

Case No. **S230899**

IN THE SUPREME COURT OF CALIFORNIA

BARRY S. JAMESON,
PLAINTIFF AND PETITIONER,

v.

TADDESE DESTA,
DEFENDANT AND RESPONDENT.

SUPREME COURT
FILED

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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
OPENING BRIEF ON THE MERITS**

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INTRODUCTION

In 2002, plaintiff Barry Jameson—indigent, incarcerated, and representing himself—sued Defendant Dr. Tadesse Desta for providing negligent medical treatment while Jameson was in prison. On three separate occasions over ten years, the San Diego County Superior Court dismissed Jameson’s case. Each time, however, the Court of Appeal reversed. *Twelve years* after filing his complaint, Jameson was finally on the cusp of bringing his case to trial. But yet again, the superior court prevented his claims from reaching a jury. It granted Desta’s oral motion for nonsuit based only upon Jameson’s opening statement.

This time, however, the superior court also deprived Jameson of any effective remedy in the Court of Appeal. A few days before the commencement of trial, the trial court issued a minute order informing Jameson that an official reporter would not be present for his trial, invoking the San Diego Superior Court’s policy of categorically refusing to provide official reporter services for all civil trials. Instead, under that policy, Mr. Jameson was required to secure and pay for the services of a private reporter *pro tempore*—services he clearly could not afford.

At the outset of his case, Jameson had been granted a fee waiver under Government Code section 68631. Under recently enacted Government Code section 68086, subdivision (b)—which requires that reporters’ fees “shall be waived for a person who has been granted a fee waiver under [Government Code] section 68631”—he was entitled to an official reporter free of cost. But through its policy, the trial court rendered meaningless any bene-

fit that the Legislature bestowed in enacting section 68086, subdivision (b).

The Court of Appeal affirmed in full. (*Jameson v. Desta* (2015) 241 Cal.App.4th 491, 495 (*Jameson IV*.) It compounded the superior court's error by holding that Government Code section 68086, subdivision (b) "does not mandate that a trial court provide indigent litigants with court reporter services where no official court reporter is provided by the court, as was true in this case." (*Id.* at pp. 502–03.) The court ruled that under such circumstances, every litigant, even an indigent one, must arrange and pay for the services of a private reporter *pro tempore*, under Rules of Court, rule 2.956. (*Id.*) Because Mr. Jameson suffered the arbitrary misfortune of filing his action in a county that—through no fault of his own—categorically refuses to provide an official reporter for any civil trial, the Court of Appeal held that he forfeited any appeal of the nonsuit for want of a proper reporter's transcript to provide a record on appeal. (*Id.* at pp. 503–04.)

The Court of Appeal's ruling cannot stand. California law requires the courts of this state to exercise their discretion in order to protect the rights of indigent and imprisoned litigants to access the courts, including the right to effectively appeal. Other than the trial court's own policy, no statute or rule permitted—much less required—the trial court to deprive Jameson of access to an official court reporter. Under the circumstances, by failing to take appropriate measures to ensure Jameson's access to the courts, the trial court abused its discretion, and significantly prejudiced Jameson.

ISSUES PRESENTED FOR REVIEW

The issues presented for this Court's review are:

1. Jameson has been granted a fee waiver under Government Code section 68631. Did the Court of Appeal err by permitting the trial court's policy to never provide official reporters in civil trials to absolve the court of its obligation under Government Code § 68086 subdivision (b) to waive reporter's fees for fee waiver litigants?

2. Legislatively established policy and longstanding precedent from this Court require courts to exercise their discretion in a manner that protects the rights of indigent litigants with colorable claims to access the courts to redress their grievances. Did the superior court abuse that discretion by adopting a court reporter policy that has the practical effect of categorically denying all indigent litigants access to court reporters, and thus their practical ability to make a record for appeal?

STATEMENT OF THE CASE

I. Jameson's Fourteen-Year Odyssey Through the Courts.

In 2002, Jameson sued Desta, a prison doctor, in San Diego Superior Court, alleging negligent medical treatment for Hepatitis C while Mr. Jameson was incarcerated. (*Jameson IV, supra*, 241 Cal.App.4th at p. 494.) The operative counts of his complaint litigated by the parties allege medical negligence and breach of fiduciary duty through lack of informed consent. (*Id.* at pp. 495–96.)

Over the next thirteen years, Jameson's case followed a circuitous but predictable course. The superior court would find some reason to dismiss his case, only to be reversed by the Court of Appeal.

In 2005, the superior court dismissed Jameson's complaint for lack of diligent service. (*Jameson v. Desta* (July 2, 2007, D047824), 2007 WL 1885104 at *2 opn. mod. July 26, 2007 [non-pub. opn.] (*Jameson I*.) But three years earlier, Desta had signed a "notice and acknowledgement of receipt indicating that he had been served with a summons and a complaint." (*Id.* at *6) The Court of Appeal reversed in an unpublished opinion. (*Id.* at *9.)

On remand, the superior court again dismissed when Jameson—still incarcerated—failed to appear at a telephonic case management conference. (*Jameson v. Desta* (2009) 179 Cal.App.4th 672, 674 (*Jameson II*.) But the evidence showed that Jameson's nonappearance resulted from prison officials denying him access to the telephone. (*Id.* at pp. 681–83.) The Court of Appeal again reversed, holding that the superior court had abused

its discretion by depriving Jameson of “meaningful access to the courts.” (*Id.* at 683.)

On a second remand, the superior court granted summary judgment in favor of Desta, finding that Jameson had not come forward with evidence to raise triable issues as to causation. (*Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1148 (*Jameson III*.) The Court of Appeal reversed a third time. (*Id.* at 1149.) On the merits, it ruled that Desta failed to meet his initial burden on Jameson’s informed consent claim and that Jameson had sufficiently raised triable issues as to causation on his negligence claim. (*Id.* at pp. 1164–74.) The Court of Appeal further determined that the trial court improperly permitted Desta’s lawyer to take an *ex parte* deposition of Jameson’s medical expert, over Jameson’s objections. (*Id.* at pp. 1174–76.) The court noted that the trial judge’s statements in overruling Jameson’s objections were “entirely inconsistent with [the] mandate” “that an indigent incarcerated litigant has a right to prosecute a bona fide civil action on his own behalf and to be afforded meaningful access to the courts in doing so, and that the trial courts are to ensure that this right is protected.” (*Id.* at p. 1176.) The court was sufficiently concerned by the superior court’s comments that it found it necessary to “remind the trial court of its obligation to ‘ensure indigent prisoner litigants are afforded meaningful access to the courts’[.]” (*Id.* at p. 1149.)

Finally, with the case before it a fourth time, the superior court set the matter for jury trial on April 21, 2014. (*See* RA 231–32.) A minute order reflecting a hearing on April 18, 2014—with

Jameson appearing by telephone—states that the court notified the parties that “the Court no longer provides a court reporter for civil trials, and that the parties have to provide their own court reporters for trial.”¹ (*Ibid.*) After trial was continued twice to address pending motions (RA 250–51, 252–53), a civil jury trial commenced on April 28, 2014. (RA 254.)

After an hour-long jury selection process, Jameson, *pro se* and appearing via telephone from prison, gave his opening statement. (RA 257.) No court reporter, official or otherwise, was present to transcribe the proceedings.² After giving his own opening statement, Desta moved for nonsuit. (RA 257, *see Jameson IV, supra*, 241 Cal.App.4th at p. 497.) The superior court granted the motion, dismissing the case for a fourth time, ruling that “Jameson did not establish causation in his opening statement,” (RA 257, *see Jameson IV, supra*, 241 Cal.App.4th at pp. 503–04), in significant tension with the appellate court’s most recent ruling in *Jameson III*. (*Cf. Jameson III, supra*, 215 Cal.App.4th at p. 1168 [holding that “Jameson raised a triable issue of fact with re-

¹ The hearing itself was not reported. (RA 231.) This minute order is the only reference in the record that the superior court would not be providing a reporter.

² Jameson’s *pro se* opening brief to the Court of Appeal asserted that at the beginning of trial, Defendant indicated that he would not be having the trial reported. (Jameson’s Appellant’s Br. at p. 42.) Jameson’s brief stated that he orally objected to the court’s refusal to provide a reporter at that time, but that his objections were overruled. (*Ibid.*) The trial court’s minute order does not reflect any objection or ruling on it (RA 256–257) and without a transcript, there is no way to know what was said.

spect to both the standard of care and causation.”].) Judgment was entered on July 31, 2014. (RA 259–60.)

II. The San Diego Superior Court’s ‘No Official Reporters’ Policy.

“At a hearing 10 days prior to the commencement of the jury trial, the trial court informed the parties that ‘the Court no longer provides a court reporter for civil trials, and that parties have to provide their own reporters for trial.’” (*Jameson IV, supra*, 241 Cal.App.4th at p. 500 [quoting RA 232].)³ Indeed, since 2013, as a matter of official court policy, the San Diego Superior Court has not provided official court reporters in civil, family, or probate matters, including all civil trials. (See S.D. Super. Ct. Form ADM-317, *Policy Regarding Normal Availability and Unavailability of Official Court Reporters*.)⁴ The policy affords no exceptions for indigent litigants, even when they have qualified for a fee waiver and have no other way to pay for a record. (See S.D. Super. Ct. Form ADM-315, *Official Reporter Pro Tempore Policy* at 2.)⁵ It specifically states:

In cases where the court no longer provides court reporters, indigent litigants are not entitled to have the court provide or pay for a court reporter based on a fee waiver. *Fee waivers apply only to*

³ The hearing occurred on April 18, 2014, which was only three days before the scheduled onset of the trial. (See RA 231–32.) As noted, after two continuances, jury selection began on April 28, 2014, which was ten days after the trial court’s admonishment about the lack of official reporters.

⁴ Attached as Ex. A, per Rules of Court, rule 8.520(h).

⁵ Attached as Ex. B, per Rules of Court, rule 8.520(h).

fees charged by the court. They do not apply to court reporter fees and costs in cases where the court is not providing the court reporter. Privately retained court reporters are independent from the court, and are allowed to charge indigent litigants for their services.

Ibid. (emphasis added).

The trial court's policy left Jameson without recourse. Incarcerated and indigent, he could not afford to pay for the services of a private reporter *pro tempore*, the only permissible way under the trial court's policy for him to make an adequate record of oral proceedings for appeal. By outsourcing *all* civil trial reporting to private reporters, the trial court has rendered it effectively *impossible* for an indigent civil litigant like Jameson to create a trial record, fee waiver or not.

III. The Opinion of the Court of Appeal.

Jameson timely appealed the judgment of nonsuit, as well as several other orders of the trial court. (AA 1207–09.) On the nonsuit, Jameson argued that the trial court erred in ruling that based on his opening statement, he could never establish causation. (*Jameson IV, supra*, 241 Cal.App.4th at pp. 504–05.) Jameson's arguments included several claims of error related to the trial court's decision, such as its refusal to permit Jameson to admit his own expert's testimony by deposition, its refusal to permit Jameson to establish causation by relying on Desta's expert or the doctrine of *res ipsa loquitur*, and various issues regarding the trial court's approved jury instructions. (*Ibid.*)

The Court of Appeal, however, declined to reach the merits of any of these arguments, holding that “none of [them are] cog-

nizable in the absence of a reporter's transcript." (*Id.* at 505.) Citing an earlier case, the court explained that "a[n] appellant who fails to provide a reporter's transcript on appeal is precluded 'from raising any evidentiary issues on appeal.'" (*Id.* at 504 [quoting *Hodges v. Mark* (1996) 49 Cal.App.4th 651, 657].) "Because an order granting a nonsuit is dependent on a review of the evidence to be presented at trial, an appellant cannot obtain reversal of such order in the absence of a reporter's transcript." (*Ibid.*) As "the record on appeal does not contain a reporter's transcript[,] Jameson is therefore precluded from obtaining a reversal of the trial court's ruling granting Desta's motion for nonsuit." (*Ibid.*)

As to why Jameson lacked the record he needed to preserve his appeal, he argued: (1) that the trial court erred by "waiting until trial started to disallow a court reporter"—depriving him of an opportunity to make a record on the issue—and (2) that Code of Civil Procedure section 269(a)(1) and [Government Code] section 68086(b)⁶—which requires that a court reporter's fee "shall be waived for a person who has been granted a fee waiver under Section 68631"—required the court to provide him with an official reporter free of charge. (Jameson's Appellant's Br. at 43.)

The Court of Appeal rejected these arguments. On the timing, the court found that the admonition reflected in the trial court's April 18, 2014 minute order was adequate, particularly because Jameson's brief had not specifically argued that the trial court did not properly follow Rules of Court, rule 2.956, which

addresses the court's obligation to provide notice of the unavailability of official reporters. (*Jameson IV, supra*, 241 Cal.App.4th at p. 502 & fn.10.) And as to Jameson's right to a free reporter, the court held that section 68086(b) requires only to a waiver of appearance fees for *official reporters*. (*Id.* at p. 503.) According to the court, it does not, however, require a free reporter when the superior court declines to provide any official reporters at all, and instead requires all parties—pecunious and poor alike—to secure the services of private reporters *pro tempore*. (*Ibid.*) Relying on Rules of Court, rule 2.956(c) and the superior court's official policy, the court held that “it is a ‘party’s responsibility to pay the reporter’s fee’ where an official court reporter is not provided by the court,” even when that party is an indigent litigant who has been granted a fee waiver. (*Ibid.*)⁷

Rejecting Jameson's other arguments, the Court of Appeal affirmed the judgment in full in an unpublished opinion issued on October 14, 2015. (*Id.* at p. 495.) On October 20, 2015, the acting presiding justice on the panel ordered the opinion certified for publication. The court's decision became final on November 19, 2015. (Cal. Rules of Court, rule 8.264(b)(3).)

Jameson filed a timely petition for review on December 1, 2015, which the Court granted on January 27, 2016.

⁶ Any further references to “section 68086” are to the Government Code.

⁷ Neither rule 2.956 nor the superior court's policies were expressly addressed in Desta's appellate briefing. (*See* Desta's Respondent's Br. at p. 50–53; *cf. People v. Alice* (2007) 41 Cal.4th 668, 671.)

THE COURT OF APPEAL'S DECISION MUST BE REVERSED

As explained below, this Court has often been presented with the question of when—the statutes on the subject being silent—courts can imply exceptions to mandatory court fees for *in forma pauperis* litigants. Over the past hundred years, it has repeatedly answered that question with an emphatic “yes.” This case, in contrast, presents an easier question. Here, in section 68086, subdivision (b), the Legislature has affirmatively determined that *in forma pauperis* litigants are entitled to the waiver of a court reporter’s appearance fee. Can California’s courts nonetheless evade that obligation and effectively deprive these litigants of an appellate record by outsourcing all civil reporting to private reporters who charge an appearance fee to all litigants, rich and poor alike? The answer, resoundingly, is “no.”

California law recognizes that poor and imprisoned litigants have a fundamental right to access the courts, including the appellate process. Under well-established principles, the courts of this state must exercise their discretion in crafting procedures sufficient to vindicate that right. Although the trial court in this case had means within its discretion to ensure the presence of a reporter at Jameson’s trial to create a record for appeal, it took no steps at all to preserve Jameson’s access to an appeal. Indeed, it has essentially tied its own hands by enacting a court-wide policy that makes it practically *impossible* for any fee-waiver litigant to obtain court reporting services at his civil trial. In doing so, the trial court ran afoul of the clear policies of this state and abused its discretion in denying Jameson access to the courts.

I. California Law Requires Courts to Exercise Their Discretion in Favor of Ensuring Indigent Litigants' Rights of Access to Justice.

“Access to justice is a fundamental and essential right in a democratic society. It is the responsibility of government to ensure that all people enjoy this right.” (California Commission on Access to Justice (October 2002) *The Path to Equal Justice: A Five-Year Status Report on Access to Justice in California*, Finding A, page 36; see also *Cruz v. Superior Court* (2004) 120 Cal.App.4th 175, 179.) In 2009, the California Legislature declared as the policy of this state, “[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.” (Gov’t Code, § 68630, subd. (a)). “California law and court procedures should ensure that court fees are not a barrier to court access for those with insufficient economic means to pay those fees.” (*Ibid.*) “Providing access to justice for self-represented litigants is a priority for California courts.” (Cal. Rules of Court, rule 10.960(b).)

Indeed, as the Court of Appeal recognized in *Jameson II*, California law specifically affords prisoners “a statutory right to initiate civil actions.” (*Jameson II, supra*, 179 Cal.App.4th at p. 678 [citing Penal Code, § 2601(d)].) “In the case of an indigent prisoner initiating a bona fide civil action, this statutory right carries with it a right of meaningful access to the courts to prosecute the action.” (*Ibid.* [quoting *Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 792 (*Wantuch*)].)

These policies have a lengthy and proud lineage in the decisions of this Court. Nearly a century ago, the Court held that

California courts have an inherent equitable power to permit an indigent person to litigate *in forma pauperis* and bring actions without paying filing fees. (*Martin v. Superior Court* (1917) 176 Cal. 289, 296 (*Martin*); see also *Baltayan v. Estate of Getemyan* (2001) 90 Cal.App.4th 1427, 1436 (*Baltayan*) (conc. opn. of Johnson, J.). [“Nearly 85 years ago, in *Martin v. Superior Court*, the California Supreme Court proclaimed poverty could not be allowed to deny anyone access to this state’s courts” (footnote omitted)].) Through the next seventy years, the Court extended that right in various respects.

Two years after *Martin*, the Court held that an indigent could obtain a waiver of statutory jury fees, even though the statute afforded no express exception. (*Majors v. Superior Court* (1919) 181 Cal. 270, 274 (*Majors*)). Later decisions followed suit for other fees. (*Conover v. Hall* (1974) 11 Cal.3d 842, 851 [power to waive statutorily required undertaking to obtain preliminary injunction]; *Ferguson v. Keays* (1971) 4 Cal.3d 649, 654 (*Ferguson*) [power to waive appellate filing fees]).⁸

Ferguson is most closely on point. There, the question presented was the “inherent power of an appellate court to waive its own filing fees to accommodate indigent civil litigants[.]” (*Ferguson, supra*, 4 Cal.3d at p. 654.) The pertinent fee statutes neither permitted nor prohibited courts from waiving filing fees on ap-

⁸ Cf. *Jara v. Mun. Court* (1978) 21 Cal.3d 181, 186 [4-3 decision holding that small claims courts were not required to provide interpretive services because other resources were available to protect their ability to participate in the small claims process].

peal. (*Id.* at 656.) Relying on both common law courts' historical exercise of "the power to permit indigents to appeal in forma pauperis," and *Martin's* reasoning that statutes generally permitting the collection of fees should not be read to divest courts of the power to permit parties to proceed *in forma pauperis*, the Court held that California courts inherently possess the authority to grant waivers. (*Id.* at pp. 654–56.) Importantly, in examining the rationale for requiring filing fees, the Court explained that "the legitimate purposes of providing financial support for our courts and discouraging frivolous or unnecessary litigation . . . do not require us to deprive indigents of access to the appellate courts." (*Id.* at 657.)

Ferguson was not ultimately called upon to reach the issue of whether an *in forma pauperis* litigant had the right to obtain a free transcript on appeal. (*Id.* at pp. 653–54 & fn.3; see also *Jara, supra*, 21 Cal.3d at p. 184 [recognizing that *Ferguson* did not reach the issue].) The Court did, however, express some skepticism about the accuracy of historical analysis contained in a 1930 Court of Appeal decision that declined to grant a writ ordering a trial court to afford a free transcript to an indigent plaintiff. (*Ferguson*, at pp. 653–54 ["Although [*Rucker v. Superior Court* (1930) 104 Cal.App. 683] without citation of authority, questioned whether at common law the right to sue in forma pauperis extended to appeals or writs of error, several English cases prior to

1850 (when the common law was incorporated into our jurisprudence) had expressly recognized such a right.”].)⁹

On several occasions, the Court has also acted to protect the rights of indigent persons to obtain *in forma pauperis* status in the face of challenges to their indigency. (See *Earls v. Superior Court* (1971) 6 Cal.3d 109, 117; *Isrin v. Superior Court* (1965) 63 Cal.2d 153, 165 (*Isrin*); see also *March v. Municipal Court* (1972) 7 Cal.3d 422, 430) In particular, these cases rejected rules that have “the practical effect of restricting an indigent’s access to the courts because of his poverty[.]” (*Isrin, supra*, 63 Cal.2d at 165.). Such rules “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*.” (*Ibid.*)

⁹ *Rucker* and its progeny (see *City of Rohnert Park v. Superior Court* (1983) 146 Cal.App.3d 420, 427 [collecting cases]) have no bearing on Jameson’s appeal in this case because Jameson’s appeal addresses only the issue of the *court reporter’s appearance fee*, not the actual costs of preparing an appellate transcript. “[C]ourt reporter fees are entirely different expense than transcription fees and must be paid whether parties order transcripts or not[.]” 7 Witkin, *California Procedure* (2015 online ed.) Judgment, § 135, p. 670 [citing *Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 58].)

The state maintains a Transcript Reimbursement fund to assist indigent appellants in paying transcript fees. (See Bus. & Prof. Code, § 8030.6.) That fund, however, compensates for *transcript preparation fees*, not the *court reporter appearance fees* at issue in this case. (*Ibid.*) Under the Court of Appeal’s reasoning, Jameson will never be able to apply for Transcript Reimbursement because he was financially unable to secure the attendance of a reporter in the first place.

And as to prisoner litigants like Jameson,¹⁰ the Court has held—and subsequently reaffirmed—that “as a matter of due process and equal protection under both the federal and California Constitutions an indigent prisoner who is a defendant in a bona fide legal action threatening his interests is entitled to access to the courts to be heard in his defense.” (*Yarbrough v. Superior Court* (1985) 39 Cal.3d 197, 200 (*Yarbrough*) [quotation omitted]; see also *Payne v. Superior Court* (1976) 17 Cal.3d 908, 924 (*Payne*)). Because access is a fundamental right, “[t]he state has the burden of demonstrating a compelling state interest to justify the infringement.” (*Payne, supra*, 17 Cal.3d at p. 919.)¹¹

Ultimately, the Court determined that only a compelling interest may justify denial of a prisoner’s right of access to the courts. (See *id.* at pp. 919–22 [rejecting various interests such as safety and rehabilitation as non-compelling]; see also *Earls, supra*, (1971) 6 Cal. 3d at pp. 113–14. Trial courts are thus required to exercise their discretion in as informed a manner as possible to effectuate the prisoner’s right of access to the courts. (*Yarbrough, supra*, 39 Cal. 3d at p. 207.) At least in some cases

¹⁰ Jameson was a prisoner during all proceedings before the trial court and his first three appeals. He was released on parole while a decision on his most recent appeal was pending.

¹¹ *I.e.*, a deprivation of a prisoner’s right to access the courts is reviewed with strict scrutiny. (See generally *In re Marriage Cases* (2008) 43 Cal.4th 757, 784 [explaining standard]; *Serrano v. Priest* (1971) 5 Cal.3d 584, 597 (*Serrano*) [classification by wealth, when used as the basis of denying fundamental interests, subject to strict scrutiny].)

where an imprisoned litigant is the defendant in a civil action, that may require even the appointment of counsel. (*Ibid.*)

Yarborough is essentially the Court's last word on these issues.¹² But in the ensuing years, a number of Court of Appeal decisions—including a prior appeal in this case—have examined the line of cases running from *Martin* to *Yarborough*, applying them in novel contexts.¹³ The cogent analyses in these cases support the general proposition that trial courts must soundly exercise

¹² More recently, the Court has also referenced indigent litigants' rights of access to the courts in other contexts. (See *Silverbrand v. Cnty. of Los Angeles*, (2009) 46 Cal.4th 106, 121 (*Silverbrand*) [extending prison mailbox rule to civil cases]; *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1353 (*Elkins*) [invalidating local rule requiring direct testimony in family law cases to be provided by declaration].)

¹³ See *Alshafie v. Lallande* (2009) 171 Cal.App.4th 421, 436 [requiring implied indigent-litigant exception to Code Civ. Proc., § 1030's requirement that out-of-state plaintiff post costs bond]; *Apollo v. Gyaami* (2008) 167 Cal.App.4th 1468, 1485 (*Apollo*) [trial court abused its discretion in granting summary judgment without ensuring prisoner plaintiff rights of access were vindicated]; *Jameson II, supra*, 179 Cal.App.4th at p. 864 [trial court abused its discretion in dismissing Jameson's case due to nonappearance on telephonic hearing that was not prisoner's fault]; *Hoversten v. Superior Court* (1999) 74 Cal.App.4th 636, 642 (*Hoversten*) [trial court abused its discretion by failing to consider means by which imprisoned father could meaningfully participate in hearing concerning visitation rights]; *Wantuch, supra*, 32 Cal.App.4th at p. 794 [similar facts as *Jameson II*]; see also *Garcia v. Santana* (2009) 174 Cal.App.4th 464 (opn. of Zelon, J., for the court, joined by Woods, J., conc. in judgment) [relying on right of access cases in holding that trial court could exercise its discretion to give a zero dollar attorney fee award against an indigent litigant]; *Baltayan, supra*, 90 Cal.App.4th at 1436 (conc. opn. of Johnson, J.) [same holding as *Alshafie*].

their discretion in favor of preserving the rights of indigent and imprisoned litigants to access the courts.

Wantuch, supra, 32 Cal.App.4th 786, is particularly instructive. There, an indigent prisoner had sued his defense attorney for malpractice in his criminal case. (*Id.* at p. 790.) He requested appointment of counsel, but was denied. (*Id.* at p. 791.) A year into “actively participat[ing] in the prosecution of the action,” plaintiff failed to appear at a status conference. (*Ibid.*) His case was dismissed for lack of diligent prosecution, and an \$82,000 judgment was entered against him on the defendant’s cross-claim. (*Ibid.*)

The Court of Appeal recognized that the case fundamentally implicated the right of prisoners to access the courts. (*Id.* at p. 792.) It began its analysis by explaining that this Court had previously held in *Yarbrough* and *Payne* that an “indigent prisoner who is a *defendant* in a bona fide civil action threatening his or her personal or property interests has a federal and state constitutional right, as a matter of due process and equal protection, of meaningful access to the courts in order to present a defense.” (*Ibid.* [emphasis original]) For similarly situated prisoner *plaintiffs*, the court explained that the *statutory* right to initiate actions currently codified in Penal Code section 2601, subdivision (d)¹⁴ was of similar dimension, and carried with it “a right of meaningful access to the courts to prosecute the action.” (*Ibid.*) It followed that “[a] prisoner may not be deprived, by his or her in-

mate status, of meaningful access to the civil courts if the prisoner is both indigent and a party to a bona fide civil action threatening his or her personal or property interests.” (*Ibid.*) “Meaningful access to the courts is the ‘keystone’ of an indigent prisoner’s right to defend against and prosecute bona fide civil actions.” (*Ibid.*)

If those two criteria—indigency and a bona fide action—are met, courts are obligated to ensure that meaningful access is preserved. (*Ibid.*) “A prisoner does not have the right to any particular remedy.” (*Id.* at p. 793.) Relying on the analysis in *Yarbrough*, however, the court held that a trial court must take all of the appropriate facts into account and fashion an “appropriate remedy to secure access in the exercise of its sound discretion.” (*Id.* at pp. 793–94.)

As the Court of Appeal would later explain in *Apollo*, “[g]enerally, a trial court has discretion to choose among [various] remedies in safeguarding a prisoner litigant’s right of meaningful access to the courts to prosecute or defend against a civil action threatening his or her interests.” (*Apollo, supra*, 167 Cal.App.4th at pp. 1483–84 [citing *Yarbrough, supra*, 39 Cal.3d at pp. 200–201 and *Wantuch, supra*, 32 Cal.App.4th at pp. 793–794].) But “a trial court *does not have discretion to choose no remedy* in cases where the prisoner’s civil action is bona fide and his or her access to the courts is being impeded.” (*Id.* at p. 1484 [emphasis added];

¹⁴ At the time, the relevant provision was codified at subdivision (e). (*See Wantuch, supra*, 32 Cal.App.4th at p. 792 fn.3.)

see also *Jameson II*, *supra*, 179 Cal.App.4th at p. 683 [quoting language].)

* * *

Choosing no remedy is precisely what occurred in Jameson's case. The court was faced with claims from an indigent prisoner. His claims were sufficiently bona fide to merit three prior reversals on appeal, including the reversal of a summary judgment on the *identical causation issue on which the trial court granted defendant's nonsuit*. (See *Jameson III*, *supra*, 215 Cal.App.4th at p. 1164.) But the trial court in this case did *nothing at all* to ensure that Jameson had meaningful access to the appellate process following the fourth dismissal of his case. Instead, it relied on its policy of *never* providing official reporters in civil trials to deny him any effective access at all. That was an abuse of the trial court's discretion.

II. State Law Afforded the Trial Court in This Case Ample Discretion to Protect Jameson's Right to Access the Civil Appeal Process.

Indeed, the trial court had ample discretion to ensure that Jameson could create an effective record of oral proceedings for appeal. Nothing in the various California law addressing the appointment and compensation of court reporters prohibited the superior court from having Jameson's trial reported by an official reporter with an appearance fee waiver.

"For more than a century, state law has provided that the official record of superior court proceedings be taken down in shorthand." (*California Court Reporters Association, Inc. v. Judicial Council of California* (1995) 39 Cal.App.4th 15, 18 (CCRA))

“The report of the official reporter, or official reporter pro tempore, of any court, duly appointed and sworn, when transcribed and certified as being a correct transcript of the testimony and proceedings in the case, is prima facie evidence of such testimony and proceedings.” (Code Civil Proc., § 273(a).) The Code of Civil Procedure sets out California’s strong policy that every case should be transcribed in order to preserve a record of proceedings:

An official reporter or official reporter pro tempore of the superior court *shall* take down in shorthand all testimony, objections made, rulings of the court, exceptions taken, arraignments, pleas, sentences, arguments of the attorneys to the jury, and statements and remarks made and oral instructions given by the judge or other judicial officer, in the following cases: (1) In a civil case, on the order of the court or at the request of a party .

...

(Code Civ. Proc., § 269(a) (emphasis added).)

“[S]ection 269 *requires* that superior court proceedings be taken down by an official shorthand reporter if a request is made.” (*CCRA, supra*, 39 Cal.App.4th at p. 27 [emphasis original]). The mandatory nature of the provision was made clear in *CCRA*, which held that state law prohibits using electronic recording in lieu of a court reporter in unlimited civil cases. *Id.* at pp. 33–34 (invalidating Rules of Court that would have authorized electronic recordings as records of proceedings, as inconsistent with Code Civ. Proc., § 269 and other statutes). Thus, in this State, absent legislative reform, the only way a superior court

can fulfil its duties under section 269(a) is to ensure that reporters, either full-time or pro tempore, are available upon request.

“The Government Code also addresses matters pertaining to official reporting of superior court proceedings. The fees and costs of an official reporter are set forth [in section 68086].” (*CCRA, supra*, 39 Cal.App.4th at p. 28; *see also* 7 Witkin, California Procedure (2015 online ed.) Judgment, § 135, p. 670 [summarizing reporting fees].) While section 68086 anticipates the parties incurring fees for both official reporters and reporter’s *pro tempore*, the statute says nothing about when the court may permissibly decline to provide an official reporter. Subdivision (a) of section 68086 addresses the calculation and allocation of appearance fees for official court reporters. (Gov’t Code, § 68086, subd. (a).) As discussed, subdivision (b) states that “[t]he fee shall be waived for a person who has been granted a fee waiver under Section 68631.” (*Id.*, subd. (b); *see also* Cal. Rules of Court, rule 3.55(7) [fee waiver includes waiver of “Reporter’s fees for attendance at hearings and trials, if the reporter is provided by the court”].) Subdivision (c) provides that official reporter costs are recoverable as costs by a prevailing party. (Gov’t Code, § 68086, subd. (c).) And subdivision (d) empowers the Judicial Council to adopt rules to ensure “(1) That parties are given adequate and timely notice of the availability of an official court reporter[;] (2) That if an official court reporter is not available, a party may arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter, the costs therefor recoverable as provided in subdivision (c)[; and] (3) That if the services of an

official pro tempore reporter are utilized pursuant to paragraph (2), no other charge shall be made to the parties.” (*Id.*, subd. (d).)

Rules of Court, rule 2.956 carries out the instructions of section 68086(d). (Cal. Rules of Court, rule 2.956(a).¹⁵) Like section 68086, it does not actually dictate when or in what circumstances superior courts should or should not make official reporters available in civil matters. Instead, the rule is addressed only to the methods by which the courts must *give notice* of the unavailability of official reporters and the steps parties may take if they are unavailable. (*Id.*, subds. (a)–(d).)

In particular, the rule requires only that trial courts adopt and post local policies “enumerating the departments in which the services of official court reporters are normally available, and the departments in which the services of official court reporters are not normally available during regular court hours. If the ser-

¹⁵ The text of the rule is out of date. Subdivision (a) states that the “rule is adopted solely to effectuate the statutory mandate of Government Code sections 68086(a)–(b) and must be applied so as to give effect to these sections.” (Cal. Rules of Court, rule 2.956(a).) The rule was adopted in 1994 and last amended in 2007, before the 2013 bill that enacted the current version of section 68086, including adding the language in subdivision (b) regarding fee waivers. (*See* Stats. 2013, ch. 454 § 1.) The reference to “sections 68086(a)–(b)” refers to the version of the statute in place in 2007, in which subdivisions (a) and (b) contain requirements that are similar in all pertinent respects to subdivisions (a) and (d) in the current version of the statute. (*See* Gov’t Code, § 68086 (2007).) In its current version, the rule may be in conflict with section 68086(b), in that it does not account for waiver of reporters’ fees. It does not appear, however, that the Court needs to resolve that issue in this case.

vices of official court reporters are normally available in a department only for certain types of matters, those matters must be identified in the policy.” (Cal. Rules of Court, rule 9.256(b)(1).) The policy must be published, either in a local newspaper, by sending it to parties, or by local rule. (*Id.*, subd. (b)(2).)

When all courtrooms do not normally “have the services of official court reporters available for 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.” (*Id.*, subd. (b)(3).) “If a party requests the presence of an official court reporter and it appears that none will be available, the clerk must notify the party of that fact as soon as possible before the trial.” (*Ibid.*)¹⁶ For non-trial matters, the unavailability of an official reporter needs only to “be noted on the court’s official calendar.” (*Id.*, subd. (b)(4).)

And when an official reporter is not available for a civil trial or hearing, “a party may arrange for the presence of a certified shorthand reporter to serve as an official pro tempore reporter.” (*Id.*, subd. (c).) “It is that party’s responsibility to pay the reporter’s fee for attendance at the proceedings, but the expense may be recoverable as part of the costs, as provided by law.” (*Ibid.*) In

¹⁶ As noted, *ante* at note 3, the record does not reflect that the trial court complied with this notice requirement having given only an oral indication (reflected only in a terse minute order) three days before the scheduled beginning of trial. (RA 231.) The court did not solicit a statement from Jameson regarding whether he demanded an official reporter, as required under Rules of Court, rule 2.956(b)(3).

cases where a party provides a reporter and pays his or her attendance fee, the parties will not be charged the ordinary official reporter's fee in section 68086, subd. (a). (*Id.*, subd. (d).)

In sum, these two key provisions—section 68086 and Rule 2.956—are entirely silent regarding when and how trial courts may decline to provide an official reporter, whose fee must be waived for indigent litigants under section 68086(b). Nor do any of the other myriad statutes governing court reporters address this issue. (See Gov't Code, §§ 69941, 70043, 70044, 70048 [addressing appointment and compensation of official reporters and reporters *pro tempore*, including specifically in San Diego County].) It is thus clear that these laws vest the superior courts of California with substantial discretion in deciding the circumstances in which an official reporter will be provided in a civil action.

But a court's discretionary power is not unlimited. It must not be abused in a way that plainly appears to effect injustice. (See generally, *Clavey v. Lord* (1891) 87 Cal. 413, 419.) As the prior section explained, a trial court abuses its discretion when it fails to act to protect indigent litigants' rights of access to the courts. That is particularly the case given section 68086(b)'s express requirement that reporter fees shall be waived for indigent litigants.

III. Local Court Rules and Policies That Cabin the State-Granted Discretion of Superior Courts to Protect the Rights of Indigent Litigants Are Invalid.

In addition to section 68086 and Rule 2.956, the Court of Appeal also relied upon the San Diego Superior Court's official 'no official reporters for civil trials' policy. (*Jameson IV* cited at

15.) But given the superior court's discretion to determine when to provide official reporters, the court's policy is irreconcilable with settled state law requiring trial courts to exercise their discretion in favor of ensuring the right of indigent litigants to access the courts.

“A trial court is without authority to adopt local rules or procedures that conflict with statutes or with rules of court adopted by the Judicial Council, or that are inconsistent with the Constitution or case law.” (*Elkins, supra*, 41 Cal.4th at p. 1351.)¹⁷ “Reviewing courts have not hesitated to strike down local court rules or policies on the ground they are inconsistent with statute, with California Rules of Court promulgated by the Judicial Council, or with case law or constitutional law.” (*Id.* at p. 1352.) Court rules cannot be used to completely frustrate the purpose of higher authorities, such as by sanctioning loopholes that would render state-imposed requirements meaningless. (*In re Robin M.* (1978) 21 Cal.3d 337, 347.) And when a trial court is permitted by statute to broadly exercise its discretion and account for a full range of factors in rendering a decision, a court rule purporting to cabin that discretion is invalid. (*People v. Hall* (1994) 8 Cal.4th 950, 963; *see also Contractors Labor Pool, Inc. v. Westway Contractors, Inc.* (1997) 53 Cal.App.4th 152, 168; *Cortez v. Bootsma* (1994) 27 Cal.App.4th 935, 938; *cf. Cruz v. Ayromloo* (2007) 155 Cal.App.4th 1270, 1275 [local rule purporting to limit trial court's

¹⁷ Superior court policies are afforded the same treatment as local rules. (*See Wisniewski v. Clary* (1975) 46 Cal.App.3d 499, 504.)

discretion recognized as valid because it contained a savings clause permitting deviation from the rule if “otherwise determined by the court”].)

The superior court’s rule cannot stand under these standards. By categorically refusing to provide official reporters in civil trials—*specifically including trials for indigent litigants with fee waivers* (see Ex. B, at 2)—the policy renders section 68086(b) meaningless. Worse, it constitutes an abdication of the trial court’s discretion to take necessary measures to ensure that the fundamental and statutory rights of indigent and prisoner litigants like Jameson to access the courts are meaningfully preserved. By abdicating that discretion, the superior court has effectively determined to “choose no remedy” as a collective body. (*Accord Apollo, supra*, 167 Cal.App.4th at pp. 1483–84.) In the face of overwhelming authority, the policy cannot be permitted to stand.

Jameson does not dispute that the San Diego Superior Court enacted its policy to address legitimate constraints on the court’s resources. But the court’s good intent does not make the policy valid. Indeed, this Court has repeatedly rejected the proposition that deprivations of indigents’ access to the courts can be justified by the budgetary concerns that animate the superior court’s policy. As the Court 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, supra*, 6 Cal.3d at pp. 113–14; see also *Ferguson, supra*, 4 Cal.3d at p. 657.) And specifically with regard

to local rules, as the Court more recently observed in *Elkins*, “[a] common theme in the appellate decisions invalidating local rules, and one that also appears in the present case, is that a local court has advanced the goals of efficiency and conservation of judicial resources by adopting procedures that deviated from those established by statute, thereby impairing the countervailing interests of litigants as well as the interest of the public in being afforded access to justice, resolution of a controversy on the merits, and a fair proceeding.” (*Elkins, supra*, 41 Cal.4th at p. 1353.)

The Court has not hesitated to strike down court rules and policies far less chilling of the right to access to the courts than the superior court’s policy here. (*See id.* at p. 1354. [striking local rule requiring direct testimony to be presented by declaration in family law cases as inconsistent with the evidence code and unnecessarily burdensome on often unrepresented family court litigants]; *People v. Pena* (2004) 32 Cal.4th 389, 403 [striking appellate court’s practice of soliciting waivers of oral argument by suggesting to the parties that the panel had already made its decision and that argument would be unhelpful as inconsistent with the right to oral argument on appeal].) Under the circumstances, the superior court’s policy of refusing to provide official reporters in civil trials is invalid to the extent it denies indigent litigants access to the courts.

IV. The Court of Appeal’s Decision and the Superior Court’s Policy Are Suspect Under Both the California and United States Constitutions.

Finally, it bears recognition that the full extent of indigent and imprisoned plaintiffs’ *constitutional* rights to access the ap-

peals process has never been fully explored in California. (*See Ferguson, supra*, 4 Cal.3d at p. 657 fn. 6 [declining to reach equal protection and due process questions].) Given the long-recognized fundamentality of the right of access to the courts, (*see generally In re Allison* (1967) 66 Cal.2d 282, 288) and this Court's recognition that wealth is a suspect classification when it comes to access to fundamental rights, (*see Serrano, supra*, 5 Cal.3d at 597) there can be little doubt that there are substantial state constitutional interests at play.

Indeed, the sheer arbitrariness of effectively limiting access to the appellate process based on an appellant's poverty and the reporter policy in the particular county in which he filed his complaint raises substantial federal equal protection and due process concerns as well. (*See Lindsey v. Normet* (1972) 405 U.S. 56, 77 ["When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."]; *Adsani v. Miller* (2d Cir. 1998) 139 F.3d 67, 77 ["[P]rinciples of due process and equal protection mandate that an appeal process established by statute must be fairly and equally accessible to all litigants."].)

As explained in detail above, however, existing precedent dictates that Jameson's appeal is resolvable on narrower non-constitutional grounds. The denial of his right to access the courts nonetheless implicates serious constitutional questions. That is cause enough to construe his statutory and common law rights broadly, and any infringements on them as narrowly as possible. (*See Elkins, supra*, 41 Cal.4th at 1357 [explaining that

the rule of avoiding constitutional questions “directs that if reasonably possible, statutory provisions should be interpreted in a manner that avoids serious constitutional questions.” (quotation omitted)].). Such caution should inform the court’s analysis here.

V. The Trial Court’s Failure to Provide an Official Reporter Was Prejudicial Error *Per Se*.

Finally, Jameson does not dispute that procedural errors are ordinarily subject to a harmless error analysis. (See Code Civil Proc, § 475; Cal. Const. Art VI, § 13.) But under the circumstances, it is axiomatic that the forfeiture of an appeal due to the erroneous denial of a court reporter to an indigent litigant is a structural error that merits *per se* reversal. (See generally *People v. Hosner* (1975) 15 Cal. 3d 60, 70.) The very lack of an adequate record resulting from the court’s error means that “an appellate court has no way to measure the prejudicial effect of error.” (*People v. Bigelow* (1984) 37 Cal. 3d 731, 745.) Without a transcript, any attempt to assess the prejudice caused by the failure to provide a reporter would invariably amount to “speculation running riot.” (*Hosner, supra*, 15 Cal.3d at 70.) Consequently, a reversal of the judgment and remand for a new trial is required.

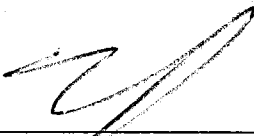
* * *

For the reasons stated above, the opinion of the Court of Appeal should be reversed, the trial court's judgment vacated, and the matter remanded for a new trial, during which Jameson should be afforded an official reporter to make an adequate record for further appeal without payment of a reporter's appearance fee.

Dated: February 26, 2016

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I, Michael J. Shipley, hereby certify that in accordance with California Rules of Court, rule 8.520(c)(1), I have employed the word count feature of Microsoft Word to verify that the number of words contained in this brief, including footnotes, is 8,062 words.

Dated: February 26, 2016



Michael J. Shipley
KIRKLAND & ELLIS LLP



SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

POLICY REGARDING NORMAL AVAILABILITY AND UNAVAILABILITY OF OFFICIAL COURT REPORTERS

Official court reporters are normally available in felony criminal cases and juvenile matters during regular court hours. Official court reporters are not normally available in civil, family, or probate matters with exceptions listed below.

- Family Law Matters: Official court reporters are not normally available in family law matters, with the exception of Family Support Division (FSD) matters, Domestic Violence Restraining Order hearings, Contempt hearings, and Request for Order hearings of 40 minutes or less.
- Probate Matters: Official court reporters are not normally available in probate matters with the exception of Conservatorship Appointment hearings.

The San Diego Superior Court provides electronic recording services in infraction and misdemeanor proceedings. The court may electronically record limited civil proceedings, including unlawful detainers, collections, and small claims, *if* recording equipment is available.

Parties may privately arrange for the appointment of a court-approved official court reporter pro tempore without a stipulation for civil, family, and probate matters. A list of court-approved certified shorthand reporters (SDSC Form #ADM-321), including names and contact information, who can be privately arranged and appointed as an official court reporter pro tempore without stipulation of the parties, is posted on the court's website. Also posted on the website are the policies for court reporters to be approved for the list (SDSC Form #ADM-313), and for arranging for the appointment of a reporter (SDSC Form #ADM-315).

Parties may privately arrange for the appointment of a reporter not on the court-approved list, by stipulation and order for civil, family, and probate matters. Parties may, by stipulation, arrange for the appointment of a certified shorthand reporter who is not on the court-approved list to serve in a proceeding as an official court reporter pro tempore where an official court reporter is not normally available. The court's policy for arranging for a reporter who either is or is not on the court-approved list (SDSC Form #ADM-315), and other necessary forms and information, can be found on the court's website.

Parties, including those with fee waivers, are responsible for all fees and costs related to court reporter services arranged under the foregoing provisions.

The reporting notes of all certified shorthand reporters are the official records of the court and shall be kept by the reporter taking the notes in a place designated by the court, or, upon order of the court, delivered to the clerk of the court (Gov. Code § 69955(a)). The court's policy for providing the court with electronic notes (SDSC Form #ADM-319) is posted on the court's website.

All forms, policies, and additional information can be found on the court's website at www.sdcourt.ca.gov.



SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO

OFFICIAL REPORTER PRO TEMPORE POLICY

I. Purpose

Parties have the right to arrange, at their own expense, for the presence of court reporters if the services of an official court reporter are not available for a proceeding (Gov. Code § 68086 & Cal. Rules of Court [CRC], rule 2.956). This document establishes policy for party(ies) arranging for a court reporter when an official reporter is not normally available and establishes requirements for qualifying as an official reporter pro tempore.

II. Policy

- A. If the services of an official court reporter are not available for a proceeding, a party may privately arrange for court reporter services at their expense, pursuant to Gov. Code § 68086 and CRC 2.956. This includes cases where a proceeding continues to or past the date for which a reporter is no longer normally available.
- B. Parties must make arrangements for reporters *in advance of the proceeding* to ensure the proceedings will be reported. Advance notice to the court of an intention to do so is not required.
- C. Parties may arrange for their own reporter, or may select from the *Court-Approved List of Official Reporters Pro Tempore* (SDSC Form #ADM-321) (List).
 1. Court-Approved List
 - a. As a service to court users, the court will establish and maintain a list of court-approved official reporters pro tempore who have met the requirements and qualifications established by the court. (See *Policy for Court-Approved List of Official Reporters Pro Tempore* SDSC Form #ADM-313.)
 - b. Parties are not obligated to select a reporter from this List. It is provided as a courtesy.
 2. Appointment as an Official Reporter Pro Tempore for a Proceeding:
 - a. Reporters must complete and sign sections 1, 2, and 3 of the *Appointment as Official Reporter Pro Tempore* (SDSC Form #ADM-316).
 - b. All parties present at the proceeding must complete and sign the stipulation portion of the *Appointment as an Official Reporter Pro Tempore* (SDSC Form #ADM-316) stipulating to the court appointing an official reporter pro tempore. If the reporter is on the List, the stipulation is not required. Parties appearing through Court Call or otherwise by telephone may stipulate orally, which stipulation should be noted in a minute order.
 - c. The *Appointment as an Official Reporter Pro Tempore* (SDSC Form #ADM-316) must be completed by all parties and provided to the court before the proceeding commences.
 - d. The Judicial Officer in the courtroom must order the reporter appointed as an official reporter pro tem, using the *Appointment of Official Reporter Pro Tempore* (SDSC Form #ADM-316), before she or he may report the proceeding.
- D. This policy will be posted on the court's website at www.sdcourt.ca.gov.

E. Official Reporter Pro Tempore Requirements

By signing the *Appointment as Official Reporter Pro Tempore* (SDSC Form #ADM-316), the reporter agrees to the following:

1. Is not a regular employee of the court. Note: "Per Diem" reporters, who have an Independent Contractor Agreement with the court, are not considered regular employees.
2. Has a valid, current California Certified Shorthand Reporter License and will maintain current contact information with the court.
3. All fees for reporting services, including appearance and real-time fees, are the responsibility of the party or parties who arranged the reporter services and may not be charged to the court.
4. To comply with statutes and rules applicable to official reporters pro tempore, including the duty to timely prepare transcripts, including those for appeals, in the proper form.
5. To follow directions from the court, and to be subject to the jurisdiction of the court to the same extent as an official reporter.
6. To be available for immediate (within 30 minutes) read-back of notes.
7. To be in good standing with the Court Reporters Board of California.
8. To comply with the court's requirements regarding uploading electronic notes as stated in *Official Reporter Pro Tempore Electronic Notes Upload/Archiving Policy* (SDSC Form # ADM-319), including uploading each day's stenotype notes to the court's vendor (ACORN) by 1:30 p.m. the next business day, or in the case of illness or emergency, as soon as practicable thereafter.

F. Additional Information for Parties

1. Only One Official Record

There can only be one official record of court proceedings, and only a reporter appointed by the court may report a court proceeding (CCP § 273; Gov. Code §§ 70043, 70044; *Redwing v. Moncravie*, (1934) 138 Cal. App. 432, 434). Only one reporter will be allowed to report a court proceeding at any given time. If the parties cannot agree on a reporter, the judicial officer will make the selection.

2. Payment for Official Reporter Pro Tempore Services

CRC 2.956(c) provides that the party arranging for an official reporter pro tempore is responsible for paying the reporter's fees. These expenses may be recoverable as part of a party's costs as provided by law (Gov. Code § 68086(a)(4)).

3. Indigent Litigants

In cases where the court no longer provides court reporters, indigent litigants are not entitled to have the court provide or pay for a court reporter based on a fee waiver. Fee waivers apply only to fees charged by the court. They do not apply to court reporter fees and costs in cases where the court is not providing the court reporter. Privately retained court reporters are independent from the court, and are allowed to charge indigent litigants for their services.

4. Transcripts

a. Copies of transcripts may be ordered to be lodged with the court. Any party who orders proceedings transcribed by the official reporter pro tempore may be ordered to lodge a copy of the transcript with the court (CCP § 128(a)).

b. Transcripts produced by an official reporter pro tempore will be treated, for court purposes, identically to transcripts prepared by official reporters. Reporting notes of an official reporter pro tempore are official records of the court (Gov. Code §69955(a)). The notes of official reporters pro tempore, when transcribed and certified, are prima facie evidence of the testimony and proceedings (CCP § 273(a)).

- c. Original and certified transcripts are admissible as evidence to the extent otherwise permitted by law. Transcripts prepared by a privately retained certified shorthand reporter appointed by the court as an official reporter pro tempore are admissible as evidence to the extent otherwise permitted by law (CCP § 273(a)).
 - d. Unofficial transcripts prepared by other than official court reporters or official court reporters pro tempore are not admissible (CCP § 273(b); *Redwing v. Moncravie* (1934) 138 Cal. App. 432, 435; *Reid v. Reid* (1887) 73 Cal. 206; *Estate of Benton* (1901) 131 Cal. 472 at 472-480.)
5. Reimbursement of Advanced Fees
Fees lodged prior to the date this policy becomes effective for an official reporter in advance of the proceeding where a reporter will no longer be available will be returned to the party that lodged them, upon request to the court.

G. Forms and Additional Information

- 1. *Court-Approved List of Official Reporters Pro Tempore* (SDSC Form #ADM-321)
- 2. *Policy for Court-Approved List of Official Reporters Pro Tempore* (SDSC Form #ADM-313)
- 3. *Appointment of Official Reporter Pro Tempore* (SDSC Form #ADM-316)
- 4. *Official Reporter Pro Tempore Electronic Notes Upload/Archiving Procedure* (SDSC Form #ADM-319)
- 5. *Guide for Official Reporters Pro Tempore* (SDSC Form #ADM-318)

These forms, and additional information, are available on the court's website: www.sdcourt.ca.gov.

PROOF OF SERVICE

I, Amy D. Palafox, am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Kirkland & Ellis LLP, 333 South Hope St., 29th Floor, Los Angeles, California 90071.

On February 26, 2016, I served the documents listed below on the interested parties in this action as follows:

**PETITIONER BARRY S. JAMESON'S
OPENING BRIEF ON THE MERITS**

[Overnight Courier/Federal Express] By placing the document(s) listed above in a sealed overnight courier envelope and taking such packages to the nearest Federal Express office located at 333 S. Hope Street, Los Angeles, California 90071, with charges thereon fully prepaid in the ordinary course of business.

***Pursuant to Cal. Rule of Court, Rule 8.25(b)(3)
Original + 13 Paper Copies for Filing:***

**Clerk of the Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797
Clerk's Office: (415) 865-7000**

Service of 1 Paper Copy:

In the Court of Appeal, State of California
Fourth District, Division One
750 B Street, Suite 300
San Diego, CA 92101
Clerk's Office: (619) 744-0760

Service of 1 Paper Copy:

California Superior Court, County of San Diego
Hall of Justice Courthouse
330 West Broadway
San Diego, CA 92101
Hon. Joel M. Pressman, Judge, Department 66

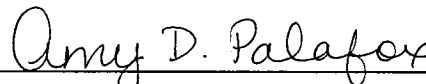
Service of 1 Paper Copy:

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Telephone (619) 400-4977
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Counsel for Respondent Taddese Desta, M.D.

(STATE) I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 26, 2016, at Los Angeles, California.



Amy D. Palafox