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.

Case No. S230259

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

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Did the trial court violate 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 was charged with criminal threats, possession of a firearm by a felon, and assault with a firearm, arising from an incident in which he pointed a gun at his mother and his girlfriend during an argument. (1CT 95-96.)

At an initial trial, the prosecutor's opening statement recounted that the evidence would show that Reese approached his mother, Beatrice Reese, during an argument, pointed a gun at her face, and threatened her by saying, "Now you're going to learn to stay out of other people's business." According to the prosecutor, the evidence would also show that Reese then pointed the gun at his girlfriend, Fagasa Jackson, and said, "You disrespected me." (ART 15-16.) The prosecutor also played a 911 call in which Beatrice said that she did not want Reese to shoot Jackson. (ART 18-19.) Representing himself, Reese gave an opening statement in which he told the jury not to believe the prosecution's version of events. He asserted that he never used a gun, no one ever stated he used one, and the incident was nothing more than a family disagreement. (ART 20-21.)

During the evidentiary portion of the trial, the prosecutor called Beatrice, Jackson, and Beatrice's brother, Bruce Reese, who had witnessed the incident. They all denied that Reese had brandished a gun. Beatrice claimed that she was on medication at the time she made the 911 call, which was played for the jury, and Bruce said that he was also on medication, which made him imagine things. (ART 26, 35-36, 61-62, 64,

68-69.) The prosecution therefore relied on the testimony of Los Angeles Police Officer Manuel Arzate, who had talked to the witnesses at the scene shortly after the incident. Officer Arzate explained that when he responded to the scene the witnesses appeared to be afraid. (ART 95.) Beatrice told him that Reese had pointed a revolver at her face while threatening her, and that he had done the same to Jackson. Beatrice said that she feared Reese would shoot her. (ART 80-83.) Jackson gave an account of the incident that was consistent with Beatrice's. (ART 85-86.) And Bruce stated that he had frozen once he saw Reese holding a gun. (ART 89.) A search of the premises turned up a holster but no firearm. (ART 91, 94.)

In closing argument, the prosecutor emphasized that the statements the witnesses had made to Officer Arzate were consistent with the 911 call and were therefore more believable than the trial testimony. (ART 180-183, 199-200.) The prosecutor also argued that appellant could have hidden the gun, so the fact that no gun was found with the holster did not undermine the prosecution's case. (ART 193-195, 200.) For his part, Reese argued that it would make no sense to hide a gun but not its holster and therefore Officer Arzate's testimony was not credible. (ART 201-204.) According to Reese, the absence of the gun showed that he was not guilty of the crimes. (ART 204-205.)

The jury deadlocked on the charges, and a mistrial was declared. (1CT 78-79, 100-103.)

After the mistrial, Reese made a motion for a complete set of transcripts, which was granted. (1CT 105.) Just before jury selection for the retrial was to begin, however, Reese complained that the transcripts of the first trial that he had received did not include opening statements and closing arguments. He argued that he needed transcripts of those parts of the proceedings "so I won't make the same mistakes." The trial court responded that Reese was entitled only to transcripts of trial testimony and

not of opening statements and closing arguments. (3RT 1, 4-5.) Reese renewed his request later the same day. The court again denied the request and reminded Reese, "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." (3RT 9-10, 15-16.)

At the retrial, which commenced the following day, the prosecutor made the same points during his opening statement, but did not play the 911 call. (3RT 367-370.) Reese elected not to make an opening statement (4RT 933). The evidence unfolded along the same lines as at the initial trial: Beatrice, Jackson, and Bruce denied that the incident happened as alleged by the prosecution (3RT 380, 384, 377-380, 392, 397-398, 411, 415, 418-419), the jury heard the 911 call (3RT 377), and Officer Arzate testified about the witness' statements at the scene shortly after the incident (3RT 607-609, 611-614, 624-626). The closing arguments mirrored those of the initial trial. (4RT 957-959, 962-963, 976-977, 981, 984-985.)

At the conclusion of the retrial, the jury found Reese guilty of all the charges, and the court sentenced him to an aggregate term of 17 years in state prison. (1CT 190-191, 203; 2CT 344-351.)

On appeal, Reese raised a challenge to the trial court's ruling regarding the transcripts, claiming that the failure to provide him transcripts of the opening statements and closing arguments of the initial trial violated his right to equal protection of the laws. (*People v. Reese* (2015) 240 Cal.App.4th 592, 597.) In a portion of its opinion that was certified for publication, a divided panel of the Court of Appeal rejected the claim. After surveying pertinent decisions of the United States Supreme Court and this Court, the majority held that the presumptive right to a "full" and "complete" transcript as discussed in those precedents—none of which addressed the precise issue presented by this case—did not extend to the

opening statements and closing arguments of counsel. (*Id.* at pp. 601-605.) The majority reasoned that the constitutional presumption focuses 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." (*Id.* at p. 602.) And while "[t]here may be a case where something more than witness testimony is required to prepare an adequate defense on retrial," there is no "categorical rule that the transcript of counsel's statements must be provided after every retrial." (*Id.* at p. 603.) The majority concluded that there was no violation of equal protection in this case because Reese "was provided the transcript of all the testimony and did not demonstrate why he needed the opening statements and closing arguments." (*Id.* at p. 605.)

Justice Flier dissented. She would have held that this Court's precedent mandates a presumption that a defendant on retrial is entitled to a transcript of the initial trial that includes the statements of counsel and that the failure to provide any part of that transcript requires automatic reversal. (*People v. Reese*, *supra*, 240 Cal.App.4th at pp. 605-610 (dis. opn. of Flier, J.).)

ARGUMENT

I. THE PRESUMPTION THAT AN INDIGENT DEFENDANT FACING RETRIAL NEEDS A TRANSCRIPT OF THE INITIAL TRIAL DOES NOT EXTEND TO THE OPENING STATEMENTS OR CLOSING ARGUMENTS OF COUNSEL

Under the Equal Protection Clause, an indigent criminal defendant facing retrial is presumed to need a "full" and "complete" transcript of the mistrial to ensure an adequate defense. The purpose of this presumption, and the history of its application, show that it governs witness testimony but not opening statements or closing arguments of counsel. When an

indigent defendant wants a transcript of something more than witness testimony, the constitutional *presumption* does not apply, but the transcript may nonetheless be required if the defendant makes a showing that such a transcript is necessary to an effective defense at the retrial. Reese did not make such a showing and therefore was not denied his right to equal protection. His conviction should be affirmed.

A. Relevant Precedents

The United States Supreme Court first established the right to a free trial transcript in *Griffin v. Illinois* (1956) 351 U.S. 12, holding that the Equal Protection Clause was violated where a criminal defendant could not obtain "adequate appellate review" without a transcript and could not afford to buy one. (*Id.* at p. 16.) In that circumstance, the Court held, the state was obligated to provide a free transcript or some "other means of affording adequate and effective appellate review." (*Id.* at pp. 19-20.) Several years later, the Court reaffirmed this holding in striking down a Washington state rule that authorized a free transcript on appeal only if the trial judge certified that the defendant's grounds for appeal were nonfrivolous. (*Draper v. Washington* (1963) 372 U.S. 487, 494-499.) The Court emphasized, however, that "part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances." (*Id.* at 495.) The Constitution is satisfied, the Court held, if "a narrative statement or only a portion of the transcript would be adequate and available for appellate consideration." (*Id.* at p. 498.) "[T]he fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review." (*Id.* at p. 496.)

In *Britt v. North Carolina* (1971) 404 U.S. 226, the Court applied these principles to an indigent defendant facing retrial. It held that, while the outer limits of the right to a free transcript were not clear, they would govern in such a situation: "the State must provide an indigent defendant with a transcript of prior proceedings when that transcript is needed for an effective defense . . . ." (*Id.* at p. 227.) The *Britt* Court thus defined the scope of the constitutional right by reference to the defendant's *need* for the transcript, which in turn depends on two factors: the value of the transcript to the defendant in connection with the retrial, and the availability of alternative devices that would fulfill the same functions as a transcript. (*Ibid.*) With respect to the value of a transcript, the Court noted that "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." (*Id.* at p. 228.) And as for alternative means, the memory of counsel (and the defendant) would likely be insufficient to perform the function of a transcript, as would "limited access" to the court reporter. (*Id.* at pp. 228-229.)[1]

On the same day the Court decided *Britt*, it again reaffirmed *Griffin* in a different case by invalidating an Illinois rule restricting the provision of free transcripts in misdemeanor appeals. (*Mayer v. City of Chicago* (1971) 404 U.S. 189, 193-199.) The Court emphasized that, under *Griffin*, "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." (*Id.* at p. 195.) The Court also

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[1] On the facts of the case, the *Britt* Court held that a transcript was not required because an adequate alternative that was "substantially equivalent to a transcript" existed in the form of ready and thorough access to the court reporter. (*Britt*, *supra*, 404 U.S. at p. 229.)

clarified the presumption used to implement that rule: "where the grounds of appeal . . . 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." (*Ibid.*) And the Court observed that a "record of sufficient completeness . . . does not mean that [the defendant] is automatically entitled to a full verbatim transcript"; if the State can show that "something less than a complete transcript would suffice" then the Constitution is satisfied. (*Id.* at pp. 198-199.)

This Court took up the issue of free trial transcripts in a pair of cases decided on the heels of *Britt* and *Mayer* four decades ago. *Shuford v. Superior Court* (1974) 11 Cal.3d 903 held that the rule of *Griffin* and *Britt* applied to a criminal defendant facing retrial who was indigent but who nonetheless had retained counsel (under a contingency agreement relating to a separate civil matter). (*Id.* at pp. 905-906.) The Court noted, however, that the defendant was not necessarily entitled to a "complete transcript," but that the burden would be on the prosecution upon remand to show that a portion of the transcript, or an alternative, would be adequate. (*Id.* at p. 907, citing *Mayer*, *supra*, 404 U.S. at pp. 194-195.)

A year later, this Court decided *People v. Hosner* (1975) 15 Cal.3d 60, in which it addressed more directly the issue of *Britt*'s requirement of need for the free transcript. The Court held that an indigent defendant facing retrial is "presumptively entitled to a complete transcript of his first trial" unless the prosecution can "overcome the presumptions of defendant's particularized need for the transcript and of the unavailability of adequate alternative devices." (*Id.* at p. 66.) Examining the proceedings below, the Court observed that the prosecution had turned over to the defendant a transcript of only "a small portion of defendant's testimony at the prior trial" and had made no showing that this was adequate for

purposes of retrial. (*Id.* at pp. 67-69.) The Court concluded that this violated the defendant's right to equal protection. (*Ibid.*)

Hosner went on to hold that federal authority required automatic reversal in this situation, reasoning that the lack of a transcript tended to taint the entire trial and there was now way of knowing how "the transcript to which the defendant was entitled" may have affected counsel's litigation of the retrial. (*Hosner*, *supra*, 15 Cal.3d at p. 70.) Nonetheless, the Court noted that its per se rule of reversal regarding the denial of a trial transcript did not necessarily apply to the denial of a transcript "of some other prior proceeding" such as a suppression hearing, a hearing on the admission of evidence, or a preliminary hearing resulting in the defendant's discharge. (*Id.* at p. 71, fn. 7.)

B. The Presumption of Need for a Trial Transcript Before Retrial Applies to Witness Testimony but not Opening Statements or Closing Arguments of Counsel

The decisions of the United States Supreme Court and of this Court make clear that an indigent defendant facing retrial is presumed to need a "full" and "complete" transcript of the initial trial unless the prosecution can show that only portions of the transcript, or something in lieu of a transcript, would suffice to facilitate an effective defense. The precedents do not directly address what constitutes a "full" or "complete" transcript of the prior trial that an indigent defendant is presumed to need. But the scope of the presumption is illuminated by consideration of the purposes of the constitutional rule and the context of the cases applying it.

The presumption of need used to implement the rule that an indigent defendant must be given the basic tools needed for an effective defense—a narrower issue than the scope of the rule itself—focuses on discovery and impeachment. The *Britt* Court explained that the Equal Protection Clause requires that an indigent defendant be provided "the basic tools of an

adequate defense." (*Britt*, *supra*, 404 U.S. at p. 227.) Thus, a transcript of a mistrial must be given to an indigent defendant prior to retrial "when that transcript is needed for an effective defense." (*Id.* at p. 227.) And "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." (*Id.* at p. 228.) *Shuford* acknowledged these foundations of the constitutional rule (*Shuford*, *supra*, 11 Cal.3d at pp. 906-907), as did *Hosner*, which noted that the failure to provide "the transcript to which the defendant was entitled" would be prejudicial because of its impact on the evidence in the retrial and, in particular, on counsel's ability "to impeach or rebut any given item of evidence" (*Hosner*, *supra*, 15 Cal.3d at p. 70).

It is the *evidence* that was used against the defendant in the first trial that constitutes discovery and may be used for impeachment at the retrial, and thus it is the transcript of witness testimony that a defendant is presumed to need for an adequate defense. (See *People v. Markley* (2006) 138 Cal.App.4th 230, 241 ["[T]he transcript of the first trial would contain testimony pertaining to the same charges at issue in the retrial—in most cases, from the same witnesses who will be called to testify at the retrial. For this reason, the transcript of the first trial constitutes 'a basic tool[ ] of an adequate defense.'"].) Indeed, a transcript of the evidence itself directly implicates a defendant's broader constitutional right to "a meaningful opportunity to present a complete defense" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690), including the rights to confrontation and effective cross-examination, including impeachment (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678; *United States v. Bagley* (1985) 473 U.S. 667, 676-677 see also *People v. Brown* (2003) 31 Cal.4th 518, 538), and to present testimony that is "relevant," "material," and "vital to the defense" (*Washington v. Texas* (1967) 388 U.S. 14, 16; see also *People v. Ayala* (2000) 23 Cal.4th

225, 269). A transcript of opening statements and closing arguments of counsel does not serve the same purpose, or implicate the same constitutional concerns, that a transcript of witness testimony does.

The circumstances addressed in *Britt*, *Shuford*, and *Hosner*—the leading decisions directly addressing the right to a free transcript prior to retrial—do not support any more expansive an interpretation of the presumption of need. In *Britt*, the defendant was given no transcript whatsoever, and was presumed to need a transcript for retrial. That would have violated equal protection, except that an adequate alternative existed under the particular facts of the case. (*Britt*, *supra*, 404 U.S. at pp. 228-230.) In *Shuford*, the trial court similarly denied the defendant's request for a transcript outright. (*Shuford*, *supra*, 11 Cal.3d at p. 905.) The matter was remanded for a determination whether only a portion of the transcript, or an alternative, would "suffice to assure him an adequate defense upon retrial." (*Id.* at p. 907.) And in *Hosner*, the defendant was given a "partial transcript" amounting to only "a small portion of the defendant's testimony at the prior trial." (*Hosner*, *supra*, 15 Cal.3d at p. 68.) In that context, the Court held that the defendant was presumptively entitled to a "complete" transcript of his first trial. (*Id.* at p. 66.) None of these cases suggests that the presumptive need for a "full" and "complete" transcript would be broader than a transcript of witness testimony.

Although an indigent defendant is not *presumed* to need more than a transcript of witness testimony before retrial, that does not mean that equal protection would never demand more. If an indigent defendant can demonstrate that a transcript of some other part of the trial proceedings is "needed for an effective defense" (*Britt*, *supra*, 404 U.S. at p. 227), then the Constitution requires that the transcript be provided for free. Requiring the defendant to demonstrate need in this situation makes sense because the prosecution is not necessarily privy to the defendant's trial strategy; outside

the core category of witness testimony, it is more pragmatic to ask the defendant to show why a particular transcript *is* needed than to ask the prosecution to show why the opposing party would *not* need the transcript. Applying the presumption only to witness testimony also makes sense because any need to refer to the exact words of opening statements and closing arguments (and other portions of the proceedings), if it were ever even necessary, would be much less critical than the need to refer to the exact words of a witness's testimony.

C. Reese's Counterarguments are Unpersuasive

Reese offers several arguments as to why the presumption for a "full" and "complete" transcript should, to the contrary, be construed to encompass opening statements and closing arguments of counsel. He first places heavy reliance on the Ninth Circuit Court of Appeals' decision in *Kennedy v. Lockyer* (9th Cir. 2004) 379 F.3d 1041, which determined that United States Supreme Court authority clearly establishes an indigent defendant's constitutional right to a transcript of a mistrial including the opening statements and closing arguments of counsel. (AOB 11-14.) His reliance is misplaced. *Kennedy*'s construction of what constitutes a "full" and "complete" trial transcript is dubious for the reasons already discussed. But the decision is flawed for a more fundamental reason, in that the court apparently failed to appreciate, and therefore did not address, the distinction between the scope of an indigent defendant's equal protection right to a mistrial transcript and the more narrow and specific question of the scope of the presumption of need. *Kennedy* simply concluded that an indigent defendant facing retrial "must be provided" with transcripts of "among other things, motions and the court's rulings thereon, as well as opening statements, closing arguments, jury instructions, and relevant colloquies." (*Id.* at p. 1049.) And it did so without any discussion of the scope, or even mindfulness of the existence, of the presumption that the Supreme Court

has used to effectuate the constitutional rule. Its analysis is therefore unsound. Equal protection may or may not compel the provision of the various transcripts identified by the *Kennedy* court, depending on whether they are "needed for an effective defense." The question in any particular case is whether a showing of need has been made, or whether a presumed need has been rebutted. Because the Ninth Circuit in *Kennedy* asked and answered the wrong question, its analysis is unpersuasive and should be rejected. (See *People v. Linton* (2013) 56 Cal.4th 1146, 1182, fn. 8 ["We are not bound, of course, by decisions of the lower federal courts, even on federal questions, but they may be considered for their persuasive weight."].)[2]

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[2] Moreover, it is questionable whether *Kennedy* remains good authority in light of subsequent federal habeas decisions. (See *Miller v. Gammie* (9th Cir. 2003) 335 F.3d 889, 900 (en banc) [circuit precedent not binding where intervening Supreme Court decision has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable"].) Since *Kennedy* was issued, the United States Supreme Court has clarified that its precedent is clearly established as to a particular claim only when it "squarely addresses" the same issue and provides a "clear answer." (*Wright v. Van Patten* (2008) 552 U.S. 120, 125-26; see also *White v. Woodall* (2014) 134 S. Ct. 1697, 1706-1707.) The Court has also made clear that an unreasonable application of its authority is one that is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." (*Harrington v. Richter* (2011) 562 U.S. 86, 103; see also Stephen R. Reinhardt, The Demise of Habeas Corpus and the Rise of Qualified Immunity (2015) 113 Mich. Law Rev. 1219, 1228 ["this description of AEDPA is completely untethered from Supreme Court precedent. The Court had never before used the 'fairminded jurist' standard to describe the "unreasonable application' test in AEDPA . . . ."].) Kennedy's claim could not meet these standards since the United States Supreme Court's cases do not define with any particularity the scope of the presumption of need for a mistrial transcript.

Reese also argues that this Court in *Hosner* implicitly concluded that the opening statements and closing arguments of counsel "are included in a complete trial transcript" because it observed that "a lower standard of prejudice could apply when a transcript of a non-trial proceeding is improperly withheld." (AOB 15-16.) But *Hosner* did not address with any particularity the scope of *Britt*'s presumption of need, an issue that was not presented in that case and which in any event is a separate question from the standard of prejudice that should apply once an equal protection violation has been established. (See Arg. II, *post.*) *Hosner* simply identified several non-trial proceedings that would not be subject to its rule of automatic reversal. That cursory observation should be of little, if any, import in the present analysis.

In addition, Reese points to a number of ways in which a transcript of opening statements and closing arguments would be "helpful" to the preparation of a defense in advance of retrial, principally in that they would show what evidence the prosecution emphasized and what its strategy for the case was. (AOB 16-21.) However, the question of what portions of the record should be constitutionally presumed necessary to an effective defense is narrower than the question of what portions of the record might simply be "helpful." Even if a transcript of opening statements and closing arguments might help a defendant facing retrial, it would not directly serve the rationale of ensuring discovery and the opportunity for impeachment of witnesses so that it may be *presumed* that such a transcript is needed for an effective defense. (See *Ross v. Moffitt* (1974) 417 U.S. 600, 616 ["The question is not one of absolutes, but one of degrees . . . . the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required"].)

And finally, Reese invokes California Rule of Court 8.320(c)(9)(B), which makes a transcript including opening statements and closing

arguments of counsel a part of the standard record on appeal, and he argues that this rule underscores the importance of such a transcript. (AOB 22.) What California's rules of court provide for as a matter of state law, however, is not coextensive with what the federal constitution requires as a matter of equal protection. California's appellate rules call for transcripts of proceedings that even Reese appears to acknowledge would not fall within *Britt*'s presumption of need. (Compare AOB 15-16 [arguing that *Hosner*'s identification of non-trial events (such as pretrial evidentiary rulings) as outside the scope of its per-se reversal rule shows that trial events are subject to presumption of need] with Cal. R. Ct. 8.320(c) [requiring transcripts of, among other things, pretrial evidentiary rulings].) But in any event, what is needed for an effective defense at retrial is different from what is needed for an effective appeal. Appellate issues may be based on what is said during opening statements (see, e.g., *People v. Frye* (1998) 18 Cal.4th 894, 983 [addressing claim that defense counsel ineffectively highlighted anticipated evidence in opening statement that he did not introduce at trial]) or during closing arguments (see, e.g., *People v. Whalen* (2013) 56 Cal.4th 1, 77 ["it is misconduct for a prosecutor, during argument, to misstate the law"]). Whereas on retrial, the need for a transcript derives from its value as a discovery device and as a source of impeachment material. (*Britt*, 404 U.S. at p. 228.)

D. Because Reese did not Make an Adequate Showing of Need, the Trial Court's Denial of Transcripts of Opening Statements and Closing Arguments Satisfied Equal Protection

Given that the presumption of need for a transcript before retrial encompasses only witness testimony, it was incumbent upon Reese in making his request for a transcript of opening statements and closing arguments to demonstrate a need for the transcript. He argues that his statement to the trial court that the transcript would have saved him time

and helped him avoid the same mistakes was sufficient to establish the requisite need. (AOB 22-23.) But where the presumption of need does not apply the defendant must show not just that the requested transcript would be helpful but that it is necessary to secure an effective defense. (See *Britt*, *supra*, 404 U.S. at p. 227; cf. *Hosner*, *supra*, 15 Cal.3d at p. 65 [where presumption does apply, burden is on State to show that less than complete transcript would be adequate to secure effective defense].) Reese's justification, particularly in the context of this short and straightforward trial, was insufficient to show that he needed to refer to the opening statements and closing arguments of the initial trial in order to have an effective defense at the retrial. There was nothing complex or obscure about the parties' trial strategies and arguments, and the requested transcript would have had little value as a reference source.

The trial court's ruling was therefore sound, and the judgment should be affirmed.

II. EVEN IF AN INDIGENT DEFENDANT IS PRESUMED TO NEED A TRANSCRIPT OF COUNSEL'S OPENING STATEMENTS AND CLOSING ARGUMENTS PRIOR TO RETRIAL, THE FAILURE TO PROVIDE PART OF A TRANSCRIPT IS NOT STRUCTURAL ERROR

Even if Reese were correct that the constitutional presumption of need for a full record prior to retrial includes a transcript of the opening statements and closing arguments of counsel, he is incorrect that reversal is automatically required. (AOB 26.)[3] The failure to provide a portion of a trial transcript to an indigent defendant before retrial is subject to review for harmlessness. To the extent *Hosner* could be read as holding to the contrary, that decision should be clarified or reexamined. And because the

[3] Insofar as the presumption applied, Reese is correct that it was not rebutted in the trial court. (AOB 24-26.)

error asserted by Reese was harmless on the facts of this case, his conviction should be affirmed.

Article VI, section 13 of the California Constitution provides: "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." As this Court has observed, reversal for structural error—error that affects "the framework within which the trial proceeds"—is limited to instances of: "adjudication by a biased judge"; "the complete deprivation of counsel"; "the unlawful exclusion of grand jurors based on race"; "the infringement on the right to self-representation"; "the denial of a public trial"; "and the giving of a constitutionally deficient instruction on the reasonable doubt standard." (*People v. Anzalone* (2013) 56 Cal.4th 545, 553-554.) The United States Supreme Court has similarly observed that the category of structural error is limited to a class of cases in which there has been complete denial of counsel, a biased trial judge, racial discrimination in selection of grand jury, denial of self-representation at trial, denial of public trial, or a defective reasonable-doubt instruction. (*Washington v. Recuenco* (2006) 548 U.S. 212, 218, fn.2.)

In *Hosner*, this Court concluded that the failure to turn over any part of the mistral transcript except for "a small portion of the defendant's testimony" required automatic reversal because "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." (*Hosner, supra*, 15 Cal.3d at pp. 68, 70.) *Hosner* relied in part on the United States Supreme Court's decision in *Roberts v. LaVallee* (1967) 389 U.S. 40, which held that an indigent defendant is entitled to a preliminary hearing transcript upon request before trial. (*Id.* at p. 42.) Although *Roberts* did not specifically address the question of harmlessness, the dissent in that case characterized the decision as requiring automatic reversal. (*Id.* at p. 44 (dis. opn. of Harlan, J.); see also *Hosner, supra*, 15 Cal.3d at pp. 70-71.)

Both of those cases, however, involved a total, or effectively total, deprivation of a transcript and therefore must be understood in that light. (See *People v. Knoller* (2007) 41 Cal.4th 139, 154-155 ["It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the court"].) The situation here, in which Reese was given all of the witness testimony before his retrial, cannot be said to have completely infected the retrial in the manner posited by the *Hosner* Court. Indeed, *Hosner* analogized the error in that case to a complete denial of counsel. (*Hosner, supra*, 15 Cal.3d at p. 70.) And while the complete denial of counsel is recognized as a structural error, the denial of counsel at only one stage of the proceedings may be subject to harmlessness review. (See, e.g., *Coleman v. Alabama* (1970) 399 U.S. 1, 9-10; *People v. Pampa-Ortiz* (1980) 27 Cal.3d 519, 529.) The error here, if there was error, is much more analogous to the latter type of constitutional defect that is subject to assessment for its impact on the outcome of the trial.

The equal protection cases governing this issue, moreover, have consistently recognized that the scope of the right to a "full" and "complete" transcript is defined by a defendant's need for the transcript to ensure an effective defense (see *Britt, supra*, 404 U.S. at p. 227; see also *Hosner, supra*, 15 Cal.3d 60 at p. 65), and that in some cases portions of the

transcript that are not germane do not have to be provided to an indigent defendant (see *Mayer*, *supra*, 404 U.S. at pp. 194-195; *Draper*, *supra*, 372 U.S. at pp. 495-496). The presumption of need is therefore just that: a presumption. In the trial court, the State may undertake to show that only a portion of the transcript (or some alternative) would suffice to secure the defendant an effective defense. (See *Mayer*, *supra*, 404 U.S. at p. 195; see also *Hosner*, *supra*, 15 Cal.3d at p. 65.) It would make little sense to say that such a showing is permissible in the trial court but that on appeal no such showing may be made to avoid reversal of the conviction.

Hosner did not elaborate on the parameters of its per-se-reversal rule, other than to point to several examples of non-trial proceedings to which the rule would not apply. (*Hosner*, *supra*, 15 Cal.3d at p. 71, fn. 7.) In light of its facts, however, and in light of the pertinent equal protection authority, *Hosner* must be understood as calling for per se reversal only when the denial of a transcript to an indigent defendant is complete or effectively complete. Even *Kennedy*, upon which Reese relies, is in accord. The court there observed: "Where the state completely fails to provide an indigent defendant with a transcript of a mistrial for use in connection with a second trial, we would likely find structural error," but "[w]here the state fails to provide only a portion of the transcript . . . we conclude that harmless error analysis applies." (*Kennedy*, *supra*, 379 F.3d at p. 1053.)

Accordingly, reversal is not required here if the record shows that the error was harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) Reese's initial trial, and his retrial, were relatively short and the issues were straightforward. Both trials involved only four witnesses. He was given transcripts of all the witness testimony from the first trial. In the trial court, Reese stated that he wanted the transcripts of opening statements and closing arguments so that he would not repeat the same errors from the first trial. (See 3RT 4-5, 10.)

But other than arguing that the transcripts would have been useful, Reese has never explained how they would have actually affected his defense at the retrial. And it is difficult to see how the transcripts would have altered Reese's strategy. Unlike the transcripts of witness testimony, the transcripts of opening statements and closing arguments had no impeachment or discovery value. Although they may have helped to reveal the prosecution's theory of the case, that theory was basic and uncomplicated and would have been obvious even to a casual observer of the prior proceedings: the witnesses' testimony at trial was not believable, and their statements close in time to the incident were more reliable. Reese, who acted as his own attorney at both trials, could not have failed to understand and remember that theory. On this record, there can be no reasonable doubt that the outcome of the trial would have been the same even if Reese had been given transcripts of the opening statements and closing arguments from his first trial.

Thus, even if the trial court erred by failing to provide Reese those transcripts, the judgment should be affirmed.

CONCLUSION

The Court of Appeal's judgment should be affirmed.

Dated: June 27, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 6,188 words.

Dated: June 27, 2016

KAMALA D. HARRIS
Attorney General of California

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DECLARATION OF SERVICE

Case Name: **People v. Keith Ryan Reese**

No.: **S230259**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 27, 2016, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On June 27, 2016, I caused **eight** copies of the **ANSWER BRIEF ON THE MERITS** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **FedEx, Tracking # 8682 5506 3634**.

On June 27, 2016, I caused one electronic copy of the **ANSWER BRIEF ON THE MERITS** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

On June 27, 2016, I caused one electronic copy of the **ANSWER BRIEF ON THE MERITS** in this case to be served electronically on the California Court of Appeal by using the Court's Electronic Service Document Submission system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 27, 2016, at Los Angeles, California.

A. D. Kartikarini	A D Kartikari
Declarant	Signature

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