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 REPLY BRIEF ON THE MERITS

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ARGUMENT

I. THE GOVERNMENT'S PROPOSED STANDARD TO DETERMINE AN INDIGENT DEFENDANT'S RIGHT TO MISTRIAL TRANSCRIPTS, INCLUDING THOSE OF THE OPENING STATEMENTS AND CLOSING ARGUMENTS, VIOLATES THE EQUAL PROTECTION CLAUSE

In its Answer to Appellant Keith Reese's Opening Brief, the Government presents a two-part rule to determine which transcripts an indigent defendant is entitled to after a mistrial. First, the defendant only should be presumed to need the transcript of witness testimonies. Second, in order to obtain the transcript of any other trial proceeding, including the opening statements and closing arguments, the defendant must show that

the transcript is "necessary to an effective defense at the retrial." (ABM 4–5, 8–11.) Both aspects of this proposed rule violate the Equal Protection Clause.

A. Under Equal Protection Principles, An Indigent Defendant Is Presumed To Need The Transcript Of The Opening Statements And Closing Arguments From His Mistrial

The first part of the Government's proposed rule states that the presumption of need for mistrial transcripts should only apply to witness testimonies because only these transcripts meet the purposes of impeachment and discovery set forth in *Britt v. North Carolina* (1971) 404 U.S. 226 [92 S.Ct. 431, 30 L.Ed.2d 400]. (See ABM 8–10.) This reasoning is faulty for five reasons.

First, the Government's analysis contradicts the plain language in *Britt*. When discussing the type of mistrial transcript that is encompassed by the Equal Protection Clause, the *Britt* Court twice used the phrase "transcript of prior proceedings." It stated that "there 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." (*Britt, supra,* 404 U.S. at p. 227, italics added.) It also 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." (*Id.* at p. 228, italics added.)

The term "proceedings" refers to "*all* acts and events between the time of commencement to the entry of judgment." (*Kennedy v. Lockyer* (9th Cir. 2004) 379 F.3d 1041, 1046–1047, quoting Black's Law Dictionary (7th ed.1999), p. 1221, italics in *Kennedy*; see also OBM 11–12.) This inclusive definition of proceedings is consistent with Supreme Court decisions pertaining to free transcripts for an appeal, as examined by the *Kennedy* court. (See *Kennedy, supra,* 379 F.3d at pp. 1047–1048, quoting *Griffin v. Illinois* (1956) 351 U.S. 12, 13, fn. 3 [76 S.Ct. 585, 100 L.Ed. 891] [noting that "report of proceedings" included "all proceedings in the case from the time of the convening of the court until the termination of the trial"]; *Mayer v. City of Chicago* (1971) 404 U.S. 189 [92 S.Ct. 410, 30 L.Ed.2d 372] [using the term "full verbatim record"]; see also OBM 12.)

Thus, the *Britt* Court's usage of the term "prior proceedings" encompasses more than the testimonial portion of a trial, and includes the opening statements and closing arguments.

Second, the Government erroneously construes *Britt* as holding that a transcript is presumed valuable only if it functions as an impeachment tool or discovery device. (ABM 8–10.) It fails to respond to Appellant's argument that the *Britt* Court's use of the phrase "*at least* two ways" implies that the assumed significance of a transcript may extend beyond

just impeachment and discovery. (See OBM 16, citing *Britt, supra,* 404 U.S. at p. 228.) It also fails to address Appellant's arguments that the transcript of opening statement and closing arguments does actually serve as an impeachment tool and discovery device. (See OBM 16–17.)

Third, the Government asserts that *only* evidence, or witness testimony, fulfills the *Britt* purposes of discovery and impeachment because testimony "directly implicates a defendant's broader constitutional right" to present a complete defense. (ABM 9–10.) But, the right to make arguments also is a core aspect of a defendant's constitutional right to present a complete defense.

The right to make arguments existed prior to the establishment of certain key testimonial rights, like confrontation or compulsory process. "In the 16th and 17th centuries, when notions of compulsory process, confrontation, and counsel were in their infancy, the essence of the English criminal trial was *argument* between the defendant and counsel for the Crown." (*Herring v. New York* (1975) 422 U.S. 853, 860 [95 S.Ct. 2550, 45 L.Ed.2d 593], italics added.) The right to make an argument was "neither discarded nor diluted." (*Id.* at p. 861.) Rather, "[i]n a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment." (*Id.*

at p. 862.) In essence, "[t]here can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial." (*Id.* at p. 858.) The Government fails to establish that a defendant's right to present testimony is of more constitutional significance than his right to make arguments.

Fourth, the Government erroneously asserts that the circumstances in *Britt*, *Shuford v. Superior Court* (1974) 11 Cal.3d 903, and *People v. Hosner* (1975) 15 Cal.3d 60 "do not support any more expansive an interpretation of the presumption of need." (ABM 10.) It again ignores the express language utilized by the United States Supreme Court and this Court.

In *Britt*, as explained above, the United States Supreme Court twice used the phrase "transcript of *prior proceedings*." (*Britt, supra,* 404 U.S. at p. 227–228, italics added.) In *Hosner*, this Court used the phrase "prior proceedings" and "complete transcript" to describe the type of transcript to which a defendant has a presumed need. (*Hosner, supra,* 15 Cal.3d at p. 66; see also OBM 15–16.) Neither Court ever referred to just the transcripts of the testimony.

Fifth, the Government argues that this Court should disregard the Ninth Circuit's decision in *Kennedy* because the Ninth Circuit "asked and answered the wrong question." (ABM 12.) According to the Government,

the correct question "is whether a showing of need has been made, or whether a presumed need has been rebutted." (ABM 12.)

For the aforementioned reasons, the Government's question is baseless – a defendant is not required to show his need for the transcript of prior proceedings, including the opening statements and closing arguments. *Kennedy* itself shows that the Government is asking the wrong question. After analyzing Supreme Court cases, the *Kennedy* court concluded that a defendant is entitled to a full transcript of the prior proceedings, and that the Equal Protection Clause does not require an indigent defendant to show his need for a complete transcript. (*Kennedy, supra,* 379 F.3d at pp. 1049–1050.[1])

For these reasons, the Government's contention that the presumption of need only applies to a transcript of witness testimonies is unsupported.

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[1] The Government also questions whether *Kennedy* is still good law under recent habeas decisions because the Supreme Court cases "do not define with any particularity the scope of the presumption of need for a mistrial transcript." (ABM 12, fn. 2.) The Ninth Circuit's analysis of prior Supreme Court precedent, including *Britt*'s use of the phrase "prior proceedings" contradicts this point. Additionally, 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.).) This case presents the issue of a defendant's entitlement to a complete transcript, which includes opening statements and closing arguments, in the context of a direct appeal from his conviction. (See OBM 13.)

B. Under Equal Protection Principles, The State Carries The Burden To Show That The Transcript Of Opening Statements and Closing Arguments Is Not Necessary For An Effective Defense

The second part of the Government's proposed standard states that in order to obtain any other transcript besides witness testimonies, the indigent defendant must show that the transcript is "necessary to an effective defense at the retrial." (ABM 5, 10–11.) This principle violates equal protection principles for three reasons.

First, as argued in the previous section, the Equal Protection Clause mandates that the presumption of need extends to the transcript of the opening statement and closing argument. Therefore, to require an indigent defendant to make a further showing of necessity is unconstitutional.

Second, it is the prosecution's exclusive burden to argue that a particular portion of the trial transcript is *not* needed for an effective defense.

In *Britt,* the Supreme Court made clear that a defendant does not have the burden to establish his need for a transcript. The Court found that "there would be serious doubts about the decision below if it rested on petitioner's failure to specify how the transcript might have been useful to him" because "[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, italics added.)

Also, as the *Hosner* Court observed, in the companion case to *Britt* – *Mayer v. City of Chicago* – the Supreme Court held that in the context of free transcripts for appeal, "*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." (*Mayer, supra,* 404 U.S. at p. 195, italics added; see *Hosner, supra,* 15 Cal.3d at pp. 65–66.)

Thus, relying on *Britt* and *Mayer*, the *Hosner* Court concluded that "it is the *state's burden* to show that particular circumstances afford a defendant an effective defense notwithstanding his lack of a transcript of prior proceedings." (*Hosner, supra,* 15 Cal.3d at p. 64, italics added.)

The Government lifts the prosecution's burden of arguing the necessity of the transcript and places it upon the shoulders of the indigent. This burden shift offends the Equal Protection Clause.

Third, the Government imposes a heavier burden on an indigent defendant preparing for a retrial than one preparing for appeal. In *Mayer*, the Supreme Court held that when a defendant preparing for his appeal "make[s] 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." (*Mayer, supra*, 404 U.S.

at p. 195.) While a defendant preparing for his appeal only needs to make a "colorable need for a complete transcript," the Government argues that a defendant preparing for his mistrial must show that the transcript of non-testimonial events is "necessary to an effective defense at the retrial." (ABM 5.)

It would be nonsensical if a defendant facing a retrial were required to make a greater showing of need for the complete transcript than a defendant facing an appeal. Unlike in *Mayer*, the *Britt* Court specifically recognized the inherent need that a defendant facing retrial would have for a transcript of prior proceedings, including but not limited to, discovery and impeachment. (*Britt, supra,* 404 U.S. at p. 228; see also *Hosner, supra,* 15 Cal.3d at p. 65 [highlighting that *Britt* found the "particularized need" for a mistrial transcript of prior proceedings can "ordinarily be assumed."].) Also, 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 "[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.)

For all these reasons, the Government's proposal to place any burden on the defendant to establish his need for a transcript of the opening statements and closing arguments after a mistrial is unconstitutional.

C. Although Not Required, Appellant Made A Sufficient Showing Of His Need For The Transcript Of The Opening Statements and Closing Arguments

Next, the Government erroneously contends that Appellant did not show that the transcript of the opening statements and closing arguments was necessary for an effective defense. (ABM 14–15.) Even assuming he were required to do so, Appellant met his burden.

Appellant stated that he needed the transcript of opening statements and closing arguments because he did not want to "make the same mistakes," he only had a "small amount of time to study a lot," and he wanted to present a discrimination motion. (III R.T. 4–5, 10.)

Appellant's assertion that the transcript of the opening statements and closing arguments would enable him to not "make the same mistakes" is supported by law. Given the purposes of opening statements and closing arguments, such as serving as a discovery device, helping with impeachment and rebuttal of the prosecution's evidence, showing the prosecution's main theory and strategy of its case, and revealing arguments or evidence that impacted the jury, the transcript of the opening statements and closing arguments would have led Appellant to not make the same mistakes at his retrial. (OBM 16–21.)

Appellant also stated that the transcript of the opening statements and closing arguments would save him time to study the rest of the

transcript. (III R.T. 9–10.) The trial court gave Appellant the transcript of the testimonies on a Thursday, and commenced the retrial on the following Monday. (I C.T. 138.) The transcript of the opening statements and closing arguments would have focused Appellant's study of the testimonial transcript and general preparation for his retrial. (OBM 16–21.)

The transcript also could have revealed whether there was a possibility that the prosecution acted in a discriminatory or improper manner.

Lastly, assuming arguendo that Appellant had the burden to show his need for the transcript of the opening statements and closing arguments, he should only have to make, at most, a colorable claim to them. (Cf. *Mayer, supra.*, 404 U.S. at p. 195 [holding that a defendant requesting a complete transcript for appeal need only "make out a colorable need"].)

The term "colorable" is defined as "*appearing* to be true, valid, or right." (*Woodruff v. Thames* (Miss. 2014) 143 So.3d 546, 553, quoting Black's Law Dictionary (8th ed. 2004), p. 282, italics in *Woodruff.*) In a bankruptcy case, the Supreme Court contrasted a claim that is "real and substantial" versus one that is "merely colorable." (*Harrison v. Chamberlin* (1926) 271 U.S. 191, 194 [46 S.Ct. 467, 70 L.Ed. 897].) In other contexts, colorable has been defined as "some possible validity." (*Martinez-Rosas v. Gonzales* (9th Cir. 2005) 424 F.3d 926, 930

[immigration]; *U.S. v. Price* (9th Cir. 2002) 314 F.3d 417, 420 [double jeopardy].) It has also been defined as something that is "not 'wholly insubstantial, immaterial, or frivolous.'" (*Udd v. Massanari* (9th Cir. 2001) 245 F.3d 1096, 1099 [civil administrative proceeding].)

As Appellant established that the missing transcript of the opening statements and closing arguments was necessary for his effective defense, he also made out a colorable need for it.

II. THE JUDGMENT SHOULD BE REVERSED

The Government improperly urges this Court to apply the harmlessness standard under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], and not the automatic reversal standard. (ABM 15–18.) Under either standard, the judgment should be reversed.

A. The Automatic Reversal Standard Applies

In *Hosner*, this Court found that the automatic reversal standard applied because "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 p. 70.)

The decisions of the United States Supreme Court also support per

se reversal. In *Roberts v. LaVallee* (1967) 389 U.S. 40 [88 S.Ct. 194, 19 L.Ed.2d 41], the Court granted the habeas corpus petition of a defendant who was denied a preliminary hearing transcript before his trial. The dissent argued that the Court erred by not applying the *Chapman* standard of error. (*Id.* at p. 44 (dis. opn. of Harlan, J.).) According to the dissent, the defendant was given "a free transcript of the grand jury testimony of the state witness in question but made no use of this transcript at trial, and that at no time has petitioner suggested any use to which the preliminary hearing transcript could have been put, although he is in a position to know what it contains." (*Id.* at p. 43 (dis. opn. of Harlan, J.)) The majority in *Roberts* disregarded Justice Harlan's call to apply the *Chapman* standard. Instead the *Roberts* Court vacated the judgment without discussing whether the withholding of the transcript was prejudicial.

While *Roberts* pertains to the denial of a preliminary hearing transcript, its reasoning extends to cases where a defendant is denied a complete mistrial transcript. Both this Court and the United States Supreme Court relied on *Roberts* when analyzing the constitutional right to transcripts after a mistrial. For example, the *Hosner* court relied on *Roberts* to "draw[] support" for the automatic reversal standard. (*Hosner, supra,* 15 Cal.3d at p. 70.) Also, the *Britt* Court noted twice in its decision that in *Roberts*, Justice Harlan dissented because the defendant had not shown

prejudice. (*Britt, supra,* 404 U.S. at pp. 228, fn. 3, 232.) The *Britt* Court did not disapprove of the *Roberts* Court's failure to find prejudice before vacating the judgment. Instead, it relied on *Roberts*, noting the case to be "most analogous" to a defendant requesting transcripts after a mistrial, to emphasize the defendant's presumption of need for a transcript of prior proceedings. (*Britt, supra,* 404 U.S. at p. 232.)

For these reasons, the automatic reversal standard should apply when a defendant is denied a complete transcript after his mistrial, including those of the opening statements and closing arguments.

B. Even Applying The *Chapman* Standard, The Error Was Not Harmless

In the alternative, should this Court find the *Chapman* standard applicable to the error in this case, the prosecution cannot prove that the error is harmless beyond a reasonable doubt.

The transcript of the opening statements and closing arguments from the mistrial was valuable to Appellant because it would have served as a discovery device for his retrial, helped him search for impeachment evidence, prepared him to effectively rebut the prosecution's evidence, and shown him the prosecution's theory of the case and strategy. (OBM 16–21.) Also, as Appellant stated, it would have led him to not make the same mistakes, present a discrimination motion, and saved him time when

reviewing the transcript of the testimony.

In Appellant's first trial, the prosecutor in his closing arguments presented his theory of the case. He argued that Appellant "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 at the first trial, 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. We don't know." (Supp. R.T. 207.) He even speculated that the gun was hidden in the baby's blankets. (Supp. R.T. 207.)

At the retrial, the prosecution again relied on the theory of the hidden gun. (IV R.T. 984–985.) The prosecutor again pointed to places where Appellant could have hidden the gun. He argued that Appellant "could have put [the gun] 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.) The prosecution repeated its theory from the mistrial that Appellant hid the gun inside the house or had thrown it outside. (Supp. R.T. 207; IV R.T. 984–985.)

If Appellant had the transcript of the first trial's closing arguments prior to his retrial, he would have known to present evidence to undercut

the prosecutor's theory at retrial that he hid the gun. At the retrial, he would have asked Officer Arzate if he, the K9 dog, or others searched specific areas where a gun could hide. If Officer Arzate answered that specific place like the oven or the yard were not searched, or that he did not know whether specific areas were searched, then this evidence would have undercut the prosecution's theory that Appellant hid the gun.

Appellant also would have argued more effectively to the trial judge at the retrial that it should grant his request to compel Officer Ramirez's presence because Officer Ramirez, the only officer who was present during the search, was an essential part of his defense. The prosecution's theory of the case as set forth in the closing argument was that Appellant hid the gun, and Officer Ramirez's testimony, which would have covered the actual search, would have shown that it was unlikely that the gun was hidden.

Appellant also could have sought out expert witness testimony about how K-9 dogs generally search for guns, and whether K-9 dogs are able to find guns in obscure places that can easily hide a gun.

Appellant also would not have wasted time preparing for immaterial side issues for the retrial, such as the involvement of Department of Children and Family Services, especially given his limited time to study the transcripts. (III R.T 4–5, 629; IV R.T. 909–910, 984–985.)

Therefore, even if this Court were to apply the *Chapman* standard, it

should still reverse the judgment because the prosecution cannot prove that the trial court's failure to give the complete transcript, including the opening statements and closing arguments, was harmless beyond a reasonable doubt.

CONCLUSION

Appellant respectfully requests that the trial court's judgment and Court of Appeal's ruling be reversed because his Equal Protection rights were violated when the trial court denied his request for the transcript of the opening statements and closing arguments from his first trial.

Respectfully Submitted,

Dated: July 18, 2016

Esther Hong
Attorney for Appellant

CERTIFICATE OF WORD COUNT

I certify under penalty of perjury under the laws of the State of California that this brief contains 3,690 words as calculated by the Microsoft Word software in which it was written.

Dated: July 18, 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 July 18, 2016, I served the attached **APPELLANT'S REPLY 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:

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

July 18, 2016

Esther K. Hong