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SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. KEITH RYAN REESE, Defendant and Appellant.	Crim. __________ Court of Appeal No. B253610 Superior Court No. TA125272

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA
LOS ANGELES COUNTY

Honorable John T. Doyle, Judge

SUPREME COURT
FILED

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Deputy

APPELLANT'S PETITION FOR REVIEW

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SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. KEITH RYAN REESE, Defendant and Appellant.	Crim. ____________ Court of Appeal No. B253610 Superior Court No. TA125272

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA LOS ANGELES COUNTY

Honorable John T. Doyle, Judge

APPELLANT'S PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Defendant Keith Reese ("Mr. Reese") petitions this Court for a review of this matter after the Court of Appeal, Second Appellate District, Division Eight issued a decision on September 17, 2015, certified for partial publication, that affirmed the judgment.

ISSUES PRESENTED

1. Whether an indigent defendant's constitutional equal protection rights are violated when in preparation for his retrial, he requests transcripts of opening statements and closing arguments from his mistrial, the prosecution does not object, and the trial court denies his request?

2. Whether a defendant's constitutional compulsory process rights, and due process rights to a full and fair trial and to present a complete defense are denied when he is unable to call as a witness a K-9 officer who trained the dog that searched for a gun, and who was present during the search, because the prosecutor misrepresented that he would call another K-9 expert to testify, and the trial court denied defendant's motions to continue and issue a body attachment for the officer to appear?

3. Whether a defendant's prior conviction based on a guilty plea should be stricken and not be used as a sentencing enhancement when he declares that during the previous change of plea, he was not informed of, and did not knowingly or voluntarily waive any of his *Boykin*[1]-*Tahl*[2] constitutional rights, and the trial court did not hold an evidentiary hearing, or require the prosecution to provide counterevidence?

4. Whether a defendant's First Amendment rights are violated when he is convicted for making criminal threats under Penal Code section 422 for saying the following while pointing a gun at individuals: "You disrespect me," and "Now you're going to learn to stay out of other people's business"?

NECESSITY FOR REVIEW

This case presents important four questions of law that this Court should resolve. (Cal. Rules of Court, rule 8.500(b)(1).)

First, the Court should resolve whether an indigent defendant's equal

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[1] *Boykin v. Alabama* (1969) 395 U.S. 238, 245 [89 S.Ct. 1709, 23 L.Ed.2d 274].

[2] *In re Tahl* (1969) 1 Cal.3d 122.

protection rights are violated when he makes specific requests for transcripts of the opening statements and closing arguments from his mistrial, the prosecution does not object or suggest an alternative, and the trial court denies his request.

In 1975, this Court held that after a mistrial, "an indigent defendant in a criminal trial is Presumed to have a particularized need for a transcript of prior proceedings, just as he is Presumed, if he needs a transcript at all, to need nothing less than a *complete* transcript." (*People v. Hosner* (1975) 15 Cal. 3d 60, 66, emphasis added.) If the prosecution does not meet its "burden . . . [to] clearly establish the contrary," and transcripts are not provided, then automatic reversal is required. (*Id.* at pp. 69–70.)

In this case, the Court of Appeal found as a matter of law that opening statements and closing arguments are not part of this complete set of transcripts that an indigent defendant is presumptively entitled to after a mistrial. (Op. at 5–15.) As this portion of the opinion is certified for publication, trial judges will no longer have a constitutional duty (or statutory duty) to fulfill indigent defendants' requests for transcripts of opening statements and closing arguments from a mistrial, even when the prosecution does not object. Meanwhile, defendants who can afford to pay for such transcripts after a mistrial are still be able to obtain them.

Also, while this Court in *Hosner* placed the burden on the prosecution to "clearly establish" that an indigent defendant does not need the complete set of transcripts from his mistrial (*Hosner, supra*, 15 Cal. 3d at 69–70), the Court of Appeal held that a prosecutor's non-objection to an indigent defendant's request for such transcripts is immaterial.

Furthermore, while this Court in *Hosner* found that an indigent defendant is "under no obligation to go forward with such a showing of particularized need" for the complete transcripts (*Hosner, supra*, 15 Cal.3d

at p. 67), the Court of Appeal found that because an indigent defendant's reasons for such transcripts are not good-enough, he is not able to benefit from *Hosner*'s automatic reversal standard. (Op. at 12, 15.) At the same time, the Court of Appeal declined to consider on appeal the indigent defendant's arguments of prejudice if a lesser standard were to apply.

Justice Flier's dissent from the majority opinion shows that there needs to be further clarification of the *Hosner* holding, especially with respect to whether opening statements and closing arguments are part of "complete" transcripts, whether a prosecution's non-objection matters, and whether a defendant needs to make a sufficient particularized showing for such transcripts in order to invoke the automatic reversal rule. (Dissent at 1–6.)

This issue has also been raised to this Court previously in a petition for review, but was not directly addressed by this Court. The Ninth Circuit eventually granted a habeas petition of a California case, which had been exhausted through California appellate courts, and found that an indigent defendant's equal protection rights were indeed violated when he did not receive complete transcripts from his mistrial, including the opening statements and closing arguments. (*Kennedy v. Lockner* (9th Cir. 2004) 379 F.3d 1041.)

The Court of Appeal found the Ninth Circuit's holding to be inapplicable (Op. at 13–15), while the dissent agreed with the Ninth Circuit's finding that transcripts of opening statements and closing arguments are valuable and should be part of the complete transcripts given to an indigent defendant upon request if the prosecution does not properly object. (Dissent at 3–5.) This Court should determine whether lower California courts should follow the *Kennedy* holding, at least with respect to mistrial transcripts of opening statements and closing arguments.

Second, this Court should resolve a defendant's right to compulsory process and due process right to a full and fair trial and to present a complete defense are denied when he is unable to call as a witnesses a K-9 officer who trained the dog that unsuccessfully searched for a gun, and who was present with the dog during the search.

In the Supreme Court's recent decision in *Florida v. Harris* (2013) 133 S.Ct. 1050 [185 L.Ed.2d 61], the Supreme Court held that when a K-9 alerts an officer to the presence of the contraband, that this alert may constitute probable cause for a more complete search, but that the defendant must be able to argue against probable cause by asking questions regarding the K-9 handler and the search dog.

While Mr. Reese's case does not directly involve *Harris* probable cause issues, this Court should resolve whether it is just as important for a defendant to be able to ask the K-9 handler about his skills and his K-9's reliability (i.e., skills, history of search, training) when the K-9 does not actually find the contraband. Mr. Reese was unable to question the K-9 officer who was present during the search, who was the search dog's handler, and who knew of the dog's skills and abilities.

Third, this Court should resolve whether a trial court errs when it does not hold an evidentiary hearing or require prosecution to provide counterevidence after a defendant submits a declaration stating that he did not understand, explicitly waive, did not sign a written waiver, and/or was not admonished, advised, and spoken properly of any of his *Boykin/Tahl* rights prior to his guilty plea of a prior strike conviction. The defendant also submitted a letter showing that the previous court was unable to find his records. This Court should also resolve whether a defendant has to declare that "he would not have pleaded guilty had he known of his right" only when there is "an imperfect advisement of rights" or also in situations

where he declares that he was not advised of any of his rights. (Op. at 19; but see *People v. Soto* (1996) 46 Cal.App.4th 1596, 1606.)

Fourth, this Court should resolve whether statements such as "You're going to learn to stay out of other people's business" and "You disrespect me" can constitute criminal threats under Penal Code section 422 because the speaker had a gun when he made these statements. In the dicta of *People v. Bolin* (1998) 18 Cal.4th 297, this Court implicitly found that three phrases that a defendant said while using a gun was "menacing," but not a criminal threat: "(1) What are you looking at, bitch?" (2) "shut up" and (3) "he didn't like having Hispanic people there and that he was going to get us out of there." (*Id.* at p. 377, citing *People v. Brown* (1993) 20 Cal.App.4th 1251, 1253.)

For these reasons, Mr. Reese respectfully requests that this Court grant his petition for review.

STATEMENT OF THE FACTS

Prosecution's Case

Mr. Reese refers the Court to the "Facts – The Crimes" section of the appellate court's opinion. (Op. at 2–3.)

Defendant's Case

At trial, Beatrice Reese, the mother, testified that she thought there was a gun, but did not see one. (III R.T. 392.) She did not know why she said to the police that Mr. Reese threatened to kill Ms. Jackson. (III R.T. 387.) She may have said it because people say that there is a gun to get the police to arrive faster. (III R.T. 387.) She never called 911 on Mr. Reese before. (III R.T. 392.) She did not know what caused her to call the police, and did not say that she was scared of Mr. Reese. (III R.T. 389–390.)

Mr. Reese did not threaten to kill her or cause bodily harm. (III R.T. 390.) Ms. Reese wanted her son to be with Ms. Jackson, but knew that he spent a lot of time with Adrienne, his friend. (III R.T. 391.)

Bruce Reese testified he smoked crack that night, drank beer and whiskey, and was on Seroquel. (III R.T. 403.) An officer told him that he did not think Bruce saw a gun because they did not find one. He takes 24 medications daily, of which 18 are at night. (III R.T. 404.)

Ms. Jackson testified that Mr. Reese always treated her with love and respect. (III R.T .416.) She knew that he was coming from Adrienne's house. (III R.T. 416.) Ms. Jackson told Ms. Reese where he was, and Ms. Jackson probably put a lot of stuff in her head, which made her mad. (III R.T. 417.) Ms. Jackson was upset because Mr. Reese was supposed to be there, but did not call or text. (III R.T. 417.) Mr. Reese did not threaten or assault her, and she did not see him with a gun. (III R.T. 418.) She did not tell the officer that she was scared of him. (III R.T. 419.) Mr. Reese never hit her or his mother. (III R.T. 417.) She had seen Ms. Reese hit Mr. Reese before with her cane, and he just sat there. (III R.T. 418.)

STATEMENT OF THE CASE

Mr. Reese refers the Court to the "Facts – The Criminal Case" section of the opinion. (Op. at 3–5.)

ARGUMENT

I. MR. REESE'S EQUAL PROTECTION RIGHTS WERE DENIED WHEN HE DID NOT RECEIVE THE TRANSCRIPTS OF THE OPENING STATEMENTS AND CLOSING ARGUMENTS FROM HIS MISTRIAL

Four decades ago, this Court held under the Equal Protection Clause that after a mistrial "an indigent defendant in a criminal trial is Presumed to

have a particularized need for a transcript of prior proceedings, just as he is Presumed, if he needs a transcript at all, to need nothing less than a complete transcript." (*Hosner, supra,* 15 Cal. 3d at p. 66.) If the prosecution does not meet its "burden . . . [to] clearly establish the contrary," and transcripts are not provided, then automatic reversal is required. (*Id.* at pp. 69–70.)

The Court of Appeal ignored this clear holding in *Hosner* and applied a new rule: that an indigent defendant is not entitled to the transcripts of the opening statements and closing arguments of a mistrial even though: (1) he made repeated and specific requests for these transcripts; (2) he stated his reasons for the transcripts although he was not required to; (3) and the prosecution did not make a single objection or suggest an alternative to these transcripts.

As explained more fully below, the Court of Appeal made four errors.

A. Relevant Proceedings

On April 26, 2013, the court received and granted Mr. Reese's motion for a complete record of trial transcripts from his first trial. (I C.T. 105.)

On Thursday, June 6, 2013, Mr. Reese received a partial set of transcripts. (I C.T. 138.) The following Monday, June 10, when the court asked whether the parties were ready for trial, Mr. Reese responded that he was not ready because he had not received the full set of transcripts from his mistrial. (III R.T. 1, 4.) The court responded that Mr. Reese was only entitled to the trial testimony. (III R.T. 4.) Mr. Reese stated that he needed "to have opening statements and closing arguments . . . so I won't make the same mistakes. . . . I have a small amount of time to study a lot." He

also stated that the transcripts were "related to a discrimination motion. I need the full complete set. I am required by law." (III R.T. 4–5.) The prosecution did not object.

On the afternoon of June 10, Mr. Reese again moved to have all the transcripts from the first trial, and informed the court that he was not given enough time to study the transcripts. (III R.T. 9.) The court informed him that he was only entitled to have the transcripts of the testimony. (I C.T. 149.) Mr. Reese stated that the missing transcripts were "a part of my defense . . . . And I need those transcripts to not make those same mistakes because, you know, self-represented defendant is being taken advantage of." (III R.T. 10.) The prosecution did not object. The court denied the request, and the second jury trial began.

B. An Indigent Defendant Is Presumptively Entitled To "Complete" Transcripts From His Mistrial, Which Includes The Opening Statements And Closing Arguments

First, the Court of Appeal erred when it found that opening statements and closing arguments are not part of the "complete" transcript that an indigent defendant is presumptively entitled to after a mistrial. (*Hosner*, *supra*, 15 Cal.3 at p. 66.) (Op. at 10–11). As the dissent countered, "opening statements and closing arguments are no less a part of a trial than the witness testimony." (Dissent at 2.)

In *Britt v. North Carolina* (1971) 404 U.S. 226, 227 [92 S.Ct. 431, 30 L.Ed.2d 400], the Supreme Court held that the "State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. . . . [T]here can be no doubt that the State must provide an indigent defendant with a transcript of prior proceedings when that

transcript is needed for an effective defense or appeal." The Court noted that "even in the absence of specific allegations it can ordinarily be assumed that a transcript of a prior mistrial would be valuable to the defendant in at least two ways: as a discovery device in preparation for trial, and as a toolt the trial itself for the impeachment of prosecution witnesses." (*Id.* at p. 228.)

In *Hosner*, this Court reiterated a holding from a prior case that relied on *Britt* and other federal cases: "that an indigent defendant in a criminal trial who was entitled to a free transcript of a prior mistrial was *presumptively* entitled to a *full* transcript of those prior proceedings, and that the burden was on the prosecution to show that the defendant would have an effective defense or appeal with anything less than a complete transcript." (*Hosner, supra,* 15 Cal.3d at p. 64, citing *Shuford v. Superior Court* (1974) 11 Cal.3d 903.)

The Court of Appeal erred when it found that opening statements and closing arguments from a mistrial are not part of the complete transcripts of prior proceedings. (Op. at 10–11). It improperly restricts the holdings of *Hosner*, *Shuford*, and *Britt* to only mandate transcripts of witnesses' testimonies to "effectively rebut the prosecution case and impeach prosecution witnesses." (Op. at 11–12. But see Dissent at 2 ["I do not find a need to parse the opening statements and closing arguments from the rest of what the jury heard and treat these parts of the trial differently."].)

While this Court did not expressly define the meaning of complete transcripts in *Hosner*, the dicta in that case implicitly shows that opening statements and closing arguments are included within this definition. The Court noted that it would "reserve decision" on whether the *per se* standard of prejudice would apply to a denial of transcript of "some other prior

proceeding." (*Hosner*, *supra*, 15 Cal. 3d at p. 71, n.7.) As examples of "other prior proceeding[s]," Court pointed to non-trial events, such as hearings on a motion to suppress, or a motion on voluntariness of a confession (*Ibid.*) Opening statements and closing arguments, which always take place during trial, were not included.

Instead of following *Hosner*, the Court of Appeal found as a matter of law that transcripts of opening statements and closing arguments not part of the "complete" transcripts of prior proceedings described in *Hosner* because they do not have impeachment or discovery value. (Op. at 7, 12.) Contrary to this assertion, opening statements and closing arguments would help a defendant to anticipate the crucial testimonial portions of prosecution's witnesses, and find ways to impeach them. They would assist with discovery, as a defendant would know which evidence to find in order to oppose the prosecution's theory of the case. For example, Mr. Reese could have argued more effectively to the trial court that Officer Ramirez's testimony was an essential part of his defense because the prosecution's main theory of the case set forth in the closing arguments was that Mr. Reese hid the gun, and Officer Ramirez's testimony would show that it was unlikely that the gun was hidden. He also could have sought out more testimony and evidence to counter the prosecution's main contentions during his opening statements and closing arguments.

Furthermore, this Court in *Hosner* did not limit the value of mistrial transcripts to just impeachment and discovery. It also found that they could be used to rebut evidence. (*Hosner, supra*, 15 Cal.3d at p. 70.) As the dissent notes, "[t]o rebut simply means "[t]o refute, oppose, or counteract (something) by evidence, argument, or contrary proof." (Dissent at 3, citing Black's Law Dict. (7th ed. 1999) p. 1274, col. 1.) Transcripts of the opening statement and closing arguments would assist an indigent

defendant to prepare to effectively rebut the prosecution's evidence.

California courts have long acknowledged that the opening statements and closing arguments may show the theory or strategy of a party's case. (See, e.g., *People v. Gamache* (2010) 48 Cal.4th 347, 391 ["Defense counsel's closing argument reveals a two-part strategy . . . ."]; *People v. Fuiava* (2012) 53 Cal.4th 622, 725 ["Lingering doubt was a *cornerstone* of the defense's penalty phase strategy, and counsel argued it at length during closing argument" (emphasis added)]; *People v. Arnold* (1926) 199 Cal. 471, 477 ["The district attorney, in his opening statement in outlining his theory of the case and the facts he expected to prove . . . ."]; (*People v. Williams* (2013) 218 Cal.App.4th 1038, 1057 ["The prosecution's original theory, as expressed in opening argument . . . ."].)

Furthermore, California courts recognize the importance of closing argument transcripts by making them a required component of the appellate record for a defendant's criminal appeal when he is the appellant. (California Rules of Court, rule 8.320(c)(B)). This is consistent with the Supreme Court's long-held view of the significance of closing arguments:

> It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions.

(*Herring v. New York* (1975) 422 U.S. 853, 862 [95 S.Ct. 2550, 45 L.Ed.2d 593].)

The Ninth Circuit in *Kennedy, supra,* 379.3d 1041 also found that opening statements and closing arguments are considered "crucial to the development of an effective defense" because they "may provide valuable insight into the government's strategy." (*Id.* at p. 1049.) "Various tactical

and strategic decisions" of the defendant may be influenced, such as being able to "anticipate some of the prosecution's key arguments, identify potential weaknesses in its case, assess the relative weight that the prosecution would place on various items of evidence, and better determine what would be needed to refute them." (*Id.* at p. 1057.)

In *Kennedy*, the Ninth Circuit granted a habeas petition, and found that defendant's equal protection rights were violated when he only received transcripts of witnesses' testimony after he moved for the complete set of his mistrial transcripts, including the opening statements and closing arguments. (*Id.* at p. 1045.) The Ninth Circuit "doubt[ed] seriously that a wealthy defendant would ordinarily proceed in a subsequent trial without purchasing a full transcript of the proceedings, including, but not limited to, . . . the opening statements and closing arguments." (*Id.* at p. 1049.)

The Court of Appeal found that the *Kennedy* holding was not binding or applicable. (Op. at 13–14.) But, it is well established that such authority is still "persuasive and entitled to great weight." (*People v. Bradley* (1969) 1 Cal.3d 80, 86.)

Also, while the Court of Appeal found that the *Kennedy* dissent, which found that the transcripts of the testimonies were sufficient, was more correct (Op. at 13), it failed to recognize that the *Kennedy* dissent noted that it "might not necessarily disagree with the court's interpretation of *Britt*" if this were a "direct criminal appeal" instead of a habeas petition. (*Kennedy, supra*, 379 F.3d at p. 1059 (dis. opn. of O'Scannlain, J.).) Currently, Mr. Reese's appeals are direct criminal appeals, and not a habeas petition.

The *Kennedy* case is also particularly relevant because it involved a California case. The Ninth Circuit underscored that the California court of

appeal actually "conceded that under California Supreme Court precedent the trial judge erred in failing to provide Kennedy with the full transcript of prior proceedings" and that " that the trial court 'should have provided' the 'additional portions of the transcript' requested by Kennedy." (*Id.* at p. 1050.)

Lastly, while the *Kennedy* court found that transcripts of *all* proceedings must be provided, from the "commencement of the judicial action until the entry of judgment" which includes motions and rulings, this Court is not being asked to fully adopt *Kennedy*'s holding. Instead, the sole issue before this Court is whether opening statements and closing arguments are part of the complete transcripts that an indigent defendant is presumptively entitled to after a mistrial upon request. The Court should clarify that they are.

C. Mr. Reese Was Not Required To Show A Particularized Need For These Transcripts

Second, the Court of Appeal erred when it required Mr. Reese to demonstrate his particularized need for such transcripts. (Op. at 15.) The Court of Appeal found that "there was no *Hosner* error in this case, because defendant was provided the transcript of all the testimony and *did not demonstrate why he needed the opening statements and closing arguments*." (Op. at 15, emphasis added.) It also found that Mr. Reese was not entitled to the *Hosner* per se rule of reversal because he did not "*specifiy[] why it is necessary to an effective defense*." (Op. at 12, emphasis added.)

However, as the dissent explained, "*Hosner* soundly rejected the notion that a defendant should have to show a particularized need for the complete transcript of a mistrial." (Dissent at 1.) Indeed, in *Hosner*, this Court expressly held that a defendant is "under no obligation to go forward

with such a showing of particularized need" for the complete transcripts. (*Hosner*, *supra*, 15 Cal.3d at p. 67.)

Furthermore, even though Mr. Reese was not required to state any reasons for the transcripts, he explained that the opening statements and closing arguments would help him not make the same mistakes, were related to his discrimination motion, were part of his defense, were required by law, and implied that it would save him time to study the transcripts. (III R.T. 4–5, 10, 15). The Government should not fault him for not providing more specific reasons because he did not have the missing transcripts before him, especially when the Government did not make a single objection during trial.

D. Mr. Reese's Equal Protection Rights Were Violated When The Government Did Not Make A Single Objection To His Request And The Trial Court Still Denied His Request

Third, the Court of Appeal erred when it ignored the fact that the Government did not make a single objection to Mr. Reese's request for these transcripts. As the dissent noted, "the prosecution did *nothing* to rebut the presumption that appellant needed a complete transcript of the mistrial, including the opening statements and closing arguments that he expressly requested." (Dissent at 2, emphasis added).

Under *Hosner*, this Court held that in order to overcome the presumption of the defendant's entitlement to complete transcripts, the prosecution must either prove that the defendant does not need the transcript, or has access to adequate alternatives. (*Hosner, supra,* 15 Cal.3d at pp. 66, 68.) If the prosecution in unable to rebut the presumption, and the transcripts are not given to the defendant, then automatic reversal is required. (*Id.* at p. 70.)

While the prosecution's rebuttal is a crucial part of the *Hosner* test to determine whether an equal protection violation occurred, the Court of Appeal ignores this part altogether. It fails to make a single reference to the prosecution's absolute silence to Mr. Reese's specific and repeated requests for these transcripts.

Instead, the Court of Appeal posits that Mr. Reese is asking "to expand the limits of the principles set forth in *Britt*, *Shuford*, and *Hosner* to require that the state provide transcripts of the opening statements and closing arguments in every case" and to "establish[] a categorical rule that the transcript of counsel's statements must be provided after *every* mistrial." (Op. at 12, 13, emphasis in original).

Mr. Reese is not seeking these expansive holdings. He is only requesting that *Hosner* be applied. This Court already created a safety valve to prevent full transcripts (including those of the opening statements and closing arguments) to be given after *every* mistrial: the prosecution can either show that the defendant does not need the transcript, or that the defendant has access to adequate alternatives. (*Hosner, supra,* 15 Cal.3d at pp. 66, 68.) The prosecution must rebut the request during trial because otherwise, "[d]ue effectuation of an indigent defendant's constitutional right to a free transcript of a prior trial would be disserved by allowing the prosecution to postpone until a defendant's appeal its litigation, disguised under the rubric of 'harmless error,' of the issue of the defendant' particularized need for that transcript." (*Id.* at p. 71.)

Here, it is undisputed that the prosecution did not make a single objection to Mr. Reese's request for these transcripts, and did not make a single suggestion of an adequate alternative. "Throughout the proceedings, the prosecutor remained unaccountably mute on the subject of appellant's right to a transcript. Absent any showing by the prosecution which might

overcome appellant's presumptive need for a transcript, . . . error was committed . . . [and] requires automatic reversal." (*People v. Tarver* (1991) 228 Cal.App.3d 954, 957.)

E. Alternatively, the Court Of Appeal Erred When It Did Not Consider Mr. Reese's Arguments Regarding Prejudice

The automatic reversal standard applies in this case. (*Hosner*, supra, 15 Cal.3d at p. 70.) In *Hosner*, this Court noted the difference between *trial* proceedings and *non-trial* proceedings when it held back on deciding whether the *per se* rule of prejudice should apply to "some other prior proceeding" like a hearing on a motion to suppress or voluntariness of a confession. (*Id.* at p. 71, fn. 7.) In this case, Mr. Reese was denied *trial* transcripts of the opening statements and closing arguments, and therefore his convictions must be automatically reversed.

Yet, when the Court of Appeal decided to not apply the *Hosner* automatic reversal rule because Mr. Reese did not give good-enough reasons for these transcripts (Op. at 12, 15), it also decided to ignore arguments showing actual prejudice. (Op. at 14–15).

The Court of Appeal cannot have it both ways. It either should be: (1) required to follow *Hosner*, which mandates automatic reversal when the prosecution does not rebut the defendant's presumed need for complete transcripts, or (2) required to consider prejudice arguments on appeal when it finds that defendant did not give adequate reasons for transcripts to "invoke the *Hosner* rule of automatic reversal." (Op. at 12, 15.)

Applying the *Chapman* standard of prejudice, the prosecution cannot prove that the error is harmless beyond a reasonable doubt. In the closing arguments from the mistrial, the prosecutor emphasized that Mr. Reese hid the gun. He argued that Mr. Reese "hid the gun effectively," and that the "[b]ottom line is yes, the defendant was successfully able to hide the gun."

(Supp. R.T. 181, 200.) In his rebuttal closing arguments, the prosecutor speculated where the gun was hidden. He argued, " . . . so where is the gun? We don't know. He could have hidden it somewhere in the house. He could have thrown it outside, a neighbor's roof, a neighbor's yard." (Supp. R.T. 207.) He speculated that the gun was hidden in the baby's blankets. (Supp. R.T. 207.)

If Mr. Reese had this information prior to his retrial, he would have been able to ask Officer Arzate if he, the dog, or others searched these specific areas. He would have focused on discovery related to the search itself, such making a stronger argument for the presence of Officer Arzate, and not wasted time preparing for immaterial side issues, such as the involvement of Department of Children and Family Services (see e.g., III R.T. 629; IV R.T. 909–910). The prosecutor reemphasized at his second retrial that Mr. Reese hid the gun, and had Mr. Reese read the opening statements and closing arguments from the mistrial, he would have been better prepared to rebut this theory, especially given his limited time to study the transcripts. (III R.T 4–5; IV R.T. 984–985.)

For all these reasons, Mr. Reese's equal protection rights were violated when the trial court denied his request for opening statements and closing arguments from his mistrial, even though the prosecution did not object.

II. MR. REESE'S CONSTITUTIONAL RIGHTS TO COMPULSORY PROCESS WERE DENIED WHEN THE PROSECUTOR AND COURT INTERFERED WITH HIS RIGHT TO CALL THE K-9 OFFICER

The Sixth Amendment of United States Constitution, and article 1, section 15 of the California Constitution guarantee the defendant's right to compulsory process.

In order to show that compulsory-process rights were denied, a defendant must show (1) government misconduct, (2) interference, and (3) materiality of the witness's testimony. (*In re Williams* (1994) 7 Cal.4th 572, 603.)

A. Officer Ramirez's Testimony Would Have Been Material and Favorable

The Court of Appeal found that Mr. Reese's compulsory process rights were not denied because he did not meet the third prong: he did not "demonstrate[] that Officer Ramirez's testimony would have been material and favorable to the defense." (Op. at 17.)

The Court of Appeal erroneously focused on just two aspects of Officer Ramirez's potential testimony to find that it was immaterial and cumulative: that the officer would have testified (1) that no gun was found; and (2) about the size of the apartment. (Op. at 17.) However, in the following three ways, Officer Ramirez's testimony would have been material, favorable, and not cumulative.

First, Officer Ramirez was present with the K-9 during the search. Officer Arzate, the testifying officer, was not in the apartment when the search occurred. Officer Arzate waited outside while the search took place for twenty to thirty minutes, and only went in the apartment after the search was completed. (III R.T. 614.) Mr. Reese would have been able to ask specific questions about the search to Officer Ramirez, such as where he and his K-9 actually searched. The prosecutor acknowledged the significance of such information when he argued in his closing argument that the gun was not found because Mr. Reese "could have put it inside of something, in an oven or up on a shelf or a bucket. He could have thrown it away two houses down, thrown it away in the yard." (IV R.T. 984-985.)

Officer Arzate could not address these possibilities because he was not actually with the K-9 in the apartment during the search, and therefore could not answer whether oven, bucket, or yard were searched.

Second, only Officer Ramirez would be able to answer specific questions about the K-9 that searched the apartment, such as its abilities and search history. As Mr. Reese argued to the court, if Officer Ramirez had been present, he would have testified that "his dog is a very good dog" and that his dog is "trained properly" and that he would "find a gun if there's a gun there." (III R.T. 624.) Officer Arzate, on the other hand, could not answer whether the dog needed an open space to search. He answered that it would "depend[] on the circumstances . . . [and that] the K-9 officer would be able to explain." (III R.T. 627.)

Recently, the United States Supreme Court stressed the importance of giving defendants the opportunity to ask about the specific training and skills of a K-9 dog that performed a search. In *Harris, supra,* 133 St. 1050, the Supreme Court held that when a K-9 alerts an officer to the presence of a contraband, that this alert may constitute probable cause for a more complete search. The Court also held that the defendant then "must have an opportunity to challenge such evidence of a dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses. The defendant, for example, may contest the adequacy of a certification or training program, perhaps asserting that its standards are too lax or its methods faulty. So too, the defendant may examine how the dog (or handler) performed in the assessments made in those settings." (*Id.* at pp. 1057-1058.)

Based on the reasoning in *Harris,* it is just as important for a defendant, like Mr. Reese, to be able to ask the K-9 handler about his skills and his K-9's reliability (i.e., skills, history of search, training) when the K-

9 does not actually find the contraband. These questions would assist the fact-finder to determine whether the contraband was not found because it did not exist in the first place, or because the K-9 was not skilled enough to find it and more likely hidden.

Mr. Reese argued to the court that if the K-9 handler had testified, then he would say that his dog was a "very good dog," and that his dog was "trained properly" and would find a gun if the gun were there. (III R.T. 624.) Mr. Reese also argued in his closing argument that if Officer Ramirez had testified, he would have said that his "dog would never miss finding a gun. This is what we do. We're trained to find a gun. My dog is not going to miss no gun. There was no gun. My dog would find that. We would make sure my dog finds this." (IV R.T. 977.) If Officer Ramirez had made these statements, then it is very likely that the jury would have found that Mr. Reese did not actually have a gun that night, because otherwise the K-9 would have found it.

Third, Officer Ramirez would have been able to answer general questions about how a K-9 performs a search. Officer Arzate admitted that he did not know "the particulars because [he had] not been trained specifically." (III R.T. 625.) While he claimed to know how the dogs generally worked, he could not answer Mr. Reese's specific questions. When Officer Arzate testified that a dog's senses could be overwhelmed by all the different scents in a house or apartment, Mr. Reese asked him how a bomb dog could search for a bomb in a crowded airport. (III R.T. 626.) Officer Arzate responded, "I believe they're trained in a different frequency than just a K9 dog for a gun." (III R.T. 626.) Mr. Reese also asked whether "it [had] to be an open space for the dog to find the gun?" (III R.T. 627.) Officer Arzate responded that it would "just depend[] on the circumstances . . . the K9 officer would be able to explain." (III R.T. 627.) If the jury had

heard testimony about how a K-9 dog generally searches for a gun, and training it receives, there is a reasonable possibility that it would have found that Mr. Reese did not possess a gun that evening, and therefore, the search for a gun was unsuccessful.

For these reasons, the Court of Appeal erred when it found that Mr. Reese did not show the materiality of Officer Ramirez's testimony.

B. Mr. Reese Satisfies The Other Requirements Of A Compulsory-Process Violation Claim

Mr. Reese also meets the first and second prongs of a compulsory-process violation claim: government misconduct and interference.

1. The Prosecution Misrepresented That It Would Call Another K-9 Expert And An Officer In The Presence Of Officer Ramirez

First, the prosecution's misrepresentation to the court that he would call another K-9 handler or expert, and that he would call another officer who was in the presence of Officer Ramirez, interfered with Mr. Reese's right to call Officer Ramirez for his defense. (III R.T. 362–366.)

Before the trial began, Mr. Reese argued that he would not receive a fair trial and would be prejudiced if Officer Ramirez could not testify. (III R.T. 362.) The prosecution countered that another K-9 handler or expert would testify about how "a dog look[s] for a gun," how a dog is trained, and the process generally works. (III R.T. 362.) He also stated he would call an officer who was present with Officer Ramirez. (III R.T. 364.) Based on this representation, the court did not compel Officer Ramirez's presence. (III R.T. 364.)

However, the prosecution did not call a K-9 expert or handler, and did not call an officer who was present during the search. (Cf. *People v.*

Ruthford (1975) 14 Cal.3d 399, 409-410, overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 545, fn. 7 [finding that prosecution's intentional or inadvertent failure to disclose details of a witnesses' inducement to the court was misconduct in part because it "forestalled further inquiry" by the court about the inducement].)

2. *The Trial Court Erroneously Denied Mr. Reese's Motion For A Continuance In Order For Officer Ramirez To Appear*

Second, the trial court erred when it denied Mr. Reese's request for a continuance. (IV R.T. 916–918.)

When a witness is unavailable, there is good cause to continue a case when the requesting party shows the following: " (1) the party seeking the delay has exercised due diligence in securing the attendance of the witness at trial by legal means, (2) the testimony of the witness is material, (3) the testimony is not merely cumulative, (4) the attendance of the witness can be obtained within a reasonable time, and (5) the facts about which the witness is expected to testify cannot otherwise be proven." (*Baustert v. Superior Court* (2005) 129 Cal.App.4th 1269, 1277.)

Mr. Reese met his burden on all five prongs. As to the first prong, Mr. Reese demonstrated due diligence in securing Officer Ramirez's presence because he subpoenaed Officer Ramirez. The court assumed that the witness was properly subpoenaed, and there was no reason to believe otherwise. (IV R.T. 915.) Furthermore, the prosecution had also subpoenaed Officer Ramirez on May 14 or 19, and Officer Ramirez still did not make himself available when the trial started. (IV R.T. 910-911.) He was on vacation, just as he had been during the first trial.[3] (Supp. R.T. 126;

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[3] While the prosecution told the Court that Officer Ramirez was not

III R.T. 362.)

As to the second, third, and fifth prongs, Officer Ramirez's testimony would have been material, not cumulative, and could not otherwise be proven, as explained above.

As to the fourth prong, Officer Ramirez's attendance was obtainable within a reasonable time. The prosecution rested its case on Thursday, June 13, and Mr. Reese requested a continuance to next Tuesday, June 18, when Officer Ramirez was available. (IV R.T. 908.) Furthermore, even before any witness testified in this case, the prosecutor informed the court on June 11 that Officer Ramirez was on vacation, but that he had prepared another K-9 expert to testify. (III R.T. 362.) Since the prosecutor did not actually call a K-9 expert, the court should have continued the trial until the following Tuesday so that Mr. Reese could call Officer Ramirez. (Cf. *Gaines v. Municipal Court* (1980) 101 Cal.App.3d 556, 560 ["We think a subpoenaed material witness' failure to appear for trial may constitute good cause under section 1382 for the continuance of a trial beyond its statutory period."].)

For all these reasons, the trial court abused its discretion when it denied Mr. Reese's request for a continuance, and the denial interfered with Mr. Reese's ability to call Officer Ramirez for his defense.

3. The Trial Court's Erroneously Denied Mr. Reese's Motion For A Body Attachment

Third, the trial court's erroneous denial of Mr. Reese's motion to issue a body attachment for Officer Ramirez interfered with his right to call

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available for the first trial because he was sick (III R.T. 362), in actuality, Officer Ramirez was not available during the first trial (as well as the retrial) because he was on vacation (Supp. R.T. 126).

Officer Ramirez.

On June 13, Mr. Reese requested that the court issue a body attachment for Officer Ramirez if he did not appear. (IV R.T. 906.) The court denied the request. (IV R.T. 915.)

The court was well aware of the purpose and effectiveness of body attachments; it had previously ordered them for the prosecution on Beatrice Reese, Fagasa Jackson, and Bruce Reese when they did not appear at a pretrial hearing on June 6. (I C.T. 138.)

A body attachment was required because Officer Ramirez did not obey the subpoena. The court's improper denial of this motion interfered with Mr. Reese's right to call Officer Ramirez for his defense.

C. The Compulsory-Process-Rights Violation Was Prejudicial

Lastly, Mr. Reese's inability to call Officer Ramirez was prejudicial under the *Chapman* "harmless beyond a reasonable doubt" standard. (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1759.)

Mr. Reese's conviction on all counts required a finding that Mr. Reese actually had a gun in his possession. The charges of possession of a firearm and assault with a firearm required possession of a gun. With respect to criminal threats charges, Mr. Reese's words to Ms. Jackson and to Ms. Reese were non-threatening without the gun.[4]

As Officer Ramirez's material and favorable testimony about his and his K-9's training and abilities, and testimony about the search would have created reasonable doubt as to whether Mr. Reese actually possessed a gun,

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[4] In Section V of this brief, Mr. Reese asserts that even if he used his gun, there is insufficient evidence of criminal threats because his words were inherently non-threatening.

the compulsory process violation was prejudicial. (See *supra* Section II.A.)

III. MR. REESE WAS DENIED HIS DUE PROCESS RIGHTS TO A FULL AND FAIR TRIAL AND TO PRESENT A COMPLETE DEFENSE

The Court of Appeal's finding that due process rights were not violated because Officer Ramirez's testimony would have been immaterial is erroneous. (Op. at 17.)

For the same reasons that Mr. Reese's compulsory-process rights were denied, his constitutional due process rights to a full and fair trial and to present a complete defense were also denied. (*Washington v. Texas* (1967) 388 U.S. 14, 19 [87 S.Ct. 1920, 18 L.Ed.2d 1019].)

Since Officer Ramirez's testimony would have been material and favorable, as explained in Section II.A and II.C, reversal is required.

IV. MR. REESE'S *SUMSTINE*[5] MOTION CONTAINED THE REQUIRED DECLARATIONS

The Court of Appeal's finding that Mr. Reese's *Sumstine* motion was properly denied is also erroneous.

First, contrary to the Court of Appeal's finding (Op. at 19), Mr. Reese's statements were not conclusory. He submitted a two-page sworn declaration that included the necessary phrase under *People v. Soto* (1996) 46 Cal.App.4th 1596: "upon pleading guilty[,] I did not understand or explicitly waive of each of my (*Boykin/Tahl*) rights in open court and on the record." (*Sic.*) (I C.T. 263.) He also declared that he "did not sign a written waiver of my constitutional rights," and that he "was not admonished nor advised and spoken properly of any waiver or giving up advise [*sic*] of my constitutional rights." (I C.T. 264.) He also gave the trial court a letter that showed that he tried to locate the records through the

Riverside Superior Court, but the court could not find the case under his information. (IV R.T. 1802-1803.)

Second, Mr. Reese was not required to declare that he would not have pleaded guilty had he known of his right because this statement is only required when there is "an imperfect advisement of rights." (*Soto, supra*, 46 Cal.App.4th at p. 160.) Mr. Reese declared that he was not advised of any of his *Boykin-Tahl* rights, and thus was not required to make this additional declaration. (See *People v. Stills* (1994) 29 Cal.App.4th 1766, 1771.)

Even though Mr. Reese made the necessary declarations and showed that he was unable to provide any more evidence to support his claim, the trial court erred by not holding an evidentiary hearing, or requiring the prosecution to submit rebuttal evidence. (I C.T. 207-214.) His sentence, which was improperly doubled, should be reversed, and this matter should be remanded.

V. THERE IS INSUFFICIENT EVIDENCE OF CRIMINAL THREATS

Lastly, the Court of Appeal erred when it found that Mr. Reese's conviction for criminal threats against Ms. Jackson and Ms. Reese was supported by sufficient evidence.

Based on the dicta set forth by this Court in *Bolin*, *supra,* 18 Cal.4th 297, even if the Court were to assume that Mr. Reese pointed a gun while he said "You disrespect me" to Ms. Jackson, and "Now you're going to learn to stay out of other people's business" to Ms. Reese, the statements are not criminal threats. As Mr. Reese was criminalized for protected speech, his First Amendment rights were violated. (*People v. Toledo*

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[5] *People v. Sumstine* (1984) 36 Cal.3d 909.

(2001) 26 Cal.4th 221, 233.)

In *Bolin*, this Court held that the crime of criminal threat under section 422 does not require an unconditional threat of death or great bodily injury. (*Bolin, supra,* 18 Cal.4th at p. 340). It disapproved the holding in *People v. Brown* (1993) 20 Cal.App.4th 1251, which had found that a defendant's threat that he would kill victims *if* they called the police was not a "threat" for purposes of section 422 because it was not "unconditional." (*Id.* at p. 1254.)

While discussing the *Brown* opinion, this Court explained the facts that formed the threat: "the defendant accosted two women approaching their apartment and made several menacing statements as he pointed a gun at the head of one of the women. When the other said they should call the police, the defendant said he would kill them if they did." (*Bolin, supra,* 18 Cal.4th at p. 377, citing *Brown, supra,* 20 Cal.App.4th at p. 1253.) While the *Bolin* court did not explain the "menacing statements" the defendant made while pointing the gun before he threatened to kill them, the *Brown* opinion provides the phrases: (1) "What are you looking at, bitch?" (2) "shut up" and (3) "he didn't like having Hispanic people there and that he was going to get us out of there." (*Brown, supra,* 20 Cal.App.4th at p. 1253.)

While the defendant in *Brown* made these three statements while using a gun against the two women, neither the *Brown* court nor this Court in *Bolin* found them to be criminal threats. The only statement that was a criminal threat was the defendant's last statement that if the women were to call the police, he would kill them. This Court could have characterized the prior statements as criminal threats, but instead labeled them as "menacing."

Similarly, in this case, even if the Court were to assume that Mr.

Reese pointed a gun at his girlfriend and mother, his statements do not rise to the level of criminal threats under the dicta set forth in *Bolin*. The statements, "You disrespect me" and "Now you're going to learn to stay out of other people's business" are similar to the statements to the menacing statements in *Brown*. This distinction prevents a slippery slope where a defendant can be charged with criminal threats anytime he makes a command or criticism while using a gun.

Therefore, the statements do not meet the required elements of a section 422 violation. (*In re George T.* (2004) 33 Cal.4th, 620, 630.)

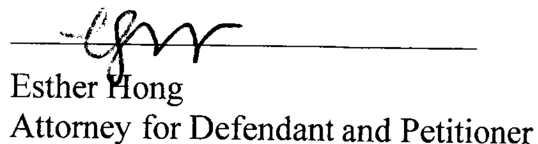
As there is insufficient evidence of criminal threats, the court violated Mr. Reese's First Amendment right to speech when he was punished for noncriminal speech, and his conviction or criminal threats should be reversed. (*People v. Benitez* (2001) 105 Cal.Rptr.2d 242, 249.)

CONCLUSION

For the reasons stated, the petition for review should be granted.

Respectfully Submitted,

Dated: October 27, 2015

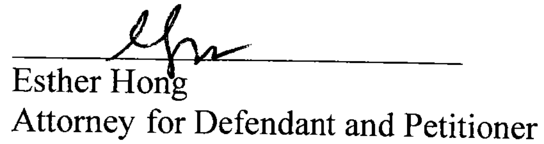


Esther Hong
Attorney for Defendant and Petitioner

CERTIFICATION OF WORD COUNT

I certify under penalty of perjury under the laws of the State of California that this brief contains 8,341 words as calculated by the Microsoft Word software in which it was written.

Dated: October 27, 2015



Esther Hong
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APPENDIX

Opinion of Court of Appeal

Filed 9/17/15

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

COURT OF APPEAL – SECOND DIST.
FILED
Sep 17, 2015
JOSEPH A. LANE, Clerk
Sina Lui Deputy Clerk

THE PEOPLE, Plaintiff and Respondent, v. KEITH RYAN REESE, Defendant and Appellant.	B253610 (Los Angeles County Super. Ct. No. TA125272)

APPEAL from a judgment of the Superior Court of Los Angeles County. John T. Doyle, Judge. Affirmed.

Esther K. Hong, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of parts II, III and IV.

Defendant and appellant Keith Ryan Reese was convicted of criminal threats, assault with a firearm, and being a felon in possession of a gun. He represented himself at a trial which ended in a hung jury. Prior to the retrial, Reese moved for a transcript of the first trial, and the trial court provided Reese with transcripts of the witnesses' testimony from the first trial. When Reese objected that he had not been provided with transcripts of the opening statements and closing arguments from the first trial, the trial court rejected his objection. At the conclusion of his second trial, a jury convicted Reese as charged. He contends he should have been provided with a transcript of opening statements and closing arguments. He also contends he was denied his right to compulsory process, that the trial court erred in denying his motion to dismiss a prior conviction and that his criminal threats convictions are not supported by insufficient evidence. We affirm.

FACTS

The Crimes

On October 4, 2012, Reese's mother, Beatrice Reese, and her brother, Bruce Reese, were at Beatrice's apartment with Fagasa Jackson and her baby daughter by Reese. At about 10:00 p.m., Reese arrived at the apartment and was upset because Beatrice had not picked him up from a friend's house. When Jackson became upset because Reese was supposed to be with her, and had not called or sent a text message, Beatrice began "giving [Reese] a hard time." At some point, Beatrice went out to the front of the apartment building and called 911.

Several Los Angeles Police Department (LAPD) officers responded to Beatrice's home, and detained and handcuffed Reese. Officer Manuel Azarte arrived at the property after Reese had already been handcuffed. Officer Azarte interviewed Beatrice, Bruce, and Jackson at the scene. The evidence regarding Officer Azarte's interviews showed the following facts: Beatrice and Reese were arguing when he pulled out a handgun, pointed it at her face, and told her something to the effect, "You're going to learn to stay out of other people's business." Reese had his finger on the trigger when he pointed the gun at

her, and was afraid. Beatrice did not say anything else to Reese because she did not want to incite him to further action.

Reese then pointed the gun at Jackson and said, "You disrespect me." Jackson began to say something to the effect, "Please don't do it." Beatrice was able to walk out of the apartment when Reese was engaged with Jackson. Once outside, Beatrice called 911.[1]

Officer Azarte showed Beatrice his gun and asked whether Reese's gun was like the officer's gun. Beatrice said no, that Reese's gun had a cylinder, unlike the officer's gun. All three witnesses — Beatrice, Bruce, and Jackson — were consistent that Reese had pulled out a gun and had pointed it first at Beatrice and then at Jackson. As Beatrice was relating the events to the officer, she seemed scared, but also in disbelief and at other times angry, as though she could not believe what had happened.

Officer Azarte and his partner searched the apartment, but did not find a gun. Officer Azarte's partner found a leather holster between a recliner and the wall in the living room area. A K9 officer, LAPD Officer Ramirez, responded to the apartment with his dog and also searched the apartment, but he, too, did not find a gun. The officers searched the one-bedroom apartment for 20 to 30 minutes.

The Criminal Case

In November 2012, the People filed an information charging Reese with making a criminal threat against Beatrice and Jackson (counts 1 & 2; Pen. Code, § 422, subd. (a)),[2] and possession of a firearm by a felon (count 3; § 29800, subd. (a)(1)). Further, the information alleged that Reese personally used a firearm in the commission of the two criminal threats counts (§ 12022.5, subd. (a)) and that he had multiple prior strike convictions within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i),

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1 The prosecution played a recording of the 911 call for the jury. During the call, Beatrice told the operator that her son had pulled a gun on her, and that he was still inside the house with his girlfriend. In talking to the 911 operator, Beatrice stated: "I just don't want him to shoot that girl while he in there."

2 Further undesignated statutory references are to the Penal Code.

1170.12, subds. (a)-(d)). In December 2012, the People filed an amended information re-alleging the original charges, and also alleging that Reese had two prior strike convictions: assault with a firearm (§ 245, subd. (a)(2)) in Los Angeles County in 1995 and an assault with a firearm (§ 245, subd. (a)(2)) in Riverside County in 1989.

In his first trial, Reese's request to represent himself was granted. Before the beginning of testimony, the trial court granted the prosecution's s motion to amend the information to add two counts of assault with a firearm (counts 4 & 5; § 245, subd. (a)(2)). On April 11, 2013, the court declared a mistrial after the jury could not reach any verdicts.[3]

After the first trial, the prosecution filed an amended information which charged Reese with the same five counts discussed above. A personal firearm use enhancement was alleged as to the criminal threats and assault with a firearm counts. (§ 120225, subd. (a).) The amended information alleged that Reese suffered a prior conviction for assault with a deadly weapon in Riverside County in 1988 which qualified as a strike under the Three Strikes Law, and as a prior serious felony conviction under section 667, subdivision (a)(1).

At a second trial in June 2013, the prosecution presented evidence establishing the facts summarized above. The prosecutor called Beatrice, Bruce, and Jackson and questioned them about what they told Officer Arzate on the night of the events at Beatrice's house. All three denied telling the officer that Reese had a gun, made any threats, and that they had been in fear. Last, the prosecutor called Officer Azarte who testified to their statements at the scene. Reese did not present any defense evidence; he argued to the jurors that they should believe the in-court testimony and not Officer Arzate's information regarding what the witnesses had reported to him. The jury returned verdicts finding Reese guilty as charged and finding the firearm allegations to be true. The trial court thereafter found the prior conviction allegation true.

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3 The record indicates that jury voted nine for guilty and three for not guilty on each of the counts.

The trial court sentenced Reese to a total aggregate term of 17 years in state prison as follows: four years for his assault with a firearm conviction as alleged in count 4, doubled to eight years for the prior strike conviction, plus four years for the firearm enhancement, plus five years for the prior serious felony allegation. The court imposed concurrent prison terms on the remaining counts.[4]

Reese filed a timely notice of appeal.

DISCUSSION

I. The Trial Court Did Not Violate Reese's Right to Equal Protection by Denying Reese the Transcript of Opening Statements and Closing Arguments.

Reese was provided with the transcript of every witness who testified at his prior mistrial, but his request for a transcript of opening statements and closing argument was denied. Reese contends this violated his constitutional right to equal protection of the law. We disagree.

Pertinent Background

The court declared a mistrial in the first trial on April 11, 2013. On April 26, 2013, Reese filed a motion for a "complete record of trial transcripts" from the first trial, which the court granted. On June 6, 2013, he apparently received transcripts of the trial testimony only. On June 10, 2013, the day his second trial commenced, Reese argued that he had not received full trial transcripts and was "required to have" opening statements and closing arguments "so [he] [would not] make the same mistakes." The court denied the request, stating: "When you represent yourself, the court cannot

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4 Because the criminal threats convictions were based on the same acts as the assault with a deadly weapon charges, the sentence on those counts should have been imposed and stayed pursuant to section 654. The trial court must impose and stay execution of sentence on convictions for which multiple punishment is prohibited. (*People v. Pearson* (1986) 42 Cal.3d 352, 359-360.) The sentence imposed is unauthorized, so we are at liberty to correct it now. (*People v. Scott* (1994) 9 Cal.4th 331, 354-355.) Accordingly, the abstract of judgment is ordered modified to reflect counts one and two are stayed.

give you any favors. You will be treated like a lawyer will be. That's why people shouldn't represent themselves. The motion to request the opening statement and closing arguments is denied. That was denied previously. That is not evidence."

Later that same day, defendant renewed his motion, and the court again denied it, saying: "That's not part of the trial transcript which will be admissible in front of the jury. Prior voir dire, opening statements and closing argument is not part of the transcript for another trial." Reese argued: "And I need those transcripts to not make the same mistakes because, you know, self-represented defendant is being taken advantage of." The court replied: "No, see, when you--when you decide to go pro per, you are a lawyer. Nobody's taking advantage of you except you put yourself in position where you don't know what you're doing." Reese renewed his request one more time, and once again the court denied it. It explained: "Well, as long as you have the testimony, that's what's important. The--the jury selection, closing arguments, and all that is--you don't need for this trial. I'm denying that."

Pertinent Law

As noted, Reese contends the denial of the transcript of opening statements and closing arguments violated his equal protection rights under the federal and state Constitutions. Because the facts are not disputed, we independently review whether a constitutional violation has occurred. (*People v. Uribe* (2011) 199 Cal.App.4th 836, 856-857.)

We begin with *Britt v. North Carolina* (1971) 404 U.S. 226, 227 (*Britt*), in which the United States Supreme Court recognized the fundamental and familiar principle that "the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." The court cited cases establishing that principle means "there can be no doubt the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal." (*Ibid.*, fn. 1.) The "prior proceedings" at issue in *Britt* were a prior trial that had ended in a mistrial, and the lower court had denied the defendant's request for a transcript of the mistrial as he was

preparing for the new trial. (*Id.* at p. 226.) *Britt* explained why, "in the narrow circumstances of this case, no violation of [equal protection] has been shown." (*Id.* at p. 227.)

Britt framed the equal protection issue this way: "The question here is whether the state court properly determined that the transcript requested in this case was not needed for an effective defense." (*Britt, supra,* 404 U.S. at p. 227.) The court recited the two factors that are relevant to the determination of need: "(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript." (*Id.* at p. 228, fn. omitted.) As to the first factor, *Britt* observed: "Our cases have consistently recognized the value to a defendant of a transcript of prior proceedings, without requiring a showing of need tailored to the facts of the particular case. . . . [E]ven in the absence of specific allegations it can ordinarily be assumed that a transcript of a prior mistrial would be valuable to the defendant in at least two ways: as a discovery device in preparation for trial, and as a tool at the trial itself for the impeachment of prosecution witnesses." (*Ibid.*, fn. omitted.) *Britt*'s references to discovery and impeachment suggest the equal protection question related to defendant's right to obtain a transcript of the *testimony*.

Based on the second factor, the *Britt* court found, even though defendant was deprived of the discovery and impeachment opportunities a transcript provides, there was no violation of defendant's equal protection rights, because there was an adequate alternative to a transcript. The court found defendant's equal protection rights were adequately protected because the trials took place in a small town, the same court reporter worked on both trials, the court reporter was a "good friend of all the local lawyers," and the reporter would have read back his notes of the mistrial at any time if counsel had informally requested it. (*Britt, supra,* 404 U.S. at p. 229.)

Our Supreme Court took up this issue in *Shuford v. Superior Court* (1974) 11 Cal.3d 903 (*Shuford*), another case in which the indigent defendant sought and was denied a transcript of a prior mistrial. The prosecution had a transcript of defense witnesses' testimony at the prior trial. The defendant moved for a full transcript and argued "that a study of a transcript of the entire proceedings was necessary for a proper preparation of his defense on the retrial." (*Id.* at p. 905.) In support of his motion, defendant provided an affidavit of the Chief Deputy Public Defender of Orange County, declaring in pertinent part that: "[I]t has been the practice of the public defender's office, in the case of defendants represented by that office in which a jury has not been able to reach a verdict in the first trial, to obtain a transcript of the evidence of the first trial, or relevant portions thereof, before commencing the second trial whenever the attorney believed it would be helpful in his representation of the defendant. . . ." (*Id.* at pp. 905-906.)

Relying on *Britt* and other United States Supreme Court precedent, *Shuford* held that the indigent defendant whose trial ends in a hung jury is entitled to a transcript at government expense to help the defendant prepare for a new trial. (*Shuford, supra*, 11 Cal.3d at p. 906.) The court issued a writ of prohibition directing the lower court to vacate its order denying the defendant's motion for a transcript. (*Id.* at p. 907.) The court did *not* decide whether defendant was entitled to the complete transcript he requested, or only a portion of the transcript, leaving that question to be decided by the trial court. (*Ibid.*)

Shuford quoted with approval from *Mayer v. City of Chicago* (1971) 404 U.S. 189 (*Mayer*), a case involving an indigent defendant's right to a subsidized transcript *on direct appeal*: "'A "record of sufficient completeness" does not translate automatically into a complete verbatim transcript. . . .'" (*Shuford, supra*, 11 Cal.3d at p. 907, quoting *Mayer*, at p. 194.) *Shuford* further quoted with approval from *Mayer*: "'We emphasize, however, that the State must provide a full verbatim record where that is necessary to assure the indigent as effective an appeal as would be available to the defendant with resources to pay his own way. Moreover, where the grounds of appeal, as in this case,

make out a colorable need for a complete transcript, the burden is on the State to show that only a portion of the transcript or an "alternative" will suffice for an effective appeal on those grounds.'" (*Shuford*, at p. 907, quoting *Mayer*, at pp. 194-195.)

There was a "colorable need" for a complete transcript in *Mayer* because defendant wished to assert on appeal that insufficient evidence supported the conviction, and prosecutorial misconduct. (*Mayer*, *supra*, 404 U.S. at p. 190.) A defendant ordinarily would need the entire transcript of testimony to effectively argue insufficient evidence supported the verdict. And a defendant ordinarily would need a transcript of all proceedings during which the prosecutor allegedly committed misconduct. The need for a transcript for appeal is analogous, though not the same as the need for a transcript of a mistrial. *Shuford*'s reliance on *Mayer* tells us that, like a defendant seeking to appeal a conviction, a defendant facing a new trial is entitled to as much of the transcript as is necessary to assure an effective defense on retrial, and when defendant has made a "colorable" showing of a need for a complete transcript before retrial, the burden is on the prosecution to show a portion of the transcript is sufficient to ensure a fair trial.

Not long after *Shuford*, our Supreme Court revisited this issue in *People v. Hosner* (1975) 15 Cal.3d 60 (*Hosner*). As in *Britt* and *Shuford*, the indigent defendant in *Hosner* was facing a second trial after a mistrial. Defendant moved for a transcript of the mistrial, and the trial court denied the motion. (*Hosner*, at p. 62.) The defendant's motion in *Hosner* argued that he needed the transcript of the first trial because it was "necessary for counsel 'to properly impeach, or to properly cross-examine the eight or nine witnesses who testified at the first trial. The testimony differed in some cases greatly, and in some cases less than greatly from the information provided to the Grand Jury, the police department, and in all the preliminary hearings prior to the trial.' Defendant also made an independent request for whatever part of the record of the prior trial had been transcribed for the prosecution." (*Hosner*, at p. 67.) The prosecution agreed to give defendant the portion of testimony in their possession from the first trial, which was only a small part of defendant's testimony. (*Id.* at p. 68.)

In *Hosner*, the Supreme Court answered "[t]he question not presented in *Shuford* [which] is now before us: what showing of particularized need, if any, must an indigent defendant make in order to become entitled to a free transcript of prior proceedings." (*Hosner*, *supra*, 15 Cal.3d at p. 66.) It held "an indigent defendant in a criminal trial is *presumed* to have a particularized need for a transcript of prior proceedings, just as he is *presumed*, if he needs a transcript at all, to need nothing less than a complete transcript." (*Ibid.*) The court must grant the defendant's motion unless the prosecution rebuts the presumption of defendant's "need for the transcript and of the unavailability of adequate alternative devices." (*Ibid.*) To the extent there is a dispute about whether a full transcript is necessary, the prosecution also has the burden of showing that the defendant would have an effective defense with anything less than a complete transcript. (*Id.* at p. 64.)

Under *Hosner*, error in failing to provide a complete transcript requires automatic reversal. (*Hosner*, *supra*, 15 Cal.3d at p. 70.) The court held that "[t]he denial of the transcript does not merely taint some specific items of evidence, leaving other items which might of their own force provide overwhelming evidence of guilt beyond a reasonable doubt. Rather, in the manner of the denial of the assistance of counsel, the denial of a transcript of a former trial infects all the evidence offered at the latter trial, for there is no way of knowing to what extent adroit counsel assisted by the transcript to which the defendant was entitled might have been able to impeach or rebut any given item of evidence. Even if an appellate court were to undertake the extraordinary burden of reviewing the records of both trials, the court would be able only to hypothesize what use at the latter trial could have been made of the transcript of the former trial." (*Ibid.*) The court recognized that reviewing courts often employ some speculation when considering how an average jury would have decided a case absent error, but the denial of a transcript introduced "an entirely new level of compound conjecture." (*Ibid.*) The reviewing court would have to first speculate about what evidence the defendant might have impeached or rebutted, and then speculate about how the jury would have reacted to

those speculative efforts. (*Ibid.*) The court characterized this as "speculation running riot." (*Ibid.*) Thus, a per se rule of prejudice was appropriate.

Reese in this case argues the many references in *Hosner* to his presumed right to a "full" and "complete" transcript establish that he has a presumptive right to opening statements and closing arguments. We are not persuaded the court erred in this case by providing a transcript of all the evidence at the mistrial, but not opening statements and closing arguments. The many references in *Hosner* to the right to a "full" and "complete" transcript must be understood in the context of the facts and issues that were before the court. The only part of the transcript given to the defense in *Hosner* was a small part of defendant's own testimony at the first trial, which obviously had no impeachment or rebuttal value to the defense whatsoever. In stark contrast, Reese in this case received *all* of the testimony of *all* of the witnesses.

"'"It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court. An opinion is not authority for propositions not considered."' [Citations.] 'An appellate decision is not authority for everything said in the court's opinion but only "for the points actually involved and actually decided."'" (*People v. Knoller* (2007) 41 Cal.4th 139, 154-155.)

The facts before the court in *Hosner* were that defendant was given only a small part of his own testimony at the mistrial, and none of the prosecution witnesses' testimony. The facts in the previous opinions that were discussed in *Hosner* similarly involved the denial of the transcript of testimony. In *Britt*, the defendant was not given *any part* of the transcript of the mistrial, yet the high court found no equal protection violation because the same court reporter transcribed the second trial and was available to read back his notes from the first trial. In *Shuford*, it is not clear from the opinion whether the prosecution provided to defendant a copy of the transcript of the defense testimony that the prosecution had in its possession, but it is clear defendant was *not* given the transcript of the testimony of prosecution witnesses. Yet *Shuford* did not hold the defense was entitled to a complete transcript of the mistrial, leaving to the trial court to decide on remand whether defendant was entitled to only a portion of the transcript.

The equal protection issue in each of these opinions focused on a defendant's right to a complete transcript of all the testimony in order to effectively rebut the prosecution case and impeach prosecution witnesses.

Reese asks us to expand the limits of the principles set forth in *Britt*, *Shuford*, and *Hosner* to require that the state provide transcripts of the opening statements and closing arguments in every case. We decline to do so. *Britt*, the seminal case on this issue, tells us "the outer limits" of the principle that the state must, as a matter of equal protection, provide indigent defendants with the basic tools of an adequate defense "are not clear." (*Britt*, *supra*, 404 U.S. at p. 227.) Similarly, the *Hosner* court expressly reserved decision on whether the per se rule of reversal would apply to an erroneous denial of a transcript of "some other prior proceeding [citation], such as a hearing on a motion to suppress [citation], a hearing on the voluntariness of a confession [citation], or a preliminary hearing which resulted in the defendant's discharge from custody." (*Hosner*, *supra*, 15 Cal.3d at p. 71, fn. 7.)

Further, we do not believe the *Hosner* per se rule of reversal was intended to apply in this case, where defendant received a transcript of all the testimony, and explained his request for the opening statements and closing arguments only by saying he needed them "to not make the same mistakes." Defendant was not required to specify how the transcript of testimony might aid his defense, because *Hosner* and the four decades of high court precedent establish without question his equal protection right to a transcript of the testimony. But the defendant who requests other parts of the transcript without specifying why it is necessary to an effective defense may not invoke the *Hosner* rule of automatic reversal.

The dissent advocates for the defense (without citation to any supporting facts in the record in this case) that the transcript of opening statements and closing arguments may be valuable "as a tool to help identify the prosecution's key arguments, identify potential weaknesses in its case, assess the relative weight the prosecution would place on items of evidence, and better determine what appellant would need to refute them." (Dis. opn. *post,* at pp. 4-5.) Thus, the dissent argues, it is logical to assume from *Hosner*

that a defendant facing retrial needs not only witness testimony but also the statements of counsel. We do not believe it is logical to presume from *Hosner* a violation of equal protection mandating reversal where defendant made no showing in the trial court that the statements of counsel had any value in preparing for the retrial in this case.

The dissent observes that it may not be said categorically that a transcript is "complete" without the statements of counsel. (Dis. opn. *post,* at p. 3.) We agree there is no categorical rule that an indigent defendant after mistrial is only entitled to a transcript of testimony in every case. There may be a case where something more than witness testimony is required to prepare an adequate defense on retrial. On the other hand, we are not persuaded that *Hosner* establishes a categorical rule that the transcript of counsel's statements must be provided after *every* mistrial.[5]

We recognize that a majority of a panel of the Ninth Circuit Court of Appeals in *Kennedy v. Lockyer* (9th Cir. 2004) 379 F.3d 1041 (*Kennedy*), rejected the argument that *Britt* requires the state to provide an indigent defendant only a transcript of testimony of a mistrial, and not other proceedings. (*Kennedy*, at pp. 1046-1047, quoting *Britt, supra,* 404 U.S. at p. 227.) After a mistrial in California superior court, Kennedy, an indigent defendant, moved for a complete trial transcript to prepare for his retrial, including opening statements, closing arguments and other proceedings. (*Kennedy*, at p. 1044.) Kennedy received only a transcript of the witnesses' testimony. (*Id.* at p. 1045.) The California Court of Appeal affirmed Kennedy's conviction, and our Supreme Court denied review. Kennedy filed a habeas corpus petition in federal court, which the Ninth Circuit held should have been granted. (*Id.* at pp. 1046, 1057.)

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5 Perhaps there should be a uniform rule requiring the state to provide an indigent defendant with the transcript of opening statements, closing arguments, and other proceedings, in addition to the testimony, as a matter of good policy and procedure. However, *Hosner* does not establish that rule as constitutionally required after every mistrial.

Of course, decisions of intermediate federal courts are not binding on us, even on matters of federal constitutional law. (*Raven v. Deukmejian* (1990) 52 Cal.3d 336, 352.) On the other hand, federal opinions are often instructive. Having carefully considered *Kennedy*, we find the dissent to be far more instructive than the majority. We agree with the dissent that the majority in *Kennedy* erred in finding the denial of a transcript of parts of the mistrial that might be *useful* is the same as denying a transcript of that which is *necessary* to an effective defense. (See, e.g., *Kennedy, supra*, 379 F.3d at pp. 1059, 1061, fn. omitted (dis. opn. of O'Scannlain, J.) ["The majority cites no Supreme Court case that extends *Britt* beyond a requirement that a transcript of all *testimonial* evidence adduced in prior proceedings be made available to indigent defendants; it finds its clearly established Supreme Court precedent not in the *U.S. Reports*, but in *Black's Law Dictionary*. . . . At bottom, the majority offers only a thinly-reasoned justification to support its extension of precedent beyond that clearly established by the Supreme Court."].)

And, while we do not know why our Supreme Court denied review of Kennedy's appeal, we note that the opinion of the lower appellate court extensively explained why *Hosner* did not mandate reversal where the defendant received a transcript of the testimony but no other proceedings. We would expect our Supreme Court ordinarily would review a decision that resulted in a deprivation of an indigent prisoner's right to equal protection. (See *Kennedy, supra*, 379 F.3d at p. 1069 (dis. opn. of O'Scannlain, J.) ["Notwithstanding the eminent reasonableness of their colleagues' analysis, two judges today inform seven others—a state trial judge, three state appellate judges, a federal magistrate judge, a federal district court judge, and a federal appellate judge (and that's not to mention the seven Justices of the California Supreme Court who summarily denied Kennedy's state petition for review)—that their understanding of the law is contrary to clearly established Supreme Court precedent."].)

We find it significant that the majority in *Kennedy* held a harmless error analysis applies where a defendant is provided the transcript of testimony but not of other proceedings. (*Kennedy, supra*, 379 F.3d at p. 1053.) *Hosner*, on the other hand, tells us a

per se rule of prejudice applies, mandating reversal, when a defendant's equal protection rights are violated by the denial of the complete transcript. We do not believe the *Hosner* court intended to apply a per se rule of reversal where a defendant received a full and complete transcript of the testimony in the mistrial, and defendant's request for the statements of counsel does not specify why they are necessary to an effective defense.

Recent decisions of the United States and California Supreme Courts recognize that errors requiring automatic reversal—structural error—are the exception rather than the rule. As our high court recently explained in *People v. Anzalone* (2013) 56 Cal.4th 545, errors not subject to the California constitutional harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, are those that """regardless of the evidence, may result in a 'miscarriage of justice' because they operate to deny a criminal defendant the constitutionally required 'orderly legal procedure' . . . ."' [I]t will be the rare case where a constitutional violation will not be subject to harmless error analysis." (*Anzalone*, at pp. 553-554; see also *Neder v. United States* (1999) 527 U.S. 1, 8-9; *People v. Mil* (2012) 53 Cal.4th 400, 410.)

This simply is not such a rare case. We find no violation of equal protection in the trial court's decision to deny a transcript of opening statements and closing arguments.

We do not intend to suggest we are free to conduct a harmless error review in a case governed by *Hosner*. Plainly, if there is *Hosner* error, reversal is mandated. We hold that there was no *Hosner* error in this case, because defendant was provided the transcript of all the testimony and did not demonstrate why he needed the opening statements and closing arguments.

II. There Was No Denial of Reese's Sixth Amendment Right to Compulsory Process

Reese contends all of his convictions must be reversed because he was denied his Sixth Amendment right to compulsory process. He claims the prosecutor represented he would secure Officer Ramirez's presence at court and failed to do so. Further, he claims that the trial court improperly denied his requests for a body attachment and continuance. We find no error.

Just before opening statements, the trial court asked Reese to disclose to the prosecutor the name of any witnesses that he intended to call at trial. Reese indicated he did not have that information, and noted further that the prosecutor already had the contact information on the K-9 handler, Officer Ramirez, whom Reese expected to call as a witness. When the prosecutor informed Reese that the K-9 handler was on vacation, Reese said he needed the dog handler to testify that the apartment he searched was small and there was nowhere to hide a gun. The court indicated that Reese could call his mother or other witnesses to testify about the size of the apartment. Later in trial, just before Reese was to present his defense, he moved for a body attachment for Officer Ramirez. At the same time, Reese moved to continue the trial for five days until the officer returned from vacation, and, in the event his requests were denied, for a mistrial. The court found the testimony of Officer Ramirez was cumulative of Officer Azarte, who testified that he searched the apartment and found no gun. The trial court then denied all of Reese's motions.

Under the "compulsory process" clauses of the federal and state constitutions, a defendant has a constitutional right to compel the testimony of a witness who has evidence favorable to the defense. (*People v. Jacinto* (2010) 49 Cal.4th 263, 268-269.) To prevail on a claim that the right to compulsory process was violated, a defendant must establish that the prosecution engaged in conduct that was entirely unnecessary to the proper performance of its duties, that the conduct was a substantial cause of the loss of the witness's testimony, and that the testimony would have been material and favorable to the defense. (*In re Martin* (1987) 44 Cal.3d 1, 31-32.) When reviewing Reese's claim that his compulsory process rights were violated, we use the standard generally applied to issues involving constitutional rights. That is, we defer to the trial court's factual findings where they are supported by substantial evidence, and independently review the historical facts to determine whether a constitutional violation occurred. (See *People v. Cromer* (2001) 24 Cal.4th 889, 894, 900-901; *People v. Seijas* (2005) 36 Cal.4th 291, 304.)

As regards the right to a mid-trial continuance, our Supreme Court has held: "A motion for continuance should be granted only on a showing of good cause. . . . The trial court has substantial discretion in ruling on midtrial motions to continue a case, and appellate challenges to a trial court's denial of such a motion are rarely successful. [Citations.]" (*People v. Seaton* (2001) 26 Cal.4th 598, 660.) Further: "When a continuance is sought to secure the attendance of a witness, the defendant must establish 'he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven.' [Citation.] The court considers "'not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.'" [Citation.] A trial court's denial of a motion for continuance is reviewed for abuse of discretion. [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037; accord, *People v. Doolin* (2009) 45 Cal.4th 390, 450.)

We find no violation of compulsory process because Reese has not demonstrated that Officer Ramirez's testimony would have been material and favorable to the defense. (*In re Martin, supra,* 44 Cal.3d at p. 32.) Multiple witnesses testified that no gun was found in Beatrice's apartment. Indeed, that fact is undisputed. Reese had available to him multiple witnesses to testify to the size of the apartment. For similar reasons, we find no abuse of discretion in denying the midtrial request for continuance. Again, Officer Ramirez's testimony was undoubtedly cumulative of Officer Azarte and the other witnesses available to Reese. For all of these reasons, we also reject Reese's constitutional argument that his right to due process — a fair trial — was violated by not awaiting Officer Ramirez's testimony.

III. The *Sumstine*[6] Motion

Reese contends all of his convictions must be reversed because the trial court erred in denying his *Sumstine* motion. Again, we find no error.

As noted at the outset of this opinion, the amended information alleged that Reese was previously convicted of assault with a deadly weapon in 1988 in Riverside County. After the jury's verdicts, a bifurcated court trial ensued on the prior conviction. The trial court found the prior conviction to be true and that it qualified as a strike pursuant to the Three Strikes law.[7] The evidence supporting the trial court's finding included a copy of an abstract of judgment reflecting that Reese had pleaded guilty to the offense of assault with a deadly weapon in 1988.

Just prior to sentencing, Reese filed a *Sumstine* motion in which he requested an order "striking [his] prior strike conviction" on the ground that he had not been properly advised of his constitutional trial rights before he entered his plea in 1988. Reese supported his motion with a personal declaration denying that he had been advised of his constitutional trial rights. The trial court heard argument on the motion. At that time, Reese offered a letter from the Riverside County Superior Court which indicated that after a search of their records, they could not find any record of his case. At the end of the hearing, the court denied Reese's *Sumstine* motion.

In *Sumstine*, the Supreme Court held that a defendant may collaterally attack the validity of a prior felony conviction entered pursuant to a plea if he was not advised of his constitutional *Boykin-Tahl* rights at the time of the plea. (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122 (*Boykin-Tahl*).) The Supreme Court has summarized the *Sumstine* procedure as follows: "When a defendant makes sufficient allegations that his conviction, by plea, in the prior felony proceedings was obtained in

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6 *People v. Sumstine* (1984) 36 Cal.3d 909, 918-919 (*Sumstine*).

7 We note that, during trial, in front of the jury, Reese stipulated that he had suffered the prior felony conviction. Reese agreed during trial that the stipulation would be offered to the jury for purposes of a foundational element — a prior felony conviction — as to the firearm possession by a convicted felon count.

violation of his constitutional *Boykin-Tahl* rights, the trial court must hold an evidentiary hearing. At the hearing, the prosecution bears the initial burden of producing evidence that the defendant did indeed suffer the conviction. The defendant must then produce evidence to demonstrate his *Boykin-Tahl* rights were infringed. The prosecution then has the right to rebuttal, at which point reliance on a silent record will not be sufficient." (*People v. Allen* (1999) 21 Cal.4th 424, 435.)

We find no error here because Reese's *Sumstine* motion did not contain sufficient allegations that his conviction was obtained in violation of his constitutional *Boykin-Tahl* rights, and did not contain sufficient allegations that he would not have pleaded guilty had he received the advisements which he claims he did not. Even generously construed, the *Sumstine* motion made no more showing than a conclusory claim of inadequate *Boykin-Tahl* advisements, without an explanation of the precise manner in which they failed to live up to legal requirements. Such vague and conclusory allegations do not warrant relief under *Sumstine*. (*Sumstine, supra,* 36 Cal.3d at p. 924; *People v. Soto* (1996) 46 Cal.App.4th 1596, 1601 (*Soto*).) More importantly, Reese did not declare that he would not have pleaded guilty had he known of his *Boykin-Tahl* rights. (See *Soto,* at pp. 1605-1606.) Indeed, at the hearing in the trial court, Reese took the tactic of arguing that he had never actually been convicted. This is more of a sufficiency of the evidence issue than a *Sumstine* issue. We find no error.

IV. Substantial Evidence Supports the Criminal Threats Counts

Reese contends the evidence is insufficient to support his convictions for making criminal threats as alleged in counts 1 and 2. We disagree.

In reviewing a claim of insufficient evidence, an appellate court must examine the record in the light most favorable to the judgment, and determine whether it contains evidence that is reasonable, credible, and of solid value that any rational trier of fact could find each element of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Staten* (2000) 24 Cal.4th 434, 460; *People v. Bolin* (1998) 18 Cal.4th 297, 331 (*Bolin*).) A reviewing court's function is not to resolve credibility issues or evidentiary conflicts. (*People v. Zamudio* (2008) 43 Cal.4th 327,

357.) When the trial evidence "reasonably justify the jury's finding as to each element of the offense, the judgment may not be overturned when the circumstances might also reasonably support a contrary finding." (*People v. Lewis* (2001) 25 Cal.4th 610, 643-644). The testimony of a single witness, provided that it is not inherently incredible or physically impossible, is sufficient to support a verdict. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Two statements by Reese are at issue here. First, his statement to Beatrice: "You're going to learn to stay out of other people's business." Second, his statement to Jackson: "You disrespect me." The issue presented by Reese is whether either statement conveyed a gravity of purpose and immediate prospect of being carried out. (*People v. Bolin, supra,* 18 Cal.4th 297, 339.) The Supreme Court has held that, in determining whether a particular statement will support a conviction for making a criminal threat, a statement that is ambiguous on its face "may nonetheless be found to be a criminal threat if the surrounding circumstances clarify the communication's meaning." (*In re George T.* (2004) 33 Cal.4th 620, 635.) Further, the Supreme Court has held that "prosecution under section 422 does not require [proof of] an *unconditional* threat of death or great bodily injury." (*Bolin, supra*, 18 Cal.4th at p. 338, fn. omitted, italics added.) Thus, a "conditional threat" is a criminal threat when its context "reasonably conveys to the victim that [it is] intended . . . ." (*People v. Brooks* (1994) 26 Cal.App.4th 142, 149.)

The record supports Reese's criminal threats conviction as to Beatrice. The trial evidence showed that, while Reese was pointing a gun at his mother's face, he stated, "You're going to learn to stay out of other people's business." The surrounding circumstances clarify that Reese was telling his mother that he was going to shoot her for getting involved in his private affairs. The same may be said with respect to Reese's criminal threat conviction as to Jackson. The evidence showed that, while Reese was pointing a gun at Jackson, he stated, "You disrespect me." The surrounding circumstances clarify that Reese was telling his girlfriend that he was going to shoot her for arguing with him. Reese's use of a gun gave meaning to the words and conveyed the

seriousness of the threat, making it reasonable for Beatrice and Jackson to perceive a conveyed threat.

To defeat this conclusion, Reese argues the jury unreasonably inferred that his words, accompanied by the pointing of a gun, constituted criminal threats. His argument largely relies on *Bolin, supra,* 18 Cal.4th 297, and similar cases. He claims those cases support the proposition that "menacing words" alone constitute something less than a criminal threat, and that the words must show a true and intended threat. Reese also argues under *Watts v. United States* (1969) 394 U.S. 705, 707-708 (*Watts*), that his criminal threats conviction cannot stand because his words were in the form of protected speech. In *Watts*, the Supreme Court found a defendant's conditional threat statements in the context of a political rally where he stated that if he was drafted and forced to carry a rifle, the President would be the first person in his sights. (*Id.* at pp. 706-707.)

We are not persuaded to find insufficient evidence because the facts of Reese's case are different in kind from those involved in *Bolin* and its progeny and those in *Watts.* We do not see mere menacing words, and we see nothing in Reese's current case which remotely resembles the situation in *Watts,* where protected speech was involved.

DISPOSITION

The judgment is affirmed.

GRIMES, J.

I concur:

BIGELOW, P. J.

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B253610

FLIER, J., Dissenting

I respectfully dissent. I would hold that denying appellant a transcript of opening statements and closing arguments from the mistrial was error under *People v. Hosner* (1975) 15 Cal.3d 60, 62 (*Hosner*), and *Hosner* requires automatic reversal. "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. [O]ur own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" (*Griffin v. Illinois* (1956) 351 U.S. 12, 16-17, fn. omitted.) "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." (*Id.* at p. 19.) Thus, the state should provide indigent prisoners with the basic tools of an adequate defense when those same tools are available for a price to other prisoners. (*Britt v. North Carolina* (1971) 404 U.S. 226, 227 (*Britt*).)

It is this bedrock right to equal protection of the law that underlies our Supreme Court's decision in *Hosner*. *Hosner* held that, as a matter of equal protection, an indigent defendant is *presumptively* entitled to a free "complete transcript" of a mistrial in preparing for retrial (*Hosner, supra*, 15 Cal.3d at pp. 62, 66; *Shuford v. Superior Court* (1974) 11 Cal.3d 903, 906 (*Shuford*).) *Hosner* soundly rejected the notion that a defendant should have to show a particularized need for the complete transcript of a mistrial: "[A]n indigent defendant in a criminal trial is *presumed* to have a particularized need for a transcript of prior proceedings, just as he is *presumed*, if he needs a transcript at all, to need nothing less than a complete transcript." (*Hosner, supra*, 15 Cal.3d at

p. 66.) The prosecution bears the burden of showing the defendant would have an effective defense with something less than a complete transcript. (*Id.* at p. 64.)

Here, the prosecution did nothing to rebut the presumption that appellant needed a complete transcript of the mistrial, including the opening statements and closing arguments that he expressly requested. If the prosecution does not make the requisite showing, denying appellant's motion for a complete transcript of the mistrial abridges his constitutional right to equal protection of the laws and constitutes reversible error. (*Hosner, supra,* 15 Cal.3d at p. 64; *People v. Tarver* (1991) 228 Cal.App.3d 954, 957 [when prosecution remained "unaccountably mute on the subject of appellant's right to a transcript," presumption was not overcome, and denial of motion for trial transcripts was error requiring reversal].)

The majority holds that *Hosner* does not compel reversal because *Hosner* must be understood in the context of the facts and issues that were before the court, and there, the defendant received only a small portion of his prior testimony and nothing else. (*Hosner, supra,* 15 Cal.3d at p. 68.) The majority suggests that *Hosner*'s presumption of need extends only to witness testimony from the mistrial, but for opening statements and closing arguments, appellant must demonstrate why he needs them for an effective defense.

Hosner should not be read so narrowly. I recognize that *Hosner* and the cases on which it relied—*Shuford* and *Britt*—involved distinguishable facts insofar as the defendants in those cases received no transcript at all or only some small portion of the prior testimony. (*Britt, supra,* 404 U.S. at pp. 226-227; *Shuford, supra,* 11 Cal.3d at p. 905.) But I see no basis on which to conclude that *Hosner*'s rebuttable presumption of need should not apply to the slightly different facts in this case. That is, when *Hosner* says an indigent defendant is presumptively entitled to a "complete" and "full" transcript of a mistrial in preparing for retrial (*Hosner, supra,* 15 Cal.3d at pp. 65, 66, 68, 69), I do not find a need to parse the opening statements and closing arguments from the rest of what the jury heard and treat these parts of the trial differently.

The opening statements and closing arguments are no less a part of a trial than the witness testimony. To be sure, they are different from witness testimony in that counsel's statements are not evidence. (CALCRIM Nos. 104, 222.) But these parts of the trial are counsels' opportunity to talk to the jury about what the evidence will or does show, to comment on and interpret the evidence, and to argue to the jury why it should decide the case in their client's favor. One cannot say categorically that a trial is "complete" without these parts of the trial.

Moreover, I am unpersuaded by respondent's argument that we should not consider opening statements and closing arguments on the same footing with trial testimony because they are "not of critical value" on retrial of the same charges, cannot be used to impeach witnesses, and do not advance the underlying goals of *Hosner*. While these nontestimonial portions of the trial may not be as valuable as witness testimony in *all* cases, and appellant cannot use them to impeach witnesses, I disagree that they do not advance the underlying goals of *Hosner*. *Hosner* appreciates the importance of the complete trial transcript *both* for its impeachment value *and* its rebuttal value. (E.g., *Hosner, supra*, 15 Cal.3d at p. 70 ["[T]here is no way of knowing to what extent adroit counsel assisted by the transcript to which the defendant was entitled might have been able to impeach or rebut any given item of evidence."].) Impeachment and rebuttal are not always the same thing. A witness's prior inconsistent testimony obviously is valuable as impeachment evidence to discredit that witness. Although impeaching witnesses may be one way to rebut an adversary's case, rebuttal may certainly take other forms. To rebut simply means "[t]o refute, oppose, or counteract (something) by evidence, argument, or contrary proof." (Black's Law Dict. (7th ed. 1999) p. 1274, col. 1.) Thus, a witness's prior testimony is not the only way to rebut the prosecution's case.

The court's discussion in *Kennedy v. Lockyer* (9th Cir. 2004) 379 F.3d 1041 (*Kennedy*) is instructive on the value of the opening statements and closing arguments. After a mistrial in state court, Kennedy, an indigent defendant, moved for a complete trial transcript to prepare for his retrial, including opening statements and closing arguments. (*Id.* at p. 1044.) Kennedy received a transcript of the witnesses' testimony, but nothing

more. (*Id.* at p. 1045.) Applying federal court precedent (*Britt*) in a habeas corpus proceeding, the Ninth Circuit determined that Kennedy's right to "'a transcript of *prior proceedings* when that transcript is needed for an effective defense or appeal'" included not just the witnesses' testimony, but the opening statements, closing arguments, and other proceedings Kennedy had requested. (*Kennedy, supra*, 379 F.3d at pp. 1046-1047, quoting *Britt, supra*, 404 U.S. at p. 227.) The court noted that opening statements and closing arguments "may provide valuable insight into the government's strategy" and were "crucial to the development of an effective defense. Various tactical and strategic decisions made by Kennedy's new counsel might have been affected had he been provided with a copy of the prosecutor's opening statement and closing argument; he might, for example, have been able to anticipate some of the prosecution's key arguments, identify potential weaknesses in its case, assess the relative weight that the prosecution would place on various items of evidence, and better determine what would be needed to refute them." (*Kennedy*, at pp. 1049, 1057.) The contention that such prior proceedings need not be provided was inconsistent with *Britt*'s stated purpose of ensuring that the defendant could prepare an effective defense and with the equal protection mandate that poor defendants have the same access to the same basic materials of a defense as the wealthy. (*Kennedy*, at p. 1049.)

Appellant's prior trial involved the same charges, the same witnesses, and the same prosecutor trying the case. It was a veritable road map for the second trial. In similar circumstances, the *Kennedy* court "doubt[ed] seriously that a wealthy defendant would ordinarily proceed in a subsequent trial without purchasing a full transcript of the proceedings, including, but not limited to, . . . the opening statements and closing arguments." (*Kennedy, supra*, 379 F.3d at p. 1049.) Thus, as a tool to help identify the prosecution's key arguments, identify potential weaknesses in its case, assess the relative weight the prosecution would place on items of evidence, and better determine what appellant would need to refute them, I can hardly agree with the respondent's assertion that a transcript of the opening statements and closing arguments "would have had no bearing on appellant's defense strategy." I also cannot say this sort of probable value in

rebutting the prosecution's case did not factor into *Hosner* declaring a presumptive right to a complete transcript of a prior mistrial.

Furthermore, though my colleagues cite favorably to the *Kennedy* dissent, I do not think the *Kennedy* dissent forecloses the result I reach here. The *Kennedy* court's aim on the habeas corpus petition was to determine whether the state appellate court's decision reflected an objectively reasonable interpretation of clearly established United States Supreme Court precedent. (*Kennedy, supra*, 379 F.3d at pp. 1059-1060 (dis. opn. of O'Scannlain, J.).) The relevant precedent was *Britt*. *Britt*, of course, held that the state must provide indigent defendants with the basic tools of an adequate defense when those tools are available for a price to other defendants, and "[w]hile the outer limits of that principle are not clear," it was at least clear that "the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense or appeal." (*Britt, supra*, 404 U.S. at p. 227.) The *Kennedy* dissent characterized *Britt* as having "fuzzy contours." (*Kennedy, supra*, at p. 1060 (dis. opn. of O'Scannlain, J.).) As a result, the dissent believed the state court's decision to deny Kennedy the nontestimonial parts of the transcript represented a reasonable interpretation of *Britt*. (*Kennedy*, at pp. 1060, 1062.) Still, dissenting Judge O'Scannlain acknowledged: "If this were a direct criminal appeal, I might not necessarily disagree with the court's interpretation of *Britt*." (*Id.* at p. 1059.)

Hosner built on *Britt* and went even further. Rather than *Britt*'s "fuzzy" rule that the state must provide "a transcript of prior proceedings" when it was "needed for an effective defense" (*Britt, supra*, 404 U.S. at p. 227), *Hosner* declared an indigent defendant is "presumptively entitled to a complete transcript of his first trial" when preparing for retrial (*Hosner, supra*, 15 Cal.3d at p. 66). We presume the defendant's need for such a transcript until the prosecution demonstrates otherwise. I believe the majority's approach of requiring appellant to initially show a need for transcripts of the opening statements and closing arguments is contrary to *Hosner*. Indeed, I think the *Hosner* presumption of need exists precisely because it is logical to assume the transcript of a mistrial will be valuable in preparing for a retrial on the exact same charges—and

this value lies not only in the impeachment value of prior witness testimony, but in the strategic value to be gleaned from counsels' statements and arguments to the jury.[1]

In conclusion, the prosecution here made no showing to overcome the presumptions benefiting appellant—that is, that he needed the transcript for an effective defense and needed nothing less than a complete transcript. Absent any showing by the prosecution, the court erred in denying appellant the transcript in its entirety, which under *Hosner* requires automatic reversal. (*Hosner, supra*, 15 Cal.3d at pp. 66, 70.) Until our Supreme Court revisits the issue, I do not believe we are free to conduct a harmless error review. I would therefore reverse the judgment.

FLIER, J.

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1 This majority observes that I do not cite to any facts in the record to support the notion that the opening statements are closing arguments would have strategic value in helping appellant prepare for retrial. This is because, like Hosner, I presume such transcript was necessary for an effective defense until that presumption has been rebutted. Respondent's attempt to rebut the presumption now consists only of conclusory assertions like those I noted above –that the transcript "would have had no bearing on appellant's defense strategy," that it was "not of critical value," and that nothing "transpired during the opening statements and closing arguments that was necessary for an effective defense."

PROOF OF SERVICE

I declare that I am over the age of eighteen years and not a party to the above-titled action. I am in good standing with the California Bar, and my work address is 1255 W. Colton Ave., Ste 502, Redlands, CA 92374. I am familiar with the business practice for collection and processing of mail with the U.S. Postal Service, and the correspondence will be deposited with the U.S. Postal Service this same day in the ordinary course of business.

On October 27, 2015, I served the attached **APPELLANT'S PETITION FOR REVIEW** by placing a true copy thereof in a sealed envelope with postage fully prepaid to be transmitted by USPS regular mail service to:

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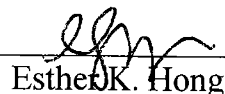
On October 27, 2015, I electronically served a copy of this document from ehong@lawyer.com to the ATTORNEY GENERAL'S OFFICE at docketingLAawt@doj.ca.gov and CALIFORNIA APPELLATE PROJECT at capdocs@lacap.com.

I also electronically filed the document with the Clerk of the Court using the Online Form provided by the California Court of Appeal, Second Appellate District.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

October 27, 2015



Esther K. Hong