

Unsettling result of Bulger trial: soon to hit big screen

By: [Harvey A. Silverglate](#) February 14, 2014

Whitey came to town on Jan. 30.

No, not the recently convicted notorious Winter Hill gang leader, but, rather, the documentary movie directed and co-produced (with Caroline Suh) by noted filmmaker Joe Berlinger. It was shown as part of the Sundance Film Festival at the Coolidge Corner Theatre to a packed house. A spirited panel discussion conducted by WBUR senior reporter (and longtime Bulger case expert) David Boeri followed the screening.

The documentary took the story from the start of James “Whitey” Bulger’s career in crime right up to his recent conviction in Boston’s federal District Court. It also, for the first time that I’ve seen, seriously considered the possibility that there was an immunity deal between Bulger and a Department of Justice prosecutor, the late Jeremiah O’Sullivan.

The film, therefore, brought to the big screen, and the discussion brought to the Coolidge, many of the vexing questions still swirling around the case, particularly about the fairness of Bulger’s recent trial.

The aftermath of the Aug. 12th racketeering verdict has had some of the repercussions I predicted in this space last April (see “[Bulger’s immunity defense: what appearance of justice requires](#),” April 17, 2013). Judge Denise Casper did not take my advice, alas. She confirmed, in her own opinion, the earlier-issued opinion of Judge Richard Stearns, released shortly before the 1st U.S. Circuit Court of Appeals ordered Stearns’ recusal.

Stearns denied Bulger’s request that he be allowed to present the jury with his central defense: that he had been granted immunity for the crimes charged. O’Sullivan, then-head of the New England Organized Crime Strike Force, orally delivered that immunity grant, Bulger claimed, sometime before December 1984. The immunity deal allegedly covered both past and future crimes committed until O’Sullivan left office. This extraordinary grant of immunity was supposedly bestowed upon the gangster in return for Bulger’s protection of O’Sullivan from the Italian mob.

To recap: The Bulger racketeering case had been randomly assigned to Stearns, who had previously held high positions in the U.S. Attorney’s Office in Boston. Another, earlier-filed 1995 Bulger indictment had been randomly assigned to Judge Mark Wolf, who, in a detailed and

damning 661-page opinion in 1999, had explored the government's corrupt relationship with Bulger and his henchmen, triggering a massive FBI scandal.

When Bulger was captured on June 22, 2011, the government dismissed the case pending in front of Wolf. The dismissal of the Wolf indictment in favor of the case to be tried by Stearns appeared, at least to me, to be designed in part to protect the DOJ from further inconvenient revelations that Wolf might elicit. This, in my view, put the credibility of the trial in question from the very beginning.

Public confidence was dealt an additional blow when Stearns then had to be ordered off the case. The 1st Circuit panel, in a memorable opinion written by none other than retired U.S. Supreme Court Justice David Souter, sitting by designation, held that the appearance of justice required Stearns' recusal.

"The period covered by the special relationship between the defendant and the FBI overlapped both the dates of the activity alleged in the defendant's indictment and the years that Judge Stearns held supervisory positions in the federal prosecutor's office," Souter wrote in March 2013.

Souter went further. He also noted that when O'Sullivan testified as a witness at a congressional hearing in December 2002 that followed the public disclosure of Bulger's relationship with the feds, O'Sullivan "was asked why the Government had sought no indictments of [Bulger] and Flemmi along with the others that were handed up," and "O'Sullivan spoke of their minimal participation." When the committee confronted O'Sullivan with a memo he had written, "which made it clear that the gang-leader informants were in no way minimal participants," O'Sullivan had no satisfactory answer, and, noted Souter, "the committee's report branded his initial testimony as 'false,' not merely mistaken."

That comment by Souter is crucial in assessing the credibility of Bulger's claim that he had an extraordinary immunity agreement with O'Sullivan.

Judge Casper then inherited the case by random draw. One of her first actions was to independently confirm the decision by her recused predecessor to turn down Bulger's motion that he be allowed to take his immunity defense to the jury.

Stearns' opinion denying Bulger's motion seemed less than completely categorical with regard to the strength of the precedents. He admitted that Bulger's proposal was in some sense unprecedented: "the issue has never been presented as starkly as it is in this case."

Yet despite the paucity of controlling legal authority on the precise question, Stearns wrote that the "import is clear: an immunity agreement cannot as a matter of public policy license future criminal conduct."

And, he concluded: "A license to kill is even further beyond the pale and one unknown even in the earliest formulations of the common law."

Though this bizarre situation might have presented a case of first impression, Stearns expressed no doubt and ruled flatly against Bulger.

Casper then argued that vacating Stearns' decision was unnecessary because the 1st Circuit had "found no actual bias on Judge Stearns' part," but she nonetheless, presumably out of an abundance of caution, purported to review the issue herself and affirmed that "such agreement, at least as to prospective immunity, is unenforceable as a matter of law."

She went on to muddy the already opaque legal waters just a bit by suggesting that Bulger might consider testifying under the rubric of "related defenses."

But those defenses each contained at least one required element that Bulger's counsel had not indicated Bulger could satisfy, and so Casper effectively ended his effort to tell his story to the jury.

At the panel discussion following the screening of "Whitey," I posed a question to Assistant U.S. Attorney Brian Kelly, who had bravely agreed to participate on the panel. Why was it, I asked Kelly, that the prosecution team was so adamant in opposing Bulger's request that he be allowed to testify as to his claimed immunity conferred by O'Sullivan? If it was legally invalid, Casper would have so instructed the jury after the close of the evidence. Assertion of the defense would have involved Bulger's taking the stand, likely subjecting him to a withering cross-examination. Without any documentation to verify Bulger's claim of immunity from O'Sullivan, Bulger's chances would have been vanishingly slim. And on the off-chance Bulger were acquitted in federal court in Boston, he would still face pending state capital murder indictments in Florida and Oklahoma, both death penalty states.

Kelly's response to my question was more or less expected from a prosecutor. He said that since, in his view, the law supported his position that the immunity claim was not admissible, he wanted it kept out of the trial, period.

But cutting off the immunity defense inevitably gave the trial a sense of suspicious incompleteness, of not providing the jurors or the public with the full picture.

In particular, the question persists of how it was that Bulger, despite his myriad and well-known crimes committed over decades, was not the subject of indictment until a new generation took over in the U.S. Attorney's Office and the FBI.

Surely Bulger's being protected by O'Sullivan seems like one possible explanation. Whether it is a plausible explanation would depend on the jury's assessment of Bulger's credibility, as well as the reputation and credibility of O'Sullivan. The jury got to judge neither.

It is true, of course, that a trial is a mechanism for determining the guilt or innocence of an accused individual on a specific charge, not an historical or journalistic exercise. But given some at least small amount of ambiguity in the case law governing the admissibility of Bulger's claimed immunity agreement, and given the judge's power to instruct the jury on the admissibility question after the close of evidence, surely the public interest, as well as the

interests of justice and the appearance of justice, would have been better and more wisely served had Casper allowed Bulger to testify as to his alleged deal. In a case rife with cover-up upon cover-up, a sense would have prevailed that, at long last, the facts were allowed to see the light of day and justice was finally done.

“Whitey” is a terrific documentary. Produced by CNNFilms and RadicalMedia, it will be shown on CNN and in selected theaters in the near future. Look for it. Every lawyer in Massachusetts — indeed, every citizen — should see the film. Consider it a civic duty.

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