirm them, there is a separate and independent reason that they should not lead to the result given them by Judge Richey below. That reason is similar to that found persuasive by the author of the majority opinion in the District of Columbia Court of Appeals, when she stated in her separate opinion: —

> One may forfeit the right to use our judicial system because of abuse relevant to such use; one does not

forfeit that right because of bad character or conduct irrelevant thereto.

App. 75.

The matter is one of due process. The Supreme Court made that clear in Insurance Corp. v. Compagnie des Bauxites, 456 U.S. 694 (1982). While that case arose under Rule 37(b) of the Federal Rules of Civil Procedure, the Court made clear that Rule 37(b) "itself embodies the standard established in Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1909), for the due process limits" on dismissal as a sanction. 456 U.S. at 705. See to the same effect, Societe Internationale v. Rogers, 357 U.S. 197, 209 (1958).

Breaking down those limits found in Rule 37(b), the Court in Insurance Corporation found two standards: "First, any sanction must be 'just'; second, the sanction must be specifically related to the particular 'claim' which was at issue in order to provide discovery." 456 U.S. at 707.

Turning to Hammond Packing, it is clear where the due process limits are. In Hammond, as here, there was a finding of a failure to produce evidence. But in Hammond, as an essential part of its due process analysis, the Supreme Court stated that the facts presumed from the failure to produce evidence were "material facts," and that "the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense" toward which the non-produced evidence would have gone. 212 U.S. at 351,

quoted in Insurance Corporation, 456 U.S. at 705. And in Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 338 (1944), the manufactured evidence went to the central issue of the case.

The failure of Judge Richey to find that any evidence had been destroyed that was material and prejudicial is in direct conflict with holdings of the Ninth Circuit. As that court stated in Phoceene Sous-Marine v. U.S. Phosmarine, 682 F.2d 802, 803 (1982):

> This appeal requires a determination whether a district court may enter a default judgment against a defendant as a sanction for the defendant's deceiving the court on a matter wholly unrelated to the merits of the defendant's case. We conclude that the entry of default under such circumstances is inconsistent with the requirements of due process and therefore reverse . . . .

In Phoceene the district court had found that a defendant "had willfully deceived the court," struck the defendants' pleadings and entered default judgment against them. Id. at 805. Yet, because the willful deception did not go to the merits of the defense, the Court of Appeals held that the default judgment was a denial of due process. In so concluding, the Ninth Circuit recognized the due process limitations imposed upon it by Hammond Packing, supra, which it stated "was premised on the idea that one may reasonably infer from the suppression of relevant evidence that the defendants' case is lacking in merit. Id. at 351 . . . ." 682 F.2d at 806 (emphasis supplied).

This holding was repeated in Wyle v. R.J. Reynolds Industries, 709 F.2d 585 (9th Cir. 1983). In Wyle the Ninth Circuit recognized that "courts have inherent power to dismiss an action

when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice." 709 F.2d at 589. But, the court went on, "the requirements of due process limit the court's exercise of its inherent power. . . . Dismissal is a permissible sanction only when the deception relates to the matters in controversy . . . ." Id. Applying the Supreme Court's ruling in Insurance Corporation, the Ninth Circuit declared: "Sanctions interfering with a litigant's claim or defense violate due process when imposed merely for punishment of an infraction that did not threaten to interfere with the rightful decision of the case. G-K Properties v. Redevelopment Agency, 577 F.2d 645, 648 (9th Cir. 1978)." 709 F.2d at 591. In Wyle the court found that the necessary materiality existed and affirmed.

The Ninth Circuit again addressed the issue just last year in Fjetstad v. American Honda Motor Co., 762 F.2d 1334 (1985). There the district court had found that the defendants repeatedly had violated discovery procedures and orders of the court concerning discovery, including the filing of incomplete and misleading answers to interrogatories. The district court imposed sanctions, including a judgment on liability. 762 F.2d at 1337. The Ninth Circuit reversed, again referring to the "due process limits" that require "the deception [to relate] to the matters in controversy." 762 F.2d at 1338. The reversal was on the ground that the conduct "did not deceive the court about the issues in controversy or threaten to interfere with the correct decision of this case, nor can it be characterized as 'utterly inconsistent

with the orderly administration of justice.'" Id.

This same concept has been central to other decisions, as well. The Fourth Circuit, for example, in Great Coastal Express v. International Brotherhood of Teamsters, 675 F.2d 1349 (1982), was faced with fraud in the form of manufactured evidence and perjury on the part of a trucking company. The union argued that "once fraud enters the case in any manner, the judgment must be vitiated without further inquiry as to the materiality or effect of the fraud on the judgment," relying upon Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944). The Fourth Circuit rejected that argument, holding that, with the possible exception of a case containing no more than a single cause of action, "materiality may well be a proper inquiry." 675 F.2d at 1354. The First Circuit has agreed. Brockton Savings Bank v. Peat, Marwick, Mitchell & Co., 771 F.2d 5, 12 (1985).[12] In the instant case, Judge Richey held no evidentiary hearing and made no specific findings that any tapes found missing and unavailable were material to any issue before the court and were not merely cumulative to evidence that was readily available, and its absence would be prejudicial to the Government. In dismissing without those specific findings, Judge Richey violated the

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12 Justice Brennan, while on the New Jersey Supreme Court, in an oft-cited and quoted opinion, declared: "Perjured testimony that warrants disturbance of a final judgment must be shown by clear, convincing and satisfactory evidence to have been, not false merely, but to have been wilfully and purposely falsely given, and to have been material to the issue tried and not merely cumulative but probably to have controlled the result." Shammas v. Shammas, 9 N.J. 321, 88 A.2d 204, 208 (1952).

directives of the Supreme Court, the precedants of other federal courts, and the dictates of due process.

The issues before the court below went to the 501(c)(3) status of Synanon. The IRS revoked that status upon a specific finding that income of Synanon inured to the private benefit of individuals. There is no showing -- and, indeed, not even Judge Braman found -- that any missing tapes or other evidence went to that issue. Judge Braman did find that tapes that he found to be missing pertained to "money" among many other subjects. But there is no showing that "money" means private inurement of income of the corporation. And Judge Richey makes no pretense of finding to the contrary.

Nor is there any showing that, when IRS ruled that income of Synanon inured to private persons, it did not have sufficient evidence for that ruling, and that additional evidence that may no longer exist was necessary to demonstrate the validity of what the IRS found without such evidence. Thus, there is no showing -- and no pretense of any finding by Judge Richey -- that any missing evidence would have been other than merely cumulative. Thus, there is no showing that the missing evidence is or may be prejudicial to the Government.

The Government argued to Judge Richey, alternatively, that Synanon did not qualify for 501(c)(3) status because its operation was not exclusively for the charitable purposes provided under that Section. Once again, there is no showing that the Government does not already have enough evidence to justify that ruling, that any tapes destroyed were not merely cumulative, and

that their destruction was prejudicial to the Government. Once again, Judge Richey makes no pretense of any detailed rulings on these due process issues.

Finally, the Government argued below that the tapes were relevant under a "public policy" test that it finds to have been created by Bob Jones University v. United States, 461 U.S. 574 (1983). Once again, no specific findings were made that any tapes destroyed were relevant to that test, that the Government did not already have enough evidence to establish any violation of that test, that the tapes presumed to be missing were not merely cumulative, and that the Government was prejudiced by any tapes that it did not acquire in discovery in this case or through other cases. It is notable that Bob Jones was decided in 1983 after the IRS audit of Synanon was concluded and after the present case was filed.

But even more, Bob Jones has no relevance to this case. In Bob Jones, the Supreme Court upheld a Revenue Ruling by the IRS, the agency that was charged with interpreting the Internal Revenue Code in accordance with express authority granted and long recognized by Congress. The Supreme Court went to great lengths to point out the consistent policies of both the legislative and executive branches that were represented in that Revenue Ruling. The contrast with the instant case is highly instructive.

The Supreme Court made clear in Bob Jones that the IRS (and, by clear implication, a trial or appellate court) does not have authority to promulgate its personal definition of what it might consider to be fundamental national public policy. Rather, the

Supreme Court laid down specific guidelines to be applied before revoking tax-exempt status under the "fundamental public policy" rationale. All of the following facts, the Court held, must exist:

> (1) There must be an express and clearly defined national "fundamental public policy";
>
> (2) There must be "no doubt" as to the nature and existence of that national fundamental public policy;
>
> (3) There can be no doubt or ambiguity that the purposes and policy of the taxpayer violate that national fundamental public policy.

The IRS action under review in Bob Jones was based upon Revenue Ruling 71-447. 461 U.S. at 574, n.3. That Revenue Ruling expressly applied only to a "racially discriminatory policy as to students" in private educational institutions. Id. In Bob Jones, the Court looked only to the propriety of that Revenue Ruling. The Court addressed no factual basis for revocation other than racial discrimination in education.

Moreover, the Court went to great lengths to limit its decision to racial discrimination in education and recounted in detail how the Supreme Court, Congress, and the Executive Branch all had found racial discrimination in education undeniably antithetical to the fundamental public policy of the nation. As the Court concluded:

> Few social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education.

461 U.S. at 595.

Indeed, the Supreme Court expressly refused to hold that

there are any grounds other than racial discrimination by private schools that may be a basis for denying tax-exempt status. 461 U.S. at 596 n.21. The Court noted further that it would be a misreading of its opinion to conclude that it considered the IRS authorized to decide whether public policies are so fundamental as to require denial of tax exemption. 461 U.S. at 598, n.23.

The contrast with the instant case is stark. Here the IRS claims exactly that power that the Supreme Court refused in Bob Jones to confer upon that agency. There is no regulation or ruling by the IRS, adopted in the normal way. No evidence of broad adherence to the policy stated is addressed. There is no more than the assertion of the IRS in which it would like the court below to join. Judge Richey's "reluctan[ce]" to do so is well placed, though not on the ground he puts it. App. 23.

Further, the Supreme Court in Bob Jones expended considerable effort to restrict its holding so that there should be no attempt by the IRS or by any court to expand that holding beyond its facts unless there is "no doubt" that the organization's purposes violated a "fundamental public policy":

> We emphasize, however, that these sensitive determinations [of "charitable" status] should be made only where there is no doubt that the organization's activities violate fundamental public policy.

461 U.S. at 598 (emphasis supplied).

Judge Richey refused to make any explicit findings of "fundamental public policy." To the extent that Judge Braman considered the Bob Jones standard, Judge Braman's ruling is irrelevant. The matter is of further significance here because

of the strong emphasis below by the IRS -- despite the Supreme Court's admonition in Bob Jones to the contrary -- that it has the power to define fundamental public policy and that the tapes that it asserts are missing were material to that position. While we believe that the evaporation of the collateral estoppel effect of Judge Braman's findings concerning the destruction of evidence eliminates this issue from this case at this time, we also believe that the law is clear that there must be a showing of relevance of any material found to be missing, that there must be a showing that the material would not be merely cumulative, and that there must be a showing that its absence is prejudicial to the Government. An analysis of Bob Jones, we respectfully urge, demonstrates that there is no relevance to any public policy test, for no such test applies to the instant case under Bob Jones.

III.

THE DISMISSAL SHOULD NOT BE AFFIRMED ON THE ALTERNATIVE GROUNDS ON WHICH JUDGE RICHEY HELD "DISMISSAL WOULD ALSO BE JUSTIFIED"

While Judge Richey clearly rested his ruling upon "inherent power to dismiss for fraud," he noted that, in his view, "dismissal would also be justified under Rules 16(f) or 41(b) for Synanon's failure to obey its orders of August 17 and October 21, 1983." App. 17. Here too, Judge Richey erred.

First, as discussed above, Judge Richey makes no specific findings that the material supplied in response to the August 17th order did not materially satisfy that order, and, since the

October 21st order appeared to add no more, that order as well. Second, as discussed above, due process requires that there be specific findings of relevancy, or lack of cumulativeness, and of prejudice. None of these findings were made. Nor was any finding made that no lesser sanction would be appropriate in this case.

Therefore, it is respectfully submitted that, if Judge Richey's statements concerning Rules 16(f) and 41(b) are to be deemed to be alternative holdings, they are erroneous and should be reversed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of dismissal should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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November 14, 1986

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief was mailed this day, postage prepaid, to counsel for the Government: Michael J. Paup, Esquire, Tax Division, United States Department of Justice, Washington, D.C. 20530; Joseph DiGenova, Esquire, United States Attorney, Judiciary Center, 555 - 4th Street, N.W., Washington, D.C. 20001.

Sherman L. Cohn, Esquire

November 14, 1986