MBG

U. S. Department of Justice

Criminal Division

Deputy Assistant Attorney General *Washington, D.C. 20530*

February 4, 1994

MEMORANDUM

TO: THE SOLICITOR GENERAL

FROM: Merrick B. Garland

RE: United States v. Boyd

Thank you for your memorandum regarding the Boyd case. Both Patty Stemler and I have spoken with AUSA Elden. Everything appears to be on track, and preparation of the brief will proceed in a manner consistent with the ground rules set forth in your memorandum.

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, DC 20530

February 4, 1994

To: Merrick Garland
Deputy Assistant Attorney General
Criminal Division

From: Drew S. Days, III DSD III
Solicitor General

Re: United States v. Boyd, No. 89 CR 098
(N.D. Ill. 9/20/93)

I have approved an appeal in the above-reference case, subject to the following two conditions:

1) That the drafting of the brief will be handled by the Criminal Division, in consultation with the United States Attorney's Office and my office; and

2) That no brief will be filed without my prior approval.

I have already conveyed these conditions to Assistant United States Attorney Barry Rand Elden. Mr. Elden expressed concern about my shifting principal responsibility for brief-writing to Main Justice, particularly because of his familiarity with the record and his desire to argue the appeal. I reassured him that the Division would be certain to take full advantage of his knowledge of the record in preparing the brief and told him that I felt any consideration of who would argue the case was premature.

Since he has already obtained an extension (the last) until March 7 we are not under the time pressure we feared. I think, however, that you should call Mr. Elden promptly to work out coordination between the Division and his office. He is expecting your call.

If I can be of assistance during the brief-writing process, please let me know. You should also feel free to consult with Bill Bryson and Miguel Estrada who are thoroughly familiar with the case.

cc: Webster L. Hubbell
Associate Attorney General

Irv Nathan
Principal Associate Deputy
Attorney General

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, DC 20530

February 3, 1994

To: Merrick Garland
Deputy Assistant Attorney General
Criminal Division

From: Solicitor General DSD'll

Re: "El Rukn" Meeting

Here are the materials for the meeting today from 5:00 p.m.-5:45 p.m. in my office on the Boyd case.

Attachment

U.S. Department of Justice

Office of the Solicitor General

The Solicitor General *Washington, DC 20530*

February 1, 1994

MEMORANDUM TO: Webster L. Hubbell
Associate Attorney General

Irv Nathan
Principal Associate Deputy
Attorney General

FROM: Drew S. Days, III DS DIII
Solicitor General

RE: Appeal Recommendation in
United States v. Boyd
(CA 7)

Attached are the following materials, in connection with our meeting on Thursday, February 3, 1994, relating to a recommendation that I authorize an appeal to the Seventh Circuit in one of the "El Rukn" cases:

1) The introduction and table of contents of Judge Marvin Aspen's 181-page opinion granting a new trial. I think that the table of contents is a fairly good "road map" of his opinion, but if you wish to see it in its entirety, just let me know;

2) The Criminal Division's recommendation in favor of appeal;

3) Assistant to the Solicitor General Miguel Estrada's recommendation in favor of appeal; and

4) Bill Bryson's recommendation in favor of appeal.

As I mentioned to you both over the telephone, I would appreciate very much getting your advice with respect to the decision to appeal, given the high visibility of the "El Rukn" prosecutions and the Attorney General's concern about the negative impact on the Department of findings by three district judges in the Northern District of Illinois of unethical and unprofessional conduct by federal prosecutors.

Memorandum

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OFFICE OF THE SOLICITOR GENERAL

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Subject

United States v. Jeff Boyd, et al.
No. 89 CR 908, N.D. Ill.
Sept. 20, 1993

Date

JOSEPH M. GERSHOWITZ
(4-3742)

To

The Solicitor General

From

John C. Keeney
Acting Ass't Attorney
General
Criminal Division

TCK
by
TMB

TIME

A PROTECTIVE NOTICE OF APPEAL HAS BEEN FILED. THE CASE IS BEING HANDLED BY AUSA BARRY ELDEN (312-353-5300).

RECOMMENDATION

The U.S. Attorney and the Criminal Division recommend Appeal.

ISSUES

1. Whether the defendants were entitled to a new trial on the ground that the government knowingly introduced perjured testimony at their trial.

2. Whether the defendants were entitled to a new trial because the government withheld exculpatory evidence in violation of the rule of Brady v. Maryland, 373 U.S. 83 (1963).

DISCUSSION

This is one of the prosecutions of El Rukns gang members in Chicago, and the third in which a district judge has granted El Rukns defendants a new trial because of prosecutorial misconduct. The charges on which the seven defendants were convicted here include RICO, RICO conspiracy, murder, kidnapping, drug conspiracy, witness intimidation, and witness retaliation. Five of the defendants got life sentences; the other two got 50 years.

After the verdicts, the district court (Aspen, J.) granted the defendants' motions for a new trial. The ruling rested on two grounds: (1) that the prosecutor knowingly introduced perjured testimony by one of its key witnesses, Harry Evans, consisting of Evans' denial that he used drugs while in federal custody following his arrest in 1988, and his denial that he discussed his testimony with the other cooperating witnesses during the trial; and (2) that the government withheld from the defense exculpatory evidence

is unlikely to have a favorable result. Fortunately, the success of an appeal would not hinge on those arguments. The best thing we have going for us is the defendants themselves, who are extremely dangerous characters.

A few weeks ago, you declined to authorize an appeal in another El Rukns case, United States v. Burnside, No. 89 CR 909 N.D. Ill. June 4, 1993), in which the district court granted the defendants a new trial based on essentially the same Brady claims raised here. Burnside, however, involved among the least dangerous El Rukns defendants; this case involves the most dangerous ones. Further, in Burnside there was a strong likelihood of further hearings in the district court based on new evidence of Brady violations and use of perjured testimony; that is not a consideration here. Because of the nature of the defendants and their crimes, this is a much more favorable vehicle than Burnside for making the arguments proposed by Mr. Elden. Indeed, the principal reason we offered the U.S. Attorney for our decision not to appeal Burnside was that a loss would seriously jeopardize our chances of successfully appealing this more important case.

In short, although it is difficult to be optimistic about our chances of winning, the U.S. Attorney has substantial arguments to make to the Seventh Circuit, and he feels exceptionally strongly that this case presents the best opportunity his office has of redeeming something from the El Rukns debacle. We would let him appeal.

Memorandum

Subject	Date
United States v. Jeff Boyd, et al., No. 89 CR 908 (N.D. Ill. 9/20/93)	December 30, 1993

To

The Solicitor General

From

Miguel A. Estrada MAE.

Time

The government has filed a notice of appeal. The government's brief would be due on JANUARY 6, 1994. A motion for an extension of time is pending.

Recommendations

The Criminal Division recommends appeal. I recommend APPEAL (dubitante).

Question Presented

Whether the district court erred in granting the defendants a new trial, after finding that the government knowingly used perjured testimony at their trial, and that the government withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963).

Facts

1. The defendants in this case were high-ranking members of an extremely violent Chicago street gang known as "El Rukns." After a trial that lasted approximately four months, the defendants were convicted of racketeering crimes (committed as early as 1966 and lasting until 1988), including numerous instances of murder, assault, kidnapping and narcotics dealing. They received harsh sentences ranging from 50 years' imprisonment to life imprisonment.

2. Following the trial, the district court (Aspen, J.) held evidentiary hearings on allegations that the government knowingly used perjurious testimony and that it failed to disclose exculpatory evidence to the defense, as required by Brady v. Maryland, supra. Other district judges have already granted new trial motions in related cases based on the same allegations of misconduct. Judge Aspen also granted a new trial in a 181-page opinion, to which I refer you for a detailed statement of the misconduct and of Judge Aspen's reasons for ordering a new trial.

Use of Perjury. In brief, Judge Aspen first concluded that one of the government's principal witnesses, Harry Evans (a former El Rukn member who cooperated and testified for the government), testified perjuriously in (i) denying that he illicitly used drugs while incarcerated at the Metropolitan Correctional Center (MCC), and (ii) denying that he discussed his trial testimony with other cooperating witnesses. In Judge Aspen's view, the chief prosecutor (Hogan) knew or should have known that Evans was using drugs while incarcerated, because MCC records and memoranda reflected that Evans had failed several urinalysis tests, because his demeanor in court and in meeting with prosecutors was suggestive of drug use, and because other inmates housed with Evans at the MCC had made claims to that effect. With respect to Evans' discussion of his testimony with other witnesses, Judge Aspen pointed to testimony by one of the prosecutors (Poulos) to the effect that the cooperating El Rukn witnesses (including Evans) had been given copies of their grand jury testimony, and that there was no way of keeping them from discussing their upcoming trial testimony with each other since they were all housed on the same floor of the MCC.

Brady Material. Judge Aspen also found that the government withheld exculpatory information from the defense. That information falls in two categories. The first is the fact that Evans and a second cooperating witness, Harris, used drugs while they were

incarcerated at the MCC -- a fact that the defense could have used to some advantage, because it indicated a willingness to commit crimes and to dissemble even after the two witnesses underwent the supposed moral conversion inherent in their decision to cooperate with the government. The second category of withheld information is the fact that Evans and Harris received "benefits" from the government as a result of, or in connection with, their cooperation. Those benefits included "contact" visits (where the inmate and the visitor can touch), free telephone services, some personal gifts (radios and the like), and personal relationships with a female paralegal and Hogan, the lead prosecutor.

Discussion

This case is extraordinarily difficult, but on balance I agree with the United States Attorney and the Criminal Division that an appeal should be authorized. In my judgment, two key considerations support that conclusion.

The first consideration is that we have a respectable case to make to the court of appeals (as the memorandum from Mr. Elden explains in detail), though there is no question that it will be an uphill battle. With respect to the first perjury issue (Evans' drug use), our most helpful fact is that, at the time of the relevant events, Evans was a physical wreck; he had suffered from renal failure, was on-and-off dialysis, and had been hospitalized. As a result of his various ailments, Evans had lawfully been given various drugs, including morphine-type derivatives which apparently would be indistinguishable from heroin in urinalysis. The prosecutors, including Hogan, could reasonably believe that the warning signs that otherwise would have placed them on notice of illegal drug use (or at least require them to make further inquiry) were entirely innocent, because they were attributable to Evans' illness and lawful medication.

With respect to the second perjury issue (discussion of testimony among cooperating witnesses), Mr. Elden's memorandum persuasively shows that the testimony on which Judge Aspen relied to conclude that the prosecutors should have known of the perjury -- the fact that each witness was given copies of his grand jury testimony and that the prosecutors knew that it was therefore <u>possible</u> that a witness would discuss his testimony with others in the shared MCC quarters -- does not reach as far as Judge Aspen thought; the witnesses were instructed <u>not</u> to discuss their testimony with each other, and the fact that there was a possibility that they would disobey does not mean that the prosecutors should have known that disobedience would in fact ensue.

As to both claims of perjury, even if the prosecutors should have known that Evans's testimony was false, we have a respectable argument that the testimony was simply not sufficiently material to justify a new trial. Where a prosecutor knowingly uses perjury to

obtain a conviction, the conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976). That standard is basically indistinguishable from the harmlessness standard applicable to constitutional violation (except as to burden of proof, since the defendant must show materiality). See United States v. Bagley, 473 U.S. 667, 679-680 (1985) (opinion of Blackmun, J.). While that is a high standard, it seems highly unlikely indeed that the perjurious evidence could have made any difference to a jury that already knew that Evans was a multiple murderer, that he had engaged in drug trafficking and drug use for many years, that he had previously lied to the government in order to try to assassinate a witness, that he was being paid by virtue of his cooperation, and that had received what must have seemed like a sweet deal to boot. See Judge Aspen's Opinion at 176-177 (detailing impeachment evidence).

Relying on United States v. Wallach, 935 F.2d 445 (2d Cir. 1991), Judge Aspen concluded that what makes the perjury material in this case is that it occurred after Evans made a deal with the government -- indicating his intention to keep to the straight and narrow. In his view, a lie after "seeing the light" would lead the jury to discount Evans' testimony more heavily. While there is perhaps something to that point, there is not enough to it for anyone to conclude that the timing of the lie necessarily dwarfs any other impeachment material, even where (as was the case here) the jury heard enough to conclude that Evans was certifiably evil. The basic point is that, in the grand scheme of things, the impeachment value of Evans' falsehoods was close to nil.

In my view, similar considerations should have led Judge Aspen to conclude that the withheld Brady material -- i.e., the information about Evans' and Harris' drug use and the information about "benefits" -- while perhaps highly significant in the abstract paled besides the mountain of impeachment material that the defense otherwise managed to pile on the witnesses. The materiality of the Brady material concerning drug use seems especially questionable in the context of this case, because, as Mr. Elden notes, it is highly doubtful that the evidence would be admissible at all.

The second consideration that leads me to recommend appeal in this case is the nature of the case. There is no real question that the defendants are truly guilty of scores of the most heinous crimes. A retrial would be difficult (and perhaps impossible) since our evidence is fast becoming stale, and since Evans and Harris continue to deny to this day that they used illicit drugs while at the MCC. If we can make a case in good faith that the defendants suffered no true prejudice as a result of the misconduct found by Judge Aspen, I believe that we should do what we can to keep the defendants from being once again unleashed on the public.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 89 CR 908
	)	
	)	
JEFF BOYD, EDGAR COOKSEY, ANDREW CRAIG, CHARLES GREEN, SAMMY KNOX, FELIX MAYES and NOAH ROBINSON,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

MARVIN E. ASPEN, District Judge:

This is the most painful decision that this court has ever been obliged to render, making the crafting of this opinion a sad and difficult undertaking. Mindful of the consequences of our ruling, we would have preferred to have been able to reach a result other than what must be.

Significant questions of prosecutorial misconduct bring "Trial I" defendants Jeff Boyd, Edgar Cooksey, Andrew Craig, Charles Green, Sammy Knox, Felix Mayes and Noah Robinson before this court seeking new trials. Initially, we retained jurisdiction to address the following issues: (1) whether the government withheld evidence of post-incarceration, positive drug tests of witnesses Harry Evans and Henry Harris in violation of the principles set forth in Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and its progeny; and (2) to the extent that Evans and Harris testified that they had not used illicit narcotics while incarcerated, whether the government knowingly used perjured testimony during the course of trial. In light of the evidence adduced during these post-

trial proceedings, however, we will expand our focus to consider the impact of other information within the possession of the government yet undisclosed to the defense, as well as additional instances of potentially perjured testimony. Finding that the government in fact (i) withheld information favorable to the defense in violation of Brady and its progeny, and (ii) suborned perjured testimony regarding such undisclosed evidence, we conclude that these defendants have been deprived of a fair trial and, consequently, grant their respective motions for new trial respecting all convictions, save Mayes' conviction for the intimidation of witness Henry Harris (Count 12) and Green's conviction for the unlawful possession of firearms as a convicted felon (Count 58).

The consequences of our ruling today are tragic in many respects. It is a tragedy that the convictions of some of the most hardened and anti-social criminals in the history of this community must be overturned.

It is tragic that the United States of America has squandered millions of taxpayer dollars and years of difficult labor by the courts, prosecutors and law enforcement officers in the investigation and trial of these botched prosecutions.

It is tragic that the hard-earned and well-deserved reputations for professionalism of the United States Attorney's Office for the Northern District of Illinois and other federal law enforcement and penal agencies in this district have been so unfairly tainted by the actions of so few.

It is a personal tragedy for the lead El Rukn prosecutor who, in seeking to attain the laudable goal of ridding society of an organization of predatory career criminals, was willing to abandon fundamental notions of due process of law and deviate from acceptable standards of prosecutorial conduct. The others who followed his lead or failed to supervise him properly, of course, share in this disgrace.

TABLE OF CONTENTS

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

January 24, 1994

MEMORANDUM FOR THE SOLICITOR GENERAL

United States v. Boyd (CA 7)

I recommend APPEAL.

This is the principal "El Rukn" case. The actors are as bad as they can be, and the convictions in this case should be defended if there is any way we can do so honorably. (These cases would be very difficult, if not impossible, to retry.) This is not a case in which to take a tactical "pass" on going to the court of appeals because we look bad. As bad as this case looks in many respects, the importance of the prosecution should overcome any temptation to walk away from the case to spare ourselves further embarrassment because of the sloppiness and improprieties revealed by the record here.

The question, then, is whether we can make a presentable argument in support of the verdicts. My conclusion is that we can, although the task will be quite difficult and the prospects of success are not very bright. In the end, however, I think we should try. There is a fair risk that we will end up with a court of appeals opinion that will hurt us in other cases, but the Chicago office is the principal office in the Seventh Circuit and thus is likely to be the office most severely affected by any bad Seventh Circuit law that develops here. And that office very much wants to take a shot with this case. So, acknowledging the risks of making bad law and the relatively poor prospects of success, I am not prepared to say that the case against an appeal is sufficiently clear that we should say no to the U.S. Attorney here.

After concluding that an appeal is appropriate, I do have some specific observations based on my review of the opinion and the U.S. Attorney's memo. Even in that regard, however, I readily acknowledge that my reaction to the case is necessarily limited to the materials we have been provided and is not as comprehensive as is probably necessary to have a real understanding of this exceptionally complex and difficult case.

My first observation is that I have reservations about our proposed frontal attack on Judge Aspen's conclusion that prosecutor

Hogan did not know that Evans was using drugs in prison. The attack in the U.S. Attorney's memo on that finding (which is subject to review only if clearly erroneous) is to take each piece of evidence and point out infirmities in the particular item. It is true that we can score a few points in that regard (particularly, e.g., with respect to the question whether the positive drug tests for Evans were "authorized," although that point is blunted by the fact that Hogan apparently never checked to satisfy himself that both tests were in fact authorized). In the end, however, I very much doubt that we will be able to persuade the court of appeals that Judge Aspen's finding of knowledge on Hogan's part is clearly erroneous. At minimum, it appears unavoidable that Hogan made no effort to investigate the issue of drug use in the MCC, and drug use by the cooperating witnesses in particular. Instead, Judge Aspen appears to be correct at least in concluding that Hogan avoided learning about drug use by the El Rukns witnesses.

I would recommend handling this problem by focusing principally on materiality, not on attacking the "knew or should have known" findings by Judge Aspen. With respect to the Napue argument, we should focus on (1) the rather brief attention paid to the drug use issue in the cross-examination of Evans (there was no reference to the issue in the direct examination), and (2) the ambiguous nature of the question about Evans' drug use -- the argument being that in light of the ambiguity of the question, the answer Evans gave was not so clearly contrary to the facts known to the prosecutor that it would necessarily trigger the prosecutor's responsibility to take steps to correct the witness's falsehood. The prosecutor might well have anticipated more by way of cross-examination on the issue, and if questions had been asked about specific incidents (such as the results of drug tests, or Harris's refusal to take a drug test), the prosecutor would have had to correct any wrong answers. But we can argue that the case is certainly not as stark as that when the answer the witness gives is consistent with the answer the witness has given to the prosecutor in private and is not squarely contrary to something the prosecutor knows to be the case. Still, that argument has to be made quite gingerly, because the record, spelled out in 70 pages of Judge Aspen's opinion, makes pretty unavoidable the conclusion that Evans was using drugs at the MCC, and makes it pretty difficult to accept that Hogan did not at least recognize the high probability that that was the fact. (The problem here for argument purposes is that we are forever claiming in criminal cases that, under the "ostrich" principle, a person who willfully avoids learning a fact is chargeable with "knowledge" of that fact for purposes of criminal statutes that require proof of knowledge; it is awkward for us to argue that "knowledge" means something very different when it is our representative whose "ostrich-like" conduct is at issue.)

I also think we cannot lightly dismiss Judge Aspen's point that the evidence of current drug use would have put Evans' testimony in a somewhat different light for the jury. Setting aside the effect of the drug use on Evans' cognitive powers, there

is a definite theme in Evans' testimony that, by the time of his cooperation, he had put his criminal past behind him. The current drug use allegations would have undermined that impression. I still think we have a plausible materiality argument, but I don't think we can take Judge Aspen to task for completely misconstruing the gist of the "conversion" theme in Evans' testimony. It may be that his reference to "seeing the light" was meant to refer (at least in part) to his recognition of Jeff Fort's true nature in 1985, long before Evans stopped engaging in criminal activities, but Evans' testimony also carries at least the suggestion that by the time of the trial he had come to recognize the evils of drug dealing; cross-examination regarding his current drug use would at least have put a bit of tarnish on that theme.

I think the point on which we are strongest is in challenging Judge Aspen's weighing of the "benefits" allegedly conferred on the El Rukns witnesses, which were not disclosed to defense counsel. Most of what Judge Aspen characterized as "benefits" were really just the more or less ordinary by-products of constant contact between the witnesses and the prosecutors and prosecutors' staff over a period of time, made worse by the fact that certain members of our staff apparently engaged in either sloppiness in dealing with the witnesses or seriously unprofessional conduct in dealing with them. There is no doubt that the witnesses took advantage of their relationship with the prosecution staff. But it is a leap to say that the greater opportunities for misconduct provided by the visits to the prosecutors' offices, and the small accommodations made to the witnesses along the way, should be regarded as Brady material. What exactly would we have "disclosed" to defense counsel? That we were lax in our security; that we let the cooperating witnesses wander around the U.S. Attorney's office and the agency offices with adequate supervision? That we were a little too familiar with the cooperating witnesses in various ways? None of that is easily translated into material that should be made the subject of a Brady disclosure, and what is more it probably happens (although I hope in less aggravated forms) in lots of cases. If the court of appeals is willing to take a less formalistic view of the Brady obligation, I think it will realize that the "benefits" portion of Judge Aspen's analysis does not cut all that much mustard.

What the case really comes down to, in my view, is Evans' drug use, and whether the prosecutor's failure to reveal facts relating to that drug use to the defense after Evans' denial on cross-examination requires that the results of the entire trial (with two minor counts excepted) be thrown out. At bottom, the effect of that error on the trial does not seem so grievous as to require that the entire case be retried (and, in light of the difficulties of retrial, that the defendants may walk). Although the atmospherics of the case are terrible, and the court of appeals may not get beyond those and beyond Judge Aspen's very seductive opinion, it is worth a shot to try to separate the atmospherics from the hard analysis of the degree and effects of the error in this case. If we get nothing else out of the case, perhaps we may

at least persuade the court of appeals that only the counts relying on Evans' testimony should be invalidated (which would leave in place those counts relying on Harris's testimony -- six counts, according to the chart at Tab C).

-- William C. Bryson WCB
Deputy Solicitor General