

7/68

Supreme Court of the United States

Office-Supreme Court, U.S.
 FILED
 NOV 26 1968
 JOHN F. DAVIS, CLERK

In the Matter of:

Docket No. 73

----- X
 :
 ROBERT NEWTON GARDNER, JR., :
 :
 : Petitioner, :
 :
 : vs. :
 :
 : THE STATE OF CALIFORNIA, :
 :
 : Respondent. :
 :
 ----- X

Duplication or copying of this transcript
 by photographic, electrostatic or other
 facsimile means is prohibited under the
 order form agreement.

Place Washington, D. C.

Date November 20, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

TABLE OF CONTENTS

ORAL ARGUMENT OF:

P A G E

Charles E. Rickerhauser, Jr., on
behalf of Petitioner

2

Jack K. Weber, Esq.

20

- - -

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

3 -----x
 4 ROBERT NEWTON GARDNER, JR., :
 5 Petitioner, :
 6 vs. : No. 73
 7 THE STATE OF CALIFORNIA, :
 8 Respondent. :
 9 -----x

10 Washington, D. C.
11 Wednesday, November 20, 1968

12 The above-entitled matter came on for argument at
13 10:05 a.m.

14 BEFORE:

- 15 EARN WARREN, Chief Justice
- 16 HUGO L. BLACK, Associate Justice
- 17 WILLIAM O. DOUGLAS, Associate Justice
- 18 JOHN M. HARLAN, Associate Justice
- 19 WILLIAM J. BRENNAN, JR., Associate Justice
- 20 POTTER STEWART, Associate Justice
- 21 BYRON R. WHITE, Associate Justice
- 22 ABE FORTAS, Associate Justice
- 23 THURGOOD MARSHALL, Associate Justice

24 APPEARANCES:

25 CHARLES E. RICKERSHAUSER, JR.
 606 South Hill Street, Eleventh Floor
 Los Angeles, California
 Counsel for the petitioner

JACK K. WEBER, Esq.
 Deputy Attorney General of the
 State of California
 600 State Building, 217 West First Street
 Los Angeles, California 90012
 Counsel for the respondent

1 preparation of his case.

2 Petitioner did not then and does not now complain
3 about the hearing but instead contends the evidence will prove
4 his habeas corpus contentions.

5 Petitioner in his motion raised the Federal questions
6 presented here, citing authorities. The Superior Court denied
7 that motion by written order, stating, among other things, that
8 none of the proceedings in that court would be of concern to the
9 California appellate courts.

10 Petitioner sought review of that denial of his motion
11 for a free transcript by petitioning for a writ of certiorari
12 in the California Court of Appeals, which was denied. Peti-
13 tioner then sought a hearing in the California Supreme Court,
14 which was denied. Both of these denials were without opinion.

15 Petitioner then petitioned this court for a writ of
16 certiorari, which was granted after a response was filed by the
17 State of California upon request. This court then appointed
18 counsel, the only time petitioner has been represented in these
19 proceedings by counsel except at the hearing on his writ of
20 habeas corpus in the California Superior Court. It is a tran-
21 script of that hearing for the purpose of presenting his conten-
22 tions for habeas corpus to the California appellate courts, this
23 court, and, if necessary, the lower Federal courts, that peti-
24 tioner is here seeking.

25 It seems clear under various decisions of this court,

1 the most recent and prominent one of which is Long versus Dis-
2 trict Court, 385 U.S. 192, that if the California habeas corpus
3 procedure was a traditional appellate procedure, equal protec-
4 tion would require that this transcript be furnished to peti-
5 tioner so that he could have the same means of pursuing his
6 remedies as a man with means to purchase the transcript.

7 The difference, if any, in this case is that habeas
8 corpus in California is termed as a theoretical matter to be an
9 original writ procedure in each of the courts of California.

10 Q That is theoretical? That is a fact, isn't it?
11 In other words, it may work to the benefit of the applicant,
12 because if this is not an appeal but rather an original, new
13 application for habeas corpus in the second court, then the
14 applicant is free to bring in additional material which he
15 would not normally be free to do if this were simply a review
16 of the District Court's action?

17 A That is true, Mr. Justice Stewart, but in prac-
18 tice it seems to me we have to look at the California procedure
19 and see how it usually works. It usually works like an appel-
20 late procedure in the usual case. Even if it isn't, I think the
21 petitioner has shown his need for that transcript to prepare
22 for the appellate court review.

23 If I might, I would like to point out that even though
24 the petitioner is theoretically able to proceed in either the
25 Superior Court or the appellant courts of California in an

1 original proceedings as a general matter and the usual practice
2 is as established in the State's brief here as referred to, is
3 that the appellate courts will require him to start in the trial
4 court.

5 Q That is not unlike the Federal system, I expect.

6 A That is right.

7 Q I think I am right in saying that under the
8 statutes an original writ of habeas corpus can be brought
9 either in the Federal district court or before a circuit judge
10 or the whole court of appeals or before any justice or before
11 this whole court. But the practice is, and it is authorized by
12 the statute in the Federal system to transfer any such applica-
13 tions filed with the circuit judges or supreme court justices
14 to the district court. Is that more or less the California
15 practice?

16 A I believe the more common practice is to deny
17 the application for habeas corpus. It is referred to in a foot-
18 note in the State's brief on the ground that he should proceed
19 in the trial court absent some unusual circumstances that the
20 trial court would not act on.

21 Q Of course, in the Federal system, there is pro-
22 vision for appeals from denials of habeas corpus. As I under-
23 stand it, in California there is no appeal from a denial.

24 A There is an appeal by the State if a petition is
25 granted.

1 Q No; an appeal from the denial of habeas corpus.
2 Is that correct?

3 A That is correct. However, many times the subse-
4 quent proceedings in the appellate court have the same effect
5 as an appeal before the appellate courts, which often limit
6 their review to the record before the trial court. That was all
7 that was asked here, since there was no complaint about the
8 hearing in the trial court or that it was insufficient or that
9 additional evidence would be required in the appellate court.

10 Q As I read your trial judge's order, he made clear
11 that the appellate court, if it was so minded, was free to ask
12 for the transcript of what had gone on in the habeas corpus
13 proceedings in the trial court. Didn't I read that correctly?

14 A That is correct, Mr. Justice. The appellate
15 court could have ordered that transcript.

16 Our position is that in order to get the appellate
17 court to take the case, it is essential to this indigent peti-
18 tioner to have that transcript available both in aid of prepara-
19 tion of his case and in establishing his case at the discretion
20 of the appellate court to take it or not.

21 Q Which transcript was it necessary for him to have?

22 A The transcript on a hearing for the petition of
23 habeas corpus in the trial court.

24 Q You are not asking that the State supply a tran-
25 script of the original trial?

1 A No, sir. This petition for habeas corpus con-
2 tended that he was denied sufficient access to the court and to
3 legal materials which, had it been established, I assume would
4 have then proceeded to attack his prior conviction and when he
5 is in on two different crimes, one of which he pleaded guilty to.

6 Q Mr. Rickershauser, do you know whether this pro-
7 cedure that Brother Stewart was talking about is peculiar to
8 California, whether there are other States and, if so, how many
9 that have this same procedure; that is to say, that don't permit
10 appeals in postconviction proceedings but that do provide for
11 original proceedings in the superior courts?

12 A I am sorry, Mr. Justice Fortas. I don't know the
13 answer to that question. I will attempt to supply it if you
14 desire me to do so.

15 Q I would be interested in having that, yes.

16 A All right.

17 It seems, from the original common law practice, that
18 it is reasonable to suppose that it exists in other States, but
19 I can't actually answer the question.

20 Q I gather, from what you say, that sometimes there
21 are hearings in the supreme court.

22 A That is correct.

23 Q When you file a new petition in the supreme court
24 instead of appealing, sometimes there is a hearing.

25 A That is correct, Mr. Justice White.

1 Q Why wouldn't you, if they wouldn't give you the
2 transcript of what occurred in the lower court, ask for a hear-
3 ing so you could make a record and put the evidence before the
4 Supreme Court of California?

5 A We would ask for a hearing.

6 Q Are you claiming the constitutional right not to
7 have to ask for that hearing?

8 A No. I am claiming that in order to get that
9 hearing, it is necessary to have this transcript.

10 Q Why is that?

11 A Both in aid of preparation of the petition for
12 the hearing and in proving to the court---

13 Q Had you prepared the petition without such a
14 transcript in the lower court and got a hearing on it?

15 A That is correct. You understand that I didn't,
16 sir.

17 Q I understand it. But the petition was filed in
18 the lower court and you had a hearing on it.

19 A That is correct.

20 Q Is there any reason to suspect that you couldn't
21 have got a hearing in the Supreme Court of California if the
22 Supreme Court of California refused to call up the record from
23 the lower court?

24 A I am not sure I follow your question. The
25 Supreme Court of California does not have to grant a hearing on

1 the petition.

2 Q That is true, but it has never been denied yet,
3 has it?

4 A Yes, it has.

5 Q Did you ever ask them for a hearing?

6 A Yes.

7 Q So that you come here in a situation where they
8 couldn't call up the record in the trial court and wouldn't
9 give you a hearing?

10 A That is correct. We do not know what happened
11 at that hearing in the trial court as a result of any
12 subsequent proceedings, and neither has there been any other
13 hearing.

14 Q Neither did the Supreme Court of California?

15 A That is right.

16 Q Where does that show in the record that the
17 Appellate Court denied a hearing on your application?

18 A The only proceeding that is before the Court
19 in this case is the request for the hearing. I believe the
20 Court could take notice of the fact that two other petitions
21 for certiorari are pending in this court at this time relating
22 to the subsequent proceedings in this petitioner's attempt to
23 obtain habeas corpus.

24 Q I thought what we had here -- perhaps I am
25 quite wrong -- was simply the denial of the trial court to

1 supply your client a free transcript of the hearing to be used
2 by him in his new application for habeas corpus in the
3 Appellate Court. I thought that is what we had before us
4 here.

5 A It is really arguable, I guess, what you have
6 before you because the petitioner took that denial to the
7 California Court of Appeal by writ of certiorari and then took
8 that to the Supreme Court of California by petition for
9 hearing, both of which were denied. He then came here for a
10 writ of certiorari, which was granted, directed to the Superior
11 Court of California, although we have treated it in the brief
12 as directed to the Supreme Court. I think it would lie to
13 another court.

14 Subsequently, he has pursued his habeas corpus
15 remedies in the California Appellate Court and has filed
16 petitions for certiorari. That is not this case. Those cases
17 are pending here.

18 Q But this case is an attack, is it not, upon the
19 denial of the trial court of a request for a free transcript
20 of the habeas corpus proceedings in the trial court to be used
21 by your client, which he says is necessary for him to have, in
22 order to file an application for habeas corpus in the Appellate
23 Court?

24 A That is correct.

25 I was discussing the fact that the California

1 procedure has developed appellate similarities. I don't
2 think it is required in establishing our case. We don't ask
3 this court to say that California in fact has an appellate
4 remedy. We are just showing that it has some of the same
5 aspects and therefore makes the need for this transcript even
6 greater under those circumstances and that it is not always the
7 tradition to grant separate hearings to consider these
8 records separately.

9 We think the basic considerations underlying the
10 transcript cases are that an indigent prisoner is to be
11 afforded an adequate means of review in the appellate courts
12 as a man with means would require the furnishing of this
13 transcript.

14 It seems to us that the facts of this case uniquely
15 demonstrate the essential aspect of this transcript. This
16 petitioner in his habeas corpus petition is asking or claiming
17 that he is denied access to the courts. This is obviously a
18 problem with complexity in which the courts must weigh his
19 liberty and his rights against the right of the institutional
20 authorities to run the prisoner, a complex problem.

21 It is almost unbelievable that a man who had means
22 would not purchase the transcript of this hearing in the trial
23 court in order to assist him in the preparation of his papers
24 in the appellate courts and also to demonstrate to the appellate
25 courts how it is that he was denied access, which would

1 certainly be of assistance to a court in determining whether
2 or not there was the kind of denial of access that would be a
3 deprivation of his rights.

4 So it is our view, therefore, that there is the kind
5 of invidious discriminaiton between the prisoner of means and
6 the prisoner without means that the transcript cases have
7 discussed.

8 Q Mr. Rickershauser, do you know what happens in
9 the Supreme Court of California when a habeas petition is
10 filed and the court decides to hear it? Does the court hear
11 it? Suppose evidence has to be taken? Do they ever take
12 evidence before the court?

13 A My understanding is that a master is appointed
14 or a referee and that a transcript is obtained of that
15 proceedings, which is then reviewed by the court to the extent
16 necessary to reach a decision.

17 Q They don't customarily then rely on the
18 transcript of the lower courts?

19 A There are Court of Appeal cases in which they
20 have relied on it. I am sure they would in this case had they
21 granted a hearing, because the petitioner doesn't seek to
22 establish anything beyond that transcript. This isn't a case
23 where he is asking for the transcript in order to comb it for
24 errors that he might then urge in an appellate court.

25 But there is obviously some speculation as to what

1 they would do.

2 I would like to mention one or two of the state's
3 contentions, the first one of which seems to be that there are
4 not sufficient allegations of need for the transcript. We
5 feel that a layman with a problem such as this, trying to
6 establish that he doesn't have adequate access to the courts,
7 when on the face of it he is in court, has alleged all that any
8 layman ought to have to allege in expressing his need for this
9 transcript, especially when he contends that he is willing to
10 rely on it and that he had a fair hearing in that trial court.

11 Q I am confused as to what is here. I am looking
12 at the appendix, page 22. That apparently is the order in the
13 Supreme Court of California, entitled "Petition for Hearing,"
14 "Order Denying Hearing," "Petition for Hearing Denied." And
15 yet our writ at page 63 runs not to that order of the Supreme
16 Court of California but apparently to the Superior Court of
17 California.

18 A I think I mentioned a few moments ago that it is
19 not actually clear from an arguable standpoint as to what is
20 here. It is true that the writ does run to the Superior Court
21 in the State of California.

22 Q May I just ask there, looking at page 50, that
23 would appear to be to the denial of the petition for writ of
24 certiorari -- is that it? -- in the District Court, because
25 at page 52 the order seems to be "Petition for Writ of

1 Certiorari Denied."

2 A That is the order of the Court of Appeals.

3 Q Is that what this ran to, to that order and not
4 on the order of page 62 of the Supreme Court of California?

5 A Mr. Justice Brennan, your writ ran to the order
6 of the Superior Court on page 43 of the appendix.

7 Q Is that denying a transcript?

8 A That is correct.

9 Q You appealed that order?

10 A That was taken to the Court of Appeals in
11 California by a writ of certiorari under the procedures of
12 that state of which there is no decision establishing that it
13 is either the incorrect or correct procedure. It was then
14 taken to the California Supreme Court.

15 Q That is where you asked for a hearing in the
16 Supreme Court?

17 A That is right.

18 Q That is like petitioning for a writ of
19 certiorari to the Supreme Court of California?

20 A I am sorry. We asked for the supplying of the
21 transcript below, and I assume there would be a hearing. The
22 procedure in the California Supreme Court is a petition for a
23 hearing which has the discretionary aspects of the petition for
24 certiorari here.

25 Q In other words, this is not something -- that

1 petition for hearing in the Supreme Court of California --
2 peculiar to state habeas corpus?

3 A No, sir. That is the way the petition is brought
4 forward for hearing.

5 Q This wasn't a petition for a hearing on a writ
6 of habeas corpus?

7 A No. I misled you.

8 Q You didn't mislead. It is just those labels.
9 Apparently, a "petition for hearing" is just a label describing
10 a procedure for the Supreme Court of California under a
11 discretionary review?

12 A That is correct. It is a luxury perhaps that
13 Petitioner is here in time on the orders both of the Superior
14 Court and of the Supreme Court.

15 Q I must say I have a little trouble seeing how
16 our petition runs to that order on page 43 later than to the
17 denial of the order denying a petition for certiorari in the
18 state courts.

19 A It would only be proper on your writ,
20 Mr. Justice Brennan, if the order of the Superior Court was the
21 last order possible in the state court system. If it was a
22 final judgment of the final court, our view is that is not the
23 case because it could have been taken up in certiorari.

24 The Attorney General questions that in his brief.
25 But I think it is correct. I think it would be more

1 appropriate, although certainly up to that court.

2 Q I gather your point is, if our writ runs to
3 that order at page 43, then there is before us the question
4 you raised of the denial of the transcript.

5 A That is correct. I don't think there is any
6 question about that issue being before you if you should have
7 the Supreme Court denial of hearing before you either. That
8 is the issue as it was raised on the request for a writ.

9 Q If it was denying the transcript, you would
10 still have left over the question of whether you really were
11 denied anything if you could get a new hearing on the petition
12 for habeas corpus, a new evidentiary hearing in the Supreme
13 Court of California.

14 A The question really, I think, Mr. Justice White,
15 is whether we needed that transcript in a constitutional
16 sense in an application for that hearing.

17 Q Just to prepare?

18 A To prepare and to convince the court.

19 Incidentally, the California statute requires us to
20 make a brief description of the proceedings below.

21 Q Which shouldn't you have to come here, after
22 they have denied you a hearing? Let's assume they grant your
23 petition for a hearing. You filed a writ of habeas corpus in
24 the California Supreme Court, and they granted you a hearing on
25 it, an evidentiary hearing. Then I don't suppose you would

1 have any constitutional claim for the transcript in the lower
2 court.

3 A I think that is correct.

4 Q Which shouldn't you have to come here, having
5 been denied both the transcript and the hearing?

6 A My reaction to that is that at that point we
7 would have lost our right to attack the order below in the
8 trial court denying the transcript.

9 Q But then you could come here and say that:
10 "We have a petition for habeas corpus, and they won't give us
11 either a hearing or a transcript."

12 A I think that would be another way to raise the
13 issue.

14 Q Mr. Rickershauser, I see that we had number 894,
15 miscellaneous, in the 1967 term and number 1001, miscellaneous,
16 1967 term, which were respectively the petitions for
17 certiorari to the Superior Court of California, apparently
18 denying a petition, and the petition for certiorari to the
19 California Supreme Court.

20 In the last one, the petition was filed for a writ
21 of certiorari to the California Supreme Court, was asking us to
22 review the order denying the petition for habeas corpus. Is
23 that right?

24 A That is correct.

25 Q Did you say to us that those were filed or

1 timely filed?

2 A I did not address myself to the timely filing
3 of that one. I said that this case was timely filed with
4 respect to the order of both the trial court and of the Supreme
5 Court denying a hearing.

6 Q I see. But those other petitions are before us
7 and have not been acted upon.

8 A That is correct.

9 Q So we do have up here a petition for certiorari
10 which has not been acted on, asking us to review the refusal
11 of the Supreme Court of California to grant habeas for the
12 petition?

13 A That is correct.

14 I was discussing the state's contention as to the
15 specificity of the allegations. I think the final state's
16 point that I would like to discuss is that the decisions of
17 this court in the transcript cases talk about the state may
18 provide adequate alternatives. The difficulty I have with
19 that here is that there is no adequate alternative that we are
20 able to determine and none has been offered. The only discus-
21 sion of any is that the Petitioner alleged with particularity
22 what happened at the hearing.

23 This, I think, is an undue burden upon him, one that
24 a man with means would not assume; and that, therefore, there
25 is the kind of discrimination without alternatives that the

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

transcript cases require in this court; and that the decision
below should be reversed.

Thank you.

MR. CHIEF JUSTICE WARREN: Mr. Weber?

1 ORAL ARGUMENT OF JACK K. WEBER, ESQ.,

2 ON BEHALF OF RESPONDENT

3 MR. WEBER: Mr. Chief Justice, may it please the
4 court.

5 Permit me to begin by attempting to distinguish
6 Long versus District Court of Iowa and to explain something of
7 our California procedures in the process of doing that.

8 The obvious distinction between Long and the situa-
9 tion here is that California does have habeas corpus, and Iowa
10 had an appeal procedure. However, permit me to emphasize the
11 significance of that difference. When you have an appeal,
12 although it is possible to hear the matter on a clerk's
13 transcript, in the ordinary case the focus is on the trial
14 court below, the proceedings there, and the reported transcript
15 of those proceedings.

16 Q You are talking about an appeal of a denial
17 from habeas corpus. You are not talking about an appeal from
18 a conviction.

19 A That is right. The focux of the court is to
20 review the proceedings below to determine whether or not there
21 was error. In order to do that, you look at the transcript.

22 However, in California we have an entirely different
23 procedure, where the proceedings below are entirely tangential
24 and collateral. There the court doesn't necessarily review
25 the proceeding below. It receives allegations from the

1 petitioner, and it tests those allegations to determine their
2 sufficiency. Because of that, because the court relies on
3 allegations, it does not necessarily need a transcript to
4 resolve the issue.

5 There is another aspect of this difference also.
6 The habeas corpus procedure has multiple stages. The first
7 stage is a collecting stage. After that, the court gets into
8 the process of determining the truth of the allegations if it
9 has not denied the petition.

10 Thus, in this initial stage, the court does not
11 require proof. It does not require evidence. It does not
12 require a procedure for submitting the matter in any particular
13 way. It can proceed to determine the sufficiency of the
14 allegations just by reading the allegations. This is the
15 normal, the meaningful and the usual way to proceed in habeas
16 corpus matters.

17 Q If you file a petition in habeas in the trial
18 court and the allegations are deemed by the trial court as
19 sufficient, you may get a hearing in the trial court. But you
20 repeat the identical allegations in a petition filed either in
21 the Court of Appeals or in the Supreme Court. Either of those
22 courts may deem them insufficient. Is that it?

23 A That is correct, your Honor, yes. Although
24 there are differences between judges---

25 Q I understand, but that is the way it works.

1 There is just no appeal -- whether he was right or wrong in
2 the hearing -- what the trial judge did, I gather, is what he
3 said under your practice, that it is not reviewable either in
4 the Supreme Court or in the Appeal Court.

5 A I wouldn't go so far as to say it is not
6 reviewable. There are rare cases in which the appellate court
7 has determined that there was some error in a collateral
8 attack proceeding in the court below. But the usual practice
9 is to treat the whole matter, the new -- and it is a de novo
10 proceeding, I guess, mainly.

11 Q Suppose there had been a hearing in the trial
12 court and at the conclusion of the hearing the fact-finding
13 was entered against the petition. Nevertheless, may the
14 petitioner file that same complaint in the Court of Appeals of
15 the Supreme Court and perhaps get another hearing even though
16 this may result in perhaps a contrary fact-finding?

17 A That is the way it is done. As a matter of
18 fact, he isn't bound by the substantial evidence or any of the
19 other customary rules relating to appeal. He isn't bound by
20 the record below or anything else. The second time around he
21 can find some new ways to present matters to the court and new
22 and better allegations.

23 Q How can the Supreme Court find error in the
24 record below that doesn't have the record?

25 A Of course, when it proceeds by allegations, it

1 doesn't need to find error in the court below. They just test
2 the sufficiency of the allegations and determine the original
3 substantive claim anew.

4 However, if the petitioner alleges there was some
5 error below, the court, if it desires to do so, can get into
6 the business of evaluating what happened below with a tran-
7 script of what occurred there.

8 Q How can it determine that he is not entitled to
9 have those allegations considered if it doesn't have the
10 record upon which they are based?

11 A Now we are getting into the second stage of the
12 habeas corpus procedure which relates to proof. He would go
13 to the appellate court, and he would set out his allegations
14 about what went wrong in the court below. If the court deemed
15 those allegations sufficient, then it would get into a question
16 of getting the transcript and establishing the truth of those
17 claims.

18 Q If it doesn't find those allegations sufficient,
19 what course does the Supreme Court take?

20 A It denies the petition.

21 Q Then it doesn't have an independent hearing of
22 its own?

23 A It holds an independent hearing if it finds that
24 the allegations are sufficient and that they require an
25 evidentiary test. It doesn't always go straight to hearing,

1 you understand. The usual procedure of the Court is to appoint
2 counsel for the petitioner and to coax the parties into entering
3 into stipulations and to test out whether there is any real evi-
4 dence differences between them because hearings are an expensive
5 and cumbersome process.

6 Q If this is in the Supreme Court and it is finally
7 concluded that there has to be live testimony taken before some-
8 one, before whom is it heard?

9 A It is a referee. I think I have cited the Riddle
10 Case in my brief where the Court describes this procedure. Then
11 the transcript is prepared and the Court receives the report of
12 the referee and then it redetermines and reweighs the referee's
13 findings, giving them great weight but not being bound by it.

14 Q Is that also true in the intermediate Court of
15 Appeals?

16 A Yes.

17 Q In reference to a referee?

18 A Yes.

19 Q Mr. Weber, in this original paper that the peti-
20 tioner files, I assume the state files a response?

21 A If the Court requests it, yes, Your Honor.

22 Q Would the state use the transcript?

23 A It depends on the nature of the allegation. If
24 the nature of the allegations are such that a transcript would
25 be necessary to answer them, we quite often will secure a

1 transcript and supply it to the Court at that point.

2 Q But the petitioner couldn't get the transcript?

3 A Of course, if he doesn't have the means, he can't
4 buy the transcript. He would have to make some request to the
5 Court.

6 Q So the state would use a transcript because the
7 state, I assume, has the means?

8 A We still have a few dollars, yes.

9 Q So that the state would use a transcript for its
10 pleadings, but would deny that transcript to the pauper?

11 A There is always a process of testing out these
12 claims. When the Court requests a response, the state would
13 secure a transcript. But the petitioner has to get his transcript,
14 in effect, at the suffrance of the Court if he is an indigent.
15 He has to ask the Court for it and he has to establish his need
16 for it to the Court. It just isn't practical, we feel, to let
17 him be the judge.

18 Q Isn't it worse when the pauper without a lawyer is
19 up against the weight of the whole prosecuting authority of the
20 State of California plus the transcript?

21 A I usually feel that if the situation is turned
22 around, that the petitioners are the ones who are putting us on
23 the spot through their allegation. But there does exist this
24 difference, the state does have the power to order a transcript,
25 the indigent has to secure his transcript at the determination

1 of the Court. This procedure, I guess, comes about because of
2 the possibilities of economic waste involved.

3 If the indigent could just secure every transcript that
4 he desired at his own determination, we are concerned that many
5 of the prisoners would abuse that sort of a privilege.

6 Q Don't you do that, though on direct appeals from
7 convictions?

8 A As this Court has pointed out, there is a differ-
9 ence between direct appeals.

10 Q I know, but what about my question?

11 A We do furnish free transcripts.

12 Q Automatically?

13 A Automatically, yes.

14 Q Whether they have money or not?

15 A Whether they have money or not, yes, sir. Cali-
16 fornia is very liberal in doing that.

17 Q Let me ask you this, Mr. Weber. If this man had
18 had the money and had purchased the transcript, could it have
19 been used in the Supreme Court to determine whether he was entitled
20 to a hearing there?

21 A The Court customarily receives any documents that
22 petitioners send and they will make use of those documents, yes,
23 sir.

24 Q Then if he isn't able to get that, then the Court
25 would abuse it. Then he has suffered some deprivation, has he

1 not?

2 A We don't deny that there is some difference between
3 the way the indigent are treated here and between the power of
4 the state to secure transcripts. The problem is one of determining
5 whether that difference or discrimination is invidious.

6 Q How is that justified on the part of the state?

7 A The justification for requiring him ---

8 Q The discrimination that you just mentioned?

9 A The justification would be in the economic cost
10 in furnishing the transcripts, some without some test for need.

11 Q So it seems to me as to a state like California
12 that won't be a very good argument, because if a man if a million-
13 air and he has a long trial, the state pays for his transcript
14 on appeal?

15 A Yes.

16 Q Why shouldn't an indigent have it in a situation
17 like this if a man of means could have the transcript and it
18 would be used by the Court in determining the merits of the
19 case?

20 A I think that perhaps the best answer to Your Honor's
21 question is that the indigent has an effective procedure apart
22 from having the transcript. He can describe it all to the Court
23 in his allegations if he feels he wants to do so.

24 Q A layman without a lawyer?

25 A He did file a petition in the Superior Court which

1 gained him a hearing. We feel that that is an adequate test to
2 demonstrate that he would be able to do the same thing in an
3 Appellate Court.

4 Q But his hearing came to nought in the Superior
5 Court. If the Supreme Court in some instances will review that
6 transcript to determine whether there was error in it, why
7 shouldn't he have the opportunity to have that before the Court?

8 A Because we need some test to curb waste in these
9 areas.

10 Q To curb what?

11 A Waste in these areas, because if we give all of
12 these transcripts out, whether the indigent needed them or not,
13 it would cause a wasteful system.

14 Q It is just/^{the}pecuniary matter, then, as far as the
15 state is concerned?

16 A Of course, if human resources were unlimited and
17 funds were unlimited, we would be able to provide indigent prison-
18 ers with all that they wanted in the way of transcripts and in
19 many other problem areas, too.

20 Q How often does the State Supreme Court have a
21 master appointed or referee appointed? Is that a matter of common
22 practice or is it very rare?

23 A I would say that it is a fairly common practice.
24 One can pick up almost any volume of the California Supreme Court
25 report and it will have two or three such hearings.

1 Q Mr. Weber, do you know the answer to the question
2 as to whether there are other states that have this same proce-
3 dure?

4 A I made a very quick canvas of the laws of the
5 other states and there are about five or so that still retain the
6 common law procedure. Many of the others have been adopted by
7 statute on an appeal procedure. Some others have converted
8 review procedures into something that is virtually equivalent to
9 an appeal.

10 I think North Dakota has something that they
11 call the power of superintending control, which is in effect a
12 kind of appeal procedure.

13 Q At the time this appellate procedure was estab-
14 lished in California, habeus corpus did not have the scope that
15 it has now, did it? In those days all that you could prove on
16 habeus corpus was that all that was necessary for the state to
17 prove was that a warrant of arrest had been issued and a man had
18 been arraigned and so forth. If those things had been complied
19 with, the writ was denied, is that right?

20 A It is very true, Your Honor.

21 Q Now that has been expanded in recent years.

22 A California has greatly expanded the writ of habeus
23 corpus to protect the right of prisoners.

24 Q But this right of the transcripts has not been
25 expanded in accordance with that procedure?

1 A We feel that the right to transcript is adequate
2 at the present time in order to fully protect the real rights
3 of the prisoners while at the same time providing some kind of
4 a screening procedure to take off waste and needless requests and
5 so on.

6 Q A moment ago, you referred to going on to the
7 Supreme Court of California after the petitioner files his peti-
8 tion of habeus corpus in the lower court and it is denied. He
9 makes his allegations and you referred to his alleging what
10 went on in the lower court.

11 A He could, if he desired to do so, write out his
12 own bill of exceptions.

13 Q As a matter of practice, if I petitioned for a
14 habeus corpus in the Superior Court and am denied after a hearing
15 and then I file a petition for habeus corpus in the Supreme Court
16 of California, in the Appellate Court and then the Supreme Court,
17 and I finally filled one in the Supreme Court of California and
18 all I do is put the same allegations in it that I put in in the
19 Superior Court. That is all I do.

20 If the Supreme Court of California thinks those
21 allegations are sufficient to grant the writ if they are true,
22 what do they do at that point?

23 A They issue an order to show cause usually.

24 Q Then what happens?

25 A Then the state will file its return to it and

1 answer the claims.

2 Q Will the Supreme Court of California at that point,
3 if they think that they need to find out whether these allegations
4 are true or false, do they ever call for the transcript of the
5 lower court?

6 A I don't recall any cases off-hand where they have
7 called for the transcript.

8 Q So that if their exclusive method of resolving
9 evidence conflicts in the Supreme Court on petitions for habeus
10 corpus where the state and the petitioner cannot agree on the
11 facts, the exclusive method of resolving those is by having a
12 hearing there before a referee and they make their own resolution
13 of the fact.

14 A That is generally speaking true, although it is
15 possible that one of the parties will supply a transcript of what
16 occurred to the Court so that it can use that in making determina-
17 tions of fact.

18 Q But I suppose that if either party refused to
19 accept that transcript, there would have to be a new hearing?

20 A I don't know of any cases in which the California
21 Supreme Court has dealt with that particular problem overtly. I
22 suppose that if it was certified transcript by a reporter, there
23 wouldn't normally be any issue as to its validity. It is not
24 something that arises too often.

25 Q But do you think it is any more likely that the

1 Supreme Court would grant a petition for habeus corpus filed
2 in that Court if the petitioner there can make in allegations
3 about what went on in the lower court?

4 A I think that the likelihood of a hearing in the
5 State Supreme Court would depend on the substantive claims more
6 than anything else. It would depend on whether he has sufficientl
7 stated that he has been deprived of certain constitutional rights.

8 Q If you were representing an indigent petitioning
9 for habeus corpus in the Supreme Court of California after a
10 denial in Superior Court, would you use the transcript of what
11 went on before the Superior Court in that evidentiary hearing
12 there? Would that transcript be useful?

13 A In most cases I think it would not. There is some
14 possibility that you could find something in there that might
15 interest or intrigue the Supreme Court. But I think that that
16 possibility is sufficiently remote and speculative that it would
17 be out-weighed.

18 Q Let's take a rather simple case. Suppose his alle-
19 gation is, "I was tried and convicted and did not have the assist-
20 ance of counsel." That is his petition for habeus corpus in the
21 Superior Court. There is a hearing in the Superior Court.

22 At the conclusion of the hearing, the trial judge
23 concludes that the fact is to the contrary, that he did have the
24 assistance of counsel. Now he then goes into the Supreme Court
25 with the identical petition, "I didn't have the assistance of

1 counsel at my trial."

2 Are you suggesting that in the face of a finding
3 to the contrary that the Supreme Court wouldn't be interested in
4 the transcript, to go ahead and have its own hearing on that
5 question?

6 Q If the allegations were sufficient, they would call
7 for a rule to show cause and the state, I suppose, would respond
8 and say he did have counsel and you would say, I suppose, as
9 Justice Marshall indicated, you might have the transcript, or
10 without the transcript you could say it was found to the contrary
11 in the lower court?

12 A You could just get the records from the Superior
13 Court file from the original trial.

14 Q What if you did get the record and you attached
15 a part of the transcript to your return and said he did have
16 counsel and "Here is what was found in the Superior Court"?

17 A The Court would normally rely on the Superior
18 Court records unless they are disputed by the petitioner in some
19 way. I suppose that if he said that the records are awry, that
20 some sort of hearing would be necessary to determine the accu-
21 racy of the record.

22 Q If so, are you suggesting in that hypothetical
23 case the Supreme Court might not deny the petition or deny a
24 hearing on the basis of the hearing in the Superior Court?

25 A I have never known the Supreme Court to expressly

1 deny a hearing based on the hearing in the Superior Court. Of
2 course, I don't know of any cases in which they have discussed
3 the point at all so that it is largely a matter of trying to
4 guess at what goes on in minds of the justices.

5 Q Mr. Weber, suppose all of the facts stated in
6 the petition in the Superior Court were true. Would they be
7 sufficient to grant a hearing in the Supreme Court?

8 A In this particular case. This is an unusual
9 situation because between the time that the petition was pre-
10 sented in the Superior Court and the time that the Supreme Court
11 received the substantive allegations, it came down with a major
12 pronouncement in this area affecting inmate rights and that
13 determination was against the petitioner, so that the legal situa-
14 tion had changed considerably.

15 I think that the State Supreme Court could have
16 utilized its very recent decisions to deny the petition without
17 a hearing in this particular case.

18 Q So you take the position that even if all the
19 allegations of the petition in the Superior Court were true, that
20 he would not be entitled to any relief?

21 A That is correct, yes, Your Honor.

22 Although, of course, we do dispute the truth of
23 the allegations in the petition.

24 Q If these are actual de novo hearings, independent
25 hearings, and in the interest of not wasting money, why take a

1 transcript at all? Why do you record it except that if a person
2 was wealthy enough, he could pay for it?

3 A Of course, the writ is granted in the Superior
4 Court. The state would have a writ of appeal, so that would be
5 one situation where a transcript would be necessary.

6 Q It doesn't help the petitioner at all.

7 A Some of these procedures help the state occasion-
8 ally. Again, the transcript could be used by one party or the
9 other.

10 Q Doesn't it add up to the transcript is really for
11 the purpose of helping the wealthy petitioner and the state,
12 period, and that is all?

13 A I wouldn't agree with that. I notice that the
14 Federal Courts have the power to order the transcript made up
15 from the reporters' notes and also that it does bear on the
16 Federal determination as well as a state determination.

17 Q We only have the State of California here.

18 A Yes, but the Federal Courts have the power to deter-
19 mine the state habeus corpus petitions to order the transcript
20 of this particular evidentiary hearing. So that would be a situa-
21 tion in which the petitioner would benefit from the preparation
22 of a transcript.

23 Q Providing he has sufficient legal advice and all
24 and knew where the Federal Court was.

25 A We have forms provided for the petitioners.

1 Q I guess I have taken you too far afield, but to
2 me it looks like the benefit of the transcript is solely for the
3 state and if the person is able to pay for it.

4 A No, Your Honor, it goes a little beyond that, I
5 think, in that our procedures are adequate to give meaningful
6 habeus corpus to indigent prisoners as well as to those who have
7 some funds.

8 If there are no further questions, I will submit
9 the matter, Your Honor.

10 MR. CHIEF JUSTICE WARREN: Mr. Rickershauser?

11 MR. RICKERSHAUSER: I have nothing further, Mr. Chief
12 Justice.

13 MR. CHIEF JUSTICE WARREN: Mr. Rickershauser, on behalf
14 of the Court, I desire to thank you for accepting this assignment
15 to represent this indigent defendant. We consider that a real
16 public service. We are comforted by the fact that lawyers will
17 do so.

18 Thank you, Mr. Weber, for representing your state in
19 this fair and diligent manner.

20 (Whereupon, at 10:55 a.m., oral argument in the above-
21 mentioned matter was concluded.)