

United States Court of Appeals For the First Circuit

No. 12-2488

IN RE JAMES J. BULGER,
Petitioner.

PETITION FOR A WRIT OF MANDAMUS
TO THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Richard G. Stearns, U.S. District Judge]

Before
Lynch, Chief Judge,
Souter,* Associate Justice,
and Selya, Circuit Judge.

J. W. Carney, Jr. for petitioner.
Mark T. Quinlivan, Assistant United States Attorney, with whom
Carmen M. Ortiz, United States Attorney, and Zachary R. Hafer,
Assistant United States Attorney, were on brief for respondent.

March 14, 2013

*Hon. David H. Souter, Associate Justice (Ret.) of the Supreme
Court of the United States, sitting by designation.

SOUTER, Associate Justice. James Bulger, the defendant in the federal criminal prosecution underlying this petition,¹ asks us to issue a writ of mandamus to require reversal of the district court's order denying a motion for recusal of the judge currently assigned to preside in the case. With great respect for the trial judge, we nonetheless grant the petition, because it is clear that a reasonable person would question the capacity for impartiality of any judicial officer with the judge's particular background in the federal prosecutorial apparatus in Boston during the period covered by the accusations.

I

The as-yet-untested indictment returned by a Massachusetts federal grand jury in 2001 describes the defendant as a leader of a criminal organization in Boston from 1972 to 1999. It charges him with a number of federal offenses, including violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act, and it alleges that he committed 19 murders ancillary to the RICO conspiracy. The defendant's associate in the crimes charged, Stephen Flemmi, was likewise indicted and has since been convicted and sentenced on a guilty plea. See United States v. Flemmi, 225 F.3d 78, 81-83 (1st Cir. 2000); United States v. Flemmi, 245 F.3d 24, 25-27 (1st Cir. 2001); United States v. Connolly, 341 F.3d 16, 21 (1st Cir. 2003). The defendant remained

¹ See United States v. Bulger, No. 99-10371-RGS (D. Mass).

a fugitive until his arrest in 2011, with these proceedings ensuing.

During the 1970s and 1980s, organized crime in Boston was investigated by the Federal Bureau of Investigation and prosecuted federally either by the United States Attorney's Office or by a separate team of prosecutors, called the New England Organized Crime Strike Force, which operated independently of control by the United States Attorney, but not free from communication with his office. The defendant now alleges that over the course of that earlier period these law enforcement groups came to know of whatever evidence the Government relies upon to charge the crimes listed in the indictment. He argues that owing to his level of notoriety, the earlier prosecutors could not possibly have been ignorant of the involvement on his part that their successors now seek to show. He says that they refrained from taking action because they were aware of rumors he was working with the Government as an informant. Further, he contends that their failure to prosecute him is evidence that the Justice Department had granted him immunity for all crimes now alleged, which is at least one of his responses to the indictment.

The defendant's case was randomly assigned to the Honorable Richard G. Stearns of the United States District Court for the District of Massachusetts. Earlier in his career, Judge Stearns held a variety of managerial and supervisory appointments

within the U.S. Attorney's Office in the District, and during a significant period of the time covered by the indictment he was at various times Chief of the General Crimes Unit, Chief of the Criminal Division, First Assistant United States Attorney, and Senior Litigation Counsel.

In moving that Judge Stearns recuse himself, the defendant cited 28 U.S.C. § 455(a), (b) (1), (b) (3) and (b) (5) (iv). He asserted that a reasonable person would conclude that the judge could not be impartial, particularly in treating with the immunity defense, after the judge had held those positions of high responsibility in the U.S. Attorney's Office during part of the period in question, and that recusal was required under § 455(a). The defendant also contended that Judge Stearns likely would have had personal relationships at the time with numerous witnesses and would himself be a material witness, necessitating recusal under § 455(b).

Judge Stearns denied the motion. He found that his impartiality could not reasonably be called into question because at the time relevant here the U.S. Attorney's Office was separate from the Strike Force. He stated that he had no doubt that he could remain impartial and that no reasonable person could doubt it. Judge Stearns rejected the defendant's § 455(b) (5) (iv) claim because he had no personal knowledge of anything material to the charged conduct.

The defendant then renewed his motion in part, asserting again that recusal was warranted under § 455(a) and (b)(5)(iv). He alluded to Judge Stearns's order denying the first motion, in contending that "a failure to participate in any investigation targeting [Bulger] . . . is circumstantial evidence that corroborates [his] assertion of his immunity agreement." Pet. App. 137. The defendant also represented that he intended to call as a witness Robert S. Mueller, III, the current Director of the Federal Bureau of Investigation and formerly a Chief of the Criminal Division of the local U.S. Attorney's Office, who is said to be a close friend of Judge Stearns. The defendant reiterated his argument that a reasonable person would question Judge Stearns's impartiality.

Judge Stearns denied the renewed motion, concluding that it raised no new matters of law or fact (beyond the identification of the late Jeremiah O'Sullivan as the person defendant claims to have given him the promise of plenary immunity). Judge Stearns said that he remained unpersuaded that the defendant would call him as a witness, as he knew nothing of any relevance to the case.

The defendant now petitions this court for interlocutory relief by a writ of mandamus directing Judge Stearns to vacate his order denying the renewed motion for recusal and to remove himself from the case. He raises here the same two arguments for recusal presented in the renewed motion: that a reasonable person would

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.