Case No. S230899

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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, Fourth Appellate 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

PETITIONER BARRY S. JAMESON'S REPLY BRIEF

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Just as Petitioner Barry Jameson was filing his Opening Brief in this case, the Sixth District of the Court of Appeal issued an opinion in *In re Marriage of Obrecht* (2016) 245 Cal. App. 4th 1. *Obrecht*—a family law dispute—was filed in a superior court with a "no official court reporters" rule essentially identical to the San Diego Superior Court policy currently before the Court. Finding that appellant had forfeited a claim of error because he could not provide a record on appeal, the court eloquently remarked:

> We are deeply troubled by the trial court's policy of conducting all family law matters without a reporter unless a reporter is engaged by one or both parties at their own expense. . . As illustrated by this case, the absence of a verbatim record can preclude effective appellate review, cloaking the trial court's actions in an impregnable presumption of correctness regardless of what may have actually transpired. Such a regime can raise grave issues of due process as well as equal protection in light of its disparate impact on litigants with limited financial means. The practice becomes all the more troubling when viewed in combination with the statewide prohibition against privately recording court proceedings "for any purpose other than as personal notes." (Cal. Rules of Court, rule 1.150(d).) Perhaps the time has come at last for California to enter the twentieth (sic) century and permit parties to record proceedings electronically in lieu of the far less reliable method of human stenography and transcription. *Until that day, however, we believe the right to effective appellate review cannot be permitted to depend entirely on the means of the parties.*

Id. at p. 9 n.3 [emphasis added; "(sic)" in original].

The Presiding Justice's observation could not be more true. California law protects and has long protected the right to judicial recourse, including the right of all litigants, rich or poor, to appeal adverse trial court decisions. It was against this backdrop

that the Legislature enacted section 68086, subdivision (b) of the Government Code, waiving court reporters' fee for indigent litigants. The San Diego Superior Court's policy of categorically denying official reporters failed to respect that central norm of the justice system by shutting out indigent litigants like Mr. Jameson from the appellate courts, and was therefore an abuse of discretion and an unlawful court rule.

Desta's arguments otherwise are unavailing. He argues that the trial court did not abuse its discretion because it made a rational choice to prioritize its fiscal difficulties over Jameson's "illusory" right of access. According to Desta, because indigents like Jameson often face substantial obstacles to success, even without access to a court reporter, any rule ensuring the creation of a trial record is a wasteful expenditure of resources. That argument, however is without support in morality, much less the law or the facts.

In a similar vein, Desta also argues that the trial court's policy is permissible because it only causes the forfeiture of *some* indigents' appeals. Of course, this court has never found that a barrier to access must be universal in order for it to be worthy of challenge.

Desta further disputes the existence of a constitutional right a free court reporter. Jameson, of course, has not argued that such a right exists—only that the constitutional concerns implicated warrant solicitude of the nature of his access rights as a matter of statutory and common law. And he also argues that Jameson was required to attempt to proceed by settled statement

to permissibly appeal the trial court's procedural error. But that argument too is without support. Nor do any of Desta's other arguments carry the day.

Thus, as addressed below and in the Opening Brief, the Court should reverse the judgment of the Court of Appeal and remand so that Jameson can have the trial he has been seeking for over fourteen years.

I. The Superior Court Abused Its Discretion by Failing to Take any Meaningful Measures to Ensure Jameson's Access to the Appellate Process.

Desta's Answering Brief discusses at some length various decisions of federal and state courts addressing the rights of indigent litigants to obtain fee waivers or free copies of trial court transcripts for use on appeal. (*See* Respondent's Answer Brief (RAB) 14–21.[1]) Despite his lengthy exegesis, however, he refuses to grapple with general legal proposition Jameson advances in the opening brief: When statutes or rules of court afford discretion to a trial court in crafting its procedures, that discretion must be exercised with solicitude for the rights of indigent and imprisoned litigants to access the courts. (Petitioner's Opening Brief (POB) 17–18.) Nor does Desta address that proposition's logical corollary: That a trial court that takes *no measures at all*

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[1] Although the discussion addresses a half dozen Court of Appeal opinions *In re Marriage of Obrecht* (2016) 245 Cal. App. 4th 1, 9 n.3—addressed in the Introduction, *supra*—was not one of them.

to ensure access for indigents necessarily abuses the discretion afforded it. (*See id.* at p. 19.)[2]

Instead of contesting or even addressing the validity or application of these rules, Desta offers three related excuses for why the trial court needn't have done anything to ensure that Jameson had an adequate opportunity to create a trial record for appeal.

First, Desta suggests requiring a trial court to take measures to ensure the creation of an adequate oral trial record would be an "illusory" right. (RAB 30.) According to Desta, because indigent pro se litigants face other impediments that make it extraordinarily difficult for indigent plaintiffs to prevail, Jameson has no "meaningful 'access to justice'" anyway. So it was perfectly rational for the trial court to decline to expend any of its indisputably taxed resources in support of a futile endeavor. (*Id.* at p. 31.).

Second, Desta points out that it is only in "a very limited number of cases (primarily lengthy trials) in which an indigent plaintiff cannot effectively appeal without a reporter's transcript." (*Id.* at p. 33.) He suggests that meaningful access does not

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[2] Desta's brief spends nine pages discussing the essential facts and holdings of a dozen cases. (RAB 14–23.) Tellingly, it does not cite, much less attempt to distinguish, the cases cited in the opening brief addressing the requirement that trial courts exercise their discretion in favor of protecting the right to access. (See POB 17–20 [discussing *Wantuch v. Davis* (1995) 32 Cal.App.4th 786 and *Apollo v. Gyaami* (2008) 167 Cal.App.4th 1468.) and collecting various other cases standing for the same general proposition in a footnote].)

require a court reporter because "only a small percentage of appeals would even be affected, [as] a transcript is not needed in the large majority of appeals." (*Id.* at p. 33.)

And third, Desta asserts that the right of access to the courts entails only a "right to participate" and *not* a "right to prosecute the action effectively." In doing so, he Desta tries to draw a distinction between waivers of court fees and affirmatively providing services to indigents.

None of these arguments has any merit.

A. That a Favorable Decision from this Court Will Not Remove Every Obstacle to Meaningful Access by Indigent Litigants Is Not an Appropriate Basis to Affirm.

The primary argument raised in Desta's brief is that because indigent *pro se* plaintiffs like Jameson face various other obstacles in prosecuting their cases—such as an inability to pay for counsel, expert witnesses, and transcription costs—the trial court's failure to afford any opportunity to create a record of oral proceedings for appeal leaves him no worse off in terms of meaningful access to the courts. (RAB 24–37.) Indeed:

> [T]here is no meaningful "access to justice" if the plaintiff is provided with a court reporter but not a free transcript on appeal, or if he is provided with a reporter and a free transcript but not an attorney to prepare the appeal, or if he is provided with a reporter and a free transcript and an attorney but not expert witnesses to testify at trial should he obtain a reversal on appeal.

(*Id.* at p. 31.)

Desta apparently believes that, unless the state Legislature adopts a full-blown "civil *Gideon*" system,[3] this Court cannot and should not offer any special solicitude whatsoever for indigent litigants when it comes to the court reporting statutes. Absent that, these litigants are destined to lose one way or another, so why bother?

Setting aside the argument's moral monstrosity, it makes no legal or empirical sense. Were the point a legally cogent one, it would erase every one of this Court's long line of incremental improvements in the rights of indigents to access the courts. Why waive filing fees for a plaintiff *in forma pauperis* if he is never going be able to prove the defendant's negligence led to plaintiff's daughter's death? (*Cf. Martin v. Superior Court* (1917) 176 Cal. 289, 296 (*Martin*).) Why waive jury fees if he is destined for a defense verdict? (*Cf. Majors v. Superior Court* (1919) 181 Cal. 270, 274 (*Majors*).) Why waive appellate filing fees if the plaintiff can't afford the cost of transcribing the record or to hire a lawyer to draft her briefs, especially since she will inevitably lose on remand? (*Cf. Ferguson v. Keays* (1971) 4 Cal.3d 649, 654 (*Ferguson*).) At its core, Desta's argument isn't merely a cavil with providing a free court reporter to indigent litigants—it is an argument against the very notion of incremental progress on the

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[3] *See generally* Hon. Mark Juhas, *On the Anniversary of Gideon, an Argument for Free Civil Representation* (Sept. 2013) Los Angeles Lawyer 44.

road to equal access to justice.[4] Absent the perfect, suggests Desta, there is no reason for a court to exercise in discretion in favor of the mere good, particularly if it costs money.

Along these lines, Desta suggests that the abuse of discretion standard asks "whether the trial court exceeded the bounds of reason." (RAB 36 [quoting *Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.) According to Desta, since a reported trial would be "illusory" unless Jameson also has a right to free transcription of the reporter's transcript,[5] Desta argues that the trial court "made a rational decision not to provide reporter in civil actions," including in fee waiver cases, particularly in light of the budgetary constraints faced by the courts in this state. (RAB 36–37.)

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4 *Cf.* Rev. Dr. Martin Luther King, Jr., *Where Do We Go from Here?* (Aug. 16, 1967) ["Let us realize that the arc of the moral universe is long, but it bends toward justice."] <http://kingencyclopedia.stanford.edu/encyclopedia/documentsentry/where_do_we_go_from_here_delivered_at_the_11th_annual_sclc_convention/> (as of June 26, 2016).

5 Although Desta contests the point, that an indigent civil litigant has no right to a free transcript necessary to prosecute his appeal is by no means a settled issue of California law. As noted in the opening brief, (POB 14–15) the line of Court of Appeal cases suggesting that no such right exists has its roots in a seventy-five-year-old Court of Appeal case—*Rucker v. Superior Court* (1930) 104 Cal. App. 683—whose rationale has been called into question by this Court. (*See Ferguson, supra*, 4 Cal. 3d at p. 653–54.) In any event, because the right to a free transcript was not presented by the facts of Jameson's appeal—the lack of a reporter left nothing for him to pay to transcribe—and because the Court did not certify it as an issue presented for review, Jameson will not belabor the point.

Of course, the abuse of discretion standard is neither as deferential nor as narrow as Desta makes it out to be. As the Court recently explained, a trial court's discretion "must be exercised within the confines of the applicable legal principles." *Sargon Enterprises, Inc. v. Univ. of S. Cal.* (2012) 55 Cal. 4th 747, 773. "To determine if a court abused its discretion, we must thus consider 'the legal principles and policies that should have guided the court's actions.'" (*Ibid.* [quoting *People v. Carmony* (2004) 33 Cal.4th 367, 377].) "The legal principles that govern the subject of discretionary action vary greatly with context. . . . They are derived from the common law or statutes under which discretion is conferred." (*Ibid.* [quoting (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297–1298 (*Drew*)].) "Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion." *Ibid.* [also quoting *Drew*].

Under this standard, the trial court's policy exceeds the confines of the long-established principles regarding the obligations of California courts to ensure indigents have access to justice. These principles cannot yield simply because they are fiscally inconvenient for the judicial branch. Indeed, the Legislature itself has found and declared "[t]hat fiscal responsibility should be tempered with concern for litigants' rights to access the justice system." (Gov't Code, § 68630, subd. (b).) And the Court similarly explained in *Earls*, "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. Supe-*

rior Court (1971) 6 Cal. 3d 109, 114 [applying rule in context of right to appeal].) Thus, even if the cost-benefit explanation advanced by Desta is somehow "rational" in a general way, it is nonetheless an abuse of discretion.

In any event, if the reporting of an indigent's civil trial is ensured by a favorable ruling from this Court, it would by no means be "illusory," even without a corresponding right to a free transcript. First off, although the Transcript Reimbursement Fund may be small compared to the need, its existence presupposes that there will be transcribed proceedings for it to fund. (*See* Bus. & Prof. Code, § 8030.6.) And—as the present case illustrates—an indigent litigant can obtain representation on appeal by a non-profit legal services provider or private *pro bono* counsel.[6] Counsel who provide these free services often advance the costs of obtaining the reporter's transcript—costs that are recoverable by a prevailing party on appeal. (*See* Rules of Court, rule 8.278(d)(1)(B).) But a reporter's transcript can *never* be obtained if the trial went unreported. Absent a trial record to justify a reversal, these opportunities will have fleeting value to an indigent appellant.

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[6] Indeed, the courts themselves are currently working with legal services organizations to create appellate *pro bono* projects. Recently, the Second District of the Court of Appeal, in conjunction with Public Counsel, has launched a pilot project to provide representation to indigent litigants. (*See* Appellate Pro Bono Pilot Project, Second District Court of Appeal, *http://www.courts.ca.gov/2503.htm*).

Equally importantly, a litigant unable to pay for a private court reporter to attend every day of a trial[7] may well be able to find the funds needed to transcribe a few pages identifying an error he wishes to appeal. (*See, e.g.*, *Leslie v. Roe* (1974) 41 Cal.App.3d 104, 107 [noting that a partial transcript may be an affordable alternative for indigent litigants].) One of Jameson's prior appeals is illustrative. There, the Court of Appeal reversed in part because the trial court told Jameson 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." (*See Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1161 (*Jameson III*) [alterations original in opinion].) Although these intemperate comments appeared in a written order, had they been oral, the option of ordering the transcription of only the few pages of transcript containing the comments would have proven a viable option for Jameson to present a record on appeal for this issue.[8]

Moreover, Desta's claim that a right to have a trial reported is meaningless without a corresponding right to a free transcript thus misses a key distinction between the two: Having a trial go

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[7] If provided by the court, a court reporter's fees in San Diego are $403 per half day or $806 per full day. <http://www.sdcourt.ca.gov/portal/page?_pageid=55,1057199&_dad=portal&_schema=PORTAL.> Because the court does not regulate fees of privately hired reporters, Jameson and other indigent litigants may face even more prohibitive costs.

[8] Elsewhere in the brief, Desta suggests that Jameson could not afford even a partial record. (RAB 55–56.) But nothing in the record establishes that fact.

unreported means that it will be *impossible* for an indigent litigant to find the wherewithal to order and pay for a transcript at some time in the future. The record of an unreported trial is lost *forever*, and well before the litigant could possibly know that a transcript will be necessary to support his appeal.

Indeed, the Court of Appeal recognized this crucial distinction in misdemeanor criminal cases, where the right to a reporter was categorically guaranteed, but the right to a free transcript was not. (*See Andrus v. Municipal Court* (1983) 143 Cal.App.3d 1041, 1051, *disapproved on unrelated issue by Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208 n.11.) As the *Andrus* court noted, there is a "world of difference" between "when the state must collect a verbatim record" versus "when it must provide a transcript of that record." (*Ibid.*) Reporting is required, in part because of the "the impossibility of predicting what might arise in even the simplest trial[.]" (*Ibid.*) In contrast, in assessing "the need to prepare a transcript posttrial, knowledge will replace speculation[.]" (*Ibid.*) Likewise, an error in permitting transcription has an easy remedy: order the transcript prepared. On the other hand, a failure to require reporting offers little recourse other than to "reverse for lack of an adequate record." (*Ibid.*)

Moreover, having a trial reported has benefits even if it is unclear whether the indigent litigant can later obtain a transcript. (RAB 55.) Even *without* a transcript, an indigent appellant benefits from the presence of a court reporter. Just as in the era before verbatim transcription, the reporter's notes may be used to settle a statement. (*See W. States Const. Co. v. Municipal Court*

of City & County of San Francisco (1951) 38 Cal.2d 146, 150 (*Western States*) [including reporter's notes as a resource to be used when settling a statement]). Indeed, as discussed *infra*, § II, courts have held that a trial court is under no duty to settle a statement absent an unofficial transcript or notes to assist it. (*See, e.g., 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"]).

B. That the Lack of a Record of Oral Proceedings Does Not Doom Every Indigent's Appeal Does Not Excuse the Denial of the Right of Access in Cases Where It Does.

Desta claims that Jameson "overstates the extent of the denial of 'access to justice' resulting from a Court not providing a reporter to indigent plaintiffs." (RAB 33.) Desta notes that in "many or most appeals, a reporter's transcript is not necessary for effective appellate review." Thus, according to Desta, "the fact that *some* appeals brought by indigent plaintiffs will not be successful because of a lack of a transcript does not justify mandating the provision of reporters to indigent plaintiffs in personal injury actions." (*Ibid.*)

Notably, this argument is unsupported by any citation to authority supporting the proposition that a barrier to the right of indigents to access to the courts is acceptable if it does not leave them without remedy in every case. Indeed, that has no support in the law. California's courts have repeatedly intervened to remove obstacles to the right of access that apply only in limited circumstances. That not every case is jury-triable does not mean that jury fees are an acceptable impediment to access by indi-

gents. (*Cf. Majors, supra,* 181 Cal. at p. 274.) That every plaintiff does not seek a preliminary injunction does not mean that an undertaking requirement is an acceptable obstacle either. (*Cf. Conover v. Hall* (1974) 11 Cal.3d 842, 852.) And that most plaintiffs do not hail from out of state does not mean that a requirement that an indigent foreign plaintiff post security for costs is a permissible barrier to access. (*Cf. Alshafie v. Lallande* (2009) 171 Cal.App.4th 421, 431.) It is simply untrue that an impediment to access that fails affect all, or even most, indigent litigants is somehow an acceptable barrier to access to the courts.

C. The Right to Access Requires More than an Empty "Right to Participate"

Finally, Desta argues—yet again without citation to authority—that the right of indigents to access the courts is limited to a "right to participate," not a right to anything else the would be helpful to "prosecute the action effectively." (RAB 34.) This appears to arise from his belief that California's "policy of providing access to those without adequate means is limited to the *waiver of court fees.*" (*Id.* at p. 30.) "It does not extend to mandating the provision of services." (RAB 30.) That distinction, however is completely artificial and in several respects demonstrably incorrect. It is, in any event, without support in the decisions of this or any other court.[9]

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[9] Although he doesn't acknowledge as much, the Answering Brief at least tacitly admits that this framework cannot apply to criminal cases (RAB 15 [discussing the requirement to provide free transcripts to criminal defendants established by *Griffin v. Illinois* (1956) 351 U.S. 12]), cases addressing significant issues of

Contrary to Desta's intimation, an indigent's right of access is not a stale formalistic right to participate. Indeed, the Court has rejected barriers that have "the practical effect of restricting an indigent's access to the courts because of his poverty" because they "contravene[ ] the fundamental notions of equality and fairness which since the earliest days of the common law have found expression in the right to proceed *in forma pauperis*." (*Isrin v. Superior Court* (1965) 63 Cal.2d 153, 165. (*Isrin*).) As numerous decisions have emphasized that the right of access must be *meaningful*. (*See Payne*, 17 Cal.3d at p. 926; *Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 792; *Jameson III*, *supra*, 215 Cal. App. 4th at p. 1176.) Just how meaningful is the right to appeal from a trial when the absence of a reporter makes it *impossible* for an indigent appellant to obtain the record that is a practical necessary for any hope of a reversal?

Moreover, the dichotomy suggested by Desta—between the court's forbearing collection of a fee versus affirmatively outlaying funds from the public fisc to pay for services—is demonstrably false. When, for instance, jury fees are waived for an indigent

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family cohesion (*id.* at p. 21 [discussing the requirement to provide free transcripts to parents challenging terminations of parental rights established by *M.L.B. v. S.L.J.* (1996) 519 U.S. 102]), or in cases involving an incarcerated indigent *defendant* (*id.* at pp. 19–20 [discussing the requirement to appoint counsel in certain civil cases where the defendant is imprisoned established by *Payne v. Superior Court* (1976) 17 Cal.3d 908].) Thus, although he fails to explain why, Desta's claim that the right to access is limited to a formal right to participate is apparently limited to *pro se* indigent civil *plaintiffs*.