1960

The Caryl Chessman Case: A Legal Analysis

Minn. L. Rev. Editorial Board

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/3201

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
Note

The Caryl Chessman Case:
A Legal Analysis

The authors of this Note analyze the major legal issues involved in the Chessman case. They conclude that Chessman was accorded all of his rights under the law, that the complexity of the legal issues did not warrant twelve years of litigation, and that judicial indecision was the principal factor which accounted for the years of delay.

In 1948 Caryl Chessman, having been sentenced to suffer the punishment of death by lethal gas, was confined to a cell on San Quentin's death row. The events which had brought Caryl Chessman to death row, while sensational, were not unlike those which had placed many criminals in the same plight. The future—the years of criminal appeals, many of which Chessman himself launched and conducted from his prison cell—was from the standpoint of time alone to be unique in the annals of criminal justice. Not until nearly twelve years had passed did Chessman's execution bring to a close the series of dramatic legal controversies and timely stays of execution.

During the months immediately preceding Chessman's execution, the Chessman case became an international issue. To many, Chessman had done expiation for his crimes by spending twelve years on death row while his case was litigated through the courts. Public attention was also turned toward the efficacy of the death penalty in modern society. Because of the clamor of public opinion over the capital punishment controversy, the legal issues which were raised by the Chessman case were all but obscured. It is with these legal issues that this Note proposes to deal.

I. THE FACTS

A. The Crimes and the Criminal

Chessman's history was one replete with violations of the law and with commitments to reform school and prior criminal convictions. The events which led to Chessman's last convictions, as the jury found them, were as follows:

On January 3, 1948, Chessman committed armed robbery by taking $500.00 in cash and $300.00 in checks from a store in Pasadena, California.
On January 13, 1948, Chessman stole a car parked in the city of Pasadena.

On January 18, 1948, Chessman committed first degree robbery by taking approximately $15.00 from two persons on the Pacific Coast Highway and by taking over $20.00 from two other persons near the Rose Bowl.

On January 19, 1948, Chessman approached a man and a woman seated in a parked car, robbed between $35.00 and $50.00 from the man in the car and carried the woman away some twenty-two feet to the car he was driving. With threat of death, he forced her to commit fellatio. He then took approximately $5.00 from his victim’s purse, permitted her to get out of the car, and drove away.

On January 20, 1948, Chessman committed first degree robbery against two persons in the vicinity of Mulholland Drive.

On January 22, 1948, Chessman approached a man and woman parked in a car on Mulholland Drive. When the man in the car told Chessman that he had no money, Chessman ordered the woman into his car. After he had driven away and parked the car, Chessman forced the woman to unclothe and to commit fellatio and attempted to rape her. He then drove her to within a block of her home where she was allowed to leave his car.

On January 23, 1948, Chessman and a confederate entered a clothing store in Redondo and committed first degree robbery. Both the proprietor and his employee were ordered into a back room. Chessman then took the employee into the front of the store and ordered him to open the cash register from which Chessman took $227.30. When the employee was again in the back room, both the employee and the proprietor were relieved of their personal money. Three hundred dollars worth of clothing was also taken from the store.

Later, on the night of January 23, 1948, when Chessman and his confederate were still in possession of the money and clothing taken from the store, police identified the car in which they were driving. After a chase at speeds ranging up to eighty-five miles an hour, the police stopped Chessman by running into the side of his car. Chessman fled on foot but police managed to capture both him and his confederate.

B. The Litigation and the Appeals

Chessman was tried by jury in the Superior Court of the State of California in and for the County of Los Angeles on charges of eighteen felonies. Although during the course of the trial he was advised by a deputy public defender, Chessman himself conducted his own

1. It is the purpose of this section to list in skeletal form the major litigation and to present only a brief statement of the points pressed during these appeals.
defense throughout the trial. On May 21, 1948, the jury found Chessman guilty of seventeen felonies including two violations of the "Little Lindbergh Law" with penalties set at death.

Before the California Supreme Court heard Chessman's automatic appeal which is accorded by the State of California in all capital cases, Chessman moved in the supreme court for augmentation and correction of the record. On May 19, 1950, the California court granted the motion for augmentation by allowing the inclusion in the transcript of the *voir dire* examination of the jurors and the opening argument of the prosecution. The court held that the transcript was adequate to permit a review. *People v. Chessman*, 35 Cal. 2d 455, 218 P.2d 769, *cert. denied*, 340 U.S. 840 (1950).

Having exhausted his state remedies and having been denied a petition for writ of certiorari on the transcript issue, Chessman petitioned the United States District Court for the Northern Division of California for a writ of habeas corpus. Relief was denied by the federal district court and by the federal court of appeals, and the United States Supreme Court denied certiorari. *Chessman v. California*, 341 U.S. 929 (1951).


On May 19, 1952, Chessman again petitioned for a writ of habeas corpus in the United States District Court for the Northern Division of California. The petition was denied without hearing and the United States Court of Appeals for the Ninth Circuit affirmed. *Chessman v. People*, 205 F.2d 128 (9th Cir.), *cert. denied*, 346 U.S. 916 (1953).

On July 16, 1954, Chessman filed a petition for a writ of habeas corpus in the Supreme Court of California which was denied on July 21, 1954. On July 29, 1954, Justice Carter of the California Supreme Court granted a stay of execution. *Ex parte Chessman*, 43 Cal. 2d 296, 273 P.2d 268, *motion to vacate stay of execution denied*, 43 Cal. 2d 391, 274 P.2d 645 (1954). After Justice Carter had granted the stay of execution but before the California Supreme Court had refused to vacate the stay, Chessman, on August 14, 1954, filed a petition for a writ of certiorari with the United States Supreme Court from the California court's denial of a writ of habeas corpus on July 21, 1954. The petition for certiorari, in which Chessman charged that the transcript had been fraudently prepared, was denied "without prejudice to an application for writ of habeas corpus in an appropriate United States District Court." *Chessman v. California*, 348 U.S. 864 (1954).

Chessman once again filed a petition for a writ of habeas corpus
in the United States District Court for the Northern Division of California. That petition was dismissed without a hearing. In re Chessman, 128 F. Supp. 600 (N.D. Cal.), aff'd sub nom., Chessman v. Teets, 221 F.2d 276 (9th Cir. 1955). The United States Supreme Court reversed, remanded to the district court and held that if the allegations of fraud in preparation of the transcript were true, Chessman had been denied due process. Chessman v. Teets, 350 U.S. 3 (1955).

On remand, the federal district court found that there had been no fraud in preparation of the transcript. Chessman v. Teets, 138 F. Supp. 761 (N.D. Cal.), aff'd, 239 F.2d 205 (9th Cir. 1956). The United States Supreme Court granted certiorari on the limited question whether Chessman had been denied due process by not being allowed to be present at the proceeding to settle his transcript. Chessman v. Teets, 353 U.S. 928 (1957). The United States Supreme Court vacated the judgments of the court of appeals and of the district court and held that California was required to grant a hearing to settle the transcript at which either Chessman or his counsel would be present. Chessman v. Teets, 354 U.S. 156 (1957).

In February 1958, a second settlement hearing on the transcript was held in Superior Court of Los Angeles County. The court denied Chessman's motion to reject the reporter's transcript and to find that no usable or adequate transcript was available. However, because the court made ninety changes not in accord with its original order and without notice to Chessman or hearing on the corrections, the California Supreme Court ordered the lower court to hold another hearing with either Chessman or his counsel present to determine objections to the ninety changes. Chessman v. Superior Court, 50 Cal. 2d 835, 330 P.2d 225 (1958).

At the re-resettlement hearing in the Superior Court of Los Angeles County, the ninety changes were allowed to stand. The California Supreme Court, on appeal, affirmed the findings of the superior court that the resettled transcript was adequate. People v. Chessman, 52 Cal. 2d 467, 341 P.2d 679, cert. denied, 361 U.S. 925 (1959).

Subsequently, in another petition for writ of habeas corpus in the federal court, Chessman attacked the resettlement proceedings held by the California court and also alleged that his lengthy confinement constituted cruel and unusual punishment. This petition was denied by the federal district court and by the court of appeals. Chessman v. Dickson, 275 F.2d 604 (9th Cir. 1960).

On May 2, 1960, after attempts at obtaining clemency, reprieves, and stays of execution had failed, Chessman was executed by the State of California.
II. THE TRANSCRIPT

The chief grounds upon which Chessman made his numerous appeals involved questions of preparation and adequacy of the court reporter's record of the trial. Before all of the reporter's notes of the oral proceedings had been transcribed, the court reporter who had taken them died. Since the California Rules on Appeal do not provide for a procedure when transcription cannot be completed by the reporter himself, Chessman argued that a new trial should be granted. The trial court, however, ordered a substitute court reporter to transcribe the balance of the notes. After the prosecutor had approved the transcript, a copy was sent to Chessman who was then incarcerated in San Quentin. He requested in writing a number of specific changes and charged that the transcript was inaccurate and incomplete. At a hearing at which Chessman was neither present nor represented by counsel, the trial judge allowed some of

2. CAL. R. ON APP. 38(c) provides: "Where a judgment of death has been rendered and an appeal is taken automatically as provided by law, the entire record of the action shall be prepared."

CAL. R. ON APP. 38(a) provides that a normal record on appeal shall include, among other records, "a reporter's transcript of the oral proceedings taken on the trial of the cause and on the hearing of the motion for a new trial . . . ."

CAL. R. ON APP. 35(b) provides that "the reporter shall prepare an original and 3 clearly legible typewritten copies of the reporter's transcript . . . and shall append to the original and each copy a certificate that it is correct."

3. In place of the certification that the transcript was correct as provided by CAL. R. ON APP. 35(b), the substitute reporter certified that the transcript prepared by him was "a full, true and complete transcript of said shorthand notes of said Ernest R. Perry, deceased, [the original court reporter] upon said trial to the best of my ability." People v. Chessman, 35 Cal. 2d 455, 459, 218 P.2d 769, 771, cert. denied, 340 U.S. 840 (1950).

4. At this time, Chessman requested some 200 corrections to the transcript; the trial judge allowed some 80 of the corrections. Chessman made the following computation to support his contention that the transcription had been abridged:

Ernest Perry, the dead court reporter, dictated 593 pages of testimony from 15 hours and 45 minutes of trial before he died. Stanley Fraser, who finished from Perry's notes, dictated 1,194 pages from 34 hours and 20 minutes of trial, Chessman said. From that, in one of the legal documents prepared for his appeals, he calculated that Perry produced an average of 37.9 pages per trial hour, while Fraser produced only 34.8 pages.

"It is thus mathematically certain," Chessman wrote, "that if Mr. Perry had transcribed his own notes of that portion of the trial transcribed by Fraser, he would have produced 3.1 pages of dictation more per trial hour. To state this another way, in dictating Mr. Perry's notes, Fraser has 'lost' 3.1 pages of proceedings for every trial hour . . . more than 105 pages of the oral proceedings."

Actually, Chessman apparently slipped on his arithmetic. Perry's average would have been 37.7 pages per trial hour; the difference between him and Fraser, 2.9 pages per hour, and the so-called "loss" in Fraser's transcription, about 98 pages.


5. See note 66 infra.
the changes and denied others, after which he certified the record. On appeal from the trial court’s order, the California Supreme Court held that the record was adequate to permit the court to ascertain whether there had been a fair trial or any miscarriage of justice. Subsequently, Chessman raised the question in the federal courts of his right to counsel at the settlement hearing. After the United States Supreme Court had held that the ex parte settlement was a denial of due process, another settlement hearing was held in California superior court at which Chessman was present and represented by counsel. On appeal to the California Supreme Court, the resettled transcript was again found to be “substantially accurate and sufficiently complete in every respect to permit a fair review of the appeal from the judgment of conviction.”

6. The following changes were among those allowed by the trial judge:

- “The gentleman in Esquire” to read “General Eisenhower.”
- “I left up there after perhaps five hours” to read “and left it there for perhaps five seconds.”
- “Fingerprints” to “pictures.”
- “Inglewood” to “enclosure.”
- “Paper cartons” to “fender skirts.”
- “Afternoon” to “forenoon.”
- “Available” to “durable.”
- “Scared” to “approached.”
- “Official” to “advisory.”
- “Edith Owens” to “Bertha Case.”
- “Jonathan Lewis” to “Phillip Daniel . . .”

Bernhard, Changes Allowed in Trial Record, San Francisco Call-Bulletin, reproduced in appendix to Chessman, Trial by Ordeal (1955).

7. The trial judge, in compliance with Cal. R. on App. 35(c), certified that “the objections made to the transcript herein have been heard and determined and the same is now corrected in accordance with such determination . . . and the same is now, therefore, approved by me.” People v. Chessman, 35 Cal. 2d 455, 459, 218 P.2d 769, 771 (1950).


10. At this proceeding the court ordered approximately 2000 changes to be made. Some of these changes were ordered in the part of the transcript prepared by the original reporter as well as in the part prepared by the substitute reporter. The court then made approximately 90 changes, generally resulting from clerical errors in the list of changes ordered, without notice or hearing. The California Supreme Court held that these last 90 changes, which in effect were an amendment to the court’s original order, had to be determined upon a hearing at which Chessman was present. Chessman v. Superior Court, 50 Cal. 2d 835, 330 P.2d 225 (1958). Thereafter, Chessman stipulated to 26 of the 90 changes but continued to object to the remaining 64. At a re-settlement hearing on the 64 changes, again with Chessman and his counsel present, the superior court disallowed the objections to the changes and ruled that they should stand. On appeal, the California Supreme Court affirmed the lower court’s finding that the 2000 changes in no way affected “the substance and nature of either the People’s case or the defendant’s defense.” Id. at 840, 330 P.2d at 227.

A. The Adequacy of the Transcript

When the California Supreme Court initially examined the Chessman transcript in 1950, it conceded that the transcript was not a "verbatim record of every word that was said in the trial court." This concession was realistic since the transcription by a substitute reporter of over twelve hundred pages of reporter's notes, which in the opinion of some court reporters were indecipherable, undoubtedly resulted in some inaccuracies. The court, however, took the position that while the transcript was imperfect, it was adequate to permit a just and fair disposition of the appeal on its merits. The court offered some substantiation for its position by pointing out that in normal circumstances where a reporter lives to transcribe his own notes, the certificate which he is required to sign—that the "transcript is correct"—is no more than a certification that the "transcript is correct to the best of the particular reporter's and the transcriber's abilities." The court also observed that the minimum statutory dictation-speed requirement for court reporters in California does not insure altogether complete and accurate transcripts and that Chessman's transcript was possibly as accurate and complete as one produced in normal circumstances.

The court's position that the transcript was adequate may have initially been open to the normal doubt encountered when a court determines a factual issue against an appellant. Subsequent consideration of the transcript issue by various courts, however, dispelled substantially all of the doubts which at one time may have existed. After the 1950 decision by the California Supreme Court,

---

13. On September 16, 1948, when the appointment of the substitute stenographer was under consideration, the Chairman of the Executive Committee of the Los Angeles Superior Court Reporters' Association wrote the Board of Supervisors respecting the matter, as follows: "We believe the purported charge against the county . . . will reflect further adverse publicity upon our group because we have serious doubts that any reporter will be able to furnish a usable transcript of said shorthand notes. Other reporters of our number have examined and studied Mr. Perry's notes and have reached the conclusion that many portions of the same will be found completely indecipherable because, toward the latter part of each court session, Mr. Perry's notes show his illness. We feel that this should be brought to your attention."

15. 88 Stat. of Cal. 1082–88 (1909), in force at the time of the Chessman trial, provided as a minimum standard for court reporters immediate transcription of material dictated at the rate of 150 words per minute for five minutes. CAL. Gov't. CODE § 69948, presently in force, sets forth the same requirements.
every federal court and state court which considered the issues related to the transcript found the transcript to be adequate and to have been competently prepared. This fact alone is virtual proof that the record was adequate to permit a court to determine Chessman's claims. But other factors also tend to confirm the correctness of the California courts' determination. For instance, many of the changes which were requested and allowed were undoubtedly insignificant and in themselves did not materially affect the substance of the transcript. The number of changes which the court al-

16. In Chessman v. Teets, 138 F. Supp. 761 (N.D. Cal. 1956), a federal district court found that "shorthand reporter Perry [the original reporter] was not unable to properly record the trial proceedings. . . ." and that "Fraser [the substitute reporter] was exceptionally and specially competent to transcribe Perry's notes and did so with fairness and competently." Id. at 765.

17. After the California Supreme Court had found the transcript adequate for a fair appellate review on Chessman's appeal on that issue, People v. Chessman, 35 Cal. 2d 455, 218 P.2d 769, cert. denied, 340 U.S. 840 (1950), the court reconsidered the problem when Chessman made his appeal on the merits. People v. Chessman, 38 Cal. 2d 166, 238 P.2d 1001 (1951), cert. denied, 343 U.S. 915 (1952). The California court said: "Re-examination of these arguments [Chessman's arguments that the transcript was inadequate] and of the transcript leaves us convinced that the transcript permits a fair consideration and disposition of the appeal." Id. at 172, 238 P.2d at 1005.

In a subsequent proceeding which convened on November 25, 1957, and which continued for forty-two days until February 14, 1958, Judge Evans of the Los Angeles superior court found "that the shorthand notes of Mr. Perry were decipherable and that Mr. Frazier [sic] was competent and qualified to transcribe and did so transcribe those notes fairly and in a substantially accurate manner. . . ." Chessman v. Superior Court, 50 Cal. 2d 835, 839, 330 P.2d 225, 227 (1958). After the California Supreme Court had remanded the case for further proceedings to determine alleged errors, Chessman again appealed to the California Supreme Court. Once again the court concluded that "the corrected reporter's transcript is substantially accurate and sufficiently complete in every respect to permit a fair review of the appeal from the judgments of conviction. . . ." People v. Chessman, 52 Cal. 2d 467, 469, 341 P.2d 679, 692 (1959).

18. See note 6 supra for examples of some of the changes allowed in the transcript. It should be remembered that some of these changes may not be as radical or significant when they are placed in context as they seem to be when nakedly stated. The fact that the court in 1958 allowed approximately 2000 changes in the transcript and that it could then hold that these changes did not alter the substance of the Chessman defense, People v. Chessman, 52 Cal. 2d 467, 341 P.2d 679 (1959), is evidence that the changes Chessman pressed were of little substance.

Furthermore, Chessman probably made some invalid requests for changes. For instance, in his first attack on the record, People v. Chessman, 35 Cal. 2d 455, 218 P.2d 769 (1950), Chessman asserted that the result was mistaken in "showing that he did not cross-examine certain witnesses." Id. at 463, 218 P.2d at 774. The court determined that this contention was unfounded, not only on the grounds of contrary testimony by the substitute reporter and of the notes taken by the trial judge, but also on the ground of the contrary testimony of the deputy public defender who acted as Chessman's legal advisor during the trial.

Similarly, Chessman contended that the trial judge, on May 21, when the jury returned for further instructions, told them that Chessman "was one of the worst criminals he had had in his court, and that the jury should bring in the death penalty. . . ." People v. Chessman, 52 Cal. 2d 467, 485, 341 P.2d 679, 692 (1959). The federal district court, however, determined that Chessman's allegation was "false
lowed also becomes less impressive when it is realized that these changes were made in a transcript of over two thousand pages. Nor does the fact that a substitute reporter transcribed the notes necessarily lead to the conclusion that the transcript was inadequate.

Since a number of shorthand symbols do not represent only one word, a reporter who has taken notes of extensive testimony may not produce an altogether complete and accurate record even when he transcribes his own notes. Furthermore, it is not an unprecedented procedure for a substitute reporter to prepare a transcript from another reporter's notes. In the Chessman litigation the transcription by a substitute reporter is less significant because upon at least one other occasion the original and substitute reporters had worked together.

21. During the 1958-59 hearing, an expert witness presented by Chessman, demonstrated this point by writing:


People v. Chessman, 52 Cal. 2d 467, 487 n.9, 341 P.2d 679, 691 n.9 (1959).

22. It is an inevitable conclusion that if a competent court reporter takes the testimony of a witness who speaks rapidly and if that reporter does not transcribe his notes for several days, the record he will produce will not be perfect. Although he will be able to rely on his recollection of what occurred at trial to a certain extent, he will be chiefly dependent upon his notes. Since each note-symbol can mean various things, see note 21 supra, his position is not too different from that of a substitute reporter inasmuch as he will be unable to reconstruct exactly what happened.

23. In People v. Chessman, 52 Cal. 2d 467, 341 P.2d 679 (1959), the court said: "The preparation of a transcript by a substitute reporter is not unprecedented; the evidence at the resettlement hearings discloses that in other cases one court reporter has transcribed another's shorthand notes." Id. at 486, 341 P.2d at 690.

24. "[I]t appears that in 1945 Perry [the deceased reporter] transcribed Fraser's
Although Chessman persisted in asserting that the transcript of his trial was inadequate, he was unable to point to specific, prejudicial error in the record. There were, of course, circumstances which cast some doubt on the accuracy of the transcript and which Chessman utilized effectively to create and to perpetuate doubt concerning the transcript's adequacy. But since an adequate transcript is not synonymous with a perfect transcript, it is proper for a court to set a standard for adequacy based upon the appellant's need for bringing certain matter before the court in any particular case. It was this function which the California courts performed. Thus, it seems not unfair to accept as sound the California courts' position that the Chessman transcript was adequate to permit a fair appellate review.

B. California Procedures

The California Supreme Court's determination of the adequacy of the record was based upon Chessman's failure to prove prejudicial error in the transcript. After the court in the first Chessman appeal had stated that in all appeals the defendant is presumed to have been accorded a fair trial, it held that the appellant has the burden of proving not only that there is error in the transcript but that that error is consequential and prejudicial. Chessman was unable to meet this burden. Thus, the initial problems which the transcript controversy raises are whether the procedures employed by the California courts to determine adequacy of the transcript were consistent with California precedent and whether they constitute sound judicial practice.

Until 1943 California provided that an appeal should be made on a narrative form record of the proceedings when death or disability of the court reporter made transcription by the reporter taking the notes impossible. As a result, controversies similar to that in the notes of a two-week criminal trial held in 1932; Fraser thereafter examined the transcript which Perry had prepared and found it 'very true and accurate.' Ibid. Such circumstances as the death of the original court reporter, the appointment of a relative of the prosecutor as a substitute reporter, and the number of changes allowed by the courts were all employed by Chessman to create doubt concerning the accuracy of the transcript.


26. The court in People v. Chessman, supra note 26, said: "Inconsequential inaccuracies or omissions in a record cannot prejudice a party; if in truth there does exist some consequential inaccuracy or omission, the appellant must show what it is and why it is consequential." Id. at 462, 218 P.2d 773.

27. In 1909, the legislature of California enacted § 1247 b of the Penal Code which provided that:

if a transcription of the phonographic reporter's notes can not be obtained, by reason of his illness or death, the appellant shall cause to be prepared and filed, in the place thereof, a transcription of such of the proceedings as was by the court ordered to be transcribed by the phonographic reporter.

In 1928, Sup. Ct. Rule II § 9 was adopted and provided that:
Chessman case did not arise. However, in cases where portions of the record were lost or destroyed and where a complete record was impossible to obtain, the California court has almost consistently placed the burden of showing prejudicial error on the appellant and in the absence of such showing has denied new trials.28 Similarly, if a transcription of the phonographic reporter's notes cannot, for any reason, be obtained, the appellant shall cause to be prepared and filed, in the place thereof, a statement of such of the proceedings as were or shall be ordered by the court to be transcribed.

This procedure remained in force until the present Rules on Appeal were adopted in 1945. Rules on Appeal 36(b) provides:

If a transcription of any part of the oral proceedings cannot be obtained for any reason, the appellant, as soon as the impossibility of obtaining a transcript is discovered, may serve and file an application for permission to prepare a settled statement thereof.

As Justice Edmonds stated in his dissenting opinion, a settled statement under Rule 36 could be used only upon Chessman's request. The majority, on the other hand, took the position that the Rules on Appeal were not meant to change so radically the former rules so as to relieve the appellant of furnishing a statement on appeal. The court stated that where literal compliance with the rules became impossible without fault of anyone, it should inquire "whether there is or can be made available a record on which [the] . . . court can perform its function of reviewing. . . ." People v. Chessman, 35 Cal. 2d 455, 460, 218 P.2d 769, 772 (1950).

29. In People v. Botkin, 9 Cal. App. 244, 98 Pac. 861 (1908), the court said:

It is now urged that because the entire record cannot now be presented to this court, we should reverse the judgment and remand the case for a new trial. No authority is cited in support of this position, and we know of none that could be.

It is incumbent on the appellant to show error, and we know of no rule that permits us to presume that defendant did not have a fair trial because a portion of the record upon her appeal has been destroyed without fault of either party.

Id. at 249, 98 Pac. at 864. Also see, Diamond v. Superior Court, 189 Cal. 732, 210 Pac. 36 (1922) (reporter died before transcribing notes); Visher v. Webster, 13 Cal. 8 (1859) (instructions given by the court were lost or mislaid); Cooper v. Superior Court, 12 Cal. App. 2d 336, 55 P.2d 299 (1936) (instructions given at trial were destroyed and court reporter neglected to record them).

In Snell v. Neilson, 50 Cal. App. 27, 194 Pac. 530 (1920), the District Court of Appeals of California of the Third District said that "where, as here, the record of the trial or any substantial portion thereof has been, before it has been properly made up for the purpose of an appeal, and without any fault of the party against whom judgment has gone, lost or destroyed, a new trial should be granted." Id. at 32, 194 Pac. at 532. However, the decision in the Snell case was not held to be authority on this point in Diamond v. Superior Court, supra.

A problem similar to the one where full records are unavailable is raised in the situation where the record is not authenticated in accordance with the applicable statute or rule. In cases such as these the California courts have consistently dismissed the appeal. While Chessman himself seemed to have relief upon early cases in which California courts refused to consider records on appeal because they lacked proper authentication, (see People v. Martim, 32 Cal. 91 (1867); People v. Lee, 97 Cal. App. 321, 275 Pac. 815 (1929); Lewis v. Lapique, 26 Cal. App. 448, 147 Pac. 221 (1915) (civil case); People v. Brecker, 20 Cal. App. 205, 127 Pac. 696 (1912); People v. Schultz, 14 Cal. App. 106, 111 Pac. 271 (1910)), the problem raised by these cases is not entirely analogous to the Chessman situation. These cases establish the court's strict requirement of authentication, but they presuppose that an authenticating officer as provided by law was available and that the appellant could have obtained a certification had he attempted to do so. In such circumstances, where the appellant has the responsibility of perfecting the appeal, the dismissal of the appeal
under the present California Rules on Appeal, the court has con-
tinued to place the burden of proving prejudicial inaccuracies in the
record on the appellant. 30

When the burden of proving error in the record is placed upon
the appellant, he may in some circumstances be faced with serious
problems of proof. A series of inaccuracies and omissions which al-
together could be prejudicial might well be difficult to prove
singly. 31 The appellant will most likely be faced with this problem
when he asserts that the evidence does not support the verdict and
that certain impeachment testimony or contradictory testimony has
been misstated or omitted. It is arguable that the court is in no po-
sition to consider the evidence when it has before it an incomplete
record. However, when the record contains evidence which sup-
ports the jury's finding, the fact that that evidence was contradicted
or that the witness was impeached is of no real significance since the
court cannot reverse a judgment merely because it disagrees with
the weight a jury may have given to certain evidence. 32 Further-
ten can at least logically be justified on the basis of the appellant's laches. These cases
be distinguished on the ground that Chessman was not at fault in failing to
comply with the Rules on Appeal. If the Court were to bind itself to a formal
argument based on these cases to its logical conclusion without considering the
absence of fault on Chessman's part, the result would be the dismissal of the appeal
or the affirming of the judgment without passing on the merits of the appeal. Such
a grossly unjust result is, of course, unthinkable and was rejected by the court.

30. See People v. Fuentes, 132 Cal. App. 2d 484, 282 P.2d 524 (1955), a case in
which part of the reporter's notes were lost. The court placed the burden on the
defendant "of showing either prejudicial error in the record or that the record is so
inadequate that he is unable to show such error." Id. at 488, 282 P.2d at 527.

31. In People v. Chessman, 85 Cal. 2d 455, 218 P.2d 769 (1950), Justice Edmonds,
in a dissenting opinion, wrote:

It is unreasonable to place upon a defendant sentenced to death the burden of
showing wherein omissions and inaccuracies in the record vitally affect his
rights. This is particularly true of the evidence in the present case relating to the
question of identification. . . . It may be that if the missing testimony were
presented upon the appeal, Chessman's guilt would not be so clearly established
as to enable this court to say that such errors as may be relied upon as grounds
for reversal did not result in a miscarriage of justice.
Id. at 473, 218 P.2d at 779.

32. The California Supreme Court, in People v. Schafer, 198 Cal. 717, 247 Pac.
576 (1926), has summarized its position as follows:

It is the function of the jury in the first instance to determine what facts are
established, and before a verdict which has been accepted by the trial court,
and subsequently approved on motion for a new trial, can be set aside on appeal
upon the ground of insufficiency of the evidence, it must be made to appear
that upon no hypothesis is there sufficient substantial evidence to support the
conclusion reached in the court below.
Id. at 720-21, 247 Pac. at 577. (Emphasis added.) As the court in People v. Chess-
man, 35 Cal. 2d 463, 218 P.2d 769 (1950), pointed out, Chessman did not contend
that the evidence in the transcript was not actually received at trial. The record
of the trial is replete with evidence establishing Chessman's guilt. Since the jury
obviously believed this evidence, the fact that they may have disregarded contradic-
tory or impeachment testimony not included in the record is not a ground for
granting a new trial.
more, there is questionable merit in allowing an appellant to assert inaccuracy in the transcript while placing the burden of proving the adequacy on the appellee or the state. Such procedure would in effect cast upon the state or appellee the burden of proving the entire transcript in cases where the appellant chose to put numerous portions of the transcript in question by asserting frivolous claims of error. Since a superior court can properly presume that the findings of an inferior court are not in error, it is logical to place the burden of proving inaccuracies on the appellant by presuming the correctness of the finding of the trial court that the transcript reflects what occurred at the proceedings. Furthermore, it is not unreasonable to require an appellant to present affidavits of the witnesses who testified at the trial to demonstrate that their testimony was materially different from that appearing in the transcript.

A further problem concerning state procedures revolves about the court's refusals to grant a new trial as a matter of course after the death of the court reporter. The right of a new trial in a criminal case is controlled in California by a statute which sets forth the various grounds upon which a court may grant a new trial. The impossibility of obtaining a transcript produced in strict compliance with the Rules on Appeal is not one of those grounds. On the other hand, California procedure allows a new trial at the discretion of the court in a civil case when the death or disability of the trial reporter renders a transcription by the original reporter impossible. While in numerous instances valid distinctions between civil and criminal cases support differences in procedure, the California

33. Cal. Pen. Code § 1181. The following grounds for granting a new trial are among those provided: (1) absence of defendant from trial, (2) receiving of evidence out of court by the jury, (3) misconduct of the jury, (4) deciding of verdict by lot, (5) error in instruction of law to jury and prejudicial misconduct by the prosecuting attorney, (6) verdict being contrary to law or evidence, (7) new evidence discovered after the trial.

The California Supreme Court in People v. Chessman, 35 Cal. 2d 455, 218 P.2d 769 (1950), apparently regarded the seven enumerated grounds as exclusive.

34. Cal. Civ. Proc. § 953(e) provides:

When it shall be impossible to have a phonographic report of the trial transcribed by a stenographic reporter as provided by law or by rule, because of the death or disability of a reporter who participated as a stenographic reporter at the trial, or because of the loss or destruction, in whole or in substantial part, of the notes of such reporter, the court or a judge thereof shall have power to set aside and vacate the judgment, order or decree from which an appeal has been taken or is to be taken and to order a new trial of the action or proceeding. It has been held in Caminetti v. Edward Brown & Sons, 23 Cal. 2d 511, 144 P.2d 570 (1944), that the granting of a new trial under this statute is discretionary with the court so that even if Chessman's case had come under this statute or a comparable one, it does not necessarily follow that he would be given a new trial as a matter of right.

35. The nature of a criminal case is such that certain procedures are required. For instance, the grand jury procedure, the indictment and the information are procedures which are expedient in criminal cases. However, they would be virtually
practice is based on an arbitrary distinction. When it is considered that property as well as social position, freedom, and life itself are often involved in a criminal action, there is little justification for the distinction which California has drawn. Although California has the power to grant new trials in civil cases but to deny them in criminal cases in the same circumstances, there is little doubt but that the cost of an added safeguard of a new trial would be small when compared with the greater certainty which it would afford.

While the merits of the California system may be subject to attack, the system cannot be said to have worked an injustice in the Chessman case. The repeated examinations by the state and federal courts of the issues concerning the transcript and the consistent resolution against Chessman on all of his claims lend support to the proposition that the transcript was adequate. The validity of Chessman's convictions is no more questionable because of the transcript controversy than in many cases in which convictions hinge upon a factual determination by judicial machinery and in which the convicted man continues to maintain that he is innocent. It must be admitted that finality in the area of the transcript controversy was attained only after extended litigation of this issue which caused great expense to the state, hardship to Chessman, and in many instances unfortunate publicity to the state's legal system. Thus, even though Chessman was given every right which California accords to any person in his situation, and even though the transcript was adequate, it is possible, with the advantage of hindsight, to argue that expediency alone should have dictated the granting of a new trial. But expediency is not in all instances equated with sound judicial practice. The California practice of denying a new trial in a criminal case once the transcript has been found to be adequate is neither aberrant nor of such a nature that reasonable men could not agree on its wisdom. It cannot be denied that requiring an appeal on an adequate but imperfect transcript may in the majority of cases result in justice being done more readily than if a new trial were to be granted. Since California has established and adhered to the practice that no new trial should be given when an adequate

36. In People v. Fuentes, 132 Cal. App. 2d 484, 282 P.2d 524 (1955), Presiding Justice Shinn in a concurring opinion wrote:

I take this occasion to state my opinion that the inability of a defendant desiring to appeal to obtain a reporter's transcript should be made a ground for granting a new trial, as it is in a civil case. It is far better that a defendant be retried than that the state should permit itself to be subject to the criticism that it has denied an appellant a fair and adequate record on appeal.

Id. at 490, 282 P.2d at 528–29.
C. Due Process

The second major problem involved in the controversy concerning the Chessman transcript is whether Chessman was denied due process of the law guaranteed by the fourteenth amendment of the federal constitution. In relation to matters involving preparation and settlement of the transcript, the United States Supreme Court held that Chessman's charges of fraud in preparation of the transcript, if proved true, would be a denial of due process, and that the ex parte settlement of the record violated Chessman's constitutional right to procedural due process. The Supreme Court by denying certiorari declined to pass on other issues relating to the transcript. However, the possibility that there have been violations of constitutional rights is not foreclosed by the Court's repeated denials of certiorari. The basic issue left unresolved by the Supreme Court is the constitutionality of requiring Chessman to make his appeal on a transcript prepared by a substitute reporter instead of granting a new trial when the original court reporter had died.

37. Chessman v. Teets, 350 U.S. 8 (1955). It was Chessman's contention that the transcribing reporter and the prosecuting attorney had connived to alter the transcript. After the lower federal court dismissed the petition because it did not present a federal question, Chessman v. Teets, 128 F. Supp. 600 (N.D. Cal. 1955), and the court of appeals had affirmed, 221 F.2d 276 (9th Cir. 1955), the United States Supreme Court reversed the dismissal and held that "the charges of fraud as such set forth constitute a denial of due process of law in violation of the Fourteenth Amendment." 350 U.S. at 3-4. Upon remand, the federal district court found that Chessman had failed to sustain the allegations of his petition and, therefore, discharged the writ. Chessman v. Teets, 138 F. Supp. 761 (N.D. Cal.) aff'd, 239 F.2d 205 (9th Cir. 1956), rev'd on other grounds, 354 U.S. 156 (1957).


40. But see the dissent of Mr. Justice Douglas in Chessman v. Teets, 354 U.S. 156 (1957), in which he states that his "dissent is based on the conviction that, in substance, the requirements of due process have been fully satisfied, that to require more is to exalt a technicality." Id. at 167.

41. It is arguable that when the United States Supreme Court held that the ex parte settlement of the record was a denial of due process, Chessman v. Teets, 354 U.S. 156 (1957), it was recognizing the propriety of requiring an appellant to make his appeal on a transcript prepared by a substitute reporter. This argument is based on the assumption that the Court would not have required California to hold settlement hearings on a transcript which did not and would not meet due process requirements. Although this position has merit and is generally convincing, it is arrived at only by reading meaning into an area where the Court in effect has denied certiorari by limiting its writ of certiorari to Chessman's right to be represented at the settlement proceedings. This interpretation of the meaning of a denial of a writ of certiorari is, of course, a practice conjectural in nature and consistently condemned by the Court. See Brown v. Allen, 344 U.S. 443 (1953).
Shortly after the adoption of the fourteenth amendment the Supreme Court held that due process of law does not include the right of an appeal in criminal cases.\(^{42}\) The Court has, however, in practice departed from this early position, and it is now generally recognized that due process requirements are applicable to criminal appellate review.\(^{43}\) Because a record of the trial is essential to any appeal, it logically follows that standards of due process are applicable to the preparation and adequacy of the transcript on which an appeal is made.\(^{44}\) The Supreme Court has in the past only infrequently dealt with due process requirements in the area of criminal appellate review.\(^{45}\) The Court has not laid down with any

\(^{42}\) In 1894, in McKane v. Durston, 153 U.S. 684 (1894), the Court explicitly held that the due process clause of the fourteenth amendment did not require a state to give a right of review in criminal cases because such a right had not been accorded at common law. The Court concluded that if a state gave a right of review, it could do so "upon such terms as in its wisdom may be deemed proper." \(\text{Id. at 688}\). Also see National Union of Marine Cooks & Stewards v. Arnold, 348 U.S. 37 (1954) (civil action); Carter v. Illinois, 329 U.S. 173 (1946); Murphy v. Massachusetts, 177 U.S. 155 (1900); Kohl v. Lehlbach, 160 U.S. 238 (1895); Andrews v. Swartz, 156 U.S. 272 (1895).

\(^{43}\) Although the Court has continued to pay lip-service to the position that due process does not require a right of appeal in criminal cases, it has in reality modified its position by holding that the proceedings on appeal are part of the process of law and must, therefore, meet the constitutional requirements established by the due process clause. See Cole v. Arkansas, 383 U.S. 196 (1968); Frank v. Mangum, 237 U.S. 309, 327 (1915).

\(^{44}\) The Court's continued reference to the McKane case has, however, caused some uncertainty. For instance, in Griffin v. Illinois, 351 U.S. 12 (1956), Mr. Justice Douglas, speaking for the Court, said:

> It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all. See, e.g., McKane v. Durston, 153 U.S. 684. But that is not to say that a State that does grant appellate review can do so in any way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently, at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discrimination.

\(\text{Id. at 18}\). The Court's statement in the Griffin case is open to two interpretations: (1) The reference to due process coupled with the reference to equal protection might mean that the due process clause will not allow inequality. Insofar as the sentence also refers to "invidious discrimination," it is possible to assume that the Court meant to use the term only as referring to a standard of uniformity in applying a procedure, not as referring to any standard of intrinsic fairness. In short, it may have referred to due process as affording only as much protection in this case as the equal protection clause. Or (2) it can be read as being independent of the reference to the equal protection clause, thus requiring a standard of fairness above that of uniform treatment. The latter interpretation is reasonable in light of the holdings in such cases as Frank v. Mangum, \supra\ note 43.

\(^{45}\) Chessman v. Teets, 350 U.S. 3 (1955), is an example of the United States Supreme Court's extending due process requirements to state post-conviction procedures. Also see Griffin v. United States, 351 U.S. 12 (1956).

Since the Court has probably extended due process requirements to cover criminal appellate procedure, the standards in this area will in the future be defined through
exactness the requirements imposed by the due process clause in relation to what constitutes an adequate record on appeal. Similarly, the Court has not defined due process requirements in relation to what exact procedures are required in preparation of the reporter's transcript to insure its adequacy. However, despite the absence of decree in this area, it is possible, on the basis of general concepts of due process, to formulate certain principles by which the record used and the procedures employed in the Chessman litigation may be judged. Since at common law there was no right of appeal as it is known today, history and tradition are of little, if any, assistance in determining due process requirements. The standards of due process applicable to records on appeal must, therefore, be established by determining what practices are in accordance with "fundamental principles of liberty and justice." 47

If appellate review—the purpose of which is to correct errors made at trial—is one of the processes which is due, a minimal standard for a record must certainly be that it be adequate to permit an examination of any alleged error in the proceedings. Anything less than a standard of such adequacy would be tantamount to a failure to accord a full hearing since the alleged error to be reviewed may have precluded a proper hearing at trial. There is little doubt, therefore, that an appeal on an inadequate record would be a violation of fundamental justice and fairness. 48 Since the California Su-

46. In England appeals as we know them today were not generally afforded in criminal cases until the passage of the Criminal Appeals Act in 1907. There were available before that time such processes as the writ of error which afforded a means of review by royal discretion of alleged errors apparent upon a limited record in convictions for felonies. See Orfield, CRIMINAL APPEALS IN AMERICA 14–31 (1939).

47. The Court in Hurtado v. California, 110 U.S. 516 (1884), observed that to hold the historical test to be exclusive or to be the only test of due process "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians." Id. at 529.

In dealing with the due process clause, courts have used various terms to express the nebulous meaning of "concepts of fundamental liberty and justice." The following quotations are examples of the general vagueness of the terms which courts have employed: "certain fundamental rights, which that system of jurisprudence of which ours is a derivative, has always recognized," Brown v. Levee Comm'rs, 50 Miss. 468, 479 (1874), quoted in Hurtado v. California, supra at 536; "principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); and "those principles of liberty and justice which lie at the base of all our civil and political institutions," Hurtado v. California, supra at 535.

48. Although the United States Supreme Court did not explicitly hold that a record must be adequate in Chessman v. Teets, 350 U.S. 3 (1955), it did hold that a fraudulently prepared transcript was a denial of due process. A transcript fraudu-
preme Court found that the Chessman transcript was adequate to permit a fair appellate review and since this decision was reasonably supported by the facts surrounding the preparation and settlement of the transcript, it is reasonable to assume that the substantive requirements of due process insofar as they relate to the adequacy of the Chessman transcript were met.

However, even when a transcript is adequate to allow a fair appellate review, the possibility remains that certain procedures in producing the transcript are of such a nature that the possibility of error in the transcript becomes so great that these procedures are a violation of due process. Therefore, in the Chessman litigation, the further question of whether the procedures employed by the California courts to settle the transcript on which the appeals were made rather than allowing Chessman a new trial is a denial of due process is raised.

Presumably, the procedures which the United States Supreme Court has in the past indicated may be proper are in consonance with concepts of fundamental justice and fairness and therefore meet due process standards. The fact that the Court has indicated that it is proper in some circumstances for an appeal to be made on something other than a transcript of the oral proceedings indicates that at present a transcript is not absolutely necessary in order to meet due process requirements. The Court has expressly approved of a record of the trial court proceedings in a narrative format prepared by the attorneys and the trial judge, supplemented by memories.
form.  If a record which consists of a statement of the case as it is agreed to by the parties or as it is prepared from the trial judge's notes or from testimony taken from witnesses who testified at the trial meets the requirements of due process, it would seem that an appeal on a settled reporter's transcript found to be adequate to permit a fair appellate review would also in that respect conform to due process requirements.

Likewise, the procedures established by the Supreme Court for the lower federal courts indicates that the Court considers the practice of requiring an appeal on a transcript settled by a trial judge to be fair and just. The Federal Rules of Civil Procedure which relate to preparation of a record and which are incorporated into the Federal Rules of Criminal Procedure provide that the district court shall settle any difference as to whether the record accurately discloses what occurred in the district court. In effect, this procedure is similar to the settlement procedure which has been granted to Chessman when he was given opportunities to settle the transcript. On this basis, therefore, it seems clear that the procedure

50. In Miller v. United States, supra note 49, the Court said: "[O]ften it is expedient and satisfactory to summarize the evidence and transmute it into narrative form." Id. at 198. Again in Johnson v. United States, 352 U.S. 565 (1957), the Court approved of the narrative form of record when it said: "It is essential, however, that he [petitioner] be assured some appropriate means — such as the district judge's notes or an agreed statement by the trial counsel — of making manifest the basis of his claim. . . ." Id. at 566.

There are, of course, circumstances in which a narrative of the trial court proceedings may not serve to present the type of record necessary to pass upon the petitioner's allegations of error. A common situation would arise when the petitioner asserts that the verdict was not supported by the evidence. A transcript in this situation is almost imperative. However, an adequate but imperfect transcript may be sufficient to allow examination of the petitioner's contention that the verdict cannot be sustained by the evidence. If the transcript contains enough evidence which could have been believed by the jury, the imperfect transcript allows adequate review of the question of the sufficiency of the evidence. See note 32 supra and accompanying text.

51. 18 U.S.C. § 3772 provides: "The Supreme Court of the United States shall have the power to prescribe . . . rules of practice and procedure with respect to any or all proceedings after verdict . . . in criminal cases . . . in the United States district courts . . . in the United States courts of appeals . . . and in the Supreme Court of the United States."

52. FED. R. CRIM. P. 39(b) provides: "The rules and practice governing the preparation and form of the record on appeal in civil actions shall apply to the record on appeal in all criminal proceedings. . . ."

53. FED. R. CRIM. P. 75(h) provides:

It is not necessary for the record on appeal to be approved by the district court or judge thereof . . . but, if any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. See, e.g., Handford v. United States, 249 F.2d 295 (5th Cir. 1957).
employed by California in settling a transcript and denying a new trial when an adequate transcript could be prepared meets standards of due process.

Another possible measure for determining due process requirements can be the practices presently employed by state and federal courts. Concededly, a procedure in effect in a majority of state and federal courts does not of itself necessarily establish conclusively a standard of due process. Nevertheless, the Court, in determining due process requirements, will probably give weight to the fact that a substantial number of courts regard a procedure as fair and just.52

A number of jurisdictions have passed upon the question of whether a new trial should be granted when a transcript of the oral proceedings cannot be produced by the reporter taking the notes because of his death or disability. The problem presented by the death of the court reporter is that the appellant, through no fault of his own, is forced to make his appeal on a reporter's transcript which is prepared by a reporter who must rely solely on the notes taken without the aid of recollection of what occurred at the trial.54

The fact, therefore, that a number of states allow a new trial when the court reporter dies before he transcribes his notes55 while a substantial number of other jurisdictions deny a new trial in the same circumstances56 is significant.57 If the Court should follow the

---

54. The problem has arisen in civil as well as in criminal cases, but there would seem to be no significant reason for distinguishing between the two on this basis. If there is a distinction to be made, the situation arising in a capital criminal case would seem to require a new trial more urgently than would a civil case.

A similar situation arises when the appellate procedure requires a bill of exceptions and when the bill cannot be settled by the trial judge because of his death or disability. See, e.g., J. W. Ripey & Son v. Art Wall Paper Mill, 27 Okla. 600, 112 Pac. 119 (1910). The problem is generally academic today because most states have either abolished the formal bill of exceptions or provided by statute that the judge's successor has the power to settle the bill.


Judge Medina, in United States v. Di Canio, 245 F.2d 713 (2d Cir. 1957), wrote:

There is no rule of thumb to govern the action of this court on an appeal from a criminal conviction in those instances where the court stenographer who reported the trial has died and another reporter has prepared the transcript from stenographic notes. The absence of a completely accurate transcript does not, without more, invalidate a conviction. A new trial will be ordered only if necessary to the protection of a party's rights. Hence, the defects of the record must be of a prejudicial character, not merely inconsequential inaccuracies or omissions. Nor do we say any distinction is necessarily to be drawn between civil and criminal appeals. Each case must stand on its own bottom; and the outcome will depend upon the circumstances of the particular case. Id. at 715.

57. One of the more common reasons for not granting a new trial in these circum-
thinking in *Wolf v. Colorado,* in resolving this problem, it will regard a new trial as only one of the remedies afforded to insure the right of having an adequate transcript on appeal. It would seem, therefore, that in light of such contrariety of views on whether to grant a new trial in these circumstances, the Court will hesitate, if not refuse, "to treat the remedy as an essential ingredient of the right." An explicit holding by the Court on the procedural and substantive due process questions raised by the transcript controversy in the Chessman case would have satisfactorily put to rest the contentions that Chessman was denied constitutional rights. Yet despite the absence of such decree there is little or no doubt but that Chessman was in fact accorded his full measure of due process. For while the requirements of the federal constitution in the area of criminal appellate procedure remain generally undefined, it is clear that on the basis of general concepts of due process that Chessman has been denied no constitutional rights in the matters relating to the preparation and adequacy of the transcript.

III. The Right to Counsel and Self-Representation

This colloquy took place forty-eight days prior to the beginning of Chessman's trial. As the court predicted, upon commencement of the trial, Chessman, having had no formal legal training, ap-

---

59. Id. at 29.
60. Colloquy between Chessman and the trial court as reproduced in People v. Chessman, 35 Cal. 2d 455, 466, 218 P.2d 769, 775 (1950).
peared without counsel and moved for a continuance so he might properly prepare his defense.61 The California Supreme Court affirmed the denial of the motion on the ground that Chessman's decision to defend himself did not entitle him to any special privileges and that his inability to interview witnesses and obtain law books was a permissible consequence of this choice.62 The court emphasized the fact that he had been forewarned that a continuance would not be granted.63 Subsequent to the denial of this motion, but prior to impaneling the jury, Chessman accepted the services of the Deputy Public Defender provided that he would act solely in the capacity of "legal adviser," and permit Chessman to conduct his own defense.64 Chessman did conduct his own defense, but the trial Judge refused to allow him to approach either the jury box during his preliminary examination of the jurors, or the witness stand while he was interrogating witnesses.65

61. The principal ground upon which Chessman based his request for a continuance was that he was unable to obtain necessary witnesses needed for the presentation of his case. In affirming the denial of the request, the California Supreme Court said:

He says that a main point on which he will rely on appeal is that he was not allowed to subpoena defense witnesses. The record before us shows that defendant asked that two witnesses who resided out of the county be subpoenaed and that the trial judge properly refused to order their attendance because defendant's "Affidavit to substantiate necessity for issuance of foreign subpoenas" affirmatively showed that the desired testimony of these witnesses . . . would not have been admissible. . . . Defendant does not explain what other witnesses he wished to call or what testimony he expected them to give. It appears that three days before the trial the deputy district attorney, with defendant's consent, gave to a deputy sheriff a list of 20 desired witnesses prepared by defendant and instructed the sheriff to serve subpoenas on the listed persons. Twelve of these people appeared and testified; two were served and their nonappearance is not explained; two others were the above-mentioned persons who resided out of the county; still another was present in court but did not testify. It further appears that throughout the trial defendant had the services of Mr. Al Mathews, deputy public defender, as "legal adviser" and the services of an investigator for the public defender's office who interviewed 34 witnesses, and subpoenaed some of them, for the defendant.

People v. Chessman, supra note 60, at 465-66, 218 P.2d at 775.

62. People v. Chessman, 38 Cal. 2d 166, 174, 238 P.2d 1001, 1006 (1951). As Chessman was confined in jail while awaiting trial, there is little doubt that he was handicapped in trying to secure favorable witnesses and to prepare his defense.

63. Ibid.

64. Ibid.

65. Id. at 176, 238 P.2d at 1007. If these restraints were placed on Chessman after he refused to accept court-appointed counsel, it could be argued that his decision to defend himself was made without full knowledge of the handicaps under which he would be forced to conduct his defense and hence vitiate the effectiveness of his waiver of counsel. However, after the trial had commenced, Chessman was quoted as saying:

I wish to point out that it is my intention to act in propria persona at this time and to continue to do so until such time as it is legally established that I am not qualified to do so, and that I will not accept a court-appointed attorney.

Brief for Respondent, p. 3, Chessman v. Teets, 354 U.S. 156 (1957). Following this
These facts raise the question whether Chessman was denied his constitutional right to counsel.66

A. Right to Counsel During the Trial

The right to be represented by counsel when tried for a crime in a federal court is provided by the sixth amendment which states that “in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.”67 The leading decision interpreting the breadth of the sixth amendment’s guarantee is Johnson v. Zerbst,68 in which the Supreme Court stressed the primary importance of the layman’s right to be represented by legally trained counsel.69 The Court held that denial of the right to

statement, Chessman repeatedly affirmed his decision to conduct his own defense. Ibid. Thus, there seems to be no validity to the claim that the restraints placed upon Chessman nullified the effectiveness of his waiver. 66. Chessman’s right to be represented by legal counsel was also in issue between the time of conviction and the subsequent initial appeal. Following conviction by the trial court, Chessman was sent to San Quentin Prison pending the outcome of the automatic appeal provided by California law in all capital cases. See CAL. PEN. CODE § 1239(b). Because of the unexpected death of the court reporter and the ensuing difficulties in transcribing the reporter’s notes of the proceedings, hearings were held for the purpose of settling the transcript. Although Chessman continued to act as counsel in his own behalf, he was not allowed to be personally present at these hearings, nor was he represented by other counsel. Chessman v. Teets, 354 U.S. 156, 159-62 (1957). The United States Supreme Court held that in this instance Chessman was denied the right to counsel under the due process clause of the Fourteenth Amendment. Reed v. Reed, 404 U.S. 42, 47 (1971). The Court recognized the fact that Chessman gave the right to counsel at the time of the trial, but concluded that this did not extend to the settlement hearings. At this point, the Court directed the court to hold further proceedings in relation to the transcript issue, the connoting present that at all future proceedings Chessman was to be represented a person or by counsel. It should be noted that in the resettlement hearings subsequent to the above mentioned decisions, Chessman was personally present to represent by counsel. See Chessman v. Superior Court, 50 Cal. 2d 835, 836-37, 302 P.2d 225, 227 (1958). Thus it appears that although Chessman’s right to a public defense counsel at the original settlement hearings, was violated by his not being represented at the original settlement hearings, it was corrected.

19 Con. amend. VI. To implement this constitutional provision, Rule 44 of the Federal Rules of Criminal Procedure provides:

A defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceedings unless he elects to proceed without counsel. Fed. R. Crim. P. 44. Rule 5(a) provides that an accused be brought promptly before the Magistrate and Rule 5(b) provides that the Magistrate must advise the defendant of his right to counsel and allow sufficient time to retain counsel.

Thus, a defendant is entitled to counsel at a critical stage of the prosecution unless he voluntarily waived his right to counsel. The development of the federal right to counsel, see Fellman, To Counsel, 30 Neb. L. Rev. 559 (1951).
counsel precluded a federal court from obtaining jurisdiction over the matter and rendered void any judgment it might enter. This sixth amendment guarantee of right to counsel does not apply directly to state criminal prosecutions, but it has been held to apply to state capital cases through the due process clause of the fourteenth amendment.

The California Constitution also provides that an accused has the

limited by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this court has pointed to "... the humane policy of the modern criminal law..." which now provides that a defendant "... if he be poor, ... may have counsel furnished him by the state... not infrequently... more able than the attorney for the state."

Id. at 462-63.

Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or liberty.

Id. at 467-68.


72. See, e.g., Quicksall v. Michigan, 339 U.S. 660 (1950); Powell v. Alabama, 287 U.S. 45 (1932). In Powell, the United State Supreme Court reversed the convictions of nine negro youths who had been sentenced to death for the rape of two white girls. In the state prosecution, counsel was not appointed, and the defendants were without legal assistance until the first day of the trial when a member of the local bar volunteered to conduct the defense. The Supreme Court held that the right to counsel in a capital case was a fundamental right guaranteed a defendant. In explanation of why the right to counsel was so vitally important to a defendant, the Court, through Mr. Justice Sutherland, said:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incomplete evidence, or evidence irrelevant to the issue or otherwise inadmissible.

Id. at 68-69. Powell is authority only in those situations where the defendant is being tried for a capital offense. The Court concluded that:

even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness,
right to be represented by counsel in a criminal prosecution.\textsuperscript{73} In interpreting this constitutional mandate, the California courts have held that the right to counsel extends to all state criminal prosecutions in which the defendant may be deprived of his life or liberty, including prosecutions for misdemeanors.\textsuperscript{74}

It is quite clear that under the constitutions of both the United States and the State of California Chessman had an absolute right to be defended by counsel, and it is also clear that he could have availed himself of this right had he desired to do so. But, it is likewise uniformly held that the right to counsel may be waived by a defendant even in a capital case\textsuperscript{75} if he is capable of appreciating the gravity of his decision and no undue pressure is applied by the prosecutor or the court to force the defendant's decision.\textsuperscript{76} The doctrine of waiver rests on the premise that it is as equally violative of constitutional rights to force a defendant to accept counsel against illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law. . . .

\textit{Id.} at 71.

Although certain dictum in \textit{Powell} is subject to broad interpretation as to the role of the federal courts in supervising state court right to counsel problems under the due process clause, later decisions of the Supreme Court have limited the effect of this dictum. See, e.g., \textit{Betts v. Brady}, 316 U.S. 455 (1942) (due process not violated in state robbery prosecution where custom of state was to appoint counsel for indigent defendants only in capital cases); \textit{Avery v. Alabama}, 308 U.S. 444 (1940) (no denial of due process in capital case where counsel appointed two days preceding trial and case vigorously defended and all appeals taken). \textit{But cf.}, \textit{Chandler v. Fretag}, 348 U.S. 3 (1954) (due process violated in situation where defendant waived counsel in larceny trial unaware that conviction would carry life sentence under habitual criminal statute).

For implications of the \textit{Powell} case, see \textsc{Beany, The Right to Counsel in American Courts} 151-61 (1955) and \textsc{Fellman, The Federal Right to Counsel in State Courts}, 31 Neb. L. Rev. 15, 16-20 (1951).

\textsc{73.} \textsc{CAL. CONST.} art. 1, \textsection 8 provides that upon being brought before a magistrate, a defendant must be told that he has a right to be represented by counsel. \textsc{CAL. CONST.} art. 1, \textsection 13 provides that a defendant has the right "to appear and defend, in person and with counsel." These provisions have been implemented by the California Penal Code which describes in minute detail the procedures to be followed by the courts in informing the accused of the nature of his crime and his right to counsel. \textsc{CAL. PEN. CODE} \textsection 858 provides that upon being brought before a magistrate after arrest, the defendant must be informed of his right to be represented by counsel. \textsc{CAL. PEN. CODE} \textsection 987 provides that upon arraignment, if defendant is not represented by counsel, he must be informed of his right to have counsel appointed if he cannot afford to hire counsel of his own choice, and wishes to be represented by counsel. \textsc{CAL. PEN. CODE} \textsection 1018 provides that a court may not accept a guilty plea for a crime for which the maximum penalty is death, or life imprisonment without possibility of parole, unless the defendant is represented by counsel.

\textsc{74.} See, e.g., \textit{In re Masching}, 41 Cal. 2d 530, 261 P.2d 251 (1953).


\textsc{76.} In \textit{People v. Mimms}, 110 Cal. App. 2d 310, 242 P.2d 331 (1951), the court states that no pressure may be brought to bear on the defendant in order to persuade him to waive his right to counsel.
his express wishes as it is to force him to go to trial without the benefit of counsel.\textsuperscript{77} In addition to refusing the services of counsel several weeks before the commencement of the trial,\textsuperscript{78} Chessman reiterated his decision to conduct his own defense some thirty-five times during the course of the trial.\textsuperscript{79} Although initially Chessman may have been unaware of the complexity of the legal issues confronting him and the difficult problems in preparing his defense, it is clear that during the course of the trial he was in a position to appreciate fully the gravity of his decision. Thus, there is no justification for the contention that he was not accorded his full constitutional right to counsel at the trial.

B. Restraints During Trial

While conducting his defense, Chessman was not allowed the freedom of the court room, but was restricted to the area of the counsel table.\textsuperscript{80} He alleged that this restraint unduly hampered the conduct of his defense and was favorable to the prosecuting attorney who could move freely around the court room.\textsuperscript{81} In rejecting the contention that the action of the trial judge in restricting Chessman's activity in the court room was prejudicial, the California Supreme Court said:

\begin{quote}
In representing himself he retained this status [prisoner] and did not attain that of an attorney at law who is an officer of the court and responsible to it. Furthermore, the defendant had suffered previous convictions for crimes of violence. Neither the presumption of innocence as a rule of proof in relation to the crimes charged nor the elements of a fair trial under due process required the court to conduct the trial proceedings oblivious to the facts mentioned. Considerations for the safety and security of all persons present in the courtroom, including the defendant, and for the judicial process itself, justified the trial judge in feeling that it was unwise to allow defendant to wander freely around the court room.\textsuperscript{82}
\end{quote}

\textsuperscript{77} See, e.g., State v. Moore, 121 Mo. 514, 26 S.W. 345 (1894). In Adams v. United States \textit{ex rel.} McCann, 317 U.S. 296 (1942), in commenting upon the waiver doctrine, Mr. Justice Frankfurter stated:

\begin{quote}
The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court. But the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open.
\end{quote}

\textit{Id.} at 279.

\textsuperscript{78} See note 60 \textit{supra} and accompanying text.

\textsuperscript{79} See Brief for Respondent, p. 8, Chessman v. Teets, 354 U.S. 156 (1957).

\textsuperscript{80} See People v. Chessman, 38 Cal. 2d 166, 176, 238 P.2d 1001, 1007 (1951).

\textsuperscript{81} \textit{Ibid.}

\textsuperscript{82} \textit{Ibid.}
It has long been the law in California that any action on the part of the trial judge which unduly accentuates the fact that the defendant is in custody and is possibly a dangerous person is likely to be prejudicial in the eyes of the jury and should not be permitted. Nevertheless, the California courts have indicated that certain restraints may be necessary in order that the trial judge may carry out his responsibility of maintaining order and decorum in the courtroom. Although it is difficult to extract from the cases a test which may be applied in all situations to determine when a trial judge's action in restraining a defendant is excessive, it is clear that the restraint employed should be of a type designed to prevent a threatened disorder, and not punitive or vindictive in nature.

83. In People v. Harrington, 42 Cal. 165 (1871), a defendant was brought into the courtroom for trial in irons. On appeal, the record did not disclose any reason why the manacles were necessary. In reversing the conviction, the court said:

In my opinion any order or action of the Court which, without evident necessity, imposes physical burdens, pains, and restraints upon a prisoner during the progress of his trial, inevitably tends to confuse and embarrass his mental faculties, and thereby materially to abridge and prejudicially affect his constitutional rights of defense; and especially would such physical bonds and restraints in like manner materially impair and prejudicially affect his statutory privilege of becoming a competent witness and testifying in his own behalf.

84. See People v. David, 12 Cal. 2d 639, 86 P.2d 811 (1939); People v. Kimball, 5 Cal. 2d 609, 55 P.2d 483 (1936); People v. Deveny, 112 Cal. App. 2d 767, 247 P.2d 128 (1952); People v. Harris, 98 Cal. App. 2d 662, 220 P.2d 812 (1950); In re Malone, 44 Cal. 2d 700, 284 P.2d 805 (1955) (dictum). Similarly, CAL. PEN. CODE § 688 contains the following provision: "Nor can a person charged with a public offense be subjected, before conviction, to any more restraint than is necessary for his detention to answer the charge."

85. See, e.g., McDonald v. United States, 89 F.2d 128, 136 (8th Cir. 1937); State v. Van Bogart, 85 Ariz. 63, 831 P.2d 597 (1958), cert. denied, 359 U.S. 973 (1959); People v. Kimball, 5 Cal. 2d 609, 55 P.2d 483 (1936). In Eaddy v. People, 115 Colo. 488, 174 P.2d 717 (1946), the Colorado court reversed a conviction in a case where defendant in a murder trial was forced to wear coveralls with "County Jail" stenciled on them throughout the trial. The defendant was a soldier and the state contended that if he were dressed in his uniform, the jury would be prejudiced in his favor. In rejecting this contention, the court said:

We believe the mind of a prisoner would be as much disturbed and his mental faculties as much confused and embarrassed by carrying on his person such brand of incarceration, as here required, as by physical shackles, and that a prejudice against a prisoner might equally well be created thereby in the minds of the jurors.

The federal courts apply the same basic standard to determine the reasonableness of any restraint placed on a defendant as do the California courts. See, e.g., DeWolf v. Waters, 205 F.2d 284 (10th Cir.), cert. denied, 346 U.S. 837 (1953); Blaine v. United States, 136 F.2d 284 (D.C. Cir. 1943); Seadlund v. United States, 97 F.2d 742, 748 (8th Cir. 1938). In Odell v. Hudspeth, 189 F.2d 300 (10th Cir.), cert. denied, 342 U.S. 878 (1951), the standard was stated in the following manner:

Freedom from shackling and manacling of a defendant during the trial of a criminal case has long been recognized as an important component of a fair and impartial trial. . . . Ordinarily such procedure should be permitted only to
In determining whether the restraints placed on Chessman were necessary in order to prevent a possible disorder in the courtroom, it is relevant that he had a record of past convictions for crimes of a violent nature. In addition, he was being tried for crimes which because of their nature have a tendency to arouse public indignation. These factors could lead a trial judge to the conclusion that a substantial risk existed that actions of the defendant, the witnesses or the spectators could precipitate an outburst in the courtroom. This is especially true since Chessman was conducting his own defense. However, because he was defending himself, it is arguable that any restraint which might have hampered the conduct of his defense was unreasonable unless absolutely necessary. Since Chessman was relatively unfamiliar with proper courtroom technique, any restraint on his movements might have lessened the effectiveness of his presentation when compared to that of an experienced prosecutor not hampered by similar restraints. Also, if the jury were aware that the trial judge had ordered Chessman restrained, they might have inferred that in the judge's opinion, the defendant was guilty; this could have been very prejudicial. However, the fact that Chessman only contended that the restraints hampered him in the conduct of his defense, and not that the jury was prejudiced as to his guilt leads to the inference that the jury was probably unaware of the restraints.

With the benefit of hindsight, it is not difficult to reconstruct the situation which faced the trial judge and conclude that his decision to restrain Chessman was unnecessary. But, since a trial judge has prevent the escape of the prisoner or to prevent him from injuring bystanders and officers of the court or to maintain a quiet and peaceable trial.  

Id. at 302.

In the Odell case, a state prisoner petitioned a federal district court for a writ of habeas corpus on the grounds that the trial judge's order that he be handcuffed throughout his murder trial was a violation of the due process clause of the fourteenth amendment. From the facts alleged in the petition, it appeared that no compelling grounds existed for imposing the restraint. In affirming the denial of the petition, the court indicated that the proper forum to test the reasonableness of the judge's determination that restraint was necessary is the state appellate courts. As petitioner failed to appeal his conviction in the state court, he was precluded from collaterally attacking the judge's discretion by the use of the habeas corpus proceeding. By way of dictum, the court indicated that in certain circumstances, the federal courts would reverse a conviction if the restraint imposed was clearly unreasonable.

Thus in the Chessman case, the ruling of the state supreme court that the trial judge did not abuse his discretion in imposing the restraint on Chessman's freedom of action would preclude raising the question in a habeas corpus proceeding, under the Odell court's reasoning, unless clearly unreasonable.

86. The appellate courts generally recognize that such a circumstance may be critical in sustaining the use of physical restraints in a criminal prosecution. See, e.g., People v. Kimball, supra note 85; People v. Harris, 98 Cal. App. 2d 662, 220 P.2d 812 (1950); State v. McKay, 63 Nev. 180, 167 P.2d 476 (1946).

87. See People v. Chessman, 38 Cal. 2d 166, 176, 238 P.2d 1001, 1007 (1951).
a primary obligation to maintain order in the court room and to prevent potential areas of conflict from flaring into overt acts of violence, he must of necessity be granted wide discretionary power in determining whether certain actions are justified under all the conditions of a particular case. Thus, although it is doubtful whether the trial court's decision to restrict Chessman's movements was absolutely necessary, it is clear that it was related to the end of preventing possible disorders from occurring in the court room and was not an abuse of discretion.

C. Caliber of Chessman's Defense

An appellate court will overturn a criminal conviction if it finds that the accused's defense was conducted in such a grossly incompetent manner that in effect he was denied a fair trial. In a situation in which an accused conducts his own defense, as Chessman did, it is more likely that it would be handled in an incompetent manner than when the defense is conducted by an attorney. But as the instances where a defendant waives his right to counsel and conducts his own defense are rare, few general rules have been established to determine when the lack of skill on the part of the defendant will result in a reversal of a conviction. Appellate courts, however, ap-

88. The range of the discretion allowed a trial court is illustrated by the decision in State v. Van Bogart, 85 Ariz. 63, 331 P.2d 597 (1958), cert. denied, 359 U.S. 973 (1959). In this case, defendant caused considerable disturbance by shouting and cursing during the early stages of the trial. After a warning, the trial judge ordered the defendant gagged while the jury was being impaneled and the complaint read. At this point, the gag was removed and the defendant was allowed to conduct his own defense. In viewing the trial judge's action drastic but reasonable under the circumstances, the Arizona Supreme Court placed great emphasis on the necessity that courts be kept free from disturbances. Although the Van Bogart case is extreme and may be subject to valid criticism, the fact remains that the attitude of the appellate court is typical. See, e.g., Cwach v. United States, 212 F.2d 520 (8th Cir. 1954); People v. Kimball, 5 Cal. 2d 608, 55 P.2d 488 (1936); People v. Deveny, 112 Cal. App. 2d 767, 247 P.2d 128 (1952); State v. McKay, 63 Nev. 180, 167 P.2d 476 (1946).

89. In Gibbs v. Burke, 337 U.S. 773 (1949), the petitioner had not been offered the services of counsel by the court and had conducted his own defense. In reversing the conviction, the Court held that the trial judge had not sufficiently protected the rights of the petitioner. The Court, through Mr. Justice Reed said:

Furthermore, the fair conduct of a trial depends largely on the wisdom and understanding of the trial judge. He knows the essentials of a fair trial. The primary duty falls on him to determine the accused's need of counsel at arraignment and during trial. He may guide a defendant without a lawyer past the errors that make trials unfair. . . . Obviously a fair trial test necessitates an appraisal before and during the trial of the facts of each case to determine whether the need for counsel is so great that the deprivation of the right to counsel works a fundamental unfairness.

Id. at 781.

90. Bean, op. cit. supra note 72 at 59.

91. For illustrations of the approaches taken by the courts in determining whether a defendant's conduct of his own defense was so incompetent as to require reversal,
pear reluctant to reverse convictions solely on the ground that a defendant has conducted his own defense in a bungling manner. This reflects an attitude on the part of appellate courts encouraging indigent defendants to accept court-appointed counsel for offenses of a relatively serious nature. For this reason, there is little practical difference between the standards the courts apply in determining when the overall competence of the defense conducted by an attorney is of such low caliber as to justify reversal and the situation where the defendant conducts his own defense. In both situations, the courts allow a reversal only in those rare situations where the defense approaches a sham and glaring errors are repeatedly committed by counsel. Because the minimal standard of competency see, e.g., Shelton v. United States, 205 F.2d 806 (5th Cir. 1953); Zahn v. Hudspeth, 102 F.2d 759 (10th Cir. 1939); People v. Adame, 169 Cal. App. 2d 587, 337 P.2d 477 (1959); People v. Pearson, 150 Cal. App. 2d 811, 311 P.2d 142 (1957).

92. In Burstein v. United States, 178 F.2d 665 (9th Cir. 1949), defendant waived counsel and defended himself. In affirming the conviction, the court stated, in the following manner, a general attitude taken by appellate courts when an accused conducts his own defense:

When appellant chose to proceed without counsel, he chose a course of action fraught with the danger that he would commit legal blunders. But having made that choice he did not thereby acquire the right to have the court act as his counsel whenever he seemed to be blundering. It cannot be said that the court denied him representation of counsel, or denied him a fair trial, because the judge refrained from intermeddling.

Id. at 670. Also see Shelton v. United States, supra note 91; Zahn v. Hudspeth, supra note 91; People v. Adame, supra note 91.

93. The following excerpt from People v. Adame, 169 Cal. App. 2d 587, 337 P.2d 477 (1959), is typical of the trial court's efforts to have a defendant represented by counsel in a pending trial:

The Court: I am in no position to provide you with an advisor at this late date. This Court has previously appointed Mr. Barcroft to represent you. I have known Mr. Barcroft for twenty-five years. I know him as an able, conscientious, well-informed attorney, possessed of more than average, or more than ordinary ability. . . . This is not a case where the Court has appointed an inexperienced young lawyer just out of school. . . . Now if you are dissatisfied with Mr. Barcroft and this case is ready for trial and you want to try this case yourselves, that is perfectly all right with me. But if that situation should develop, I am not going to act as your attorney. If you elect to represent yourselves, you will be bound by the same rules of conduct we expect and demand from every attorney. You must be familiar with the rules of evidence, and if the questions you ask are improper or improperly asked, they will not be permitted to be answered. Now, whatever you want to do is entirely up to yourselves. There is an old saying that he who acts as his own attorney has a fool for a client, and while it is an old saying, I think it is a true saying.

Id. at 591-92, 337 P.2d at 480-81.

94. Compare Shelton v. United States, 205 F.2d 806 (5th Cir. 1953); Zahn v. Hudspeth, 102 F.2d 759 (10th Cir. 1939); People v. Adame, supra note 93; People v. Pearson, 150 Cal. App. 2d 811, 311 P.2d 142 (1957), with Miller v. Hudspeth, 176 F.2d 111 (10th Cir. 1949); People v. Amado, 167 Cal. App. 2d 345, 334 P.2d 254 (1959); People v. DeSimone, 9 Ill. 2d 522, 138 N.E.2d 556 (1958).

95. See, e.g., Miller v. Hudspeth, supra note 94; Andrews v. Robertson, 145 F.2d 101 (5th Cir. 1944), and People v. Amado, supra note 94. For examples where con-
required of attorneys is so low, a defendant acting as his own counsel gains no preferential treatment from the courts merely because he is a layman unfamiliar with the intricacies of the legal system.

Chessman centered his defense around the theory that he was a "professional" criminal and thus would not have committed the crimes for which he was charged in the blundering manner in which he contended they were committed. Consequently, he did not object to certain evidence and conduct on the part of the prosecution. This tactic very likely had a negative affect on the jury and did not favorably impress the appellate court.

However, Chessman's theory of defense does not appear to be the product of incompetence, but rather appears to have been a calculated risk on Chessman's part that the jury would accept his principal contention. His plan apparently was carried out, but, of course, it did not have the desired effect. Although Chessman's theory of defense was ill-advised, that is not to say he conducted the defense in such a grossly incompetent manner that he did not receive a fair trial. This conclusion is strengthened by the fact that Chessman appeared to be extremely competent in the art of cross-examination of key witnesses during the trial.

victions have been held invalid for incompetency of counsel, see United States ex rel. Hall v. Ragen, 60 F. Supp. 820 (N.D. Ill. 1945); People v. DeSimone, supra note 94. See People v. Chessman, 38 Cal. 2d 166, 177-78, 238 P.2d 1001, 1008 (1951).

97. Ibid.

98. Ibid.

99. The following account indicates the extended nature of the trial proceedings: The trial was a lengthy one, beginning April 29 and ending May 21, 1948. Petitioner defended himself. Eighty-one witnesses testified and were called or recalled a total of more than 120 times. . . . It will be noted that the testimonial evidence alone comprises 1500 pages of the disputed Reporter's Transcript. . . . Eighty-four exhibits were offered. . . . There were two full days of argument to the jury. . . . More than 50 different complex instructions were given. Petition for certiorari, pp. 28-28, Chessman v. Teets, 354 U.S. 156 (1957). Although length alone does not necessarily indicate the caliber of the defense, it does show that Chessman conducted his defense in a vigorous manner.

100. In the following excerpt, Chessman is cross-examining Mary Alice Meza, one of the state's prosecuting witnesses:

Q Do you recall stating to the police at the time you reported this matter, that this automobile had a reddish glow or tint, or that the numerals were red on the dash?

A Yes.

Q And that two panels of the instruments were red, both of them?

A Yes.

Q The entire dash, then, from one side to the other, had this same reddish appearance?

A No, only a couple of them; not everything. I would say just two circles I remember being illuminated.

Q What do you specifically remember?

A Specifically remember about what?

Q What part of the dash was red?

A There was the clock and some other thing by the driver's wheel.
IV. DEATH PENALTIES UNDER SECTION 209

Among the seventeen felonies of which Chessman was found guilty were four convictions of kidnapping for purposes of robbery under section 209 of the California Penal Code. The jury, which found that Chessman had inflicted bodily harm upon two female victims by forcing them to commit acts of sexual perversion, set the penalties for two of the kidnappings at death. For the other two convictions of kidnapping, which were based upon the robbery of the clothing store, Chessman received a life sentence without the

Q Directly in front of the driver's wheel or approximately directly in front?
A Approximately in front of it.
Q I will show you Exhibit 26, and ask you if this is a fair representation of the instrument panel you saw. Of course, you cannot tell the color.
A Yes, that looks similar to it. Yes, I would say that would be it.
Q To your knowledge, did this bandit's automobile have a radio?
A I don't remember anything about it, if it did. I don't remember.
Q Was there ever any talk about a radio, by the bandit; did he ever mention that he had one?
A No, not that I recall.
Q Did he mention he was capable of receiving police calls?
A Not that I recall.
Q Did you see anything on the instrument panel to indicate there was a radio in the automobile?
A I didn't notice.
Q Didn't you see anything in the automobile to indicate that there may be a portable radio in that automobile?
A I don't remember.
Q Did you see anything in this automobile other than the things you have already testified to, a gun and flashlight, anything on any of the seats of this car?
A No, I don't remember anything else.
Q You were observing very closely during this time, attempting to get all the impressions you could to assist the police; is that right?
A I wasn't—I was doing it very generally. I was not aware of the fact that I was actually doing it for the police. I remember I was just observing things, just generally; not well.

Transcript, pp. 410-12.

101. At the time of Chessman's trial, CAL. PEN. CODE § 209 provided:
Every person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion . . . or robbery or to exact from relatives or friends of such person any money or valuable thing, or who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnapping suffers or suffer bodily harm or shall be punished by imprisonment in the State prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm.

102. Bodily harm under § 209 is defined as follows: "any touching of the person of another against his will with physical force in an intentional, hostile and aggravated manner, or projecting of such force against his person." People v. Tanner, 3 Cal. 2d 279, 297, 44 P.2d 324, 332 (1935).

103. See text at 942 supra.
possibility of parole. Since the existence of the two death penalties rendered the validity of the life sentence under section 209 academic, Chessman had throughout his appeals centered his attack on the validity of the former. In 1951, after Chessman was convicted of kidnapping, but before the California Supreme Court had passed on his appeal, the California legislature amended section 209. Prior to the amendment, the language of the statute permitted a sentence of life imprisonment without possibility of parole or a death sentence merely for a conviction for detaining a victim while committing robbery when bodily harm had also been inflicted. In construing the statute the California Supreme Court, in People v. Knowles, refused to depart from the literal meaning of the statute and held, in effect, that an act which was nothing more than armed robbery was within the conduct proscribed by section 209 and punishable as kidnapping. Because of this harsh result, the California legislature, by the 1951 amendment, made asportation an essential element for a conviction of kidnapping for purposes of

104. The first paragraph of CAL. PEN. CODE § 209, after its amendment in 1951, provides:

Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers bodily harm. See note 101 supra.

105. When the inapplicable terms were deleted from the pre-1951 statute it provided: "Every person who . . . holds or detains . . . [another person] to commit . . . robbery . . . shall suffer death or shall be punished by imprisonment in the State prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person . . . subjected to such kidnaping suffers . . . bodily harm." See note 101 supra.

106. 35 Cal. 2d 175, 217 P.2d 1 (1950). The defendant, David Knowles, was Chessman's accomplice in the robbery of the clothing store. Both men were captured in a stolen car with the goods taken from the store in their possession. Knowles, at a separate trial, was sentenced under § 209 to life imprisonment without possibility of parole.

107. Although Knowles was convicted for detention with bodily harm, the court's construction of § 209 allowed a conviction for kidnaping resulting in a life sentence for what amounted to nothing more than robbery. This construction gave a prosecutor discretion to prosecute for armed robbery, the maximum penalty for which was five years under CAL. PEN. CODE § 213, or for kidnaping under § 209, the penalty for which was life or life without possibility of parole or death where body harm had been inflicted.

108. The court in the Knowles case said: "Reasonable men may regard the statute as unduly harsh and therefore unwise; if they do they should address their doubts to the Legislature." 35 Cal. 2d at 180, 217 P.2d at 3.
robbery. Nonetheless, it is clear that Chessman's convictions could be sustained under the pre-1951 statute, even though they were not made final by the California Supreme Court until after the amendment had gone into effect.

However, when the California legislature amended section 209 to change the acts proscribed, it also added a paragraph which mitigated sentences of some persons convicted under the previous statute. Since the legislature explicitly extended relief to "any person serving a sentence of imprisonment for life without possibility of parole," the relief was seemingly not intended to extend to some-

109. When the inapplicable terms are deleted from § 209 after the 1951 amendment, it provides: "Any person . . . who kidnaps or carries away any individual to commit robbery . . . shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person . . . subjected to such kidnapping suffers . . . bodily harm." See note 104 supra.

In People v. Chessman, 33 Cal. 2d 166, 191, 238 P.2d 1001, 1016 (1951), the California Supreme Court stated that "the detention of the victim during the commission of armed robbery, if committed since the 1951 amendment, is not punishable under section 209." Similarly, in People v. Chessman, 52 Cal. 2d 467, 496-97, 341 P.2d 679, 697-98 (1959), the court again said that "since the 1951 amendment of section 209, kidnapping for the purpose of robbery requires some asportation of the victim . . . ."

110. Although § 209 was not explicitly repealed by the California legislature, it is possible to regard an amendment as a repeal of the statute in its old form and a reenactment of the statute in its amended form. Under Cal. Gov't Code § 9605, however, an amendment is not to be considered as a repeal and reenactment in the amended form. Therefore, the common-law rule which provided that the repeal of a statute without a "saving clause" before a judgment was final operated to discharge the defendant, see, e.g., Regina v. Inhabitants of Denton, [1852] 18 Q.B. 761, 118 Eng. Rep. 287; Regina v. Inhabitants of Mawgan, [1838] 8 Ad. & E. 497, 112 Eng. Rep. 927; Miller's Case, [1764] Bl. W. 451, 96 Eng. Rep. 259, has no application to Chessman.

The legislature, by removing the crime of detention to rob under § 209, did in effect repeal that part of the law. Although there was no "saving clause" as part of the amendment which would have permitted future prosecutions under the repealed statute, Cal. Gov't Code § 9608 provides that the termination of any law creating a criminal offense does not constitute a bar to the punishment of an act already committed in violation of the terminated law.

111. The final paragraph of § 209, added by the 1951 amendment, provides:

Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under this section as it read prior to the effective date of this act shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole.

112. That part of the amendment which mitigated the sentences of the persons serving a life sentence without possibility of parole can be interpreted to mitigate the sentences of all persons so sentenced regardless of whether their convictions were based on asportation or detention. This problem is not applicable to Chessman, however, because the amendment gave no direct relief to persons under death sentences. Nonetheless, it can be argued that, because the legislature made no distinction between those convicted for detention and asportation, the court, when it assumed that one under a death sentence for detention would not be so punished after 1951, could also properly have followed the legislature's practice and disregarded the distinction between a conviction for detention and asportation.
one like Chessman who was under sentence of death. This conclusion can be justified on two grounds. The first, and perhaps the more convincing, argument which supports this view is that the language of the amendment is inapposite to any death penalty. Presumably, the legislature was aware that at the time it amended the statute there were death penalties which had been imposed under the statute but which had not been executed. Thus, the omission of language extending the relief to those persons under a death penalty was probably an intentional limitation. Second, the bodily harm inflicted by persons under a death penalty was probably in most cases more serious than the bodily harm inflicted by persons under sentence of life imprisonment without possibility of parole. The legislature may have reasoned that in a case where there had been minor bodily harm and where the jury had regarded the death penalty as too severe for the crime committed, the jury had no choice but to impose a life sentence without possibility of parole. Thus, where the jury had so acted, it was highly probable that even the lighter sentence of life without the possibility of parole had been too harsh.

Whatever the actual legislative intent, however, the California Supreme Court recognized in the amendment a strong desire to mitigate the general harshness of the results under the previous statute. Therefore, when in 1951, and again in 1959, on appeal to the California Supreme Court, Chessman urged that under the amendment his death sentences should be reduced to lesser sentences, the court assumed expressly that the amendment was intended to give relief to a person under a sentence of death for detaining to rob. It would seem that the court based this assumption on grounds independent of the provision of the amendment which only mitigated sentences of life without possibility of parole.

115. Another theory which Chessman argued on appeal was one of abandoned intent—that he robbed or attempted to rob his victims, abandoned his intention to rob, and then carried his victims away to commit bodily harm. Since under the statute the purpose for the asportation must be robbery, extortion or ransom, Chessman argued that as a matter of law the evidence could not support the verdicts. The court rejected this argument when, in People v. Chessman, 38 Cal. 2d 166, 186, 288 P.2d 1001, 1013 (1951), it said:

This argument is without merit. A defendant who engages in a course of conduct toward a female victim which includes robbery or attempted robbery, asportation of the victim, and the commission of sex crimes may present such argument to the trier of fact. But we cannot say as a matter of law that at some point of time during the abductions of his female victims defendant ceased to be a robber and became a kidnaper whose sole purpose was to inflict bodily harm by forcibly committing sex crimes.

116. In People v. Chessman, 52 Cal. 2d 467, 497, 341 P.2d 679, 698 (1959), the court said "one sentenced to death for conduct amounting to no more than robbery with infliction of bodily harm before the 1951 amendment should not be so punished after the amendment's effective date."
other words, the court seems to have based its assumption that no one should be punished by death for detaining to rob after the 1951 amendment on the ground that the crime of detention was no longer punishable under section 209. The process by which the court arrived at this position is by no means clear. Presumably, no one who had committed a violation of section 209 before 1951 and who was punished after 1951 under the pre-1951 statute would be sentenced to life without possibility of parole since a sentence of life without possibility of parole would automatically, by operation of the 1951 amendment, be mitigated to life with possibility of parole. The death penalty could, however, continue to be imposed after 1951 for mere detention where the crime had been committed prior to 1951 but where trial did not occur until after the amendment because the legislature neither mitigated the death penalty under section 209 nor barred a conviction for detention to rob. The rule which the court cites, that "the offender who commits an offense before the amendment of the statute imposing the lighter sentence gets the benefit of the lighter punishment . . ." is irrelevant to the death sentences in the Chessman case because the legislature did not lighten the penalty of death but only abolished the crime of detaining to rob. Thus, while the court's extension of relief to one sentenced to death for detaining to rob was the ground upon which the court proceeded, the wisdom of this extension is questionable.

Once the court had held that no one after 1951 should be punished by death for detaining to rob, it determined that Chessman's convictions were based on asportation and not mere detaining to rob. The court's determination may, however, be open to question because, as in the case of many jury verdicts, it is impossible to be absolutely certain of which acts the jury convicted Chessman under section 209. When all of the circumstances surrounding the verdicts are examined, there is a possibility that Chessman's convictions for kidnapping were based on mere detention to commit robbery accompanied by bodily harm to the victims.

Since the jury was instructed that the kidnapping was complete upon the seizing of the victim, it is possible that the jury may have never actually considered the question of asportation. Once it had established Chessman's guilt on the basis of detention to rob under this instruction, the only other necessary question was
whether Chessman had inflicted bodily harm on the victims. Thus, the jury may have focused on the question of whether Chessman had detained the victims to the exclusion of whether he had asported them. This possibility becomes somewhat stronger for the reason that portions of the trial court's instructions emphasized that under the statute mere detention was sufficient for a conviction. The record of the Chessman trial shows that the following instruction was given:

WHEN CARRYING AWAY OF SEIZED PERSON NOT NECESSARY—
PENAL CODE § 209

When a person seizes another with intent to hold or detain him, or seizes him in the act of holding and detaining him, to commit robbery, such seizure constitutes a crime whether or not the person so seized is carried or otherwise moved any distance from the place of the attack.121

In support of its position, the court pointed out that the form of the jury's verdict which found Chessman "guilty as charged" was a finding that Chessman had asported his victims because the charges of the indictment which had been read to the jury included the crime of asportation.122 The court's assertion is not, however, a wholly satisfactory answer to the argument that the jury may have based its decision on the detention of the victims for purposes of robbery and that it may not have passed on the question of asportation. The court's position is tenuous insofar as it rests on the inter-relation of the verdict form and the counts of the indictment which were read as part of the instructions. Although the counts of kidnapping included "seize, confine, abduct, conceal, kidnap and carry away,"123 and were incorporated into the instructions, it is unrealistic to assume that a jury which had been instructed that it need go no farther than to find detention would consider whether Chessman committed each of these acts. Because the language of the kidnapping counts is couched in mechanical, legalistic terms, it is more probable that the jury followed the specific instructions relating to the adequacy of finding mere detention than that it considered separately whether Chessman had seized, whether he had confined,

121. Instructions, p. 125.
122. The verdict as to each death penalty count reads, "We... find the Defendant guilty of Kidnapping for the Purpose of Robbery, a felony, as charged... and find that the person named suffered bodily harm and fix the punishment at death." (Italics added.) The offense charged in each of the two counts was "kidnapping for the Purpose of Robbery, a felony, committed as follows: That the said Caryl Chessman... did willfully, conceal, unlawfully and feloniously seize, confine, abduct, kidnap and carry away [the female victim]... with the intent to hold and detain and... did hold and detain said [victim]... with intent, and for the purpose of committing robbery." (Emphasis added.) People v. Chessman, 52 Cal. 2d 467, 497, 341 P.2d 679, 698 (1959).
123. See note 122 supra.
whether he had abducted, whether he had concealed, whether he had kidnapped, and whether he had carried away his victims.

But despite the factors which point to the possibility that the jury could have rendered the death penalties for a conviction based on detention, the court's position that the verdicts were based on asportation is a reasonable one. The sequence of events constituting the incidents with the two women as they were established by the testimony at trial reduces the likelihood that a verdict could have been based on detention alone. In the first incident Chessman took his victim's purse, forced her to walk twenty-two feet into his car, and forced her to commit an act of sexual perversion. He took money from the purse he had taken earlier and then permitted her to leave the car.\footnote{124} In the other incident, Chessman attempted to rob his victim, but discovered she had no money. He then forced her into his car, drove to an isolated spot, compelled her to submit to sex crimes and then drove her to the vicinity of her home.\footnote{125}

Under California law the kidnapped victim need be carried away only a matter of feet in order to permit a jury to find a violation of section 209 on grounds of asportation.\footnote{126} The evidence presented by the state at the Chessman trial was that the bodily harm was inflicted after the asportation had occurred. It is obvious that the jury believed the evidence relating to the bodily harm\footnote{127} and that at the very least they also believed the testimony related to the detention of the victims. Since the asportation was the conduct which bridged the two acts, the jury undoubtedly also believed the testimony that Chessman had carried away his two victims. Had the jury disbelieved the testimony of asportation, they would have been forced to accept the fact that Chessman had committed the sex crimes in the cars of the victims' escorts. Such a deduction is wholly unwarranted by both the state's evidence and Chessman's general denial.

It must be conceded, however, that there was no way in which

\footnote{124. Transcript, pp. 62-71.}
\footnote{125. Transcript, pp. 377-89.}
\footnote{126. The court in People v. Chessman, 38 Cal. 2d 166, 238 P.2d 1001, held that it was the fact, not the distance, of the forcible removal which constituted the kidnapping. Also see People v. Oganesoff, 81 Cal. App. 2d 709, 184 P.2d 953 (1947) (carrying victim from car in front of house into house supported conviction of kidnapping); People v. Shields, 70 Cal. App. 2d 628, 161 P.2d 475 (1945) (carrying victim from front of house to roof supported conviction of kidnapping); People v. Melendrez, 25 Cal. App. 2d 490, 77 P.2d 870 (1938) (forcing victim to walk fifty to seventy-five feet constituted kidnapping); People v. Cook, 18 Cal. App. 2d 625, 64 P.2d 449 (1937) (carrying victim from sidewalk into house constituted kidnapping).}
\footnote{127. It is a necessary deduction that the jury believed that Chessman had inflicted bodily harm since under § 209 a sentence of death can be rendered by a jury only if it finds that the victim has suffered injury.}
the California Supreme Court could be absolutely certain of what acts the jury based Chessman’s convictions of kidnapping. Therefore, in order to avoid the possible criticism that Chessman was punished too harshly for conduct which the statute no longer proscribe, the court, instead of assuming that the verdicts were based on asportation, could have placed its decision on a sounder basis by relying on the literal meaning of the statute. As either an alternative holding or its sole holding, the court could have grounded its refusal to mitigate the death penalties on the amendment’s inapplicability to a death sentence under the pre-1951 statute. Such a holding would have strengthened the court’s position. However, while a reliance on the literal meaning of the statute might have been a wiser course, the court’s position based on the assumption of a finding of asportation is not an unreasonable one and cannot be said to have resulted in an injustice to Chessman.

V. BIAS AND PREJUDICE OF FEDERAL JUDGES

A. Disqualification of Federal District Court Judges

A rehearing was scheduled in United States District Court following the decision of the United States Supreme Court that Chessman’s petition for a writ of habeas corpus, charging fraud in the preparation of the original transcript, should not have been summarily denied.\textsuperscript{128} On November 30, 1955, Judge Louis E. Goodman, who had dismissed the original petition, was assigned to preside over the hearings.\textsuperscript{129} At that time, Judge Goodman denied Chessman’s attorney’s oral request that he disqualify himself. Later the same day there was a withdrawal of the request accompanied by a statement by Chessman’s attorney to the effect that “after discussing the matter with his client, he desired to say nothing more on the question of disqualification.”\textsuperscript{130} Subsequently, friction apparently developed between Judge Goodman and Chessman.\textsuperscript{131} The major disagreement revolved around the question of the adequacy of the arrangements provided by the court to permit Chessman and his attorneys to confer and prepare for the pending hearing.\textsuperscript{132} Finally,
a month after oral request for disqualification had been made an affidavit was filed pursuant to section 144 of the Judicial Code requesting that Judge Goodman be disqualified from presiding at the hearing because of personal bias and prejudice. In filing his affidavit, Chessman relied on the following facts to support his contention that Judge Goodman should be disqualified:

1. Asserted intemperate observations and arbitrary action in denying the petition when it was originally filed.
2. Failure to enter a pretrial order concerning appellant's custody in keeping with views expressed by the judge in an earlier ex parte pretrial hearing.
3. Observation made by Judge Goodman, at the pretrial hearing of December 16, 1955 that "... this should be in the State of California, but until there is some change in the statutes, we have got to use this laundry to take care of this matter. ...".
4. Asserted failure to enforce a previously entered order concerning arrangements for conferences between appellant and his counsel.
5. Refusal to grant as long a continuance as appellant had requested.

Judge Goodman disallowed the affidavit "upon the ground that the petition on its face, as a matter of law, failed to set forth any facts showing personal bias or prejudice." Section 144 of the Judicial Code provides a procedure whereby a judge of a federal district court may be disqualified from presiding at a pending proceeding on the basis of "personal bias or prejudice." When one of the parties to an action files an affidavit alleging that the judge is personally biased or prejudiced against the movant or in favor of the opposing party, the statute dictates that the judge "shall proceed no further therein, but another judge shall be assigned to hear such proceeding." However, this stringent language is qualified by the second paragraph of the section:

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may

motions which he was filing during this period for no other reason than his personal animosity toward Chessman. For a detailed list of the motions filed by Chessman and his attorneys between December 8, 1955, and January 24, 1956, see Appendix A, Chessman v. Teets, supra note 131, at 766.

134. Chessman v. Teets, 239 F.2d 205, 215 n.19 (9th Cir. 1956).
136. In this Note, the statute dealing with the disqualification of federal district court judges for bias or prejudice will be referred to as § 144. The provision was originally enacted as § 21 of the Judicial Code of 1911. Section 21 was superseded in 1948 by § 144. No material variations exist between § 21 as originally enacted and § 144 in its present form. For general background of the historical development leading to the enactment of § 144, see generally Schwartz, Disqualification for Bias in the Federal District Courts, 11 U. Prr. L. Rev. 415–23 (1950); Frank, Disqualification of Judges, 56 Yale L.J. 605, 626–50 (1947).
NOTE

file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith. 138

The leading case interpreting section 144 is Berger v. United States, 38 where defendants of German ancestry were prosecuted for violating the Espionage Act during the First World War. The case was tried before Judge Kenesaw Mountain Landis who vehemently expressed dislike for all persons of German origin. 140 The court disallowed an affidavit charging personal bias. The defendants were convicted and appealed, alleging the disallowance of the affidavit as error. The Supreme Court reversed, holding that Judge Landis should have disqualified himself since this was the type of personal bias contemplated by the statute. The Court stated that the mere filing of the affidavit did not automatically disqualify the judge; rather, the judge had a duty to examine the affidavit to determine whether it was legally sufficient to show personal bias or prejudice. 141 The Court added that the judge against whom the affidavit is filed may not pass upon the truth or falsity of the charges. 142

In conformity with Berger, it is uniformly recognized that the judge against whom the affidavit is filed has an affirmative duty to test the "legal sufficiency" of the affidavit. 143 The standard of legal

138. Ibid.
139. 255 U.S. 22 (1921).
140. To support their contention that Judge Landis was personally biased against people of German origin, the defendants' affidavit as reproduced in the Court's opinion stated that:

"If anybody has said anything worse about the Germans than I have I would like to know it so I can use it." And referring to a German who was charged with stating that "Germany had money and plenty of men and wait and see what she is going to do to the United States," Judge Landis said in substance: "One must have a very judicial mind, indeed, not to be prejudiced against the German Americans in this country. Their hearts are reeking with disloyalty. . . . You have become a citizen of this country and lived here as such, and now when this country is at war with Germany you seek to undermine the country which gave you protection. . . . Your hearts are reeking with disloyalty. I know a safe-blower, he is friend of mine, who is making a good soldier in France. He was a bank robber for nine years, that was his business in peace time, and now he is a good soldier, and as between him and this defendant, I prefer the safe-blower." Id. at 28-29.
141. Id. at 36.
142. Ibid.

(1) The mere filing of an affidavit does not oust the judge from the cause.
(2) The judge has the right to determine the legal sufficiency of the affidavit.
(3) The bias or prejudice must be personal, i.e., antagonism or opposition to the litigant, or favoritism for his opponent.
(4) Definite views on the law, adverse rulings in the case on trial, or adverse
sufficiency will be examined in the context of the Chessman case to determine whether Judge Goodman should have been disqualified under the provisions of section 144.

1. Time Requirement under Section 144. The statute provides that the affidavit must be filed "not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time." This provision has been strictly construed by the courts and failure to comply with the requirement is grounds for the automatic dismissal of the affidavit regardless of the sufficiency of the alleged prejudice. This result is justified since the section is intended to provide a procedure to disqualify a judge for personal bias acquired prior to the pending litigation, not to provide an instrument for delay or to allow a party to "sample" the presiding judge's attitude before deciding if he wants to "keep" the judge.

Because the term had begun when Judge Goodman was assigned to preside over the rehearing, it was impossible for Chessman to

---

rulings against the suitor in other cases or in cases involving similar facts do not constitute such disqualification, even in a criminal prosecution.


145. In Hibdon v. United States, 213 F.2d 869 (6th Cir. 1954), the defendant had been convicted of a criminal offense. On appeal, he alleged denial by the trial court of his affidavit of prejudice. Defendant, acting as his own counsel, failed to file the affidavit within the time required by the statute. In rejecting defendant's contention that the requirement should be relaxed because of the fact that defendant was acting as his own counsel, the court said:

We think that appellant has presented no adequate reason why the letter of the statute should not be applied in its requirement that an affidavit of bias and prejudice against a trial judge must be filed at least ten days before the commencement of the term at which the defendant is to be tried. It would be, in our judgment, against public policy in the administration of justice in criminal cases to permit a trial judge to be sworn off the bench by a defendant who undertook to prepare his own affidavit of bias, without employing an attorney or requesting appointment of one to aid him.

Id. at 869. Also, see Eisler v. United States, 170 F.2d 273 (D.C. Cir. 1948).

146. It should be noted that if a judge determines that the affidavit filed under § 144 is "legally insufficient" and refuses to disqualify himself, his decision is not reviewable until after an adverse judgment is rendered against the movant. See, e.g., Green v. Murphy, 259 F.2d 591 (3rd Cir. 1958); Korer v. Hoffman, 212 F.2d 211 (7th Cir. 1954). Thus, there is a certain degree of risk involved in filing an affidavit of prejudice. Although a judge may go out of his way to be impartial to protect the record on appeal, it is more likely that he may be antagonistic toward the party who filed the affidavit during the remainder of the trial. This possibility coupled with the fact that relatively few cases can be found in which an appellate court has reversed a decision on the ground that the trial judge wrongfully failed to disqualify himself leads to the inference that the remedy available to the moving party may be grossly inadequate. The following are the only cases found in which an appellate court reversed a trial court's determination that an affidavit involved was not legally sufficient: Berger v. United States, 255 U.S. 22 (1921); Schmidt v. United States, 115 F.2d 394 (6th Cir. 1940); Morris v. United States, 26 F.2d 444 (8th Cir. 1928); Nations v. United States, 14 F.2d 507 (8th Cir. 1928); Lewis v. United States, 14 F.2d 869 (8th Cir. 1928).
have filed the affidavit ten days before the beginning of the term of the federal court. His petition, however, would have been properly filed had he complied with the good cause requirement of section 144. To satisfy this requirement, the affidavit must be filed "as soon as practicable before the term begins, or if the disqualifying facts are not discovered before its beginning, as soon thereafter as practicable." There was no good cause for his late filing because the basic ground on which he predicated his charge of bias was known to Chessman at the time Judge Goodman was selected to preside at the second hearing. For this reason, failure to file the affidavit until a month after the oral request for disqualification had been made would clearly violate the time requirement of section 144 and be fatal to the motion.

2. Requirement that Bias be Personal. The bias charged in the affidavit must be personal in nature and supported by the allegations upon which the belief is based. The courts have drawn a distinction between personal bias and bias which is derived from the evidence presented at a judicial proceeding. In the former case, the

148. Chessman v. Teets, 239 F.2d 205, 215 (9th Cir. 1956).
149. If Chessman had filed his affidavit of prejudice within a reasonable time after learning that Judge Goodman was to preside at the rehearing, the time requirement of § 144 would have been complied with. However, the statute makes no provision for a party who has knowledge of the facts upon which the alleged bias is predicated to delay a month before filing the affidavit in order to see if the judge was in fact biased against him. See Behr v. Mine Safety Appliances Co., 289 F.2d 215 (9th Cir. 1956); Hibdon v. United States, 213 F.2d 869 (6th Cir. 1954); Eisler v. United States, 170 F.2d 273, 277 (D.C. Cir. 1948).

150. See In re Lisman, 99 F.2d 898 (2d Cir. 1939); Craven v. United States, 22 F.2d 605 (1st Cir. 1927), cert. denied, 276 U.S. 627 (1928); United States v. 16,000 Acres of Land, 49 F. Supp. 645 (D. Kan. 1942); Schwartz, supra note 136, at 417-23.

151. In Craven v. United States, supra note 150, defendant was originally tried on a charge of illegally bringing liquor into Boston in violation of the prohibition laws. The first trial ended in a hung jury. The same trial judge presided at the retrial which resulted in a conviction. In affirming the trial court's action in refusing to allow defendant's affidavit of prejudice, the appellate court said:

At most, then, the affidavit charges a "bias and prejudice," grounded on the evidence produced in open court at the first trial, and on nothing else. We hold that such bias and prejudice . . . is not personal; that it is judicial. "Personal" is in contrast with judicial; it characterizes an attitude of extra-judicial origin, derived non coram judice. "Personal" characterizes clearly the prejudgment guarded against. It is the significant word of the statute. It is the duty of a real judge to acquire views from evidence. The statute never contemplated crippling our courts by disqualifying a judge, solely on the basis of a bias . . . against wrongdoers, civil or criminal, acquired from evidence presented in the course of judicial proceedings before him. Any other construction would make the statute an intolerable obstruction to the efficient conduct of judicial proceedings, now none too speedy or effective.

Id. at 607-08. See Brown v. Buckhoe, 244 F.2d 865 (6th Cir. 1957); Moore v. Buckhoe, 175 F. Supp. 780 (W.D. Mich. 1958), holding that the fact that a certain district court judge had never granted a writ of habeas corpus to any inmate
judge would be disqualified; in the latter situation, even though the judge might be equally biased, it would not be grounds for disqualification. Thus an action could be validly re-tried before the judge who presided at the original trial even though he was biased if the bias were derived from hearing the evidence at the first trial. For example, in *Tucker v. Kerner*, the court rejected plaintiff's affidavit filed pursuant to section 144 in which he alleged that the judge who was to hear the malicious prosecution suit which was pending had made the following statement from the bench in a previous case involving the plaintiff:

[T]he difficulty in this whole case and the sad situation presented by the whole case is that the persons who have been defrauded [by the plaintiff] are the poorest and smallest people in America, five or ten dollar people, those are the people we have to protect around here.

On appeal, in holding that the trial judge was justified in not disqualifying himself, the Seventh Circuit Court of Appeals stated that the trial judge's remarks did not evince the personal bias contemplated by the statute. In explaining its position, the court said:

Every member of this court, every member of any court, every judge, when he hears a case or writes an opinion must form an opinion on the merits and oft times no doubt an opinion relative to the parties involved. But this does not mean that the judge has a “personal bias or prejudice.” If it did, the disqualification of judges would be a matter of every day rather than the unusual and extraordinary occurrence which the statute is designed to meet.

Chessman's original petition for a writ of habeas corpus was turned down by Judge Goodman who was adamant in his view that the petition lacked merit, referring to the whole affair as "'nickel in the slot' administration of criminal justice." This statement, could of a certain prison was not sufficient grounds to show personal bias to the extent necessary to disqualify the judge in future habeas corpus proceedings brought by inmates of the same prison.


153. See, e.g., Craven v. United States, 22 F.2d 605 (1st Cir. 1927).

154. 186 F.2d 79 (7th Cir. 1950).

155. Id. at 83.

156. Id. at 84.

157. In re Chessman, 128 F. Supp. 600 (N.D. Cal. 1955). In the course of his opinion, Judge Goodman said:

When does the wheel stop turning? What must the citizen think of our “nickel in the slot” administration of criminal justice? The court would be fully justified in refusing to consider the present petition as repetitious and an abuse of the writ of habeas corpus. In fact, as provided by federal statute, I am not "required to entertain" it . . . .

Be that as it may, it is sufficient to say that, whether the facts in this petition are greater or less, either qualitatively or quantitatively, the subject matter, namely, the irregularity of the appeal transcript, is the same as that previously
pleaded with his later remark at the pre-trial hearing to the effect that he disliked having the federal courts handle California's "laundry" leads to the inference that Judge Goodman was generally impatient with the delays connected with the Chessman litigation. Although such statements exhibit bias, they closely parallel the remarks of the judge in the *Tucker* case where the bias was characterized as having been judicially derived, and thus not grounds for reversal under existing law.158

At first glance, the distinction between personal and judicial bias does not seem to be valid because, regardless of the label, if the judge is sufficiently biased the movant may be denied a fair consideration of his cause. It is the quantum, not the derivation of the bias which would prejudice the litigant. In the course of a proceeding, however, a judge is likely to make some statements which though insignificant could be used as a basis for an affidavit of prejudice in order to gain a continuance in a subsequent proceeding. Thus, the personal-judicial distinction serves a useful function in providing a mechanical device for a district judge to disallow an affidavit which, although conforming with the time and good faith requirements of section 144, is tenuous in nature and based on an isolated statement made by the judge in an earlier proceeding involving the movant. Statements of this nature do not necessarily indicate that the judge is biased, and it is more likely that they only indicate that the judge became impatient or irritated in a single instance.

---

158 The conclusion that Judge Goodman's personal feelings toward Chessman did not preclude him from being objective in hearings involving Chessman was fortified in a subsequent habeas corpus proceeding. In denying Chessman's petition for a writ of habeas corpus in January, 1960, after rejecting Chessman's contention that twelve years on death row constituted cruel and unusual punishment, Judge Goodman said:

However, extra-judicially speaking, the appeal [cruel and unusual punishment] of the petitioner in this regard is impressive. It may be that this contention of petitioner, as well as his claim with respect to the effect of the amendment to California Penal Code Section 209, may well be asserted to the Governor and the Supreme Court of California, under their Clemency powers.

Chessman v. Dickson, 275 F.2d 604, 608 (9th Cir. 1960).

In referring to this statement, Judge Chambers of the Ninth Circuit Court of Appeals remarked:

Perhaps I should not chide the judge for abandoning his robe. Perhaps he has already received his own reward. The application before me, over Chessman's own signature, says of what the judge did: "This is not due process; it is tyranny." Also, in papers before me, Chessman says (over his sole signature) of the same proceedings where the same district judge attempted to throw him a lifeline: "The district court in a manner lethally adverse to (me)", etc.

If a judge refuses to disqualify himself on the grounds that the alleged bias is judicial in nature, but the subsequent proceedings indicate that he in fact was biased, an effective remedy should be available at the appellate level. In such a case, the appellate court should examine the facts alleged in the affidavit in light of the record of the trial and if the record shows any degree of bias, the judgment should be reversed. This would adequately protect the movant's

159. The present procedure for reviewing a trial judge's decision that the affidavit is not legally sufficient seems to limit the scope of appellate review to the question whether at the time of the filing, sufficient facts are present to show personal bias with little emphasis given to the question of whether the judge in fact acted unfairly toward the movement in the course of the trial. See, e.g., Berger v. United States, 255 U.S. 22 (1921); Tucker v. Kerner, 186 F.2d 79 (7th Cir. 1950); Skirvin v. Mesta, 141 F.2d 668 (10th Cir. 1944); Craven v. United States, 22 F.2d 605 (1st Cir. 1927).

It has been recognized that a judge may become personally biased against a party during the course of the proceedings. See, e.g., Knapp v. Kinsey, 232 F.2d 458 (6th Cir.), cert. denied, 352 U.S. 893 (1956); Peckham v. United States, 210 F.2d 693, 702 (D.C. Cir. 1953); Whitaker v. McLean, 118 F.2d 596 (D.C. Cir. 1941). Such bias is to be distinguished from the bias necessary for disqualification under § 144 in that in the latter situation, the bias must be pre-existing. The courts have developed a remedy for bias which arises during the course of the proceedings and hold such bias is grounds for reversal. In Whitaker v. McLean, supra, in reversing a decision on the grounds that the judge had become biased during the course of the trial, the court said:

Often some degree of bias develops inevitably during a trial. Judges cannot be forbidden to feel sympathy or aversion for one party or the other. Mild expressions of feelings are as hard to avoid as the feeling itself. But a right to be tried by a judge who is reasonably free from bias is a part of the fundamental right to a fair trial. If, before a case is over, a judge's bias appears to have become overpowering, we think it disqualifies him.

Id. at 596.

The basic problem in applying the remedy is to determine the extent of the bias necessary in order to justify a reversal. The courts have looked to the standards developed under § 144 in resolving this issue. See Knapp v. Kinsey, supra, at 465-66. Thus, in effect, there is little practical difference between the quantum of bias necessary under either situation—in either, the bias must be substantial. Compare Knapp v. Kinsey, supra; Peckham v. United States, supra; Whitaker v. McLean, supra; Blackmone v. United States, 151 A.2d 191 (D.C. Munic. Ct. App. 1959); Wright v. Mathias, 128 A.2d 658 (D.C. Munic. Ct. App. 1957), with Berger v. United States, 255 U.S. 22 (1921); Calvaresi v. United States, 216 F.2d 891 (10th Cir. 1954); Tucker v. Kerner, 186 F.2d 79 (7th Cir. 1950); Baskin v. Brown, 174 F.2d 391 (4th Cir. 1949); Eisler v. United States, 170 F.2d 273 (D.C. Cir. 1948).

Isolated prejudicial statements made by a judge in the course of a judicial proceeding are not grounds for reversal. In Blackmone v. United States, supra, the trial judge had remarked from the bench that "If the jury lets her go, I'll drop dead." In refusing to reverse a conviction because of this statement, the court said:

To require disqualification, it is necessary to show that the judge's opinion has become so overpowering in his mind as to amount to personal bias against the defendant.

Id. at 197. As to Judge Goodman's alleged refusal to enforce certain pretrial orders and failure to grant a further continuance, if present, these errors could have been reviewed on appeal. In Ex parte American Steel Barrel Co., 230 U.S. 35 (1913), the Supreme Court stated:

[Section 144] was never intended to enable a discontented litigant to oust a
rights while at the same time, the usefulness of the personal-judicial bias distinction would be preserved.

Since Chessman’s principal allegation of bias was known to him in time to file an affidavit under section 144, this factor is clearly not an instance of bias arising during the course of the trial. However, the denial of the requests for certain orders, Judge Goodman’s statement to the effect that he disliked having a federal court do California’s “laundry” and the failure to grant a further continuance are the only proper grounds on which the appellate court could have found sufficient bias to justify reversal of the district court’s decision. Standing alone, these actions by Judge Goodman would not appear to be a sufficient showing of personal bias to justify reversal of the decision.

B. Disqualification of Federal Courts of Appeals Judges

Chessman was given an opportunity to raise a further question of bias when the Ninth Circuit Court of Appeals affirmed Judge Goodman’s determination that the affidavit of prejudice was not legally sufficient. Chief Judge Denman dissented from the majority opinion and Judge Lemmon, concurring in the denial of a petition for rehearing, took occasion to write a supplementary opinion taking issue with Judge Denman over the questions raised in his dissenting opinion. After generally attacking Judge Denman’s position, he concluded by stating:

Chessman’s case has been before the courts of California and of the United States for many years. The “law’s delay” in this case has become a national scandal. . . .

There remains only one more step to be taken in the case of the State of California versus Caryl Chessman. That step will be to carry out one of two sentences of death entered against Chessman eight and one half years ago.

Chessman has been accorded all due process except the long overdue process of his execution. By such execution, perhaps, the blot upon California’s juristic escutcheon will be, if not wholly erased, at least partly dimmed.

Judge because of adverse rulings made, for such rulings are reviewable otherwise, but to prevent his future action in the pending cause. Neither was it intended to paralyze the action of a judge who has heard the case, or a question in it, by the interposition of a motion to disqualify him between a hearing and a determination of the matter heard. This is the plain meaning of the requirement that the affidavit shall be filed not less than ten days before the beginning of the term.

Id. at 44.

160. See note 134 supra and accompanying text.


162. Chessman v. Teets, 239 F.2d 205, 221 (9th Cir. 1956) (concurring opinion on denial of petition for rehearing).

163. Id. at 223.
This opinion elicited another supplementary opinion by Judge Denman who answered Judge Lemmon's charges by stating that the length of time a case has been before the courts should not be a factor in determining whether the appellant has been afforded due process.\textsuperscript{164}

There is no standard which dictates that a judge of a federal court of appeals must disqualify himself for bias. Section 144 applies only to federal district court judges and there are no statutory or common-law procedures which provide for the disqualification of courts of appeals judges.\textsuperscript{165} Whether a judge of a court of appeals is to be disqualified is apparently solely within his discretion. Likewise, the question of the disqualification of a Supreme Court justice is a matter of purely personal concern of the justice involved.\textsuperscript{166} It is a matter "which cannot properly be addressed to the Court as a whole."\textsuperscript{167} A system of voluntary disqualification for judges of higher courts seems to be entirely adequate because the nature of the appellate procedure minimizes the danger that the bias would have an adverse effect on the decision. There is less intimate contact with the parties than in a trial proceeding and there is no danger that a jury may be adversely affected by the judge's attitude;

\textsuperscript{164} Ibid. (concurring opinion dissenting from denial of petition for rehearing). In the course of his opinion, Judge Denman stated:

In stating that Chessman has been deprived of the right so recognized by Judge Hamley [right to be represented at settlement hearing], Judge Lemmon appears to be moved by the fact, as he states it, that "Chessman's case has been before the courts of California and of the United States for many years. The 'law's delay' in this case has become a national scandal."

I do not agree with the contention that the same question of law is to be decided in one way if considered at the beginning of a prosecution, and in a different way if it is for consideration after seven years of prosecution of the same case. Equally unfair to Judge Hamley is Judge Lemmon's criticism that he gave consideration to Chessman's second contention, when the court had no jurisdiction so to act.

\textsuperscript{165} Id. at 223. Judge Hamley wrote the majority opinion in the instant proceeding, concurred in by Judge Lemmon.

\textsuperscript{166} In Frank, \textit{Disqualification of Judges}, 56 \textit{Yale L.J.}, 605, 612 (1947), the author remarks that:

The contemporary disqualification practice of both federal and state courts is broader than that of the common law. Not only has the principle of pecuniary interest been extended to keep pace with changing economic institutions, but relationship between judge and litigant and a variety of other types of judicial bias have been prohibited in modern practice by the common law.

Expansion of common law concepts has been brought about in the federal appellate courts, where no statute controls, largely through the exercise of their own discretion. Also, for the results of a survey carried out among federal appellate judges indicating the grounds upon which they would, through the exercise of personal discretion, disqualify themselves from hearing a case, see \textit{id.} at 637.

\textsuperscript{167} Ibid.
and even if a judge were biased, the other members of the court might act as a check upon him.

Chessman's cause was not ultimately prejudiced in light of the fact that the Supreme Court reversed this decision on other grounds. Nevertheless, support is given to the argument that, at least in the later proceedings, the courts were impatient with the whole affair and were no longer being wholly objective and unbiased in their attitudes toward the Chessman case. The outburst served only to create another facet in the Chessman litigation which might lead some to believe that justice has miscarried.

VI. LITIGATION IN THE FEDERAL COURTS

The federal courts' treatment of the Chessman case is the primary factor which allowed Chessman to keep his litigation alive for twelve years. Although Chessman's repetitious use of habeas corpus in the federal courts over an extended period of time was not unique, the Chessman case serves to focus attention on the possible delays and relitigations which result from the fact that a state prisoner has two forums in which to litigate. Thus any attempt to

169. In Brief for Petitioner, pp. 26-28, Chessman v. Teets, supra note 168, the point is effectively made by Chessman that the exchange between Judges Lemmon and Denman received wide-spread coverage in the newspapers. The brief quotes from an editorial published in the San Francisco Examiner which stated:
"We agree with Judge Lemmon of the United States Court of Appeals that the law's delays in the Caryl Chessman case are a national scandal. . . .

After this Chessman will come other Chessmans. So long as such creatures are permitted to subvert justice at will by misusing the right of writ of habeas corpus, that long will the blot remain."

Id. at 27. The brief concludes on the note that the overall effect of the judicial bickering is to incite public opinion against Chessman's cause.


Also see Baker, Federal Judicial Control of State Criminal Justice, 22 Mo. L. Rev. 109, 127 (1957), where the author states:
In many such cases as these it can only be stated with a large measure of truth
explain the delay in the Chessman case requires an examination of the mechanics involved in federal habeas corpus procedure as well as the application of res judicata principles throughout the Chessman litigation.

The writ of habeas corpus in the federal courts is made available to state prisoners whose convictions have been obtained in a manner not consonant with federal constitutional safeguards. However, the doctrine of comity dictates that federal courts not interfere with state court decisions without giving the state adequate opportunity to make a full determination of any federal question which a state prisoner may raise. To effectuate this doctrine, the Judicial Code provides that before a state prisoner may petition the federal courts for a writ of habeas corpus he must exhaust his state post-conviction remedies. These post-conviction remedies have been held to include an application for certiorari to the United States Supreme Court from the decision of the highest state court determining the federal question.

Prior to 1954 the Chessman litigation pursued a normal course in the state and federal courts. On the issues relating to the adequacy of the transcript and to the merits of the case, Chessman first exhausted his state post-conviction remedies and then presented in the federal courts the federal questions which the issues raised. This series of litigation was not unreasonably prolonged, nor did it pose any unusual problems of relitigation of issues which had been that the only way the state can enforce the death sentence is to precipitate its execution between the denial of a habeas corpus petition by one court and the granting of a stay by another.


174. Judicial Code, 28 U.S.C. § 2254 (1948): An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

For description and analysis of the post-conviction remedies available to Chessman in California see Note, Post-Conviction Remedies in California Death Penalty Cases, 11 Stan. L. Rev. 94 (1959).


176. See note 183 infra.

177. After the one year required to prepare and settle the transcript, state proceedings on the narrow question of whether the settled transcript was adequate to
passed upon in the same court before.\textsuperscript{178} Had the litigation been terminated by 1954, the Chessman case would in no way have been unique.

Although by 1954 the California courts had manifested the opinion that the Chessman litigation was closed,\textsuperscript{179} the United States Supreme Court indicated for the first time that there was possible merit in Chessman’s contentions. In this instance, Chessman had applied to the Supreme Court for certiorari from the denial of a habeas corpus petition by the California Supreme Court. Certiorari was denied “without prejudice to an application for a writ of habeas corpus in an appropriate United States district court.”\textsuperscript{180} Subsequently, a fair appeal on the merits required approximately sixteen months. Subsequently, this question took up an additional seven months of litigation on habeas corpus petitions in the federal courts.

After the California Supreme Court affirmed the convictions and the United States Supreme Court denied certiorari, it required nineteen months for the federal courts to deal with Chessman’s petitions of habeas corpus on the federal questions raised by the convictions.

Thus, there was a period of five and one-half years before the merits of the Chessman case had been litigated through the state courts and presented to the federal courts. Of this time, twenty-five months were spent in the federal courts in habeas corpus proceedings. While this period may have been longer than the average amount of time required to litigate a capital case, it cannot be said to be unreasonably lengthy. See note 183 infra.

178. The first series of appeals to the state and federal courts was concerned primarily with the question whether the settled transcript was adequate to provide a basis for the California Supreme Court to affirm the conviction on the automatic appeal provided by California law.

The second series of appeals followed the affirmation of the conviction by the California Supreme Court and was concerned with the totality of the issues raised by Chessman on appeal, including the following:

(1) that Chessman was forced to go to trial unprepared; (2) that confessions obtained by force and intimidation and promises of partial immunity were used in evidence against him; (3) that said confessions were treated as “admissions” by the court and prosecution with the result that the jury was authorized to base a verdict of guilty upon these involuntary statements; (4) that the trial resulting in Chessman’s conviction was unfair; (5) that § 209 of the California Penal Code, under which the death penalties were imposed, is unconstitutional as applied to Chessman; (6) that petitioner was placed in double jeopardy; and (7) that due to extrinsic fraud practiced by the prosecuting attorney and the trial judge the transcript of record was incomplete and further that Chessman was not permitted to show that important parts of the proceedings were missing or were incorrectly recorded.

Chessman v. People, 205 F.2d 128, 129 (9th Cir. 1953). Of course, the basic issue of the adequacy of the transcript was again adjudicated, but considering the interrelation of these issues, this duplication of court effort is not unusual.

179. After it had passed on the merits, the California court consistently denied Chessman’s petitions for writs of habeas corpus. Not until 1957, when the United States Supreme Court remanded the case to the state court to resettle the transcript with Chessman or his counsel present, did the California court re-open the litigation.


Since a denial of certiorari is not an adjudication on the merits, e.g., Brown v. Allen, 344 U.S. 443, 491-92 (1953), the fact that a petitioner would not be prejudiced by a simple denial has led some to contend that the phrase “without prejudice” is
quently, the Supreme Court granted certiorari twice, and remanded the case in 1957 to the California courts for further proceedings regarding the settlement of the transcript.

Throughout all of the litigation, Chessman complied with the mechanical procedures required of a state prisoner to gain access to the federal court. Furthermore, the federal courts made no meaningless. In recent years the Supreme Court has used this phrase approximately nineteen times. See Reitz, Federal Habeas Corpus: Postconviction Remedy for State Prisoners, 108 U. Pa. L. Rev. 461, 503–13 (1960). In his article Professor Reitz suggests that the Court uses this phrase to indicate that some procedural impediment precluded it from granting certiorari. His suggestion concerning the Chessman case is that the California habeas corpus decision from which certiorari was sought rested upon the adequate non-federal ground of res judicata. While this would preclude the Supreme Court from granting certiorari, it might not prevent further application to the federal district court for habeas corpus. Thus the Supreme Court could have achieved the same result with a simple denial of certiorari.

It is possible that the phrase "without prejudice" is intended by the Court to exert a subtle pressure on the district court to give a petition serious consideration in borderline cases. See Hart, The Supreme Court 1958 Term, Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84, 114 n.88 (1959), where it is stated. "The Court's practice seems explicable only as a bit of gratuitous legal aid to prisoners combined with extracurricular communications of Delphic encouragement to federal district judges."

In the Chessman case the federal district court viewed the phrase as an "invitation" to Chessman to apply for habeas corpus. In re Chessman, 128 F. Supp. 600, 601 (N.D. Cal. 1955). The court of appeals viewed it as an indication of a justiciable question. In re Chessman, 219 F.2d 162, 164 (9th Cir. 1955).


183. The following diagram illustrates Chessman's compliance with the requirement of exhaustion of state post-conviction remedies and the progress of the litigation to the remanding of the case to the California courts in order to resettle the transcript in 1957:

<table>
<thead>
<tr>
<th>STATE POST-CONVICTON REMEDIES</th>
<th>FEDERAL PROCEEDINGS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conviction</td>
<td>Jun. 25, 1948</td>
</tr>
<tr>
<td>Certification of Transcript</td>
<td>Jun. 3, 1949</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Transcript</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>dismissed appeal charging</td>
<td></td>
</tr>
<tr>
<td>inadequacy of transcript</td>
<td></td>
</tr>
<tr>
<td>California Supreme Court</td>
<td>May 19, 1950</td>
</tr>
<tr>
<td>United States Supreme Court</td>
<td>Oct. 9, 1950</td>
</tr>
<tr>
<td>denied certiorari.</td>
<td></td>
</tr>
<tr>
<td>United States Supreme Court</td>
<td>Dec. 4, 1950</td>
</tr>
<tr>
<td>dismissed petition</td>
<td></td>
</tr>
<tr>
<td>for habeas corpus</td>
<td></td>
</tr>
<tr>
<td>on adequacy of transcript</td>
<td></td>
</tr>
<tr>
<td>United States Supreme Court</td>
<td>Feb. 27, 1951</td>
</tr>
<tr>
<td>court dismissed petition</td>
<td></td>
</tr>
<tr>
<td>for certificate of probable cause.</td>
<td></td>
</tr>
<tr>
<td>United States Supreme Court</td>
<td>May 14, 1951</td>
</tr>
<tr>
<td>denied certiorari.</td>
<td></td>
</tr>
</tbody>
</table>
### NOTE 993

**Conviction affirmed on merits by California Supreme Court.**

United States Supreme Court denied certiorari on merits.

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dec. 18, 1951</td>
<td>United States district court dismissed petition for habeas corpus on federal questions raised on merits.</td>
</tr>
<tr>
<td>May, 28, 1953</td>
<td>Affirmed by United States court of appeals.</td>
</tr>
<tr>
<td>Dec. 14, 1953</td>
<td>United States Supreme Court denied certiorari.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>May 18, 1954</td>
<td>Habeas corpus petition attacking transcript.</td>
</tr>
<tr>
<td>July 21, 1954</td>
<td>Petition denied without opinion by California Supreme Court.</td>
</tr>
<tr>
<td>Oct. 25, 1954</td>
<td>United States Supreme Court denied certiorari without prejudice.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Apr. 7, 1955</td>
<td>Affirmed by court of appeals.</td>
</tr>
<tr>
<td>Oct. 17, 1955</td>
<td>United States Supreme Court granted certiorari, remanding to United States district court for hearing regarding possibility of fraud in settling transcript.</td>
</tr>
</tbody>
</table>

**COUNSEL AT SETTLEMENT HEARING**

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Apr. 8, 1957</td>
<td>United States Supreme Court granted limited certiorari on question of the right to counsel at settlement hearing.</td>
</tr>
<tr>
<td>June 10, 1957</td>
<td>Remanded to California courts for resettling of transcript.</td>
</tr>
</tbody>
</table>
exceptions in these procedures for the Chessman case. Although Chessman undoubtedly gained time by being able to maneuver between state and federal courts, he cannot be blamed for the delays which were caused by a system of dual sovereignties. Nor can Chessman be criticized for utilizing the writ of habeas corpus to its maximum potential. If any criticism lies in the Chessman case, it lies with the federal courts which allowed Chessman to protract the litigation beyond the necessary time by considering and passing upon issues which had been before them on previous occasions.

Although no res judicata effect attaches to the results of a determination on habeas corpus, section 2244 of the Judicial Code permits a discretionary "res judicata" effect to be given to denials of petitions for habeas corpus. Thus, a federal judge may deny the petition on the grounds that it is repetitious of prior petitions or that it raises claims which the petitioner could have raised earlier but failed to do.

In 1955, the lower federal courts evinced a desire to terminate the litigation on grounds of "res judicata" when they invoked section 2244 to dismiss Chessman's contentions that fraud was present in the preparation of the transcript. This position was based on the ground that Chessman's contentions of fraud had, in substance, been before the Court previously and that the contentions were only elaborated in the petition then under consideration. The United

See generally Appendix to opinion by Mr. Justice Douglas, Chessman v. Teets, 354 U.S. 156 (1957); Appendix II, People v. Chessman, 52 Cal. 2d 467, 503, 341 P.2d 679, 701 (1959). For complete citations of cases referred to in diagram, see text at supra.

186. In commenting on the effect of § 2244, Professor Moore states: The elementary rule that a denial of habeas corpus is not res judicata remains undisturbed. A circuit or district judge has complete freedom to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court . . . of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.
188. Be that as it may, it is sufficient to say that whether the facts in this petition
States Supreme Court, however, acted to prolong the litigation by granting certiorari and writing a per curiam opinion holding that Chessman's allegations, if proved true, constituted a denial of due process.\textsuperscript{189} Since Chessman contended that he was not aware of the full extent of the fraud at the time of his earlier petitions,\textsuperscript{190} the Court's action is not entirely without justification.

But no such justification exists for the Court's subsequent\textsuperscript{191} holding that Chessman had been denied due process by not being represented at the transcript settlement hearing. As a basis for its decision, the Court stated \textquoteleft\textquoteleft that it was not until the present proceedings in the District Court that the facts surrounding the settlement of the state court record were fully developed.\textquoteright\textsuperscript{192} However, the findings of fact in the federal district court dealt solely with the issue of fraud perpetrated by the prosecuting attorney and the substitute reporter in preparing the record, adding nothing to the Court's knowledge surrounding the settlement of the record.\textsuperscript{193} Moreover, the fact there had been no representation at the settlement hearing was not susceptible of "development"; it had long been established that Chessman was neither present nor represented by counsel at that hearing.\textsuperscript{194} Furthermore, the Court had been aware of Chessman's lack of representation at the settlement hearing for seven years, but despite the fact that there were ample opportunities to put the matter at rest, it was not until 1957 that the Court did so.\textsuperscript{195}

\textsuperscript{191} Chessman v. Teets, 354 U.S. 156 (1957).
\textsuperscript{192} Id. at 164, n. 13.
\textsuperscript{194} This fact was adjudicated in the earliest California decision on the transcript in People v. Chessman, 35 Cal. 2d 455, 218 P.2d 769, cert. denied, 340 U.S. 840 (1950).
\textsuperscript{195} See Mr. Justice Douglas dissenting in Chessman v. Teets, 354 U.S. 156, 172 (1957): The present decision states in theory the ideal of due process. But the facts of this case cry out against its application here. Chessman has received due process over and again. He has had repeated reviews of every point in his case. The question of adequacy of the reconstructed record has been here seven times. The question of Chessman's right to participate in the settlement proceedings has been here at least four times. Not once before now did a single Justice vote to grant certiorari on that issue. If the failure to let Chessman, or a lawyer acting for him, participate in the hearing on the settlement of the record went to jurisdiction \ldots then we should have granted certiorari when the Supreme Court of California first held \ldots that the reconstructed record was a proper record for appeal \ldots Nearly seven years later we return to precisely the same issue and not only grant certiorari but order relief by way of habeas corpus. (Emphasis added.)
Since the Supreme Court has repeatedly stated that a denial of certiorari can in no way be regarded as an adjudication on the merits,\(^{196}\) it is clear that the early denials of certiorari in the Chessman case did not foreclose the Court from subsequently granting certiorari. Thus, although the Court's action technically was not improper, waiting seven years to settle an issue which could have been put at rest long before was not consonant with sound judicial practice.

VII. Conclusion

The factor which overshadows all others in the Chessman case is that a man was confined on death row for twelve years while the courts laboriously attempted to afford him his rights under the law. To layman and lawyer alike, the Chessman case has posed the question of whether our judicial processes have been unable to put at rest the case of a determined and intelligent criminal who was capable of fully exploiting the legal issues involved in his case. But no answer to this question is possible until the more fundamental question of why it took over a decade to settle the issues involved in the litigation is resolved.

No single legal issue involved in the Chessman case justified the delay which turned the case into a cause célèbre. Rather, a combination of fortuitous and unique circumstances culminated in a series of legal and political issues which in sum total account for the delay. The fortuitous event of the death of the court reporter not only gave rise to the major legal issue in the case but, more important, furnished Chessman time during which he was able to place his case before the public. This Chessman accomplished by becoming a widely read convict-author who, while repeatedly professing his own innocence, lucidly described the conditions of a condemned man on death row. So effective were Chessman's endeavors to enlist the sympathies of the public that his case drew international attention.

It is not inconceivable that the force of public opinion affected the judicial treatment of the Chessman case. The closer examination which the United States Supreme Court apparently began to give the Chessman case in 1955 and in 1957 may have been due in part to the recognition which Chessman had gained. Whatever force public opinion exerted on the Court in 1955 and 1957, the Court's action, which in effect re-opened the Chessman case, is an illustration of the flexibility which is built into the American system of criminal law. While this flexibility is required to treat adequately the unusual case, a just system of criminal procedure also demands that at some reasonable point in time adjudication becomes final.

It is, of course, impossible to set an arbitrary time beyond which a condemned man is precluded from remedial judicial processes because the complexity of the legal issues involved may in some cases require that the period of litigation be extended to afford the criminal all of his rights.

Since the legal issues in the Chessman case were not so intricate that they could not have been resolved without the protracted litigation, no justification can be found here for prolonging the Chessman appeals over a twelve-year period. Furthermore, the delay in the Chessman case was not attributable to an inherent defect in the structure of our criminal appellate procedure. Rather, the human factor— the very strength and, paradoxically, the very weakness of our judicial processes—entered the Chessman case in the form of judicial indecision. It is this factor, together with several unique but legally uncomplicated circumstances, which accounts for the unprecedented delay in the Chessman case.