No. S132814
(Court of Appeal No. B163115)
(Los Angeles County Super. Ct. No. BC 206388)

IN THE SUPREME COURT OF CALIFORNIA

THE OAKLAND RAIDERS,
Plaintiff-Appellant,

vs.

NATIONAL FOOTBALL LEAGUE,
Defendant-Respondent,

and

PAUL TAGLIABUE AND NEIL AUSTRIAN,
Defendants-Respondents.

Appeal from Los Angeles County Superior Court
Honorable Richard C. Hubbell, Judge

SUPPLEMENTAL BRIEF OF DEFENDANT-RESPONDENT NATIONAL FOOTBALL LEAGUE

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INTRODUCTION

By letter dated September 25, 2006, the Court asked the parties to submit briefs addressing the following questions:

(1) Should the court reconsider *Mercer v. Perez* (1968) 68 Cal.2d 104, to the extent that it bars an appellate court from remanding a case to a trial court to enable the trial court to file a statement of reasons in support of its order granting a new trial?

(2) Should the court reconsider *Treber v. Superior Court* (1968) 68 Cal.2d 128, to the extent that it bars an appellate court from issuing a writ of mandate to compel a trial court to file a statement of reasons in support of its order granting a new trial?

The answer to each question is "no."

The right to a new trial is entirely a creature of statute. In creating that right and providing an opportunity for a new trial, the Legislature imposed numerous, highly specific conditions. Among other things, the Legislature required (a) that the trial court specify *in writing* the reasons, as well as the grounds, for any new trial order, (b) that the specification of reasons be prepared *personally*, without delegation to counsel, by the judge who heard the motion, and (c) that the specification of reasons be prepared, signed, and filed *no later than ten days after entry of the new trial order*. The Legislature prescribed no exceptions to these requirements; it did not authorize

the appellate courts to extend the period within which the trial court must comply; nor did it authorize the appellate courts to resurrect a lapsed deadline.

The absence of exceptions was not inadvertent. As this Court recognized in *Mercer* and *Treber*, the deadline for preparing and filing a specification of reasons reflects not only the Legislature's intent to ensure a meaningful basis for appellate review, but also its insistence on *contemporaneous* and *personal* deliberation, as well as *written evidence* of contemporaneous and personal deliberation, *before* a new trial may be validly required.

The holdings of *Mercer* and *Treber* -- and other Supreme Court cases applying the statutory deadline -- have been settled law in California for nearly forty years; during that period, they have been repeatedly and uniformly applied by California's appellate and trial courts. There can be no question that those holdings accurately reflect the Legislature's intent: The decisions interpret express statutory language; they were rendered in the immediate wake of the legislation that they apply; and although the Legislature has since repeatedly amended *other* provisions of the Code of Civil Procedure pertaining to new trial procedure, *Mercer* and *Treber* have not been "overruled" by amendment or questioned by the Legislature in any way. Absent legislative intervention, there is no basis for changing the settled law now.

Nor is there any question that the deadlines associated with the specification requirement -- well known to the trial courts and the trial bar --

have served well the administration of justice. For forty years, they have helped to ensure careful, personal, *contemporaneous* deliberation before new trials are granted. Indeed, during that period -- and especially during the last quarter century -- the number of cases asserting, much less finding, a failure to comply with section 657's specification requirements has been astonishingly small. There has been no criticism or question about the rules from the Courts of Appeal; there has been no call by the trial courts or the trial bar for their revision; even the Raiders did not seek their reexamination here.

We demonstrate in the pages that follow that principles of statutory construction and *stare decisis*, as well considerations of sound judicial administration, weigh overwhelmingly against *judicial* reconsideration of the settled law reflected in the holdings of *Mercer*, *Treber* and dozens of other cases.

Those considerations are especially compelling in this case, which for many reasons is an inappropriate vehicle to address the questions raised by the Court's letter. The defective new trial order here was entered in 2002, more than four years ago. Despite repeated cautions by this Court and the Courts of Appeal, the Raiders made absolutely no effort, before the statutory deadline elapsed or thereafter, to secure the required specification of reasons. The trial judge who heard the motion is now retired; for that reason, it would be impossible to recreate the reasons that he had in mind when he issued his unsupported order years ago.

Moreover, if there were a remand here and "reasons" could somehow be mustered in support of the new trial order, a further appeal would likely follow, with the result that, if the new trial order were ultimately affirmed, any resulting trial would occur in 2008, 2009, or later to resolve disputes over events that occurred in 1995, 1994 and before. A trial based upon such dated memories -- and the problems associated with witnesses who had died or otherwise become unavailable in the interim -- would hardly serve the interests of justice.

We take no position on whether the Court should invite *the Legislature* to revisit the issues presented, except to note the following: The adverse effect of any exceptions to the governing rules would be limited if the power to resurrect an expired period for compliance with the specification requirement were (a) conditioned upon the prevailing party's having made timely efforts before expiration to request a specification of reasons and (b) confined to writ review sought promptly after expiration of the statutory period.

I. BECAUSE THE RIGHT TO A NEW TRIAL IS SOLELY A CREATURE OF STATUTE, A NEW TRIAL CANNOT BE GRANTED WITHOUT STRICT STATUTORY COMPLIANCE.

For more than 80 years, this Court has recognized as beyond question that the trial courts' power to grant new trials is entirely a creature of statute, and that strict compliance with prescribed statutory requirements is necessary for a new trial to be granted.

> Of course, there can be no question as to the established rule in this state that the authority to seek, and the power of the court to grant, a new trial is statutory, and proceedings therefor must be strictly pursued in the manner provided by law in order that litigants may not lose their rights.

(*Telefilm, Inc. v. Superior Court* (1949) 33 Cal. 2d 289, 294; accord, e.g., *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 899 ["The power of the trial court to grant a new trial may be exercised only by following the statutory procedure . . ."]; *Prothero v. Superior Court* (1925) 196 Cal. 439, 444 ["New trial proceedings are statutory and the provisions of the statute must be strictly followed . . ."].)

The purely statutory nature of the courts' authority is reflected in numerous decisions of this Court holding that trial courts' power to grant new trials is limited by the express terms of the statutory grant. This principle has been applied to every element of new trial procedure. For example, California courts, including this Court, have consistently held that:

- trial courts have no authority to grant a new trial on their own motion (e.g., *Sanchez-Corea v. Bank of America*, *supra*, 38 Cal.3d at p. 899 [trial courts are "without power to order a new trial *sua sponte*"]);
- trial courts have no authority to grant a new trial on grounds not articulated in section

657 (e.g., *Fomco, Inc. v. Joe Maggio, Inc.* (1961) 55 Cal.2d 162, 166 ["a motion for a new trial can be granted only on one of the grounds enumerated in the statute"]);

- trial courts have no authority to grant a new trial on grounds not asserted in the new trial motion and the notice of intention to move for a new trial (e.g., *Malkasian v. Irwin* (1964) 61 Cal.2d 738, 745 [new trial motion "can be granted only on a ground specified in the motion"]; *Wagner v. Singleton* (1982) 133 Cal.App.3d 69, 72 [new trial motion "can only be granted on a ground specified in the notice of intention to move for a new trial"]);
- trial courts have no authority to grant a new trial if a notice of intent to move for a new trial is not timely filed (e.g., *Union Collection Co. v. Oliver* (1912) 162 Cal. 755, 756 ["where a party has failed to move for a new trial within the period limited by the Code, he has waived his right to make

such motion"; trial court is "not authorize[d] . . . to revive the right which has thus been lost"]; accord *Kisling v. Otani* (1962) 201 Cal.App.2d 62, 67-70); and

- trial courts have no authority to order a new trial based upon a premature notice of intention to move for new trial (e.g., *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 459 ["[G]iving notice of intention to move for a new trial before the case is decided is 'premature,' and without legal effect."].).

(See generally 8 Witkin, Cal. Procedure 4th (1997) Attack, § 19, p. 524 [statutory grounds exclusive]; *id.* § 20, p. 524 [statutory procedure mandatory]; *id.* § 55, p. 559 [late filing void]; *id.* § 58, p. 562 [premature notice ineffective].)

These authorities, like *Mercer* and *Treber*, collectively reinforce the principle that because new trial procedure is purely statutory, the requirements prescribed by the Legislature must be scrupulously followed before a new trial may be granted. The Legislature has the *exclusive* power to specify new trial requirements; the Legislature has the *exclusive* power to change those requirements; the courts have no power to do either. (See

Sanchez-Corea v. Bank of America, *supra*, 38 Cal.3d at p. 905 n.5 ["The power of the legislature in specifying procedural steps for new trials is exclusive and unlimited. The wisdom of or necessity for certain requirements are matters for legislative and not judicial consideration and the judiciary, in its interpretation of legislative enactments may not usurp the legislative function by substituting its own ideas for those expressed by the legislature."] [quoting *Mercer*; internal punctuation and citations omitted].)

Thus, unless and until the Legislature enacts different rules or requirements, the answers to the questions posed by this Court must (and should) be "no."

II. SECTION 657 AUTHORIZES A TRIAL COURT TO PREPARE, SIGN, AND FILE ITS SPECIFICATION OF REASONS ONLY WITHIN TEN DAYS FOLLOWING ENTRY OF THE NEW TRIAL ORDER.

Section 657 provides that when a new trial is granted, the court "shall specify . . . the court's reason or reasons for granting the new trial upon each ground stated. . . . If an order granting such [a] motion does not contain such specification of reasons, the court must, within 10 days after filing [the new trial] order, prepare, sign and file such specification of reasons in writing with the clerk." (Code Civ. Proc., § 657.)

The Legislature used the word "must," not "may." *Mercer* and *Treber* hold that this language means what it says. Both *unanimously* hold that if the trial court fails to file a timely specification, an appellate court may

not thereafter contravene the plain meaning of the statute and resurrect the trial court's authority to do so. (*Mercer v. Perez*, *supra*, 68 Cal.2d at pp. 120-124; *Treber v. Superior Court*, *supra*, 68 Cal.2d at pp. 134-135; accord *La Manna v. Stewart* (1975) 13 Cal.3d 413, 418.)[1]

These holdings correctly interpret the plain and unambiguous language of section 657. The statutory language -- "must" -- is mandatory. The time period for *"prepar[ing], sign[ing] and fil[ing]"* the specification of reasons expires "10 days after" filing of the new trial order. The term "must" immediately precedes, and applies directly, to the deadline. The statutory interpretation reflected in this Court's precedents is therefore no less correct or reasonable today than it was in 1965, when the legislation was passed, and in 1968, when this Court twice *unanimously* applied the statutory language in accord with its plain meaning, and in 1975, when it did so yet again.

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[1] The Courts of Appeal are in accord. (See, e.g., *Clemens v. Regents of University of California* (1970) 8 Cal.App.3d 1, 20 ["Where the trial court has failed adequately to specify its reasons for granting a new trial . . . pursuant to Code of Civil Procedure section 657, an appellate court is without power to remand the matter for further specification of reasons . . ."]; cf. *Hand Electronics v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862, 867-868 [10-day limit jurisdictional; late-filed specification invalid]; *Smith v. Moffat* (1977) 73 Cal.App.3d 86, 91 [same]; *Swanson v. Western Greyhound Lines, Inc.* (1969) 268 Cal.App.2d 758, 759 [same]; *Brooks v. Harootunian* (1968) 261 Cal.App.2d 680, 683 [same]; see generally 8 Witkin, Cal. Proc. 4th (1997) Attack, § 90, p. 593 [discussing time limit for filing specification]; *id.* § 100, p. 605 [no *nunc pro tunc* correction of late-filed specification].)

Furthermore, *Mercer* and *Treber* uphold the Legislature's intent in prescribing both substantive *and procedural* requirements governing specifications of reasons. Indeed, this Court observed -- explicitly, and for the Legislature to see -- that allowing an appellate court to reinstate or revive the trial court's lapsed authority to "prepare, sign, and file" a statement of reasons would "largely frustrate both purposes of the 1965 amendments to section 657." (*Mercer v. Perez*, *supra*, 68 Cal.2d at p. 123.)

> First, the statutory incentive to careful judicial deliberation before awarding a new trial would be weakened if the only consequence of an inadequate specification of reasons were that one or two years later an appellate court might direct the judge to add a few words to his original order. By the same token, there would be little incentive for the moving party to take steps to insure that the judge complied with the statute at the time of ruling; moreover, it is not impossible that such a party might prefer as a tactical matter to allow the inadequate specification to stand, hoping that the prospect of two certain appeals would discourage his opponent to the point of compromise or abandonment.
>
> Second, the legislative intent to promote a more effective review of new trial orders would be substantially thwarted if the judge failed to make an adequate specification of grounds or reasons in the first instance. The appellant would then be compelled to prosecute one appeal merely to vindicate his right to a proper record of the ruling below, followed by a second appeal to challenge the ruling on its merits. . . . Neither the public, nor the bar, nor the courts should be subjected to such a burden.

(*Id.* at pp. 123-124 [footnotes omitted].) Had those considerations not reflected the Legislature's intent when it enacted the requirements in 1965 -- or had the Legislature intended for appellate courts to respond to noncompliance with a remand, rather than applying the perfectly workable standard of review ("should have been granted") prescribed by section 657 -- the Legislature certainly would have revised the rules. It never has.

Strict enforcement of clearly expressed procedural deadlines established by the Legislature is not unusual. Indeed, appellate courts repeatedly hold that procedural deadlines indistinguishable from the statutory deadline for "preparing, signing and filing" a specification of reasons -- including other statutory deadlines contained in the Chapter of the Civil Code governing new trial procedure -- may not be resurrected after expiration. (See, e.g., *Stuart Whitman, Inc. v. Cataldo* (1986) 180 Cal.App.3d 1109, 1113 ["[i]n the absence of statutory authorization, neither the trial nor appellate courts may extend or shorten the time for appeal, even to relieve against mistake, inadvertence, accident, or misfortune"]; *Maynard v. Brandon* (2005) 36 Cal.4th 364-372 [deadline for seeking trial de novo after fee arbitration may not be extended]; *Advanced Building Maintenance v. State Comp. Ins. Fund* (1996) 49 Cal.App.4th 1388, 1394 [deadline for filing motion to vacate judgment under section 663, which provides that party "must file . . . [w]ithin 15 days . . .," may not be extended.].)

In short, there is no reason for the Court today, nearly forty years later, to conclude that its assessment in 1968 of the Legislature's 1965 intent was in error. Nor is there any basis for this Court to conclude that its reading of the plain meaning of the statute was incorrect. Indeed, even without regard to the passage of time and considerations of *stare decisis*, there would be no justifiable basis for this Court, if it were addressing the issue for the first time today, to reach a holding different from the holdings it reached in *Mercer* and *Treber* forty years ago.

III. PRINCIPLES OF *STARE DECISIS* WEIGH STRONGLY AGAINST REVISITING THIS COURT'S DECISIONS IN *MERCER* AND *TREBER*, ESPECIALLY GIVEN THAT THOSE PRECEDENTS ADDRESS LONG-SETTLED ISSUES OF STATUTORY CONSTRUCTION.

The rule articulated in *Mercer* and *Treber*, and subsequently reaffirmed in *La Manna v. Stewart, supra*, 13 Cal.3d at p. 418, has been the established law of California *for nearly forty years*. (See, e.g., *Clemens v. Regents of the University of California, supra*, 8 Cal.App.3d 1, 20 ["Where the trial court has failed adequately to specify its reasons for granting a new trial . . . , an appellate court is without power to remand the matter for further specification of reasons . . ."]; *Hand Electronics, Inc. v. Snowline Joint Unified School Dist., supra*, 21 Cal.App.4th at p. 867 ["Section 657 requires the statement of reasons to be filed within 10 days after the order determining the motion. The 10-day limitation is a statute of limitations, and is mandatory and jurisdictional."].)

During that forty-year period, as we have noted, the Legislature has had ample opportunity to amend the statute if it disagreed in any way with the Court's repeated application of the statutory language in accordance with its plain meaning. But it has not done so. The Legislature's acceptance of this established and unambiguous precedent for nearly *four decades* creates an overwhelming presumption against revising the statutory meaning or revisiting the question today. As this Court recently noted in similar circumstances:

> Even if we were inclined to disagree with the principles set forth in *Johnson*[*v. California* (1968) 69 Cal.2d 782], we do not believe it would be appropriate to overrule or disapprove more than three decades of precedent applying authoritative, settled statutory construction that has been central to the analysis and holdings of these decisions. During this period, the Legislature has not altered the general scope of the immunity conferred by section 820.2 as construed by this court. *The principles underlying the doctrine of* stare decisis *apply with special force in the context of statutory interpretation, because the Legislature remains free to alter what we have done.*

(*Barner v. Leeds* (2000) 24 Cal.4th 685, 710 n.2 [emphasis added]; accord *Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1005 ["we do not believe it would be appropriate to disregard authoritative, settled statutory interpretation that was central to the analysis and holding of one of our decisions"]; *People v. Latimer* (1993) 5 Cal.4th 1203, 1213, 1216 ["Considerations of *stare decisis* have special force in the area of statutory interpretation, for . . . [the Legislature] remains free to alter what we have done . . . . [A]t this late date,

any changes must be made by the Legislature, which obviously has the authority to modify the rule any time it chooses."] [citations omitted].)

These principles are even more compelling here given that, since *Mercer* and *Treber* were decided, the Legislature has on *eleven separate occasions* amended the article of the Code of Civil Procedure governing new trial orders. (See Code Civ. Proc., ch. 7, art. 2 §§ 656-663.2 [new trials].) While some of those amendments make only technical revisions, the majority were substantive, and no less than four addressed statutory time limits associated with the new trial process. In reverse chronological order, those amendments may be found at:

- 2002 Cal. Stat. ch. 784, § 65 (repealing section 655, which applied the new trial provisions to both superior and municipal courts);
- 1998 Cal. Stat. ch. 931, § 85 (amending former section 655);
- 1989 Cal. Stat. ch. 1416, § 20 (amending section 659a with respect to the time limits for filing and service of affidavits);
- 1983 Cal. Stat. ch. 1167, § 9 (amending section 658, governing the use of affidavits

and court minutes in motions for new trial, to cross reference section 657);

- 1983 Cal. Stat. ch. 302, § 1 (amending section 663a, governing the notice of intention to move to vacate judgment, to specify the contents of the required notice and to clarify the timing for its filing);
- 1981 Cal. Stat. ch. 900, §§ 4, 5 (amending section 663, governing orders vacating judgments, and section 662, governing bench trials);
- 1977 Cal. Stat. ch. 1257, § 24 (amending former section 655);
- 1970 Cal. Stat. ch. 621, §§ 1, 2 (amending section 659 with respect to time limitations for filing multiple notices of motion for new trial by different parties, and section 660 with respect to time limitations for the filing new trial orders);
- 1969 Cal. Stat. ch. 115, § 1 (amending section 662.5, governing additur and remittitur);

- 1969 Cal. Stat. ch. 87, § 1 (amending section 660 with respect to time limitation for new trial orders); and
- 1968 Cal. Stat. ch. 387, § 1 (adding section 657.1 to provide additional ground for new trial).

But there has been no amendment to overrule the holdings of *Mercer* and *Treber*; there has not been a hint that those holdings are in any way inconsistent with the Legislature's views about the ten-day limit that it imposed for preparing, signing, and filing required specifications of reasons. That is so even though this Court thirty years ago expressly recognized that there could be "an element of unfairness" to the moving party "when an appellate court's review is circumscribed due to the error of the trial court." (*Sanchez-Corea v. Bank of America, supra*, 38 Cal.3d at p. 905 n.5 [citation omitted].)

These circumstances constitute overwhelming justification for application of *stare decisis* here. (*Marina Point Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734-735 ["It is a well-established principle of statutory construction that when the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction."] [citations omitted]; see also *Moore v. Conliffe*

(1994) 7 Cal.4th 634, 648 ["The *Ribas* case was decided in 1985, and since then the Legislature has amended section 47 on numerous occasions without ever indicating its disagreement or disapproval of the *Ribas* holding . . . . Thus, even if there was any reason to question the validity of *Ribas's* interpretation of section 47 as an original proposition, principles of *stare decisis* as applied to questions of statutory interpretation would counsel against overturning the *Ribas* holding at this time."].)

That conclusion is reinforced by the fact that the Legislature failed to amend the statute -- or to "overrule" the holdings of *Mercer* and *Treber* -- despite an explicit suggestion, in a prominent law review article cited by this Court in *Sanchez-Corea,* to do so. (See *Comment, Written Specifications For New Trial Orders*, 64 Cal. L. Rev. (1976), 286, 295-296, cited in *Sanchez-Corea v. Bank of America*, *supra*, 38 Cal.3d at p. 905 n.5.) In a section entitled "A Proposal For Legislative Change," the article cited by this Court suggested that the "legislature could deal with [the absence of any opportunity to correct a trial court's failure to specify reasons] by providing for a writ of mandamus to compel the trial judge's compliance;" the Legislature was encouraged to amend section 657 to provide "a short interval, after the 10-day period . . . had expired, during which a litigant could seek the writ" and to require an "expedited appellate decision on the petition." (64 Cal. L. Rev. at pp. 295-296.) Notwithstanding this explicit suggestion thirty years ago, the Legislature took no steps to do so.

The principles of *stare decisis* discussed above are not unique to California law; they are fundamental to our nation's jurisprudence. As the United States Supreme Court recently observed: "We are, after all, dealing with an issue of statutory interpretation, and the claim to adhere to case law is generally powerful once a decision has settled statutory meaning. In this instance, time has enhanced even the usual precedential force, nearly 15 years having passed . . . ." (*Shepard v. United States* (2005) 544 U.S. 13, 23 [citations omitted].) And the Supreme Court has squarely held that

> any departure from the doctrine of *stare decisis* demands special justification. [T]he burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.

(*Patterson v. McLean Credit Union* (1989) 491 U.S. 164, 172-73 [citations and internal quotation marks omitted].)

This Court has repeatedly agreed with the United States Supreme Court that, in cases involving statutory interpretation, any departure from the doctrine of *stare decisis* demands "special justification." (*Patterson v. McLean Credit Union*, *supra*, 491 U.S. at p. 172; accord *People v. Latimer*, *supra*, 5 Cal.4th at p. 1212 [quoting *Patterson* with approval].) "Special justification" refers to circumstances [1] where there had been an "intervening

development [in] the law. . . [that] removed or weakened the conceptual underpinnings from the prior decision, or [2] where the later law ha[d] rendered the decision irreconcilable with competing legal doctrines or policies, . . . [or [3] where] a precedent may be a positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws." (*Patterson v. McLean Credit Union, supra,* 491 U.S. at p. 173-174 [multiple citations omitted].)

No such justification is presented here. No intervening developments in the law have undermined the settled statutory meaning reflected in *Mercer* and *Treber.* And the principles established in those cases are in no way "unworkable or confusing." Indeed, the paucity of reported cases on the issues raised by the Court makes clear that the California trial courts, as well as the trial bar, have long been aware of the deadline for filing specifications of reasons and, with very rare exceptions, take steps to ensure that the requirement is met.

If anything, as this Court recognized in 1968, revising these settled precedents would *interfere* with the orderly administration of justice -- and undermine the policy objectives of section 657 -- by affording the moving party a tactical incentive to remain silent in the face of a trial court's failure adequately to specify its reasons, *i.e.*, "to allow the inadequate specification to

stand, hoping that the prospect of two certain appeals would discourage his opponent to the point of compromise or abandonment." (*Mercer v. Perez*, *supra*, 68 Cal.2d at p.124.)

Moreover, if this Court is inclined to revisit *Mercer* and *Treber* -- and the unambiguous statutory deadlines that they apply -- there is no principled basis for this Court not to revisit other holdings applying other deadlines prescribed by the Legislature with similar statutory language (see, e.g., p. 11, above) or other new trial requirements prescribed by similar statutory language (e.g., the order "must state the ground or grounds relied upon by the Court"; see generally pp. 6-7, above). The uncertainty and potential confusion caused by starting down this path offer an independent reason not to depart from principles of *stare decisis* here.

In short, there is no reason whatsoever -- much less some "special justification" -- for this Court to "fix" an established legislative rule, based on unambiguous statutory language interpreted consistently for forty years, that is not in any way broken.

* * *

There is an especially compelling reason for the Court not to revisit the holdings of *Mercer* and *Treber in this case*. A remand here -- more than four years after entry of the new trial order -- could not possibly cure the failure of the trial judge, who is now retired, to *personally and*

contemporaneously prepare and file a specification of his reasons within the period prescribed by statute.

Nor do the equities favor such reconsideration in this case. Represented by sophisticated and experienced trial counsel, and notwithstanding cautionary case law of this Court and the Courts of Appeal, the Raiders failed to remind the trial court of the specification requirement even though the new trial order was plainly defective on its face.

In *Mercer* itself, this Court observed that the "moving party [may] take steps to insure that the judge complied with" the specification requirement. (*Mercer v. Perez*, *supra*, 68 Cal.2d at p. 123.) In *La Manna*, this Court reminded counsel that "the attorney for the moving party [may] assist the court by calling its attention within the 10-day period to any such deficiency in the order, thereby enabling it to be corrected within the jurisdictional period." (*La Manna v. Stewart*, *supra*, 13 Cal.3d at p. 424 [internal quotation marks and citation omitted].) And the Courts of Appeal have repeatedly cautioned that "[w]hile section 657 places upon the judge the sole duty of composing his order, in practice, equal responsibility rests *upon the party who is granted a new trial* to assure himself that the order complies with the statutory procedure." (*Gaskill v. Pacific Hospital of Long Beach* (1969) 272 Cal.App.2d 128, 133 [emphasis added]; see also, e.g., *LaBorne v. Mulvany* (1974) 43 Cal.App.3d 905, 916-917 [recognizing burden of movant and reversing new trial order where trial court failed to specify reasons];

Tagney v. Hoy (1968) 260 Cal.App.2d 372, 377 [same].) The Raiders failed to take any steps to do so.

If this Court believes that appellate courts should have more flexibility in addressing new trial orders unsupported by a specification of reasons, it is, of course, free to make such a suggestion, which would undoubtedly draw legislative attention to the issue. But, "[a]t this late date," we respectfully submit, "any changes must be made by the Legislature, which obviously has the authority to modify the rule any time it chooses." (*People v. Latimer*, *supra*, 5 Cal.4th 1203 at p. 1216; see also *Sanchez-Corea v. Bank of America*, *supra*, 38 Cal.3d at p. 905 n.5 ["The wisdom of or necessity for certain requirements are matters for legislative and not judicial consideration and the judiciary, in its interpretation of legislative enactments may not usurp the legislative function by substituting its own ideas for those expressed by the legislature."] [internal punctuation and citations omitted].)

IV. ANY NEW RULE ALLOWING APPELLATE COURTS TO RESURRECT LAPSED TRIAL COURT AUTHORITY TO FILE ITS SPECIFICATION OF REASONS SHOULD BE LIMITED TO CASES IN WHICH THE MOVING PARTY MADE EFFORTS TO SECURE COMPLIANCE PRIOR TO THE STATUTORY DEADLINE AND PROMPTLY SOUGHT WRIT REVIEW THEREAFTER.

Principles of statutory construction and *stare decisis* weigh heavily against judicially rewriting the legislative mandate, applied in *Mercer*, *Treber*, *La Manna* and for decades thereafter, in a manner that would allow a

trial judge, after the statutory deadline has passed, belatedly to prepare and file a specification of his or her reasons for a new trial order.

But if there were to be any exception to the established law in this area, we respectfully submit that it should be very narrow, permitting resurrection of the expired statutory period only in cases where the record demonstrates that the moving party took affirmative steps, prior to expiration of the statutory deadline, to request a specification from the trial court and, when unsuccessful, promptly sought writ review. Put differently, any reconsideration should be confined to *Treber*, and any change in the law should entail conditions that minimize its adverse impact on the fundamental legislative purposes of the ten-day statutory deadline.

Extending such an exception to *appellate* review, the subject of *Mercer*, would eviscerate the Legislature's deadline and create the very problem that the 1965 amendments to section 657 were intended to solve: There would be "one appeal merely to vindicate [the appellant's] right to a proper record of the ruling below, followed by a second appeal to challenge the ruling on its merits. . . . Neither the public, nor the bar, nor the courts should be subjected to such a burden." (*Mercer v. Perez*, *supra*, 68 Cal.2d at p. 124.)

Furthermore, given the length of time that ordinarily passes from entry of a new trial order until a ruling *on appeal* -- in this case, *two years and five months* -- the reliability of a belated specification following *appeal* would

be inherently suspect. And, equally important, "the statutory incentive to careful judicial deliberation before awarding a new trial would be weakened if the only consequence of an inadequate specification of reasons were that one or two years later an appellate court might direct the judge to add a few words to his original order." (*Id.* at p. 123.) Accordingly, extending any new exception to *appellate* review would be fundamentally inconsistent with the Legislature's intent; it would *create* unfairness; and it would undermine the orderly administration of justice.

An exception limited to writ review would, of course, also be inconsistent with the plain meaning of the statute as well as legislative intent. But writ review has the potential to yield a specification of reasons more quickly and efficiently than appellate review, and would thus come closer to satisfying the legislative objective of securing careful, personal, and *contemporaneous* deliberation than would appellate review. In *Treber*, for example, the Court of Appeal ruled *five days* after the application was filed and only a few weeks after the new trial order was entered, which (if the writ had been granted) would have enabled the trial judge to specify reasons when the proceedings were still fresh in his mind. (*Treber v. Superior Court*, *supra*, 68 Cal.2d at pp. 131-132.)

Because the Raiders failed to seek a writ of mandate or to take any affirmative steps to secure a timely specification from the trial court, an

appropriately narrow exception to the statutory deadline -- as outlined above -- could not (and should not) affect the outcome of this appeal.

V. BECAUSE A REMAND HERE COULD NOT POSSIBLY CURE THE TRIAL JUDGE'S FAILURE TO PREPARE A SPECIFICATION OF REASONS FOR HIS ORDER, THE COURT, IF IT IS INCLINED TO CHANGE SETTLED LAW, SHOULD EITHER (A) DO SO PROSPECTIVELY ONLY OR (B) DISMISS REVIEW AS IMPROVIDENTLY GRANTED AND ADDRESS THE ISSUE IN ANOTHER CASE.

We have previously demonstrated that a remand here could not possibly cure the failure of the trial judge, who is now retired, to *personally* and *contemporaneously* prepare and file a specification of his reasons within the period prescribed by statute. For that reason, any change in the law cannot change -- and for numerous other reasons set forth above, should not change -- the outcome of this appeal. If there is to be such a change in established precedent, it should be applied only prospectively. Alternatively, this Court could dismiss review in this case and select another vehicle to revisit the precedents addressed by the Court's recent letter.

As a general matter, in deciding whether to afford retroactive application to a new rule, "the court should identify the purposes of the new rule and determine whether on balance those purposes would be served by retroactive application generally and in the case before the court . . . ." (*Peterson v. Superior Court* (1982) 31 Cal.3d 147, 153 n.3.) Any such assessment here leads to the conclusion that a new, judicially created

exception to section 657's ten-day limit for specifying reasons should not be applied -- indeed, could not be applied -- "in the case before the court."

The presumed purpose of any such new rule -- to permit a trial judge belatedly to specify his or her reasons for a new trial order -- could not possibly be achieved *in this case* due to the retirement years ago of the judge who heard the Raiders' new trial motion. Indeed, the "dual purposes" of the specification deadline -- providing a "statutory incentive to careful judicial deliberation *before* awarding a new trial" and "promot[ing] a more effective review of new trial orders" could not be achieved in *any* case where appellate review of the new trial order has already taken place. (See *Mercer v. Perez, supra,* 68 Cal.2d at pp. 123-24 [emphasis added].)

Moreover, as this Court has repeatedly recognized, "determinations of this nature turn upon considerations of fairness and public policy." *(Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829.) In light of the Raiders' having failed to take any steps to secure a specification, their having "allow[ed] the inadequate specification to stand" (*Mercer v. Perez, supra,* 68 Cal.2d at p.124), and their having failed even to seek reconsideration from this Court of the governing rules, there plainly would be no unfairness *in this case* if any change were applied only on a prospective basis. Considerations of public policy lead to the same conclusion, as retroactive application of any new rule would in this case, and others like it, result in "one appeal merely to [secure] a proper record of the ruling below, followed by a second appeal to

challenge the ruling on its merits. . . . Neither the public, nor the bar, nor the courts should be subjected to such a burden." (*Mercer v. Perez*, *supra*, 68 Cal.2d at pp. 123, 124.)

In the alternative, and especially because (in light of the trial judge's retirement) this case represents a particularly inappropriate vehicle for considering these issues, this Court should consider dismissing review and depublishing the relevant excerpts of the Court of Appeal's opinion. (See Cal. Rules of Court, Rule 29.3(b)(1).) In that circumstance, the opinion would have no precedential effect, but this Court would be free, if it should choose to do so, to resolve the issue in another case, perhaps the companion case pending before this Court, *May v. Trustees of the California State University,* No. S132946 (pet. for review granted and deferred, June 8, 2005).[2]

CONCLUSION

For the foregoing reasons, the Court should not reconsider either *Mercer* or *Treber* to the extent that they bar an appellate court from resurrecting expired trial court authority to file a statement of reasons in support of an order granting a new trial.

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[2] We do not know whether the moving party in *May* took steps to remind the trial judge of his obligation to specify reasons, but it does appear that that judge is still on the bench. See http://www.monterey.courts.ca.gov/judges2005.html (October 6, 2006) (Judge Fields).

If the Court is inclined to change settled law in this area, its reconsideration should be limited to *Treber* and writ review. The appellate courts' authority to compel a trial judge belatedly to file a statement of reasons should be conditioned on the moving party's having promptly taken steps to request a specification or to remind the trial court of the specification requirement. In any event, considerations of fairness and public policy, as well as the equities, dictate that no such change should affect the outcome of this appeal. In any event, a remand here could not possibly establish the reasons that the now retired trial judge had in mind when he decided to grant the Raiders' new trial motion.

In the alternative, the Court may wish to dismiss review and to revisit in *May* or some other more appropriate case the questions raised by the Court's letter.

Respectfully submitted,

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