Case No. **S230899**

IN THE SUPREME COURT OF CALIFORNIA

BARRY S. JAMESON,

PLAINTIFF AND PETITIONER,

V.

TADDESE DESTA,

DEFENDANT AND RESPONDENT.

After a Decision by the Court of Appeal for the Fourth District, Division One
Case No. D066793
Affirming a Judgment of the Superior Court of San Diego County
The Honorable Joel M. Pressman
Superior Court No. GIS9465

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Answer to Jameson's Petition is most telling for the two things it does not do. It makes no serious effort to refute the fact that the issue raised in Jameson's petition—the ability of indigent litigants to make an effective record for appeal—entails a legal question of statewide importance. Nor does it seriously attempt to defend the opinion of the Court of Appeal or to refute the core arguments for reversal presented in the Petition. In particular, it offers no explanation for why, given discretion afforded to the superior courts over the manner in which to assign official and pro tempore reporters for trial, they should not be required to exercise that discretion in favor of preserving the right of indigents to access the courts.

Instead, the Answer throws up a host of procedural roadblocks arguing for a denial of review. It claims that Jameson should have tried to use more cumbersome, less effective, and likely unviable alternative procedures to make a record. Or that Jameson should have objected about the lack of a reporter more often, or earlier, or in a different format, even though the Court of Appeal reached the merits of the question. Or that Jameson's *pro se* briefing should have been more specific.

Desta's reliance on procedural dodges and traps to avoid a ruling on the merits is familiar to Jameson, who has been attempting to get his case to trial for *thirteen years*. Indeed, the procedural history of this case is rife with them. But none of the points raised should distract from the core points raised in the Petition: Notwithstanding the statutory right to fee waivers, the Court of Appeal's opinion creates a roadmap for categorically

denying indigent litigants access to the necessary means to create an appellate record. That decision is as important as it is erroneous. The Court should grant review.

ARGUMENT

I. Jameson Was Not Required to Move for a Settled Statement to Obtain Review.

Desta's principal contention as to why review should not be granted is that Jameson could and should have attempted to generate a record of oral proceedings by moving for the creation of a settled statement. (Ans. at 9–13, 20.) But in deciding whether to review the decision of the Court of Appeal in this case, whether Jameson might have availed himself of that alternative is beside the point.

First and foremost, the Court of Appeal in this case upheld—and indeed relied upon—the superior court's written policy to *never* provide official trial reporters to fee waiver defendants, based on its assessment that permitting indigents to hire their own reporters *pro tempore* was all that the law required. Nowhere does the decision under review address the availability of a settled statement as an adequate substitute, much less as an alternative procedure that must be exhausted. The Court of Appeal's holding authorizes the denial of an official reporter, *whether or not* the circumstances of a case may ultimately permit a creation of record by a settled statement. Circumstances that, incidentally, will not be known until long after an official reporter is denied and the trial goes unreported.

Desta is also incorrect that Jameson's right to relief in his appeal or on this petition can be conditioned on his having sought

a settled statement. It has been established law for almost seventy years that an "appellant is not necessarily required to prepare a settled statement pursuant to [the Rules of Court]. That remedy, as stated in the rule, is in addition to any remedy given by law." (Fickett v. Rauch (1947) 31 Cal.2d 110, 116 (*Fickett*); *see also Feldman v. Katz* (1958) 160 Cal.App.2d 836, 841 (*Feldman*)["any failure to move for a settled statement should not be considered a penalizing circumstance"]; Rules of Court, rule 8.130(h)(3) [noting that a settled statement "supplements any other available remedies"].)

Indeed, Rules of Court, rule 8.137(a)(2)(C), which addresses the circumstances under which indigent litigants can proceed by a settled statement, specifically foresees that a reporter's transcript is the preferred record of oral proceedings. It permits an indigent litigant to use a settled statement *only* when he is proceeding under a fee waiver *and* he has applied for, but not received, reimbursement from the Transcript Reimbursement Fund pursuant to Rules of Court, rule 8.130(c). (Rules of Court, rule 8.137(a)(2)(C).) It is axiomatic that an appellant cannot apply for reimbursement for the costs of transcribing a trial that was never reported. Thus, it is only *after* an indigent appellant has tried and failed to obtain preliminary approval for a transcript reimbursement request that he must take necessary steps to proceed with a record that does not include a reporter's transcript, such as an agreed or settled statement. (*See* Rules of Court, rule 8.130(c)(2)(A)–(E).) As the Petition explained, (Pet. at 17 n.13) if the Court of Appeal's decision stands, indigent litigants will nev-

er have an opportunity to *apply* for transcript reimbursement, because *there will be no reported proceedings to be transcribed.*

By suggesting that Jameson's right to relief depends on his taking efforts to obtain a settled statement, Desta effectively proposes to short-circuit the process that the Judicial Council's rules have created for indigent litigants. Instead, Desta would permit trial courts to categorically deny official reporters to *all* indigent litigants and then channel them into the settled statement process under Rules of Court, rule 8.137(a)(2)(B), which permits the creation of an appellate record by settled statement when a proceeding has not been reported or no transcription can be made. That would leave indigent litigants with *only* the option of a settled statement, even where it is impracticable or impossible to proceed that way, because the opportunity to create a record by any other means would have been lost. Thus, the upshot of Desta's categorical rule would render superfluous the specific accommodations that Rules 8.137(a)(2)(C) and 8.130(c) afford for indigent litigants by making it *impossible* for an indigent appellant to avail himself of those procedures.

Indeed, by guaranteeing that trials go unreported, that practice would also make it all the more difficult to even obtain an accurate settled statement. The Court has specifically recognized that a trial court can rely on the reporter's notes, readbacks, or partial transcripts in settling a statement. (*See Averill v. Lincoln* (1944) 24 Cal.2d 761, 765 (*Averill*) [trial court can "require appellants to furnish a transcript of the trial proceedings to assist in the settlement of the statement"]; *see also* Bernard

Witkin, *Four Years of the Rules on Appeal* (1947) 35 Cal. L.Rev. 477, 486 [noting that early interpretations of the settled statement rule would essentially require a "preliminary preparation of a transcript in almost every appeal on a settled statement"].) Without those resources at hand, courts can and do decline to prepare settled statements. (*See Averill,* 24 Cal.2d at p. 765; *Fickett, supra,* 31 Cal.2d at p. 116.)

Desta tellingly cites no authority at all to support categorically consigning indigent appellants to the settled statement procedure, much less to an appeal with no oral record at all if that procedure fails to generate a record. To the contrary, both statutes and case law show that California law favors the preservation of trial records though the creation of reporter's transcripts. (*See generally* Code. Civ. Proc., §§ 269, 273; *California Court Reporters Assn. v. Judicial Council of California* (1995) 39 Cal.App.4th 15, 26.) On the other hand, while permitted by court rule,[1] (*see* Rules of Court, rule 8.137) a settled statement is recognized as an inferior form of record generally unsuitable for most cases. Indeed, this Court has noted that a settled statement

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[1] The settled statement has an historical antecedent in the bill of exceptions, formerly codified in section 652 of the Code of Civil Procedure. (*See* 9 Witkin, California Procedure (2015 online ed.) Appeal, § 657, p. 729.) The current enactment of the Code of Civil Procedure, however, contains no authorization for the settled statement procedure. Given the mandatory language of Code of Civil Procedure section 269(a), that suggests, at minimum, that a civil appellant cannot be *required* to proceed on appeal with only a settled statement as the sole record when she or he

may ultimately prove an inadequate means to create a record of oral proceedings to permit effective appellate review. (*See In re Steven B.* (1979) 25 Cal.3d 1, 8 [rejecting argument that appellant was required "to show that a settled statement would not suffice" to obtain a new trial due to a lost reporter's transcript]; *Fickett, supra*, 31 Cal.2d at p. 116 [noting that "in the absence of a transcript it would be unreasonable to require an appellant to prepare a settled statement from insufficient data"].)

As a leading treatise on California appellate practice explains, a settled statement "is a rarely-used alternative to the reporter's transcript and is permitted only in limited circumstances." (*See* J. Eisenberg, *et al.*, California Practice Guide: Civil Appeals and Writs (The Rutter Group 2015 online ed.) § 4:14.) While a "settled statement theoretically can be used to replace the reporter's transcript entirely, . . . this is *extremely rare*." (*Ibid.* § 4:15 [emphasis added].) "More commonly, a settled statement is used only to supplement or replace part of the reporter's transcript when some or all of the proceedings cannot be transcribed through no fault of the appellant—such as death or disability of the reporter, loss of the reporter's notes, or the reporter's refusal to prepare the transcript (but even this limited use is extremely atypical)." (*Id.*)[2] Because settled statements "pose a substantial

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had a right to have a reporter present to transcribe the proceeding.

[2] *See, e.g., Weinstein v. E. F. Hutton & Co.* (1990) 220 Cal.App.3d 364, 368 [addressing circumstances where reporter's transcript of crucial testimony was lost].

danger of *inadvertently presenting an inadequate record*" (*ibid.* § 4:67 (emphasis original)) the authors recommend that "counsel generally should refrain from choosing the[m]" as a means of presenting a record of oral testimony. (*Ibid.* § 4:68.) "Ordinarily, they should be considered only where the appeal presents a simple, straightforward question of law with undisputed facts (or in those rare cases where a settled statement must be used because the reporter is unable to transcribe the trial court proceedings)." (*Id.*)

The treatise's commentary is in line with the limited role of the settled statement in modern civil procedure in California.[3] In civil cases, the procedure was used largely in appeals from municipal courts, as a matter of convenience "to permit the filing of a narrative statement 'in lieu of a reporter's transcript', thus obviating records on appeal being many times longer than there is any necessity for, and which greatly increases the costs to litigants as well as the labors of the appellate court without any corresponding benefit." (*W. States Const. Co. v. Municipal Court* (1951) 38 Cal.2d 146, 148 (quotations omitted)). In appeals from

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[3] The narrative settled statement, and its predecessor, the bill of exceptions, were far more common prior to the advent of modern court reporting technology. (*See* Doris Brin Marasse, Comment, *Appeal and Error: The Narrative Statement and the Reporter's Transcript Compared as Methods of Bringing up Evidence on Appeal* (1942) 30 Cal. L.Rev. 457, 463 ["It has been pointed out that the bill of exceptions was first used before the day of the court reporter when there was no other means of getting the evidence into the record. Today, of course, that justification for a narrative statement of the evidence is gone."].) By the early 1940s they had begun to fall into disuse. (*Ibid.* at p. 466–67.)

unlimited cases, settled statements were often permitted only when the record was relatively simple, with the understanding that if the parties and the trial court proved unable to settle a statement, a reporter's transcript could ultimately be prepared. (*See Burns v. Brown* (1946) 27 Cal.2d 631, 635 (1946); *Averill, supra*, 24 Cal.2d at p. 765; *see also* Rules of Court, rule 8.137(a)(3) [permitting parties to re-designate appellate record if motion for settled statement is denied].) It has been long-established that a trial court has the discretion to decline altogether to provide a settled statement, particularly when there is no transcript for the court to refer in accurately settling the statement. (*See Keller v. Superior Court* (1950) 100 Cal.App.2d 231, 233; *Lande v. S. Cal. Freight Lines* (1947) 78 Cal.App.2d 417, 420.)

Finally, a rule that results in categorically limiting the record on appeal *only* to settled statements is *particularly* unsuited to indigent, often *pro se*, litigants. The settled statement procedure requires coordination between the appellant, appellee, and the court to propose, amend, and settle the contents of the record for appeal. (Rules of Court, rule 8.137(b), (c).) Particularly without the benefit of counsel, the process can become a contentious, time-consuming collateral proceeding that will expend far more resources than it saves. And should that process fail to result in an adequate settled statement, the appellant would be left only with the option of appealing without any record of the trial

court's oral proceedings—exactly the same predicament in which Jameson finds himself in the present appeal.[4]

II. The Other Issues Raised by the Answer Present No Cogent Reasons to Deny Review.

A. Jameson's Supposed Failure to Request a Reporter Does Not Merit Denying Review.

The Answer argues that, to preserve the issues addressed in the Petition, Jameson was required to "request the presence of an official reporter, and if none is available . . . to retain a certified shorthand reporter to serve as an official pro tempore reporter." (Ans. at 14.) In addition to being incorrect, however, this argument does not weigh against relief.

First and foremost, Desta raised a similar waiver argument about failure to object in his Respondent's Brief before the Court of Appeal, which nonetheless ruled on the merits of the reporter

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[4] It further merits mention that a settled record approved by the trial court is also unlikely to contain the types of offhand prejudicial remarks that sometimes serve as the basis for reversal in cases such as Jameson's. (*See, e.g., Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1176 [reversing, in part, because trial judge's comment on the record that "[a]ny complaint [that Jameson has] about not being at liberty to attend the deposition is something [Jameson] should have considered before committing whatever crime that gave rise to his incarceration" was "entirely inconsistent with t[he] mandate" "that the trial courts are to ensure that [the right to meaningful access to the courts] is protected"].) Although not raised in this Petition, Jameson raised a similar judicial bias issue in this very appeal, which the Court of Appeal denied because "the record . . . does not indicate that the trial court displayed bias or prejudice against Jameson." (Opinion at 21.) Without a transcript, however, there is simply no way to be sure.

access issue. This Petition is before the Court because—regardless of whether or how Jameson raised the issue in the trial court—the Court of Appeal issued a published decision *on the merits* finding that Jameson was not entitled to have a court reporter report his trial, even though he had been granted a fee waiver. There is no reason why a procedural issue that did not prevent the Court of Appeal from reaching a decision should prevent this Court from granting review of that decision.

Moreover, the record reflects the trial court failed to properly inform Jameson that he was required to request an official reporter for his trial. Under the Rules of Court, if a superior court's policy does not provide official reporters for *all* civil trials, "the court must require that each party file a statement before the trial date indicating whether the party requests the presence of an official court reporter." (Rules of Court, rule 2.956(b)(3).) The record does not reflect that the trial court did so, and Desta does not contend otherwise. (Ans. at 14 & n.4.) Instead, the trial court appears to have orally informed the parties three days before the scheduled start of the trial about the San Diego Superior Court's official policy that no reporter would be provided. (RA 232.) The Court of Appeal found that the trial court's lack of proper notice under the Rules of Court was not an adequate reason for reversal because Jameson did not raise it in his brief. (*Opinion* at 14 n.10) The Petition does not dispute that. But surely the trial court's failure to comply with a statewide rule that is specifically designed to ensure that litigants know to demand an official reporter justifies the failure by Jameson—an indigent

prisoner, appearing *pro se* by telephone—to make a written demand in advance of trial.[5]

Finally, there should be no dispute that any request by Jameson would have been futile due to the trial court's official policy. (*See, e.g., People v. Chavez* (1980) 26 Cal.3d 334, 349 n.5 [considering issue despite lack of objection when "any objection at trial on the grounds urged before this court would clearly have been futile].) As explained in the Petition, the San Diego Superior Court's Official Pro Tempore Reporter Policy specifically explained that the requirement that all parties obtain and pay for private reporters *pro tempore* applied equally to litigants with fee waivers. (*See* Pet. at 8.) There is no credible basis to believe that the trial court would even consider violating its own official policy had Jameson only made a written request for an official reporter.

B. Deference to the Legislature Does Not Merit Denying Review.

The Answer argues that "it is for the Legislature to determine whether courts are required to provide reporters free to indigents and under what circumstances." (Ans. at 6.) According to Desta, because the "current statutory scheme does not provide for the provision of free reporters to indigents in courts that do not provide such reporters, . . . if that is to be changed, it is the role of the Legislature to do so by amending section 68086." (*Id.*) But that argument is circular: it *assumes* the correctness of Desta's

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[5] As noted in the Petition, Jameson's Appellant's Brief contended that he objected orally prior to the start of trial, but given

interpretation, while no statute actually states the rule Desta claims.

Instead, as the Petition explains, this case presents a need to harmonize several different laws. First, there is the enacted Legislative policy of the State that indigent persons and prisoners have the right to equal access to the courts to prosecute and defend civil litigation. (*See generally* Gov't Code, § 68630, subd. (a); Penal Code, § 2601, subd. (d).) Second, reflecting that policy, the court reporter fee statute specifically calls for the waiver of reporters' fees for indigent litigants. (Gov't. Code, § 68086, subd. (b).) And third, various provisions in the Government Code and the Rules of Court afford the superior courts a degree of discretion to permit the use of privately-compensated reporters *pro tempore* in lieu of official reporters. (Gov't Code, § 68086, subd. (d); Rules of Court, rule 2.956(b)–(d)). Because the Legislature has left unresolved the question of how to harmonize these provisions—resolving the question does not interfere with its prerogatives in any way. To the contrary, "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is." (*McClung v. Employment Dev. Dep't* (2004) 34 Cal.4th 467, 469-70 [quoting *Marbury v. Madison* (1803) 1 Cranch 137, 5 U.S. 137].) "*[I]nterpreting* the law is a judicial function." *Id.* (emphasis original).

Indeed, to protect the right of court access, the Court has on several occasions read non-textual exceptions into generally

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the lack of a reporter, that objection is not reflected in the record.

applicable court fee statutes, based on the courts' inherent powers and the availability of such exceptions in the common law of England. (*See Martin v. Superior Court* (1917) 176 Cal. 289, 297 (1917); *see also Conover v. Hall* (1974) 11 Cal.3d 842, 851; *Ferguson v. Keays* (1971) 4 Cal.3d 649, 654; *Majors v. Superior Court* (1919) 181 Cal. 270, 274.) If those decisions did not offend the institutional prerogatives of the Legislative, this Petition—which merely posits that trial courts should be required to exercise their legislatively delegated discretion in a manner, consistent with other statutes, that respects indigents' rights to access the appellate process—surely does not either.

C. Jameson Sufficiently Raised the Issue of His Right to a Reporter before the Court of Appeal.

The Answer also argues that this case is inappropriate for review because the Petition "raises issues and arguments that were not raised by the plaintiff and not addressed by the appellate court in its Opinion." (Ans. at 17.) But the Answer is conflating *issues* and *arguments*. The *issue* of Jameson's right to have a court reporter present to make a record at his trial—both as a matter of statute and "due process safeguards"—was raised in Jameson's *pro se* appellate brief and resolved by the Court of Appeal's decision. (Jameson AOB at 42–43; Opinion at 13–15.)[6] That

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(*See* Pet. at 6–7 n.3.)

[6] The Answer specifically asserts that due process and equal protection concerns were not addressed before the Court of Appeal. (Ans. at 17–18.) To the contrary, Jameson's Opening Brief refers to "due process" numerous times, including specifically in the section addressed to the lack of a court reporter. (*See* Jame-

is all that is necessary to preserve an issue for review by this Court. (*See* Rules of Court, rule 8.500(c)(1) ["As a policy matter . . . the Supreme Court normally will not consider *an issue* that the Petitioner failed to timely raise in the Court of Appeal" (emphasis added)]; *see also People v. Braxton* (2004) 34 Cal.4th 798, 809.)

Of course, with its exclusive focus on the reporter question, and because Jameson is represented by *pro bono* counsel for the first time on this Petition, it is unsurprising that the Petition examines the relevant authority with a degree of fulsomeness that may have been lacking in Jameson's briefing to the Court of Appeal. But—particularly given the statewide importance of the issues presented (*see Braxton, supra*, 34 Cal.4th at p. 809)—that provides no cogent reason to deny review. The issue was raised and properly preserved for this Court's consideration.

D. The Lack of a Directly Conflicting Court of Appeal Decision Does Not Preclude Review.

The Answer argues that review is not merited because "this is the first published opinion on the issue of whether the court has to pay for or provide a court reporter to parties proceeding with a fee waiver." (Ans. at 19.) The Petition, of course, did not contend otherwise. But as the Petition explained, on a more general level, the Court of Appeal's decision stands in irreconcilable conflict with earlier decisions of this court, as well as several re-

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son AOB at 43.) Indeed, the brief ultimately concludes that "Jameson contends the errors of law, constitutional violations of basic due process and equal access to the Courts, and bias and prejudice require reversal and a change of venue should be considered if the matter is reversed." (*Id.*)

cent decisions of the Court of Appeal, which stand for the proposition that trial courts must exercise their discretion in a manner that protects the rights of indigent persons to access the courts. (Pet. at 14–22.)

E. The State of the Courts' Budget Should Not Preclude Review.

Finally, Desta suggests that indigent litigants like Jameson can and should be deprived of the ability to create an effective record for appeal because the Legislature has failed to adequately fund the state courts. Of course, that premise has been rejected by the Legislature itself, which has expressly stated that fiscal concerns cannot justify denying indigent litigants access to justice. After declaring "[t]hat our legal system cannot provide 'equal justice under law' unless all persons have access to the courts without regard to their economic means," the Legislature preemptively rejected the line of argument Desta now makes, finding "[t]hat fiscal responsibility should be tempered with concern for litigants' rights to access the justice system." (Cal. Gov't Code, § 68630, subds. (a), (b).)

Indeed, section 68630 echoes the point this Court made more than forty years ago: "the broad policy of discouraging frivolous litigation and providing financial support for the judiciary does not justify depriving indigents of access to the courts." (*Earls v. Superior Court* (1971) 6 Cal.3d 109, 113–14.) Desta's invocations of the specter of fiscal hardship are thus flatly contradicted by both the statutory text and this Court's exhortations that access to justice is paramount.

* * *

The Legislature has declared that court reporters are the preferred—and often exclusive—means of creating an appellate record. It has declared that fiscal concerns should not justify denying access to justice to indigent litigants. It is thus no surprise that when the Legislature has also declared that indigent litigants should have access to court reporters to create a record, Gov't Code § 68086(b), trial courts abuse their statutory discretion when they subvert rather than support those declared policies. The Court should grant review.

Dated: December 28, 2015

Respectfully Submitted,

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CERTIFICATE OF WORD COUNT

I, Michael Shipley, hereby certify that in accordance with California Rules of Court 8.504(d), I have employed the word count feature of Microsoft Word to verify that the number of words contained in this brief, including footnotes, is 4,183 words.

Dated: December 28, 2015

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