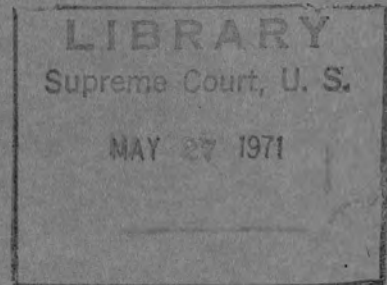


Supreme Court of the United States

OCTOBER TERM 1970



In the Matter of:

Docket No. 5250

JAMES HERMAN BOSTIC,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent,

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C O N T E N T S

ARGUMENT OF:

P A G E

Thomas C. Binley, Esq., on behalf of Petitioner.	2
Beatrice Rosenberg, on behalf of Respondent.	13
Thoams C. Binkley, on behalf of Petitioner.	25

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

JAMES HERMAN BOSTIC,

Petitioner

vs

THE UNITED STATES OF AMERICA,

Respondent

No. 5250

The above-entitled matter came on for hearing at
1:55 o'clock p.m. on Wednesday, April 21, 1971.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

THOMAS C. BINKLEY, ESQ.
300 James Robertson Parkway
Nashville, Tennessee 37201
On behalf of Petitioner

MISS BEATRICE ROSENBERG, ESQ.
Criminal Division
Department of Justice
Washington, D. C. 20530
On behalf of Respondent

1 P R O C E E D I N G S

2 MR. CHIEF JUSTICE BURGER: We will hear arguments
3 next in Number 250: Bostic against the United States.

4 Mr. Binkley, you may proceed whenever you are
5 ready.

6 ORAL ARGUMENT BY THOMAS C. BINKLEY, ESQ.

7 ON BEHALF OF PETITIONER

8 MR. BINKLEY: Mr. Chief Justice and may it please
9 the Court:

10 My name is Thomas C. Binkley. I am a member of
11 the firm of Houser, Thomas, Summers and Binkley and my Co-
12 Counsel is Mr. Philip Carden from Nashville.

13 This -- the Petitioner in this case was tried
14 under Federal District Court in Nashville, where he was charged
15 in three counts of an eight-count indictment. Specifically,
16 was charged with conspiracy or being a part of a conspiracy to
17 rob banks. He was charged with the robbing of a bank and he
18 was charged with receiving money from the robbery of this bank.

19 This trial took some 29 days, not of actual trial
20 time, but 29 days to trial. The Petitioner herein was appre-
21 hended -- at the time this trial took place he had been appre-
22 hended and returned to the penitentiary on the 5th day of June.
23 The bank robbery he was alleged to have been involved in
24 occurred on the 24th day of April.

25 Mr. Binkley, was this while he was a fugitive?

1 A Yes, sir. It was pointed out at the tir
2 trial, or it was argued by Counsel for the Government at the
3 trial that they were going to show that his escape was a part
4 of the conspiracy, but this was never shown. This is important
5 for the Cour because there were other charges made. In this
6 eight-count indictment there was a charge of a bank robbery
7 which occurred on August 3rd, which was some two months after
8 Petitioner was put back in jail and then there was also a
9 charge of murder as the violation of a Federal statute to
10 conceal crimes previously committed. All of this occurred
11 after the Petitioner was returned to the penitentiary.

12 Now, our primary contentions before the Court,
13 our first proposition: we're saying that the recent rulings of
14 the Court have changed or should change the conspiracy excep-
15 tion to the hearsay rule. We think this is especially true in
16 view of the Bruton decision and in view of the Jackson versus
17 Denno case decided before Bruton, and it is our contention that
18 Bruton draws these cases together.

19 As the Court will recall, on the Jackson case it
20 was confirmed with a confession which was turned over to the
21 jury under the New York rule which provided that the jury
22 should determine whether the confession is voluntary or not.
23 We think, even though it hasn't been extended at this point to
24 cover cases involving conspiracy, it is our contention that it
25 should follow.

1 In the Court below the District Judge allowed
2 proof to be offered and determined that the jury should deter-
3 mine whether or not a conspiracy, in fact, existed; whether
4 or not out-of-court statements made by a declarant who was --
5 the declarant making the out-of-court statement was a part of
6 the conspiracy; whether the statements were made in the course
7 of the conspiracy and whether it was in furtherance of the con-
8 spiracy.

9 Q You don't claim that Burton itself did
10 away with the co-conspirator rule, did it?

11 A Did away with what, Your Honor?

12 Q The Co-conspirator Rule.

13 A No, sir; it's our contention that the
14 rationale of Bruton and the cases preceding Bruton: Jackson
15 versus Denno and others which are mentioned in Bruton, that the
16 logical consequence is to do away with the conspiracy excep-
17 tion rules as it is now employed by the Federal Court.

18 We can see little difference in allowing, in
19 saying it's a violation of constitutional rights to allow a
20 jury to determine the voluntariness of a confession and then
21 on the other hand say that it wouldn't be proper or that it
22 would be proper for them to determine whether a conspiracy, in
23 fact, existed.

24 And we submit, in our case, in the present case
25 before the Court, the way it was tried we allowed the

1 out-of-court hearsay statements to come in. We allowed the
2 prosecution -- the prosecution, of course, can start the case
3 anywhere they want to. The prosecution started the case in
4 this case with the murder count and then the jury has to sift
5 through 13 days of testimony and determine whether or not this
6 conspiracy, in fact, existed before they can waive testimony.

7 And we submit, especially in the framework of our
8 case that it was difficult for the trial judge to keep up with
9 the statements without requiring the jury to, in effect,
10 determine whether the conspiracy existed by the hearsay state-
11 ments they were hearing.

12 And we feel that the proper rule, the rule that
13 should be required of any district court in trying this would
14 be first: to determine whether the conspiracy exists, without
15 turning this over to the jury. And it is our contention that
16 the rationale of the Bruton case would require this rule.

17 Q Once an argument was made, as long as I
18 have been at the bar, every trial, every conspiracy trial which
19 the judge has made subject to connection, that argument has
20 always been made for 40 years --

21 A Yes, sir. Well, Your Honor --

22 Q Well, if -- he wanted to be given life.

23 A I think now is the perfect time to change
24 it. I think we have come this way and I think this is the way
25 the courts are leaning, and as was stated in one of the cases:

1 there is no way that we can guarantee a defendant a perfect
2 trial. We have to guarantee him as fair a trial as we can,
3 and certainly you obviate some of the difficulties you have if
4 you require it first be established that the conspiracy exists.

5 Q The judge did charge a conspiracy, if I
6 recollect the charge, that the jury could not infer membership
7 from the conspiracy, in the conspiracy, except through the
8 testimony that was directly admissible against the defendant.

9 A Yes, sir. But this is the problem that
10 the Court has been faced with in the Jackson case and others
11 and was stated by Justice Jackson in the Krulwitch case, that
12 you just can't expect the jury to be able to sift all this
13 through and there has to be a limitation on human beings.

14 And in the present case before the Court, with
15 the conglomeration of proof that was offered we just feel that
16 it would be impossible for the jury to determine this.

17 Our second proposition is concerned with the fact
18 that we are stating that the petitioner herein was deprived of
19 a fair trial by all of this prejudice by not having a sever-
20 ance. His case was different from the other defendants in-
21 volved in that he was incarcerated at the time the alleged
22 murder was committed, at the time the second bank robbery was
23 committed and could have had no part in this; at least it would
24 have to be affirmatively shown that he had a part in it.

25 Since the 1966 Amendment to Rule 14 it's up to the

1 District Judge if he sees there is going to be some prejudice
2 involved, to sever the cases. This can be done even without
3 motion.

4 Q Now, when you just said that he claims
5 that he was incarcerated in prison when "this" took place, I
6 am not sure what your antecedent to "this" was. He wasn't
7 incarcerated when the bank robbery occurred; was he?

8 A May it please Your Honor, he was incar-
9 cerated on June 5th. He wasn't incarcerated at the time the
10 first bank robbery took place, which was April 24, 1967, but
11 there was a second substantive charge of a bank robbery which
12 took place on August 3rd and he was incarcerated at that time.

13 Q He could be part of a conspiracy, a pre-
14 existing conspiracy, could he not?

15 A Well, he --

16 Q It may have intended to cover many bank
17 robberies, but was interrupted by his recapture.

18 A Well, if Your Honor please, I haven't been
19 able to find from the Court, from this Court directly on this.
20 The Court of Appeals has held in two cases cited in our brief
21 that once a conspirator is arrested, at least as far as the
22 conspiracy is concerned his part in the conspiracy is termina-
23 ted.

24 Now, certainly a person in jail, I am sure, could
25 take part in a conspiracy, but I think at the time he's arrested

1 there would be a presumption that his part has ended and it
2 would be on the government to affirmatively show that his part
3 continued.

4 Q Why does that add to the Government's
5 burden to prove every element beyond a reasonable doubt. Is
6 that an additional burden? I'm having difficulty seeing what
7 your point is there.

8 A Well, as far as proving the conspiracy,
9 this doesn't add -- as far as proving the continuing part of
10 the conspiracy this is just a pool of evidence, if Your Honor
11 please, of the burden of going forward with the proof. Cer-
12 tainly the Government can show that he was a part of the con-
13 spiracy and if the Government can prove that he was a part of
14 it up to a point and they prove this beyond a reasonable doubt,
15 certainly he can be convicted of conspiracy.

16 The complaint the Petitioner makes about the
17 matters that took place after he was arrested is that this not
18 only affected the conspiracy count, it affected the substantive
19 count, and put him in a position where, as we argue in the
20 case, there were only two witnesses against him and witnesses
21 we say were of questionable character. But the totality of the
22 circumstances in this case put the Petitioner in such a posi-
23 tion it is our contention that the jury couldn't waive the
24 testimony of these two witnesses against him.

25 And we feel this could all have been taken care

1 of by a severance. And the severance was asked for initially.

2 For example, as we point out, the case was
3 started by the prosecution putting on evidence of a murder that
4 took place. There were four days of testimony concerning this
5 murder which the Petitioner had no part in whatever. And then
6 we had testimony concerning this other bank robbery. There
7 was testimony in the record, and the Government sought to put
8 in testimony where witnesses had been intimidated, and cer-
9 tainly this is something by the allegations, that had to happen
10 after the Petitioner had been incarcerated.

11 Q Was there any request for an instruction
12 as to the proof concerning the substantive acts that took place
13 after the rearrest and recapture of Petitioner?

14 A No, sir.

15 Q Were there any objections on that?

16 A No, sir; there were objections made all
17 during the trial concerning this but to my best recollection we
18 didn't ask for any special instructions.

19 Q Well, certainly it would have been appro-
20 priate to request and appropriate to grant an instruction
21 specifically aimed at the substantive events after his re-
22 capture; was it not?

23 A Well, we feel that it possibly would and
24 in light of the judge's rulings during the trial.

25 Q Well, if you had asked for that instruction

1 and it had been denied your arguments that you are making now
2 would have a bit more force, at least with me. But, you
3 didn't ask for such an instruction.

4 A No, sir.

5 If it may please the Court: the third matter we
6 are contending is concerned with whether or not the conspiracy
7 continued as far as the Petitioner was concerned after he was
8 arrested, and there apparently the Government is not contesting
9 this particular part of it. And, as we have stated before,
10 our primary contention here is, even if we had had limiting
11 instructions with the mass of proof that went in this case,
12 both by hearsay and nonhearsay and for matter unrelated to the
13 charges against the Petitioner, that I don't think it's -- it
14 is our contention there is no way the jury could have sifted
15 through this and come up with the proper decision.

16 And there is no way, with the instructions from
17 the court that the jury could have sifted the admissible from
18 the inadmissible and rendered a fair verdict, at least as far
19 as this Petitioner is concerned.

20 If the Court has no other questions at this time
21 I would like to reserve my remaining time for rebuttal.

22 Q -- Judge Edwards in the Sixth Circuit --
23 there is a paragraph there that says: "As to Bostic, although
24 he was in the penitentiary some time before Ferguson's murder,
25 there is no evidence that he had renounced or withdrawn from the

1 conspiracy. You may remember that.

2 A Yes, sir; I know it.

3 Q And it's now my understanding in light
4 of what -- of this record, that the Government never claimed
5 that he continued to be a member of the conspiracy after his
6 arrest and return to prison. And I'm referring now to part of
7 the record that appears on page 12 and 13 of the Government's
8 brief which shows that the prosecutor made clear that in June
9 Mr. Bostic leaves the conspiracy because he's arrested and sent
10 to the penitentiary. So at that point, of course, Bostic is
11 no longer a party to the conspiracy, and so on.

12 I gather from the few things I just read you that
13 the Court of Appeals was, at least in that respect, misappre-
14 hended what the Government's claim was. Apparently --

15 A The statement made by Judge Edwards is
16 clearly in conflict with other Court of Appeals decisions and
17 this is the only statement that I know of made in the trial,
18 this by the prosecutor, where he says that he leaves the con-
19 spiracy because he's sent to the penitentiary but continuing
20 on here -- I don't know what the jury thought this meant, where
21 it says: "So at this point of course he's no longer a part of
22 the conspiracy, but nonetheless, this would not prevent this
23 from being a single continuing conspiracy."

24 Q That was the overall conspiracy --

25 A Yes, sir.

1 Q And then in the opposition to the
2 petition for certiorari in this case the Government stated the
3 fact that there had been a charge here of conspiracy to commit
4 murder, and there was no such charge in the indictment; was
5 there?

6 A There is --

7 Q I'm not being critical of you; I'm saying
8 that that was a misstatement, I gather, in the Government's
9 opposition.

10 A Well, there was a substantive charge as a
11 part of the conspiracy, and then there was another charge of
12 committing murder to avoid apprehension. So --

13 Q And Bostic was not charged with murder or
14 with conspiracy to commit murder; am I right about that?

15 A That's right. Of course they are charged
16 in one count. He wasn't named in that -- there were 11 overt
17 acts in the conspiracy count which, if I recall, this -- the
18 murder charge being the 11th one. He wasn't named specifi-
19 cally in that. It is a part of the overt acts of the con-
20 spiracy against all parties in the trial --

21 Q Because the fact is that, as was made
22 clear, he was in prison for about three months before the
23 murder was committed and on the day the murder was committed.

24 Q Am I correct that the prosecutor's opening
25 statement to the jury he said that there was no intent on the

1 part of the Government to show that Bostic had any part in the
2 murder or conspiracy to commit murder? He affirmatively told
3 the jury that?

4 A To -- my recollection doesn't serve me
5 well on that, if Your Honor please. He might have.

6 Q It is my impression of the record that
7 his opening statement made that very clear.

8 A Yes, sir.

9 Q It was in connection with the statement, I
10 think, that at that point Bostic goes out of the conspiracy.

11 A Well, sir, of course he didn't come back
12 for ten days and this jury was locked up for 29 days, so a
13 lot transpired, but I am sure if Your Honor recalls that that
14 was said.

15 MR. CHIEF JUSTICE BURGER: Thank you.

16 Miss Rosenberg.

17 ORAL ARGUMENT BY BEATRICE ROSENBERG, ESQ.

18 ON BEHALF OF RESPONDENT

19 MISS ROSENBERG: May it please the Court:

20 I think this quotation on pages 12 and 13 of our
21 brief, is in Volume 22 of the record. It got lost -- we didn't
22 have it, as a matter of fact, at the time that our brief in
23 opposition was filed.

24 We also had filed a second brief on behalf of the
25 other petitioners which stated the facts and so that we didn't

1 file a separate statement of facts as to Bostic, but accepted
2 what the Court of Appeals had said. And there was a mistake
3 in the Court of Appeals. It says was conspiracy to rob banks
4 and commit murder.

5 Now, the charge of the conspiracy to rob banks,
6 it did allege, as one of the overt acts, that Beard and
7 Ethridge committed murder. But when you go through the whole
8 record I think it was fair to say that it was practically clear
9 to the jury that Bostic was not regarded as involved in the
10 murder. And that appears not only from page -- that's the
11 opening argument at the close of the case that we quote on
12 page 12 to 13 of the case.

13 I don't have to tell the Court how important that
14 is to a jury.

15 Q Then I was mistaken when I said it was the
16 opening statement; it was the argument to the jury.

17 A It was the opening argument at the close
18 of the case. But, that appeared earlier in the trial, too.
19 And I call your attention to the voir dire of the jury when
20 they were being picked, and that took a lot of time because of
21 the murder. There were 20 challenges, but I think it was four
22 times that -- as there were different groups to all that.
23 Petitioner's Counsel said, and an example is at page 170 of the
24 record -- he made a statement: "The fact that one of the defen-
25 dants, or more than one of the defendants was charged with

1 minor counts and are being tried along with other persons
2 causing death with, would not influence you."

3 Then the Court said: "Well, let me explain this."

4 And then he goes on and says, "In Count A the defendants Beard
5 and Gary Ethridge are charged with causing the death of Larry
6 Ferguson. Now, on the other counts of the indictment other
7 defendants are charged with offenses involving bank robbery and
8 a conspiracy to commit bank robbery. Now, the fact that these
9 two defendants were charged with causing the death of a person,
10 make it difficult to give a fair trial and to find that the
11 defendants in the other counts not guilty.

12 And this, as I said, was repeated four times
13 through the voir dire. Government Counsel, in his opening
14 statement said how he was going to proceed with the case. He
15 said: "We're going to present the proof of the murder first,
16 the murder that was committed by Bert Beard and acquiesced in
17 -- or started by Ethridge.

18 So it was perfectly clear that that murder proof
19 was as to those two and not at all as to the other.

20 Now, as to the murder, there is no co-conspirator
21 declaration. What there is is a dying declaration by Ferguson,
22 but as to the murder aspects we don't get co-conspirator
23 declarations very much at all, except to a limited extent,
24 perhaps, in relation to Ethridge. And certainly reading the
25 case as a whole, they were not imputed to this Petitioner.

1 There is nothing in the record which suggests that. As a
2 matter of fact, in relation to this petition there aren't very
3 many co-conspirator declarations that have any significance.
4 Aside from the murder the proof was like this:

5 One woman testified who was named originally as a
6 defendant; testified that in April he and Ethridge decided --
7 they had been robbing merchandise before and they decided that
8 wasn't any good because they could get caught with the mer-
9 chandise; money was safer; that they were going to the bank
10 robbery and they weren't going to do it themselves. They
11 would get people to do it for them.

12 Q As I understand it, the murder was
13 charged as an overt act; is that right?

14 A Yes.

15 Q Now, supposing that had been the only
16 overt act charged in the indictment; could that have been used
17 to prove the conspiracy against Bostic?

18 A I don't think so.

19 Q You say you do not?

20 A I do not think so. On that let me say
21 that I think the question of --

22 Q I would have supposed it could; I am
23 rather surprised you answered it --

24 A Well, I think, in relation to Bostic, I
25 think the question of withdrawal from the conspiracy, Your Honor,

1 is a question of fact --

2 Q Withdrawal; oh, I see.

3 Q He was out of the combat.

4 A It is not only that he was in jail,
5 because for example, Beard was in jail for a few days and went
6 out on bail. Beard was arrested when Bostic was taken because
7 Bostic was found in Beard's house. Now, Beard was arrested at
8 that point and then was out on bail and it was after he was out
9 on bail that they committed a third robbery and they committed
10 the murder.

11 But the question as to Bostic is a question of
12 withdrawal, and that's a question of fact and on these facts I
13 think there really is a doubt that he had willy-nilly been
14 withdrawn from the conspiracy.

15 Q Yes, or removed from it.

16 A Removed -- I don't know that it was a
17 voluntary withdrawal, but he had withdrawn.

18 Q Did the prosecutor say that to the jury?

19 A Yes; that's that quotation on pages 12
20 and 13 of our brief.

21 Q But there wasn't any instruction on it?

22 A No; there wasn't any instruction speci-
23 fically on it. There was an instruction that somebody could
24 withdraw and there wasn't any instruction on the consequences of
25 withdrawal, although I think it was evident, implicit in that

1 is if he had withdrawn he wouldn't be held. But what the
2 judge did say and what the theory of this case is was that
3 Bostic had been shown to be a member of the conspiracy to rob
4 banks on plenty of evidence that had nothing to do with the
5 murder; plenty of evidence of what he did and what he, himself
6 said, to his girl friend in part, long before he was appre-
7 hended.

8 His first robbery occurred in April and then
9 they went down to Florida, a group of them, and at this point
10 Beard comes into the picture, apparently as a friend of
11 Ferguson's. And then a whole group of them go up and try to
12 rob a bank at Orlinda. That includes this Petitioner and at
13 Orlinda, Tennessee, but that bank robbery was unsuccessful
14 because an employee of the bank lived above it and heard the
15 noise.

16 And then they come back and in June Petitioner is
17 arrested, and at that point he's out. There is no question, I
18 think, that on the facts of this case, and I think there isn't
19 any question the jury so understood -- it happened to be a
20 highly selective jury in its verdict, even as to the others.
21 And for example, there is an August bank robbery that was
22 charged but the jury wasn't satisfied as to the proof of that
23 robbery so they only person who was convicted in relation to
24 that conspiracy was Beard, who was shown to have had the money
25 from the robbery in his actual possession.

1 And while the judge did not specifically charge
2 that the murder was not to be considered in relation to
3 Petitioner, he did charge in relation to statements as to
4 others that -- and that's at 556 of the record -- that state-
5 ments, testimony has been offered, relating to statements made
6 by one or more of the defendants on one or more occasions.
7 Testimony being of the witnesses Leeman, who was a member of
8 the conspiracy and testified to acts either that he knew about
9 the planning, or that had been told to him right after the
10 robbery; Carney, who relates only to statements by Beard;
11 Farmer -- that's Petitioner's girlfriend, and Letos who was
12 with the group in Florida and testified to statements they made
13 there.

14 So that we do not have as to this Petitioner the
15 basic -- going into questionings of proving his part in the
16 conspiracy for the time he was in it by statements of co-
17 conspirators. The main part of the proof against him came
18 from his co-conspirator Leeman and his own personal admissions
19 to his friends.

20 Now, there was some other co-conspirator state-
21 ments admitted. But, as a matter of fact, when there was an
22 attempt to prove some of the statements that Ferguson had
23 made to some of the girls, at that point -- page 148 of the
24 record -- counsel objected and that didn't come in in that way.
25 But other statements by Ferguson came in at another time.

1 Other complaints that are made by Petitioner about hearsay
2 evidence don't mention him at all. As a matter of fact, the
3 main complaint is in relation to testimony regarding a young
4 man himself and had nothing to do with Petitioner.

5 So that this case really does not involve the
6 Grunewald question or the co-conspirator rule.

7 Q You aren't seeking here to sustain the
8 opinion of the Court of Appeals?

9 A No. The error, I think, is in our
10 opposition, as a matter of fact.

11 Q Because your brief in opposition seems to
12 indicate that indeed this gentleman was either convicted of
13 murder or conspiracy to murder.

14 A I can only say --

15 Q And the Court of Appeals said --

16 A -- you should have read the record in
17 regard to Bostic.

18 Q And in connection with the Court of
19 Appeals you would think the same thing.

20 A Well, that's right. I think, as I say:
21 there is a combination of things. The -- we don't concentrate
22 on Bostic.

23 Q Yes.

24 A And I am afraid the Court of Appeals
25 didn't either and --

1 Q Except what the Court of Appeals said
2 about Bostic may not be sustainable.

3 A What the Court of Appeals said about
4 Bostic is not sustainable, in my opinion.

5 Q So what should we do about that?

6 A Well, I think the question is whether
7 Bostic's conviction is --

8 Q We're talking about a judgment, not an
9 opinion right now.

10 A Right. I think the judgment is clearly
11 sustainable. The opinion is not, on these facts. I don't say
12 that there are other facts where somebody in jail might be held
13 to be a member of the conspiracy.

14 Q No; I understand that, but on these facts?

15 A On these facts the opinion is not sus-
16 tainable.

17 Q I'd like to go back to the overt act for
18 a minute. How can you tell from this verdict whether or not
19 the murder, which was charged as one of the overt acts, was not
20 the overt act that was used to find the conspiracy?

21 A Well, we do know that the jury found other
22 overt acts.

23 Q Were they special verdicts?

24 A No; they were not special verdicts, but
25 they were counts of the indictment which charged this first

1 bank robbery which Petitioner was in and charged receiving the
2 money from that bank robbery, which was split five ways.

3 Q Do you run into a sort of a Stromberg
4 problem?

5 A Well, I don't think we do because it's
6 perfectly clear that the jury found on ample, more than ample
7 evidence, that Petitioner committed this Bordeaux bank robbery.
8 Now, he was charged with being a member of the conspiracy
9 which -- to rob banks. The judge, by the way, specifically
10 refused to charge on Pinkerton in this case. He said -- in
11 doing that he said: The murder in this case is not charged as
12 an object of conspiracy; it's charged as one of the overt acts.
13 In the face of the fact that the jury clearly found that
14 these people were in a conspiracy to commit the Bordeaux rob-
15 bery and something else -- they didn't make as specific a
16 finding about the other bank robberies, but they clearly found
17 that because those were substantive events charged. The jury
18 said: "As to those substantive events you can't consider co-
19 conspirator statements." He went beyond what he was required
20 to do, but he did so charge.

21 And, as I say, the evidence is overwhelming that
22 they do this bank robbery. Then it is perfectly clear that
23 the jury found that the conspiracy to rob banks and at least
24 the overt act of the Bordeaux robbery, whether in addition it
25 also found the murder, would be unimportant.

1 Q Isn't there another at least arguable
2 response to that? Namely, that the Government concede, more
3 than conceded, asserted flatly that after he returned to
4 prison on his recapture he was out of the conspiracy?

5 A Yes.

6 Q That was probably at least as strong as
7 the instructions from the court, since it came right from the
8 prosecutor.

9 A Well, I think that is very clear and I
10 also think that if you go through the record, which you can't
11 do when you start, just putting together all the objections in
12 an appendix, and not what goes around them, I think as one
13 goes through the record I can see that the Government really
14 did try to keep the events compartmentalized. They said
15 clearly in the beginning: we're going to present the evidence of
16 the murder first and the murder concerns Beard and Ethridge.
17 There were only those two.

18 Then later on there was some attempt by Beard to
19 imply that Self, which is a young man who didn't even come up
20 on appeal, might have tried to murder him. He wasn't even
21 charged with the murder. It was made clear throughout the
22 trial that while it was an overt act in furtherance of the con-
23 spiracy, with Ethridge in the center of the conspiracy --
24 that comes through at the trial also -- it was perfectly clear
25 throughout the trial that nobody was saying that not only

1 Bostic but Self and the other defendants, nobody was accusing
2 anybody but Beard and Ethridge, as being responsible for the
3 murder. And it was Ethridge that the center of the conspiracy.

4 Q Miss Rosenberg, let me be very sure of
5 your position. Do I take it, in your answer in response to
6 Justice White's question, despite the misapprehension of the
7 Sixth Circuit Panel and Judge Edwards in his opinion, is it
8 the Government's position that this case in any event need not
9 be remanded to the Sixth Circuit?

10 A Yes. That is our position because our
11 position is that it is perfectly clear on this record in every
12 way that Bostic was not charged directly or by implication
13 with the murder. On the other hand it is perfectly clear on
14 this record that Bostic was properly convicted, both of the
15 Bordeaux bank robbery with which he was charged, and with being
16 a member of the conspiracy for the length of time that he was
17 out of jail.

18 Q I suppose he will always feel that as
19 long as that opinion stands he's charged and convicted of
20 something else, won't he?

21 A Well, Your Honor, I think it's signifi-
22 cant that in the petition for certiorari and I think in his
23 brief he says the question is whether the Court of Appeals
24 should have charged him as being responsible for the murder.
25 And all that the Court of Appeals really says is that there was

1 no showing of affirmative withdrawal from the conspiracy. I
2 don't think they said he did it or really had any part in it;
3 they just said technically and legally he hadn't withdrawn.
4 I think that was wrong, because I think that on these facts it
5 will show that he was taken off to the penitentiary and no-
6 body -- there's absolutely nothing in the record to show that
7 anybody even visited him after that.

8 I think it would be wrong to impute the murder to
9 him, but I don't think it was done at the trial. I think it
10 was made perfectly clear that he wasn't involved.

11 MR. CHIEF JUSTICE BURGER: Mr. Binkley, do you have
12 anything more? You have about nine minutes if you wish.

13 REBUTTAL ARGUMENT BY THOMAS C. BINKLEY, ESQ.

14 ON BEHALF OF PETITIONER

15 MR. BINKLEY: May it please the Court:

16 There has been some confusion on this and I think,
17 at least in our argument today we have been drawn away from
18 what might possibly be one of the minor issues in the case.
19 But, to answer in a way, the record will show that the parts
20 of the testimony we have cited in the appendix will show that
21 the prosecutor wasn't doing me any favor and the petitioner
22 any favor when he conceded that the Petitioner was back in the
23 penitentiary, because I tried in most of the case to keep that
24 out. And so I didn't feel I could elaborate on this man's
25 incarceration because it certainly doesn't help you before a

1 jury to let you know that your client's permanent place of
2 residence at this time is the state penitentiary.

3 Q Yes, but didn't it help you quite a bit
4 to have him cut loose from this, at least very much premedi-
5 tated murder, motivated murder? It helped him a lot there;
6 didn't it?

7 A Yes, sir; I am sure that that did help
8 him if, in fact, this was done. The count was still tied onto
9 the conspiracy charge and it's just a question of whether the
10 jury can remove this from their minds and take it away,
11 especially in view of everything else that came in.

12 Now, there was testimony that's pointed out in
13 our brief and we've cited examples in the appendix of portions
14 where the Government impeached their own witnesses with prior
15 statements not made by the person, but alleged to have been
16 made by the FBI man, where the statement of what the FBI man
17 said the witness said was reared in open court to impeach.

18 There was also some testimony of declarations
19 made by Ferguson, who of course was dead, and we have no way
20 to cross-examine. There was also an FBI report brought in by
21 -- when Beard was being testified. Of course, this takes
22 Beard a little out of the rationale of the Bruton case, but
23 we submit that we have pointed out instances where this has
24 happened.

25 Now, there was a discussion in court when

1 Ferguson's brother was testifying and they were trying to
2 allow this to come in by asking Ferguson's brother first if
3 he knew any of the parties, and then said: "Now, don't name
4 any of the parties, but go ahead and tell us what was said."
5 And of course, that was objected to, but that was allowed to
6 come in.

7 It's our contention that it should be spelled out
8 that now is the appropriate time the rationale of the Bruton
9 case, taking into account the Jackson case and others, should
10 set down the rules that the Government, just like in a question
11 of voluntary confession the trial judge should first determine
12 there is a conspiracy before he allows all of this hearsay to
13 come in and then ask the jury after it has heard all of this to
14 determine whether a conspiracy existed.

15 A conspiracy case is a difficult case to try. The
16 record shows that every case of hearsay and double hearsay was
17 brought into this record by the prosecutor standing up and
18 saying: "But, Your Honor, this is a conspiracy case, which
19 means everything goes." Thus, it's our contention that now is
20 the time, and certainly if the Court doesn't feel that this
21 should be reversed on, under the Bruton rule, certainly it was
22 prejudicial and prejudice could have been taken away by a
23 severance.

24 And certainly with the obstacles, the difficulties
25 the Court of Appeals found in this, that the judge, the trial

1 judge found, certainly it should have been known that we could
2 have avoided any of this by having a separate trial and we'll
3 never know -- of course we concede the jury convicted -- but
4 we will never know how they would have weighed the testimony
5 of the two witnesses against the petitioner herein had their
6 minds not been cluttered with all these other things that I
7 couldn't remove from the jury, just as I couldn't remove my-
8 self from the counsel table where we were required to be by the
9 Court.

10 And it is our contention that this case should be
11 reversed and remanded on our two grounds.

12 Thank you.

13 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Binkley;
14 thank you Miss Rosenberg. The case is submitted.

15 (Whereupon, at 2:45 o'clock p.m. the argument in
16 the above-entitled matter was concluded)