

C O N T E N T S

	<u>ORAL ARGUMENT OF:</u>	<u>P A G E</u>
1		
2	Marshall L. Small, Esq., on behalf	
3	of Petitioner	2
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5	John T. Murphy, Deputy Attorney General	
6	on behalf of Respondents	15
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8	<u>REBUTTAL ARGUMENT OF:</u>	
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NHAM

IN THE SUPREME COURT OF THE UNITED STATES

October
 TERM 1969

WILLIE WADE, JR.,)	
)	
Petitioner)	
)	
vs)	No. 55
)	
LAWRENCE E. WILSON, WARDEN, ET AL.,)	
)	
Respondents)	
)	

Washington, D. C.
November 12, 1969

The above-entitled matter came on for hearing at
12:52 o'clock p.m.

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

APPEARANCES:

- MARSHALL L. SMALL, ESQ.
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San Francisco, California 94104
Counsel for Petitioner

- JOHN T. MURPHY, Deputy Attorney
General of California
San Francisco, California
Counsel for Respondents

1 appointed at that time, Your Honor. There was a new co-
2 counsel appointed for Petitioner Wade here, in connection with
3 the appeal. The record doesn't make clear at what point in
4 time he was appointed.

5 Q So, we have nothing in this record to show
6 whether he made any efforts, or if so, what efforts he made to
7 get the transcript that had already been certified?

8 A That is correct; we do not have it in this
9 record.

10 The case went up on appeal; oral argument was waived;
11 the decision was affirmed; and thereafter, subsequently the
12 Petitioner instituted proceedings in the California Courts to
13 try to obtain a copy of this transcript for the purposes to the
14 collateral attack on his convictions. He first applied to the
15 District Court of Appeals which affirmed the conviction and
16 that Court told him he had no facilities for duplicating the
17 transcript. He applied to the California Supreme Court and
18 they told him to go back to the District Court of Appeals. The
19 transcript here of record, then indicates the following corres-
20 pondence to the California Courts. It became clear that in order
21 to obtain a copy of the transcript he would have to pay for it.
22 It was available for duplication if paid for, but that's the
23 only way he could get it.

24 Q The California Courts, do they have the power
25 to order the co-defendant to surrender his copy of the transcript

1 for use by your Petitioner?

2 A I would assume they do under Rule 10, by
3 direction of the Court they could have made it available. But
4 they took no action to do that.

5 Q And do you know whether any effort was made to
6 get them to exercise the Rule 10 power?

7 A I do not, Your Honor.

8 Q While I have you interrupted, is it a substan-
9 tial record, do you know?

10 A I have looked at the record myself, just briefly
11 perused it. I had it sent up from Los Angeles to San Fra. cisco.
12 It's approximately 800 pages long. In my brief my calculations
13 of the cost of reproduction were based on that 800 pages and on
14 commercial reproduction rates in the Bay area and that would be
15 about \$80 and if the Court's own reproduction facilities were
16 used --

17 Q That's about \$25 for the Xerox equipment.

18 A Right. It would be substantially less than
19 commercial rates.

20 What we have here, then, in summary, is a case that
21 really presents, I think, a fairly narrow issue. A case where
22 the defendant was denied his rightful transcript by the applica-
23 tion of the California Rules of Court, in connection with his
24 direct appeal. And therefore, he comes around now for purposes
25 of collateral attack, as an indigent and is unable to get a copy

1 of this transcript unless he can first demonstrate errors in his
2 original conviction.

3 I might add that he filed for habeus corpus in the
4 Federal District Court after he had been turned down by the
5 California Courts. The District Court found that yes he was
6 entitled to the transcript and ordered that he be supplied one
7 or else be discharged. The case was taken to the Ninth Circuit
8 and the Ninth Circuit reversed and said that he was required to
9 first show meretorious grounds for upsetting his conviction.

10 Turning to the argument now, on the/^{first}stage of the
11 argument question as to whether he was uncons:itutionally
12 denied his right to transcript in connection with his direct
13 appeal, as a preicates to moving on in the second stage.

14 We feel that the operation of the California Rules
15 of Court are discriminatory in at least two respects: Number
16 one in the way they discriminated between defendants tried
17 separately and defendants tried jointly. If a defendant is
18 tried separately he is entitled to the transcript whether he's
19 a millionaire or not, and regardless of the seriousness of the
20 crime involved or the severity of the sentence imposed, if he
21 is tried jointly he isn't entitled to a separate transcript
22 even if he is an indigent.

23 We also feel that there is a second basis for
24 claiming discrimination as far as indigents are concerned;
25 that the operation of the California Rules of Court preclude

1 an indigent co-defendant from receiving a right to a trial
2 transcript in connection with an appeal and this case is an
3 example of how that rule can work. So that, therefore, we
4 feel that the rules as they operate, tend to unconstitutionally
5 deny, particularly an indigent his right to a trial transcript.

6 Now, the state has argued that all that's necessary
7 is access and that the attorney on appeal had access to the
8 trial transcript for purposes of briefing the case. First of
9 all, this case demonstrates access may not be sufficient in
10 connection with reviewing the correctness of the record. It's
11 just possible that it would work out that way.

12 Secondly, and perhaps more fundamentally, is the
13 burden that it places on appointive counsel in trying to brief
14 and prepare cases, if they have only access to a record, where
15 they have to borrow it from the Attorney General of the State.
16 I have cited in the brief references to some of the problems
17 encountered as discussed and recognized by this Court in the
18 Hardy case, that appointed counsel in indigent cases may face
19 when they are trying to prepare cases.

20 So, therefore, I feel that the type of access that
21 the State says is made available here, really should not be
22 viewed as constitutionally sufficient for the protection of
23 indigents to give them the same sort of access to legal chan-
24 nels to effectuate justice as are available to persons who are
25 not indigents.

1 Q Mr. Small, is there any problem here -- I'm
2 looking at that footnote in the Court of Appeals' Opinion,
3 did that, do you think, turn at all on failure to exhaust state
4 remedies?

5 A I really don't think so.

6 Q The suggestion that he might have a good Anders
7 point?

8 A Yes, they raised -- in the Court of Appeals'
9 footnote they raised the question that there might be a good
10 Anders point but they -- he hadn't exhausted the state remedies
11 on that. I think the reference to the state remedies referred
12 to the Anders point, Mr. Justice Brennan.

13 Q In other words, you don't think there is any-
14 thing in that which precludes our reaching the merits of the
15 issue?

16 A No, sir, I don't. I think that remark was
17 directed to the Anders point, which, of course, I am not trying
18 to raise in this proceeding.

19 Q You do't think any particular showing is
20 necessary to prejudice in a particular case. Here there was
21 access to the record by Appellant Counsel and there -- is there
22 any suggestion that he could have done better with a transcript
23 of his own or anything specific?

24 A I'm really not prepared to make that contention.
25 I think we can only speculate as to what prejudice resulted to

1 this man by not having separate transcript available, either to
2 examine before it was certified as correct on appeal or at
3 subsequent stages in the procedure. We can only speculate on
4 that.

5 Q Well, do you rely at all on the unavailability
6 of the transcript to prepare for rehearing?

7 A Yes, I do. I am afraid that the record in this
8 case is not as satisfactory as it should be, although I believe
9 if the state's willing to concede the factual predicate as set
10 out in the exhibits to my reply brief, that there is basis for
11 certainly contending that the record is not available for pre-
12 paration for petition for rehearing.

13 Q Well, what do you want to win for, so you can
14 get another appeal?

15 A That would be, I think, the ultimate result.
16 First of all, I think that the man is entitled to a copy of his
17 transcript so he can at the very least, at the minimum, he can
18 at least have a copy of his transcript so that he can examine
19 it and prepare his basis for collateral attack. As step two,
20 and we had asked for that in our original brief that we filed.
21 He should have a right to appellate review, again of his con-
22 viction.

23 Because, primarily, our first argument is that he
24 should at least, as the very minimum, have a right to a trans-
25 cript to prepare for collateral attack.

1 Q Has this Court ever held that the state must
2 furnish a transcript in order to prepare a petition for Federal
3 relief?

4 A Not specifically. I think that that result can
5 be drawn by putting together cases such as Smith and Bennett
6 and Gardner versus California. In the Smith case the Court
7 indicate you couldn't impose a burden on access to habeus
8 corpus by a minimal \$4.00 filing fee, I think it was.

9 In Gardner, in effect, the Court was saying, just this
10 last term that for purpose of really effectually pursuing the
11 habeus corpus proceeding you had to make available a transcript
12 of the prior proceeding.

13 Q That was state habeus, wasn't it, Mr. Small?

14 A That was state habeus; that's correct.

15 Q But is there a right to counsel to prepare
16 a habeus corpus petition?

17 A No; not necessarily. And, of course, that
18 the point that we made in our brief, that you can draw a
19 legitimate distinction between right to counsel where a man
20 must file repeated habeus corpus petitions which may or may not
21 be meretorious and the right of the transcript, which you need
22 only once.

23 Q Well, on what provision of the constitution do
24 you rely?

25 A The 14th Amendment, violation of the Equal

1 Protection and due process.

2 Q Equal protection?

3 A Equal protection that an indigent --

4 Q That's because had he not been tried jointly
5 he would be entitled to this.

6 A That's correct.

7 Q Because he was tried jointly and the other chap
8 was supposed to have got a transcript, the rules deny him one.

9 A That's right; he has none of his own.

10 Q That's the only basis, is it, of your Equal
11 Protection argument?

12 A Well, I think you could carry it on a step
13 further and say that there are other examples of how he was
14 discriminated against, including on collateral attack. He's
15 not in the same position as a person who is a monied defendant.
16 The whole theory of the Robert and LaVallee cases that stem --

17 Q Well, on that basis it would carry the right to
18 counsel, too, wouldn't it?

19 A Not necessarily; not necessarily.

20 Q Almost necessarily.

21 A I wouldn't want to have to advance that argument
22 here in this particular proceeding, but simply the right to the
23 transcript.

24 Q How does California decide which of three or
25 four or five defendants, co-defendants, get the first shot at

1 the transcript?

2 A I only wish I knew, Your Honor; I really don't
3 know the basis by which they do In this particular
4 transcript --

5 Q And for all we know, it may have been made
6 available to all of them and each of them collectively.

7 A Well, I'm a little reluctant to speak from my
8 own personal perusal of the transcript as to what apparently
9 happened, since it's not of record here in the case. But, on
10 the facts that were alleged in the habeas petition here, which
11 hadn't been denied, Petitioner Wade never saw a copy of his
12 transcript; never had it available..

13 One other point in connection with the state's
14 argument to access as was the case here, of being sufficient.
15 It works a particular discriminatory result on the subsequent
16 proceeding on collateral attack because even if you say access
17 is sufficient for any defendant, that you only have to allow
18 him to see a transcript and not give him a copy of it, then
19 the state switches his position on collateral attack and no
20 longer grants the right of access, and in effect, is saying,
21 "Well, you can't see your transcript unless you first show
22 meretorious grounds for upsetting your conviction. So that even
23 if you were to use the access point that the state is using
24 here to try and uphold the procedures, the Petitioner here is
25 placed in a less advantageous position than he otherwise would

1 be.

2 The state is arguing, in effect, two points --
3 essentially two points as I see it, in trying to sustain the
4 position that Petitioner should not have a right to the trans-
5 script. They are, in effect, saying, first of all that the
6 burden on the state economically would just be terrifying,
7 because then anybody would come in and for purposes of colla-
8 teral attack, ask for a right to a transcript. But that isn't
9 this case. They were referring to statistics where maybe no
10 transcript had ever been prepared and a person would come in
11 and apply for a transcript for collateral attack. This is a
12 case where a transcript had been prepared and was, indeed,
13 available and could easily have been copied at a fairly small
14 cost.

15 So, the types of statistics that the state has cited
16 for the purpose of establishing undue economic burden, really
17 aren't relevant to this particular case. This is really a
18 fairly narrow case. As I say, it is a case where there is a
19 transcript in existence; the man would have gotten it in
20 connection with his original appeal, but for the peculiar
21 operation of the California Rules on Appeal.

22 Q At what stage did you come into the case,
23 Counsel?

24 A In connection with the preparation of the
25 brief on the merits in this Court.

1 Q And you were appointed by this Court.

2 A I was appointed by this Court for the purpose
3 of this case.

4 Q I'm not sure that it's relevant at all, and
5 please don't assume I'm suggesting any criticism on the ques-
6 tion, but I wonder if you made any effort to consider getting
7 an order to show cause on the co-defendant, or other processes
8 to get that transcript before you came all the way here?

9 A No, sir; I felt under the terms of the appoint-
10 ment that my obligation was to brief and argue the case before
11 this Court.

12 Q Yes, I recognize that. You are here because we
13 asked you to be here.

14 A Yes, sir.

15 The second argument that the state presents for
16 denying the right to transcript to this Petitioner is that it
17 may have a deleterious effect upon prison discipline. The
18 suggestion is made that if a prisoner gets his transcript, he
19 might be discussing his case with other prisoners and this
20 could hamper prison discipline.

21 I'm a little perplexed by this argument, because as
22 I understand it, a prisoner who, say, was tried individually,
23 rather than jointly, convicted and furnished the transcript
24 would be entitled to keep his transcript and have it in prison
25 with him and use it there.

1 So that, in effect, the state is arguing that it's
2 only co-defendants who are tried jointly who might be causing
3 problems with prison discipline by having a right to their
4 transcript. And I just don't think that this argument really
5 holds water when you look at the practicalities of the situa-
6 tion.

7 The basic premise, I think here -- that you come
8 down to, really, is the question of trying to balance -- carry
9 out as effectively as possible the administration of justice
10 for persons who are incarcerated by not clogging up the chan-
11 nels of judicial administration and making available to them
12 the instruments necessary to vindicate their rights, while at
13 the same time not thrusting unreasonable burdens on the state.

14 It seems to me that in this particular type of
15 situation where you have a man who would have had a transcript
16 but for the peculiar operation -- discriminatory operations
17 of the California law, where a transcript is available and
18 can easily be reproduced, that the balance should be struck in
19 favor of making the transcripts available to a person such as
20 this indigent. In trying to carry out the line of cases of
21 Griffin, Roberts and LaVallee; those cases, to try to ensure
22 that the channels of the courts, the access to the vindication
23 of legal rights will be available to all, without any distinc-
24 tion based on financial position of the defendant involved.

25 I would like to reserve time now for rebuttal, if I

1 could, unless the Court has other questions.

2 MR. CHIEF JUSTICE BURGER: Very well, Mr. Small.
3 Mr. Murphy.

4 ORAL ARGUMENT OF JOHN T. MURPHY, DEPUTY
5 ATTORNEY GENERAL, ON BEHALF OF RESPONDENTS

6 MR. MURPHY: Mr. Chief Justice and may it please the
7 Court: Your Honors, four facts stand out in this particular
8 case.

9 First, Petitioner Wade is now an indigent; second, as
10 a state petitioner he is a potential applicant for a writ of
11 habeus corpus in the state courts or in the Federal Courts.
12 Third, he's seeking here now a free copy of his trial trans-
13 cript for no other reason than to comb the record in the hope
14 of anticipation that he'll discover some trial error in the
15 record.

16 And the fourth fact, and I think this ties in with
17 your question, Mr. Chief Justice; and I think it's the fact that
18 we have to emphasize in this proceeding. It is that California
19 has provided this indigent with a trial attorney; a daily
20 transcript during the course of his trial, with an appeal; with
21 an attorney on appeal; and has given that attorney an access to
22 the trial transcript in the preparation of the brief on appeal.
23 California has provided all these services at the state expense
24 to this particular indigent. Now,

25 Now, the trial proceedings and the appellate process

1 which I suppose you can call the natural extension of the trial
2 proceedings, terminated in 1961. Now, since 1961 this
3 Petitioner has made no allegation in any court, state or
4 Federal, respecting the validity of his state court conviction.

5 Q Excuse me, Mr. Murphy, did I understand you to
6 say that he already had at his trial in chief, daily transcript?

7 A Yes, Your Honor. This was a capital case; a
8 first degree murder case.

9 Q And was there appeal; direct appeal?

10 A Yes, Your Honor.

11 Q This is compulsory, I gather?

12 A No, Your Honor; it was not a compulsory or
13 automatic appeal.

14 Q In any event, he had a complete transcript for
15 the purposes of that appeal, did he?

16 A Yes, Your Honor. Not personal possession --
17 the record doesn't disclose that he had a personal possession
18 of the trial transcript. The record does disclose that his
19 attorney had access to the record for the preparation of the
20 appeal.

21 Q Oh, but this is still -- how many were tried?
22 Just two of them?

23 A Yes, Your Honor.

24 Q But there was only a single transcript?

25 A Yes, Your Honor.

1 Q A single daily transcript?

2 A Yes, Your Honor. I can make that representation
3 of fact that there was but a single daily transcript prepared.

4 Q Mr. Murphy, what do you mean by access: actually,
5 I mean, was it in a certain room where they could go and use it?
6 Could they take it to their offices to Xerox it; what do you
7 mean by access?

8 A Let me -- before I answer that question -- let
9 me premise your question, Your Honor. The record that is before
10 this Court, as it was before the District Court and the Court of
11 Appeals, doesn't have the facts developed. There was never any
12 evidentiary process, either in the state courts or in the Federal
13 Courts to determine what was distribution of the daily trans-
14 cript; who had access to it, and the full circumstances surround-
15 ing the use by Appellant's counsel of the transcript during
16 the course of the appeal and the preparation of the briefs.
17 We really haven't had any evidence presented on that.

18 If we look at this record it would disclose that the
19 appointed attorney on appeal, borrowed a copy of the record
20 from the State Attorney General because of some difficulty in
21 obtaining the record from the co-defendant, Mr. Pollard. And
22 that in preparing his brief in the state direct appeal he
23 relied upon this record and I assume he can or defer from this
24 that the record that he did use was the same record that the
25 Court had. It doesn't appear here that there was any handicap

1 because he had to borrow the record from the Attorney General's
2 office, rather than going over to the prison and removing a
3 record from a prisoner and using that in the course of the
4 appellant process.

5 Q May I ask you --

6 A Yes, Your Honor.

7 Q -- the instrument that California uses when
8 there are three or four defendants, of making a copy of the
9 evidence available to all of them? I don't mean all at the
10 same time, but what is your method, if you are familiar with
11 it?

12 A Yes, Your Honor. During the course of the
13 appellate process there is an enforcable right that each co-
14 appellant or co-defendant would have to obtain a copy of the
15 record, either for the attorney to prepare the brief, or if the
16 appellant is proceeding in pro per, for himself to prepare the
17 brief. There is an enforcable right during this process that
18 of course, and it wouldn't be otherwise in this court's
19 decision in Griffin. If a man is entitled, during the direct
20 appeal to have access to the trial record in the preparation
21 of the brief.

22 Q How does the state go about fulfilling this
23 obligation?

24 A I can't speak with any more than a general
25 familiarity. When the attorneys are appointed by the Court to

1 represent the appellants the attorneys would have their inter-
2 views or discussions or conferences with the appellant and
3 borrow the record from the appellant. It would be a mutual
4 arrangement made among or between the attorneys who were
5 handling the appeal.

6 Q You mean the state has nothing to do with it,
7 just leaves it up to the different defendants to get it from
8 another defendant?

9 A Your Honor, if there was any complaint. If
10 any appointed attorney had a complaint that a transcript was
11 not available to him to prepare a brief on appeal, all the
12 attorney would have to do under the rules of court, would bring
13 this to the attention of the court and the court would take the
14 necessary action, either to reproduce a copy of the Court's
15 transcript or order the co-appellant to furnish his copy to the
16 appellant who does not have a copy.

17 Q For use in preparing his brief?

18 A Yes, Your Honor.

19 Q Well, is there no authority here as to whether
20 the state will furnish each individual defendant with a complete
21 transcript of the record; is that what it is?

22 A What the state furnished is access to the
23 record. Now, if a defendant is tried separately, of course, he
24 has a unique trial record that is peculiar to his particular
25 case, as an incident for a circumstances of the appellate process

1 it may develop that at the termination of the appeal, after
2 the reversal or the affirmation of the criminal conviction, he
3 may retain personal possession of the transcript.

4 Q Well, we ever held that where is more than one
5 defendant, that the state's under an obligation to file a state
6 transcript with each one?

7 A Not during the appellate process. The state
8 would be under an obligation to furnish the appellant attorney
9 or the appellant in --

10 Q Well, there been any case which either
11 raised this question or decided this question of whether there
12 are four or five defendants, the state has to supply four or
13 five transcripts?

14 A No, Your Honor; no case in California, nor is
15 there any Federal case.

16 Let's put this case in its perspective: Petitioner
17 Wade, without a transcript, without a transcript, is really in
18 no different position than any other potential habeus corpus
19 applicant which does not have a transcript, for any number of
20 reasons. He may not have a transcript because it was lost or
21 stolen; it was destroyed, because he appealed on a settled
22 statement, rather than on a transcript, or because he never
23 appealed at all. He doesn't have the piece of property which
24 constitutes the transcript. What he did get -- what California
25 did furnish him was a transcript for use during the appellate

1 process. And when that came to an end, the state's interest
2 in whether or not he continues to have this document in his
3 cell or wherever he wants to keep it, he got a determination.

4 Q Well, your argument then, that the state is
5 not compelled to provide the transcript for collateral attacks?
6 Only during the time that the matter can be held in the
7 appellate process --

8 A Yes, Your Honor.

9 Q -- in the original judgment; is that what you
10 are arguing?

11 A Yes, Your Honor.

12 Now, during an appellate process, whether the appeal
13 is a direct appeal from the trial or whether it's appealed
14 from a habeus corpus evidentiary hearing or whether it's an
15 appeal from a lower court corum nobis proceeding, the appeal
16 necessarily concentrates on a specific proceeding. The state
17 is interesting in satisfying itself that the proceedings below
18 have been fairly conducted in accordance with state law and
19 Federal law alike.

20 But once the appellate process ends, and I think this
21 Court recognized this in Johnson versus Avery. The responsi-
22 bility of presenting a claim; an illegality in the conviction,
23 rests upon the potential applicant for habeus corpus relief.

24 Habeus corpus is a new proceeding, but we're starting
25 something all over again. It's broad in its scope and it's

1 varied in its reach.

2 Q Mr. Murphy, did I understand that the trans-
3 cript -- there is the one that was had on appeal and it is
4 still available someplace?

5 A Yes, Your Honor. Of course, there would be
6 a copy on the files of the Court of Appeals. There is a
7 physical transcript available.

8 Q I understood you to say you gave him one when
9 he went up on appeal.

10 A No, Your Honor. We don't know those facts.
11 We really haven't had any evidentiary process to determine for
12 certainty whether or not this man did have at one time physical
13 possession, either during the course of trial --

14 Q What I'm trying to get to: is there more than
15 one copy of this transcript available as of this moment?

16 A Yes, Your Honor.

17 Q Well, why not give it to him?

18 A Well, we are involved here --

19 Q I mean, you don't need but one; do you?

20 A Your Honor, we are involved here with a very
21 broad issue. Now, Counsel for Petitioner has attempted to
22 narrow this down and to paint the state as being irresponsible
23 because it will not come up with \$40 to \$25 to Xerox a copy.
24 We have to look at the holding of the United States District
25 Court. The United States District Court said that an indigent

1 prisoner is entitled, free of charge, to his trial transcript
2 to explore the record in the hope of finding some flaw. This
3 was the issue that was ruled upon by the United States Court
4 of Appeals for the Ninth Circuit when it reversed the District
5 Court.

6 So, we're up before this Court on a broader principle
7 and if we were to furnish -- if we were to concede that the
8 District Court were correct, that any habeus corpus applicant
9 -- potential -- let me emphasize that word "potential." It's
10 not just anyone who has filed a habeus corpus petition. This
11 is "potential applicant," which could be anyone in the system.
12 And the reach of habeus corpus or the vast number of habeus
13 corpus cases involve matters that go outside the trial record
14 or matters collateral to

15 Q I could go along with that, but I don't see the
16 need for the Xerox copy. As I understand it, the state has
17 been given a copy which is available and which they don't need.
18 Is that your position?

19 A A Well, I don't know the exact number of copies,
20 but under the Rule of Court there would be an original, which
21 would have gone to the Appellate Court and there would have
22 been three copies, because this was a capital case. The
23 District Attorney would have received a copy and the Attorney
24 General would have received a copy. The third copy would have
25 gone to be shared by the appellants during the course of

1 appeal.

2 So, the answer to your question is that should be
3 an original and two copies somewhere in the State of
4 California.

5 What we think is before the Court -- the problem
6 before the Court, is not limited to this particular case. The
7 problem before the Court is whether or not when an indigent
8 makes no allegation on collateral attack, of any errors that
9 occurred in his trial, is a state then responsible to turn
10 over its copy or the copy of any other documents, whether they
11 be police reports, any other matters that might be connected
12 with the criminal proceedings; matters of physical evidence
13 that might have been produced at the trial. Whether or not the
14 state is then responsible to turn over these documents because
15 a man wants to engage in an exploration or fishing expedition.
16 We think the state burden comes to an end; that the conscience
17 of the state, that it is satisfied; that it has given the man
18 due process through a criminal trial and an appellate process.
19 comes to an end when the affirmation of the -- with the affirma-
20 tion of the suit on appeal.

21 Q Mr. Murphy, I'd say that you and your brother
22 counsel differ a little bit as to what is the issue in this
23 case. He put it in terms of this: that since California does
24 provide a free transcript to every individually-tried defendant,
25 rich or poor, it is obligated, under the Equal Protection clause

1 of the 14th Amendment, to provide an individual free trans-
2 cript to every defendant, rich or poor, who was tried jointly.

3 A Yes, Your Honor; that's how I understand it.

4 Q Then, can a defendant being tried jointly be
5 equated and given equal protection with the defendant who is
6 tried individually, simply. That's the way he posits the
7 action before us.

8 You, on the other hand, say that the issue in this
9 case has nothing to do with that, but rather is the question of
10 whether a state is obligated under the Constitution -- I suppose
11 now, the Due Process Clause -- to provide at a state convict's
12 arbitrary request, a free transcript of that convict's trial,
13 even in the absence of any allegations whatsoever on the part
14 of the convict as to any error that occurred at his trial that
15 might be subject to collateral attack, which is a much broader
16 issue, as you correctly say. And which, frankly, it seems to
17 me is what is the issue decided by the District Court and the
18 Court of Appeals in this case.

19 A Yes, Your Honor. And let me add one more fact
20 to that --

21 Q Am I right?

22 A Yes, I think that is a very accurate summary of
23 both our position and the position of the Petitioner here. Now,
24 let me add one more thing: if there were an issue regarding the
25 validity of the California procedure, whereby co-appellants or

1 co-defendants share a single copy of the transcript you would
2 not need a copy of the transcript to raise this issue. The
3 possession of a transcript would be immaterial.

4 Q Or the content of it.

5 A The content of the transcript would be
6 immaterial. The state courts in this case and Federal Courts,
7 have never passed upon this issue raised by Petitioner and of
8 course, the Petition, you might say, would be even in a better
9 position if he didn't have a copy of the transcript if he were
10 raising this point. But the District Court --

11 Q Which point?

12 A Raising the point that is some invidious dis-
13 crimination in providing an individual defendant with a trans-
14 cript than requiring co-defendant to share a transcript. You
15 don't need a transcript to reach this issue.

16 Then the order of the District Court would be mean-
17 ingless. The Court could have found, if it reached that issue,
18 that this man had been discriminated against and would have set
19 aside his conviction in ordered a reinstatement of the appellate
20 process. This wasn't done. The decision that was reached,
21 arrived at by the District Court, which was reversed by the
22 Court of Appeals, was that this man who alleged no error; who,
23 we assume -- we have no other course but to assume that he can't
24 think of any possible error. And here is a man that comes be-
25 fore the Court and is asking for a transcript at state expense

1 -- in other words, for the state to subsidize his exploration
2 in the anticipation that maybe he'll come up with something
3 that he can present seven or eight years after.

4 Q After the affirmance of his conviction on direct
5 appeal in which his counsel did have access to a transcript.

6 A Yes, Your Honor.

7 Q Did anyone ask the District Judge here to
8 direct a copy of the transcript be made, either from the co-
9 defendant or from some other person having custody?

10 A Not to my knowledge, Your Honor.

11 Q The record doesn't show in --

12 A The record discloses these alleged facts,
13 as there is no evidentiary process to get into any certainty,
14 but the record alleges these facts: that he asked the -- the
15 Petitioner --he asked the California Court of appeals for a
16 copy of his transcript some five or six years after his convic-
17 tion has been affirmed on appeal.

18 Q Was there a copy available in the court?

19 A Yes, Your Honor. If he had the funds --

20 Q And was he indigent?

21 A Yes, Your Honor.

22 Q He was indigent; there was a copy --

23 A The allegation is that he was indigent.

24 Q -- and he asked to see a copy?

25 A He asked for a copy, Your Honor; not to see a

1 copy; he asked for a copy, not to see a copy, Your Honor.

2 Q Well, is that the only issue between them,
3 whether you will give it to him or whether you will let him
4 have it available?

5 A No, Your Honor. Again, looking at this case
6 in its broadest scope, it's a question of whether or not we
7 are going to provide any requesting indigent who is a poten-
8 tial applicant to some form of collateral attack, with documents
9 at state expense. We don't provide an attorney --

10 Q You had it there. Looking at it from a
11 practical standpoint, if the Court had it, what harm would it
12 do the court to let him see it?

13 A What harm would it do, Your Honor, if you
14 -- if he applied, to provide him with an attorney or to provide
15 him with a team of investigators or to provide him with some
16 experts. There is any number of things that you could not
17 necessarily say would be harmful.

18 Q But he did not ask for those others, but we
19 have said that a man who is indigent is entitled to get for
20 himself, as nearly as possible, the status of a man who has
21 money to pay for a record. What he's saying, as I understand
22 you now, is that he's entitled to have that record made avail-
23 able to him, and he asked the court for it and they wouldn't
24 let him have it, although they had it.

25 A The court would have made it available to him

1 if he could have arranged for the reproduction of the record.
2 That's what the facts are in this case.

3 Q If who could arrange it?

4 A Pardon, Your Honor.

5 Q If who could arrange for the reproduction of
6 the record?

7 A The Petitioner himself.

8 Q Well, that means if he didn't have the money to
9 do it he just couldn't do it.

10 A Your Honor, if he had had the money he could
11 have -- to be candid with the Court -- he could have had a
12 copy of the record. But that's not the question before the
13 Court.

14 Q Seems to be the question to me, from what you
15 tell me.

16 A Well, Your Honor, here is how I would pose the
17 question: Is a state responsible to provide a record to an
18 indigent in his continuing efforts to search for a possible
19 error in his trial; or put another way: is the alleviation of
20 any doubt in the mind of the prisoner about the validity of his
21 state conviction so important -- so fundamentally important
22 that the state must assume the great financial burden, far
23 greater than any burden it has right now -- of providing a
24 transcript for any indigent who requests a copy of it.

25 Q Mr. Murphy, was it a financial burden to have

1 given him the record that they have? You said they had it.

2 A Yes, Your Honor.

3 Q There is no financial burden.

4 A Let me answer the question this way: --

5 Q Well, would you agree that it would be fair to
6 say that if there is one available it should be shared with the
7 prisoner? There would be no financial burden there, would it?

8 A Your Honor, on an administrative basis; on a
9 legislative basis, some procedure might be devised which would
10 permit an incarcerated prisoner a glance or a look at his
11 particular record.

12 Q Well, don't you think he should have the same
13 right as the wealthy person?

14 A Well, does the wealthy person, Your Honor, have
15 any real need for the transcript?

16 Q Unless I misunderstood you you said that this
17 man could get it if he could pay for it. And the only reason
18 he couldn't get it was because he couldn't pay for it, period.

19 A That's right, Your Honor. But there are also
20 many other things that he can't have because he can't pay for
21 it. He can't have an attorney; he can't have experts; he
22 can't have investigators during the course of his incarceration.

23 And this Court has never held that upon a mere re-
24 quest for these services he is entitled to it. Now, let me
25 emphasize one thing -- one more thing: we don't have an

1 absolute final foreclosure or preclusion of this inmate from
2 access to the record. Now, that's vital here. All we are
3 asking is that this potential applicant come forward and state
4 to some court an apparently meretorious ground of why his
5 conviction was invalid or why his custody is illegal; that's
6 all we're asking.

7 So, we have a balance; we have a great financial
8 burden upon the state to provide transcripts to indigents and
9 on the other side, a rather minimal requirement that the man
10 tell the court, apprise the court that he's not engaged in a
11 mere exploratory fishing expedition in the hope that he's going
12 to find an error.

13 Q Would you concede, Mr. Murphy, that the
14 District Judge had the inherent power to direct that a Xerox
15 copy or some other kind of copy be made for the benefit of the
16 District Judge?at the time of the original hearing?

17 A Your Honor, if the Petitioner had come forward
18 and alleged some trial error --

19 Q Wait --

20 A -- if he had come forward I don't think there
21 would be any question but that the District Court Judge could
22 have required the state to produce the trial transcript.

23 Q Well, taking the posture -- exactly the posture
24 that it was in when it appeared before the United States Dis-
25 trict Court Judge -- not the state court. If the District

1 Judge had said, "I want a copy of this transcript; please get
2 one for me." For \$25 or \$30 at the most it could have been
3 made. Now, would you agree or not -- I'm inquiring, because
4 I'm not sure -- does the District Court have in hand power to
5 do that?

6 A I don't think so, Your Honor. I think the
7 District Court under those circumstances would be on a fishing
8 expedition of its own. I think in order to get a justiciable
9 issue before the District Court there has to be some allegation
10 of error in the trial.

11 Now, if this Petitioner had alleged that his attorney
12 never discussed the defenses with him; that there were facts
13 outside the record that affected something that occurred during
14 trial, there wouldn't be any need, then, for the trial trans-
15 cript to resolve that. All we're asking in this case is to
16 alleviate -- not to alleviate, because we don't have the burden
17 yet -- but to ask this Court to -- not to impose upon the states
18 the burden of financing the indigent's continuing --

19 Q I think we have your argument on that point.

20 A -- once the state has satisfied itself that the
21 man had been --

22 Q Let me see if I understand your point. If the state
23 had provided this for a complete appeal once around that's the
24 end of the obligation?

25 A Yes, Your Honor.

1 MR. CHIEF JUSTICE BURGER: Fine. Thank you.

2 You have a few minutes left; I think about ten
3 minutes, Mr. Small.

4 REBUTTAL ARGUMENT BY MARSHALL L. SMALL, ESQ.

5 ON BEHALF OF PETITIONER

6 MR. SMALL: Thank you, Your Honor. I don't believe
7 I'll need to take very much additional time. I just
8 wanted to respond to two or three points that were raised
9 during the course of counsel's presentation of argument, and
10 some of the questions raised from the bench.

11 One of the points that you raised, yourself, was the
12 possibility of obtaining a show cause order to require Pollard
13 to turn over his copy of the transcript.

14 Q Would you mind speaking a little louder?

15 A Excuse me, Mr. Justice Black. One of the
16 points that the Chief Justice raised was the possibility of
17 ordering Pollard, the co-defendant here, who still has a copy
18 of the transcript, to turn it over at this stage of the pro-
19 ceedings to be used by this Petitioner Wade. I'd have a
20 question in my own mind whether California would permit such a
21 procedure because the procedure for sharing transcripts is
22 couched in terms of the direct appeal processes and I, there-
23 fore, would have a really substantial question as to whether
24 California courts would be prepared to enter such an order at
25 this time.

1 Q But since the co-defendant presumably has it,
2 or may havt it in his possession for use for the same purpose,
3 why couldn't the District Judge have issued such an order to
4 show cause on that co-defendant, either at the request of
5 counsel, if they had the imagination to ask for it, or on his
6 own motion?

7 A I suppose he could, Your Honor, but I think
8 that --

9 Q And then this case would not have engaged all
10 the time of all the people all the way to Washington.

11 A I suppose that that might have been the result.
12 But I think that that end, of itself, underscores the unfair
13 application of these California Rules of Court. Assume, for
14 instance, that there were four or five co-defendants tried here,
15 rather than just two co-defendants.

16 Q Well, why was there a denial when such a lack
17 of imagination and enterprise -- at least as I see it, is
18 exhibited on this record?

19 A Because I think that puts a burden on the
20 indigent defendant and his appointed counsel.

21 Q To ask the court to do this?

22 A To have to go to court and fight to get a copy
23 of the transcript to use. The burden that a monied defendant
24 would not have placed upon him.

25 Q Well, now he's all the way through the chain

1 of command to this Court and that was a considerably greater
2 enterprise than simply asking the District Judge in open court
3 on an oral motion to do what I have just suggested. Would
4 you not agree?

5 A I'd say that is correct, Your Honor, that
6 certainly having to take it up through this sort of procedure

7 Q I'm directing no criticism or no implication
8 of it at you.

9 A No; I understand that. Certainly, well, just
10 the cost of producing the transcript would have been a much
11 smaller portion of the cost of bringing the proceedings up to
12 this court and paying for bringing attorneys back here to argue
13 the case. But this, of course, this case is simply going to
14 be exemplary of other co-defendant cases that come up in the
15 California courts.

16 Q Also isn't it exemplary of the lack of enter-
17 prise that I see for my part on this record?

18 A It would be easier, though, I believe in terms
19 of the administration of justice if, instead of requiring
20 court-appointed counsel for indigents to fight to get copies
21 of the record, if it were made clear that they should be fur-
22 nished them, as a matter of course.

23 Q Excuse me, I don't want to interrupt your
24 answer to the Chief Justice, Mr. Small.

25 A No sir; that's quite all right.

1 Q I'm not sure I quite understand whether your
2 basic claim is that it is incumbent upon California to supply
3 a separate, extra transcript for this man for his direct appeal
4 which took place a good many years ago or whether it's now
5 incumbent upon California to supply this man upon his mere
6 request a transcript of his trial that took place many years
7 ago, for the purpose of now making a collateral attack on his
8 adjudgment of conviction; which is it?

9 A My argument is that it was incumbent upon them
10 to have supplied it years ago and because they didn't the
11 accused should not be placed in a less advantageous position
12 now because of his indigency and having to show meretorious
13 grounds for reversal before he can even have a look at his
14 trial transcript.

15 Q Because the second, of course is a much
16 broader rule of law.

17 A Yes, and I'm not arguing that.

18 Q Very understandably you are not arguing that.
19 But what if five, six or seven years ago he had been given it at
20 appeal and had lost it. Where would you be?

21 A If he had been given --

22 Q Through nobody's negligence, but it just dis-
23 appeared. Now, where would you be?

24 Q Bearing in mind before you answer it will be
25 another question I'll add: bearing in mind that if he were an

1 affluent man he could go out and buy one.

2 A Yes. I would say, and I grant it's having to
3 go beyond this particular case, I would argue that the state
4 should furnish him that copy on balance, because of the
5 relatively small expense involved, where a copy of the tran-
6 script is available and can be reproduced. I don't think it's
7 necessary to argue that.

8 Q But that is really -- it's that broad an issue,
9 is it not, that the District Court seems to have decided and
10 it's upon that broader issue that the Court of Appeals seems to
11 have reversed the District Court.

12 A The Opinion so read. However, I don't feel that
13 this Court has to deny relief to this Petitioner simply because
14 of the broader basis upon which the District Court may have
15 posited its results. This Court could cut down the basis for
16 granting transcripts for this particular Petitioner.

17 Q And in this particular State of California
18 where, if this man had been -- for everybody who's tried
19 separately and individually this question would never arise,
20 unless he lost the transcript.

21 A That's right and in the same way in most states
22 as we point out in our brief. In most states this question
23 isn't going to come up because the overwhelming majority of
24 the states give transcripts to individual defendants and to
25 co-defendants. They make no distinction in the way that

1 California and a limited number of states do. So that we're
2 talking about a very narrow issue.

3 Q Perhaps the advent of the Xerox machine and
4 other related machines will help solve this problem without
5 more --

6 A That, in substance, is really my contention;
7 that as modern techniques become available they really should
8 be applied in the judicial process, such as the stenotype
9 machine here in this Court. That over a period of time that
10 hopefully, by using modern methods of recording and duplicating
11 trial transcripts we won't have to get into this type of
12 situation. It would be easily available and easily reproduc-
13 able.

14 Thank you.

15 MR. CHIEF JUSTICE BURGER: Thank you, Counsel. You
16 acted at the appointment of the Court and you came here at our
17 request. We thank you for your assistance to the Court and we
18 thank you both for your submissions.

19 (Whereupon, at 1:50 o'clock p.m. the argument in the
20 above-entitled matter was concluded)