IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. KEITH RYAN REESE, Defendant and Appellant.	)	Supreme Court No. S230259 Court of Appeal No. B253610 Los Angeles County Superior Court No. TA125272

Second Appellate District, Division Eight Case No. B253610
Los Angeles County Case No. TA125272
The Honorable John T. Doyle, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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INTRODUCTION

The United States Supreme Court and California Supreme Court have expounded on the constitutional right of an indigent defendant in a criminal case to obtain a free transcript of prior proceedings. By comparing indigent defendants to their wealthier counterparts under the Equal Protection Clause (U.S. Const., Amend. XIV), the courts found that the State must provide a free transcript or an adequate alternative to poor defendants in order for them to effectively prepare for an appeal or a retrial.

In *Griffin v. Illinois* (1956) 351 U.S. 12 [76 S.Ct. 585, 100 L.Ed. 891], the United States Supreme Court first announced an indigent

defendant's right to obtain a free transcript in order to prepare for his appeal. It observed that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." (*Id.* at p. 19.)

Next, in *Britt v. North Carolina* (1971) 404 U.S. 226, 227 [92 S.Ct. 431], the Supreme Court found that "*Griffin v. Illinois* and its progeny establish the 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." (See also *Mayer v. City of Chicago* (1971) 404 U.S. 189, 193, 195 [92 S.Ct. 410, 30 L.Ed.2d 372].) Thus, the *Britt* court held that an indigent defendant is entitled to a free transcript of prior proceedings after a mistrial. (*Britt, supra,* 404 U.S. at pp. 227–228.)

Three years later, this Court relied on both *Britt* and *Mayer* to find that the State must provide an indigent defendant a free transcript of his mistrial. (*Shuford v. Superior Court* (1974) 11 Cal.3d 903.) It expressly referred to the United States Supreme Court's mandate that poor defendants must receive free transcripts that are necessary for their defense, when they are available to defendants who can afford to pay them. (See, e.g., *id.* at pp. 906–907.)

A year later, this Court ruled in *People v. Hosner* (1975) 15 Cal.3d 60 that an indigent defendant who makes a timely motion for the transcript of a mistrial is "presumptively entitled to a *complete* transcript of his first trial." (*Id.* at p. 66, italics added.) In order for a trial court to deny this request for a complete trial transcript, the prosecution must "overcome the presumptions of defendant's particularized need for the transcript and of the unavailability of adequate alternative devices." (*Ibid.*) Otherwise, "the erroneous denial of an indigent defendant's motion for a free transcript of a prior trial requires automatic reversal." (*Id.* at p. 70.)

While this Court has not directly addressed the question of whether opening statements and closing arguments are part of a complete trial transcript, the Ninth Circuit in *Kennedy v. Lockyer* (9th Cir. 2004) 379 F.3d 1041, 1047, has held that they are.

For the following seven reasons, this Court should follow the *Kennedy* court to hold that under the Equal Protection Clause, an indigent defendant is presumptively entitled to the opening statements and closing arguments of his first trial when he requests a transcript: (1) Supreme Court precedent establishes that transcripts of the opening statements and closing arguments are part of a complete trial transcript; (2) this Court in *Hosner* implicitly found that these transcripts are included in a complete trial transcript; (3) the transcripts of the opening statements and closing

arguments would help a defendant with pre-trial discovery and impeachment at his retrial; (4) these transcripts would help a defendant rebut the prosecution's evidence at retrial; (5) these transcripts would show the defendant the main theory and strategy of a prosecution's case; (6) closing argument transcripts would reveal the arguments and evidence that impacted the jury's verdict; and (7) transcripts of the closing arguments are automatically included in an appellate transcript.

ISSUE PRESENTED

Did the trial court violate an indigent *pro se* defendant's constitutional right to equal protection of the laws when it denied his request for transcripts of the opening statements and closing arguments from his first trial, which ended in a mistrial?

STATEMENT OF THE CASE

Appellant Keith Reese ("Reese") represented himself in two trials. (I C.T. 93.) During jury deliberations of the first trial, the jury asked the court a total of seven questions. (I C.T. 100-103.) The jury indicated that it was hopelessly deadlocked, and the court declared a mistrial. (I C.T. 103.)

Approximately two weeks after the mistrial, the court granted Reese's timely motion for a complete transcript of the first trial. (I C.T. 105.) Approximately six weeks later, on Thursday, June 6, 2013, the court gave him partial transcripts, which did not include either opening

statements or closing arguments. (I C.T. 138.)

On the following Monday, June 10, 2013, the prosecution announced that it was ready for trial, but Reese stated that he was not ready. (I C.T. 146.) Reese requested the complete transcript from his first trial, including the opening statements and closing arguments, but the court denied Reese's motion for additional transcripts and motion to continue. (I C.T. 146, 149.)

Reese's second jury trial started on the same day, based on an amended information that contained the same five counts as the information in the first trial. (I C.T. 139, 149.)

Reese was charged with two counts of criminal threats against Beatrice Reese and Fagasa Jackson (counts 1 & 2; Pen. Code, § 422, subd. (a)),[1] one count of possession of a firearm by a felon (count 3; § 29800, subd. (a)(1)), and two counts of assault with a firearm against Beatrice and Jackson (counts 4&5; § 245, subd. (a)(2)). (I C.T. 139-143.)

On counts 1, 2, 4, 5, the information alleged that Reese personally used a firearm (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a)), that the offenses were serious and violent felonies (§§ 1192.7, subd. (c)(8), 667.5, subd. (c)(8)), and required any custodial sentence to be served in state prison (§1170, subd. (h)(3)). The information also alleged as to counts 1, 2,

[1] All future statutory references will be to the Penal Code, unless otherwise

prison (§1170, subd. (h)(3)). The information also alleged as to counts 1, 2, 4, and 5, that Reese had a prior conviction under section 245, subdivision (a)(2), a serious or violent felony (§ 1170.12, subds. (a)-(d) & (b)-(i)) and a serious felony (§ 667, subd. (a)(1)).

Reese stipulated to bifurcate his prior conviction, and stipulated that he suffered the prior conviction. (I C.T. 150, 155; III R.T. 634.)

Reese waived his right to testify. (I C.T. 202.)

The jury found Reese guilty of all five counts, and found that he personally used a firearm under section 12022.5, subdivision (a). (I C.T. 190-191, 203.)

The court sentenced Reese to a total of 17 years in state prison. (II C.T. 344.) This sentence consisted of the upper term of four years on count 4, the base term, which was doubled to eight years pursuant to section 1170.12, subdivisions (a) – (d) and section 667, subdivision (b) – (i). (II C.T. 345.) The court selected a consecutive mid-term of four years under section 12022.5, subdivision (a), and an additional five years pursuant to section 667, subdivision (a)(1). (II C.T. 345.)

Reese filed a timely notice of appeal. (II C.T. 345.)

STATEMENT OF THE FACTS

The Court is respectfully referred to the facts contained in the Court of Appeal opinion in the section "Facts – The Crimes." (Op. at 2–3.)

ARGUMENT

DEFENDANT'S EQUAL PROTECTION RIGHTS WERE DENIED WHEN HE DID NOT RECEIVE THE TRANSCRIPTS OF THE OPENING STATEMENTS AND CLOSING ARGUMENTS FROM HIS FIRST TRIAL

Four decades ago, this Court held under the Equal Protection Clause that after a mistrial, "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. 65, italics in original.) If the prosecution does not meet its "burden . . . to clearly establish the contrary," and the complete transcript is not provided, then automatic reversal is required. (*Id.* at pp. 69–70.)

Reese requested a complete transcript from his first mistrial, but the trial court only provided him with the transcripts of the testimony, and denied his specific requests for the transcripts of the opening statements and closing arguments. There was no objection from the prosecution. Therefore, the trial court denied Reese his Equal Protection rights, and the judgment should be reversed. (U.S. Const., Amend. XIV; Cal. Const., art. I, § 7.)

A. Relevant Proceedings

Approximately two weeks after the mistrial, the court received and granted Reese's timely motion for a complete trial transcript from his first trial. (I C.T. 105.)

Approximately six weeks later, on Thursday, June 6, 2013, Reese received a partial set of transcripts. (I C.T. 138.) The following Monday, on June 10, 2013, when the court asked whether the parties were ready for trial, Reese responded that he was not ready because he had not received the full transcript from his mistrial. (III R.T. 1, 4.) The prosecution did not respond. The court stated that Reese was only entitled to the trial testimony. (III R.T. 4.) The following discussion took place:

> [REESE]: I have not received a full trial transcript.
>
> THE COURT: The transcripts that were ordered were all the testimony and at this point in time you are entitled only to the testimony given because of the issues that might arise during the trial[,] for example impeachment. I don't know what other transcripts you are seeking to obtain.
>
> [REESE]: I am required 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.
>
> THE COURT: When you represent yourself, the court cannot 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 and closing arguments is denied. That was denied previously. That is not evidence.
>
> [REESE]: It's related to a discrimination motion. I need the full

complete set. I am required by law.

THE COURT: You are not entitled. You are entitled to transcripts. You have been provided transcripts of the testimony portion. You have represented yourself and you are given the transcript to proceed with trial. As to discrimination, you are not treated differently.

(III R.T. 4-5.)

On the afternoon of June 10, 2013, 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 prosecution again did not object or respond. The court informed him that he was only entitled to have the transcripts of the testimony. (I C.T. 149.)

That same day, Reese's second jury trial began. (I C.T. 149-150; III R.T. 20.) On the third day of the trial, the jury found Reese guilty of all five counts. (I C.T. 203.)

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B. The Transcripts of The Opening Statements and Closing Arguments Are Included In The "Complete Transcript" Referred To In *Hosner*

It is undisputed that a defendant is presumptively entitled to a complete set of transcript after a mistrial upon request. In *Hosner*, this Court found that a defendant who makes a timely request for a transcript after a mistrial is "presumptively entitled to a *complete* transcript of his first trial." (*Hosner, supra,* 15 Cal.3d at p. 66, italics added.) It also ruled that "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." (*Id.* at p. 66, fn. 4, italics in original.)

Also, the Ninth Circuit found that it is "clearly establish[ed]" under Supreme Court precedent that "it is assumed that a defendant will 'ordinarily' need a *complete* transcript of a prior mistrial in order to present an effective defense." (*Kennedy, supra,* 379 F.3d at pp. 1049–1050, citing *Britt,* 404 U.S. at p. 228, italics added.)

While a defendant's presumed need of a complete mistrial transcript upon request is clear, this Court has not previously addressed the specific question of whether a complete transcript includes opening statements and closing arguments. This Court should find that transcripts of opening statements and closing arguments are part of a complete transcript for the

following seven reasons.

1. It Is Clearly Established Under Supreme Court Precedent That Opening Statements and Closing Arguments Are Part Of A Complete Trial Transcript

The Ninth Circuit found that Supreme Court cases "clearly establish" that a State must provide an indigent defendant free transcripts of opening statements and closing arguments of his first trial in order to prepare for his retrial. (*Kennedy, supra,* 379 F.3d at p. 1049; see also *State v. Scott* (2013) 131 Hawai'i 333, 340–341.)

The *Kennedy* court emphasized that in *Britt,* the United States Supreme Court held 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." (*Kennedy, supra,* 379 F.3d at p. 1046, quoting *Britt, supra,* 404 U.S. at p. 227, emphasis in original in *Kennedy*.) While acknowledging that the Supreme Court did not define the term "prior proceedings," the Ninth Circuit nevertheless found that "the meaning of the term is clear." (*Kennedy, supra,* 379 F.3d at p. 1047.) The term "prior proceedings" included "*all* of the acts and events that occur from the commencement of the judicial action until the entry of judgment." (*Ibid.*, emphasis in original.) The Ninth Circuit expressly found that opening statements and closing arguments were included in the definition of "prior proceedings." (*Ibid.*)

The *Kennedy* court also found that the seminal case on free transcripts, *Griffin, supra,* 351 U.S. 12, established that opening statements and closing arguments are part of a complete trial transcript. It pointed out that in *Griffin*, the Supreme Court held that the State must provide an indigent defendant with a "report of proceedings" for his appeal. (*Kennedy, supra,* 379 F.3d at p. 1047, quoting *Griffin, supra,* 351 U.S. at p. 13.) The *Griffin* court defined a "report of proceedings" as "all proceedings in the case from the time of the convening of the court until the termination of the trial." (*Kennedy, supra,* 379 F.3d at p. 1047, quoting *Griffin, supra,* 351 U.S. 13, fn. 3.) Based on *Britt's* reliance on *Griffin*, the Ninth Circuit "infer[red] that the [*Britt*] Court meant its definition of the term 'proceedings' to be the same as the definition of 'proceedings' used in *Griffin.*" (*Kennedy, supra,* 379 F.3d at p. 1047.)

Additionally, the *Kennedy* court found that *Griffin* and its progeny established that an indigent defendant is presumptively entitled to the mistrial transcripts of opening statements and closing arguments because of the value of these transcripts. It explained that transcripts of opening statements and closing arguments are "crucial to the development of an effective defense" in a retrial because they "may provide valuable insight into the government's strategy." (*Kennedy, supra,* 379 F.3d at pp. 1049, 1057.) "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.)

While case law from the Ninth Circuit is not binding on this Court, it is still "persuasive and entitled to great weight." (*People v. Bradley* (1969) 1 Cal.3d 80, 86.)

The Court of Appeal in this case declined to follow *Kennedy*, and instead found that the *Kennedy* dissent, which reasoned that the transcripts of the testimonies were sufficient, was more persuasive. (Op. at 13–14.) However, the Court of Appeal failed to recognize that even 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.).) Reese's case presents the issue of his entitlement to a complete transcript, which includes opening statements and closing arguments, in the context of a direct appeal from his conviction.

The *Kennedy* case is also particularly relevant because it involved a petition for habeas corpus from a California state conviction. A higher standard of review applies under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") when the Ninth Circuit reviews a petition

for habeas corpus for a person in state custody. Under AEDPA, the Ninth Circuit may grant a state prisoner's writ of habeas corpus "only if the state court's decision was 'based on an unreasonable determination of the facts in light of the evidence presented in State court proceeding,' . . . or the claimed constitutional error 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'" (*Id.* at p. 1046, quoting 28 U.S.C. § 2254(d)(1)–(2).) The *Kennedy* court found that the California court of appeal's holding that there was no constitutional violation when the trial court only provided the transcript of the trial testimony was "contrary to or an unreasonable application" of Supreme Court law. (*Kennedy, supra,* 379 F.3d at pp. 1051–1052.) Under the Supreme Court cases, a complete transcript of prior proceedings, including the opening statement and closing arguments, were required. (*Id.* at p. 1047.)

Thus to prevail on a habeas corpus petition in *Kennedy*, defendant was held to a much higher standard of review than is the defendant at the case in bar. The Court should follow the reasoning in *Kennedy*, and hold that transcripts of opening statements and closing arguments are part of a complete trial transcript.

2. The *Hosner* Court Implicitly Found That Opening Statements and Closing Arguments Are Included In A Complete Trial Transcript

The *Hosner* court held that when a trial court erroneously denies a transcript of a prior trial, then the *per se* standard of prejudice applies. (*Hosner, supra,* 15 Cal. 3d at p. 70.)

However, the *Hosner* court also entertained the possibility that a lower standard of prejudice could apply when a transcript of a non-trial proceeding is improperly withheld. The *Hosner* court stated: "We wish to note that we reserve decision whether the per se rule of prejudice which we apply herein to the erroneous denial of a transcript of a prior *trial* should also be applied to an erroneous denial of a transcript of some other prior proceeding." (*Id.* at p. 71, fn.7, italics in original.) The examples of "some other prior proceeding" included non-trial events, such as a hearing on a motion to suppress, a hearing on a motion on the voluntariness of a confession, or a preliminary hearing that results in defendant's release from custody. (*Ibid.*)

This discussion is significant because the *Hosner* court only contemplated a lower standard of prejudice for non-trial events. Opening statements and closing arguments always take place during a trial, and are therefore not part of "some other prior proceeding" that could be judged under a lower standard of prejudice. (*Ibid.*) As such, the *Hosner* court

implicitly found that events that place during a trial, such as opening statements and closing arguments, are part of a complete trial transcript. The erroneous denial of a complete trial transcript is judged under the automatic reversal standard of prejudice.

3. Transcripts Of The Opening Statements and Closing Arguments Help A Defendant With Pre-trial Discovery and Impeachment, As Set Forth In *Britt v. North Carolina*

This Court also should find that opening statements and closing arguments are part of a complete transcript because they help a defendant prepare for retrial in the two express ways set forth by the United States Supreme Court in *Britt.*

In *Britt*, the United States Supreme Court was faced with the question of whether defendants should be entitled to a free transcript after a mistrial. (*Britt, supra,* 404 U.S. at p. 227.) In order to answer this question, it first evaluated the value of the transcript to defendants preparing for a retrial. (*Ibid.*) The *Britt* Court found that it could "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." (*Id.* at p. 228.) By using the phrase, "at least two ways," the *Britt* Court implied that a transcript's significance was not limited to just these two reasons. (*Ibid.*)

The Court of Appeal in its opinion found that opening statements and closing arguments do not have discovery or impeachment value. (Op. at 7, 12–13.) This finding is erroneous.

Opening statements and closing arguments are valuable to a defendant after a mistrial as "a discovery device in preparation for trial." (*Britt, supra,* 404 U.S. at p. 228.) These transcripts would reveal which evidence the prosecution emphasized in the opening statements or closing arguments to prove its case. It would lead the defendant to search for evidence to counter this evidence. The transcripts would also show the prosecution's perspective on the weak parts of defendant's original defense, and would prepare a defendant to look for discovery and evidence to strengthen those areas.

The transcripts of the opening statements and closing arguments would also help a defendant find ways to impeach prosecution witnesses. (*Ibid.*) The opening statements may reveal important witnesses or testimony that the prosecution flagged for the jury to pay close attention to in the trial. The closing arguments would also show the significant testimony or witnesses the prosecution depended on to prove the elements of the crime. Such information would alert a defendant to look for ways to impeach the actual testimony or impeach the general credibility of key prosecution witnesses in a retrial.

4. Transcripts Of The Opening Statements and Closing Arguments Help A Defendant Rebut The Prosecution's Evidence

In *Hosner*, this Court stated that a complete mistrial transcript was valuable because it could help a defendant "rebut any given item of evidence." (*Hosner, supra*, 15 Cal.3d at p. 70.) The dissent of the Court of Appeal observed that "[t]o rebut simply means '[t]o refute, oppose, or counteract (something) by evidence, argument, or contrary proof.'" (Dissent at 3, quoting 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 arguments or evidence to effectively rebut the prosecution's evidence.

5. Transcripts Of The Opening Statements and Closing Arguments Reveal The Main Theory And Strategy Of A Prosecution's Case

The transcripts of the opening statements and closing arguments should be part of a complete transcript because California courts have consistently acknowledged that the opening statements and closing arguments 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 . . . ."].)

This insight into the prosecution's strategy and theory of the case are "crucial to the development of an effective defense." (*Kennedy, supra,* 379 F.3d at p. 1057.)

This is also consistent with the United States 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].)

Transcripts of the opening statements and closing arguments would enable a defendant to understand the main theory and strategy of the prosecution's case, and to prepare his strategy and presentation of evidence to effectively counter the prosecution's theory and strategy in his retrial.

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6. Closing Arguments Are Significant Because They Reveal The Arguments Or Evidence That Impacted The Jury

California courts have frequently examined a prosecutor's closing argument to determine whether an improper evidence or argument was significant to the jury, and therefore prejudicial. For example, in *People v. Esqueda* (1993) 17 Cal.App.4th 1450, the court found that the improper admission of a defendant's statements and taped interviews was prejudicial. To show prejudice, the court explained that the "[t]he prosecutor *heavily relied* upon [defendant's] trial testimony and his statements made at the interviews during *closing argument* to show he fabricated both the intruder story and the story about struggling with the gun." (*Id.* at p. 1487, italics added.) By underscoring the fact that the prosecutor emphasized this evidence in the closing arguments, the court found that the evidence influenced the jury in a prejudicial way.

Similarly, this Court judged the prejudicial impact of inadmissible evidence by examining the closing argument. (See, e.g., *People v. Lewis* (2008) 43 Cal.4th 415, disapproved on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919–920.) In *Lewis*, this Court found that the improper admission of a co-defendant's statement was harmless error, as shown by the "prosecutor's minimal use of [the co-defendant's] statement in the relevant portions of his closing argument." (*Lewis, supra,* 43 Cal.4th at p. 466.)

Just as California appellate courts examine the closing arguments to determine the impact of certain evidence or arguments to the jury, a defendant preparing for retrial should be able to examine the closing arguments from his mistrial to discern which evidence and arguments the prosecution will emphasize to the jury in the retrial.

7. Transcripts Of The Closing Arguments Are Automatically Included In The Transcript For An Appeal

California courts have already recognized the value of the transcripts of the closing arguments 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)(9)(B)). The fact that these transcripts are automatically included in an appellate record should lead this Court to find that there is an even greater right to these transcripts after a mistrial, especially when the defendant specifically requests them.

In *Kennedy*, the Ninth Circuit found that while it may be possible for a court to limit free transcripts on appeal to those that are "relevant to the issues raised," a complete transcript should presumptively be given to a defendant after a mistrial when he requests it "[b]ecause all of the proceedings from a first trial are ordinarily germane to a second trial." (*Kennedy, supra,* 379 F.3d at p. 1050.)

As California courts have already decided that transcripts of closing

arguments are a mandatory part of the appellate record for an appellant-defendant, it follows that they automatically should be given to a defendant after a mistrial when he requests trial transcripts, and especially when he specifically makes a request for them.

For this reason, and the six preceding reasons, this Court should find that a complete trial transcript after a mistrial includes the opening statements and closing arguments.

C. Although It Was Not Required, The Defendant In This Case Showed A Particularized Need For the Transcripts Of The Opening Statements and Closing Arguments

It is well established under the rulings of this Court and the United States Supreme Court that a defendant is not required to explain why he needs a complete transcript of a mistrial. In *Hosner*, this Court expressly held that a defendant is "under no obligation to go forward with such a showing of particularized need" for a complete transcript. (*Hosner*, *supra*, 15 Cal.3d at p. 67.) In *Britt*, the United States Supreme Court held that "[o]ur 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." (*Britt, supra,* 404 U.S. at p. 228.)

The Court of Appeal erred when it required Reese to demonstrate his particularized need for transcripts of the opening statements and closing

arguments. (Op. at 15.) It found "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 Reese was not entitled to the *Hosner per se* rule of reversal because he did not "*specify[] why it is necessary to an effective defense*." (Op. at 12, emphasis added.) The dissent correctly noted that "*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.)

Even though Reese was not required to, he gave the trial court reasons for the transcripts of the opening statements and closing arguments. As held in *Britt,* courts are allowed to consider specific reasons that a defendant gives for free transcripts to determine their value to the defendant. (*Britt, supra,* 404 U.S. at p. 228.) Here, Reese stated that the opening statements and closing arguments would help him not make the same mistakes, were part of his defense, were required by law, and would save him time to study the transcripts. (III R.T. 4–5, 10, 15.)

Notably, the prosecution did not object to any of these reasons. On appeal, the prosecution should not be able to argue against these reasons because it did not do so in the trial court. (Cf., *Hosner, supra,* 15 Cal.3d at p. 71, fn. 7.)

D. The Prosecution Did Not Overcome The Presumption Of Defendant's Need For The Complete Transcript Or Show That There Was An Adequate Alternative

A defendant is presumptively entitled to a complete transcript after a mistrial upon request. In order for a trial court to properly deny defendant's request, the prosecution must "at the hearing on that motion . . . overcome the presumptions of defendant's particularized need for the transcript and of the unavailability of adequate alternative devices." (*Hosner, supra,* 15 Cal.3d at p. 66.)

The following are not adequate alternatives: defendant's or counsel's memory; the presence of the same judge, counsel, and court reporter at the retrial; a short time between the mistrial and retrial; or defendant's ability to call the court reporter to read to the jury prior testimony from the mistrial. (*Britt, supra,* 404 U.S. at pp. 228–229.) Furthermore, the prosecution carries the burden to show an adequate alternative. The defendant does not "bear the burden of proving inadequate such alternatives as may be suggested by the State or conjured up by a court in hindsight." (*Id.* at p. 230.)

The Court of Appeal erred when it ignored the fact that the prosecution did not make a single objection to Reese's request for the complete transcript, including the opening statements and closing arguments. 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, italics added).

While the prosecution's objection is a crucial part of the *Hosner* test to determine whether an equal protection violation occurred, the Court of Appeal ignored this part of *Hosner's* analysis altogether. It did not address or even acknowledge the prosecution's absolute silence during Reese's specific and repeated requests for these transcripts.

Instead, the Court of Appeal posited that 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, italics in original).

Reese is not seeking these expansive holdings. He is only requesting that *Hosner* be applied. This Court in *Hosner* 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 defendant must timely request the transcript, and the prosecution can either show that the defendant does not need the full or partial transcript, or that the defendant has access to an adequate alternative. (*Hosner, supra,* 15 Cal.3d at pp. 66,

68–69.)

The prosecution must object to 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's particularized need for that transcript." (*Id.* at p. 71, fn. 7.)

Here, it is undisputed that the prosecution did not make a single objection to 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.) As in *Tarver,* the trial court erred when it denied Reese's request, and the judgment must be reversed.

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E. Alternatively, the Court Of Appeal Erred When It Did Not Apply The *Chapman* Standard of Prejudice

The automatic reversal standard applies when the trial court erroneously denies a defendant's request for a complete trial transcript. (*Hosner, supra*, 15 Cal.3d at p. 70.) Since Reese was denied *trial* transcripts of the opening statements and closing arguments, the judgment should be automatically reversed.

Yet, when the Court of Appeal decided to not apply the *Hosner* automatic reversal rule because Reese did not provide what it deemed adequate justifications for his request for these portions of the transcript (Op. at 12, 15), it also declined to apply the *Chapman* standard of prejudice. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]; see 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 trial court denies defendant's request even though the prosecution does not rebut the defendant's presumed need for a complete transcript, or (2) required to apply the *Chapman* standard of prejudice 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.)

Therefore, should this Court alternatively find that the *Chapman* standard of prejudice is applicable to the error in this case, it should still

CERTIFICATE OF WORD COUNT

I certify under penalty of perjury under the laws of the State of California that this brief contains 6,017 words as calculated by the Microsoft Word software in which it was written.

Dated: April 9, 2016

Esther Hong
Attorney for Appellant

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 April 11, 2016, I served the attached **APPELLANT'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof in a sealed envelope with postage fully prepaid to be transmitted by USPS regular mail service to:

Honorable John T. Doyle, Judge
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On April 9, 2016, I electronically served a copy of this document from ehong@lawyer.com to:

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CALIFORNIA APPELLATE PROJECT at capdocs@lacap.com.

On April 9, 2016, 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.

April 11, 2016

Esther K. Hong