

ROBERTS *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 330. Decided October 16, 1967.

Court of Appeals *held* to have erred in denying petitioner's alternative motion for an evidentiary hearing in the District Court to determine whether he was prejudiced by monitoring where it had granted his co-defendant, following this Court's remand in *Levine v. United States*, 383 U. S. 265, a new trial based on the Government's disclosure that the FBI after the indictment had monitored conversations between the co-defendant and the latter's attorney.

Certiorari granted; 376 F. 2d 993, vacated and remanded.

Thomas F. Call for petitioner.

Acting Solicitor General Spritzer, Assistant Attorney General Vinson and Beatrice Rosenberg for the United States.

PER CURIAM.

The petition for certiorari is granted. Petitioner's conviction is vacated and the case is remanded to the District Court for further proceedings consistent with this opinion.

In proceedings before the Court of Appeals pursuant to our previous remand, *Levine v. United States*, 383 U. S. 265, the Court of Appeals granted petitioner's co-defendant Levine a new trial based upon a disclosure by the Government that, after the return of the indictment, agents of the Federal Bureau of Investigation monitored conversations between Levine and Levine's attorney. But the Court of Appeals denied petitioner's motion for the same relief or, alternatively, for a remand to the District Court for an evidentiary hearing to deter-

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Per Curiam.

mine whether he was prejudiced by the monitoring; the Court of Appeals stated, however, that the motion was denied "without prejudice to such application by him to the District Court as may be appropriate." In the circumstances of this case, and in light of the acknowledgment of the Solicitor General in his brief in opposition that "the F. B. I. logs pertaining to the monitored conversations" are available, we think the Court of Appeals erred in denying petitioner's alternative motion for an evidentiary hearing in the District Court. We therefore vacate petitioner's conviction and remand to the District Court with direction to afford petitioner such an evidentiary hearing. Depending upon its findings, the District Court will either reinstate the conviction or order a new trial, as may be appropriate. See *United States v. Wade*, 388 U. S. 218, 242.

Vacated and remanded.

MR. JUSTICE BLACK dissents.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.