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IN THE SUPREME COURT OF CALIFORNIA

TRC OPERATING COMPANY, INC. et al.,
Plaintiffs, Cross-defendants, and Appellants,

v.

CHEVRON U.S.A. INC.,
Defendant, Cross-complainant, and Appellant.

AFTER A PUBLISHED DECISION BY THE COURT OF APPEAL, FIFTH DISTRICT • CASE NO. F083724
ON APPEAL FROM KERN COUNTY SUPERIOR COURT, DAVID R. LAMPE (RET.) AND J. ERIC BRADSHAW, JUDGES • CASE NO. S-1500-CV-282520-JEB

PETITION FOR REVIEW

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PETITION FOR REVIEW

ISSUES PRESENTED

1. Persons required to register as sex offenders "pursuant to Section 290 of the Penal Code"[1] are barred from serving as jurors. Does that bar apply to all sex offenders required to register under the procedures established in section 290, or only to those whose duty to register is specified in section 290 itself such that persons with out-of-state convictions for sex crimes can serve on juries as the Court of Appeal held?

2. When an appellate court reviewing a new trial order concludes juror misconduct occurred, but the trial court did not address whether the identified misconduct caused prejudice, does Code of Civil Procedure section 660 prohibit remand to the trial court to address that issue? The Court of Appeal's published opinion acknowledges a split of authority on this question, and its de novo review of the trial court's prejudice findings contradicts this Court's decision in *People v. Ault* (2004) 33 Cal.4th 1250 (*Ault*).

3. Can a challenge to the sufficiency of a verdict's findings to support a prejudgment interest award be forfeited by a defendant's lack of objection to the verdict form? If so, can the objection be made in posttrial motions or must it be made before the jury is discharged? The Court of Appeal's published opinion acknowledges a split of authority on this question.

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[1] All further unenumerated statutory references are to the Penal Code.

INTRODUCTION

This case presents three issues of statewide importance, two of which involve published splits of authority among the Courts of Appeal acknowledged by the published opinion, and one where this Court has suggested the answer. All three issues go to the heart of the civil jury trial process.

The first issue affects the fundamental integrity of the jury system—whether out-of-state sex offenders may serve on California juries. The Legislature enacted Code of Civil Procedure section 203, subdivision (a)(11) to bar from jury service all persons "currently required to register as a sex offender pursuant to Section 290 of the Penal Code based on a felony conviction." Penal Code section 290, subdivision (b) outlines how sex offenders register, whereas section 290, subdivision (c) and the ensuing provisions identify the specific sex offenders who are required to register through that process. The trial court ordered a new trial after discovering that Juror No. 10 (B.K.) lied about his prior Washington felony conviction requiring him to register as a sex offender through the process established by Penal Code section 290, subdivision (b). (13 AA 3645–3653.) But the Court of Appeal reversed because Penal Code section 290.***005***—rather than section 290 *itself*—imposes the duty to register. (Typed opn. 15–30.) Under that holding, sex offenders required to register based on out-of-state felony convictions are *eligible* to serve on juries because they need not register "pursuant to Section 290 of the Penal Code." (Typed opn. 21–30.)

The eligibility requirement's purpose—to protect jury impartiality by barring those likely to "harbor a continuing resentment against 'the system' that punished [them]" (*Rubio v. Superior Court* (1970) 24 Cal.3d 93, 101 (*Rubio*))—applies equally whether a sex offender commits his crime in California or elsewhere. The opinion undermines that purpose by allowing sex offenders who commit their offense in another state to serve on California juries, when persons who commit the same offense in California are barred. Whether a sex offense occurs in California or Washington does not affect the Legislature's view of the perpetrator's fitness for jury service. And this Court has suggested that sex offenders with out-of-state convictions *are* subject to the "registration requirement of [Penal Code] section 290." (*In re E.J.* (2010) 47 Cal.4th 1258, 1269 (*In re E.J.)*.) But, as the Court of Appeal noted in rejecting this dictum, this Court did not definitively settle that issue. It should do so now.

Second, the Courts of Appeal are divided over whether and when a reviewing court may remand to the trial court to reconsider its new trial order. New trial motions are common, and appellate courts often view the issues they raise differently than trial courts. Because the Court of Appeal found misconduct based on B.K.'s lies about his experience with the court system, it had to decide how to address whether that misconduct was prejudicial.

Appellate courts are divided over whether a reviewing court has the power to order further proceedings on a new trial motion in the trial court. Some appellate courts, as here,

conclude remand would contravene the jurisdictional 75-day period set by Code of Civil Procedure section 660 for a trial court to rule on a new trial motion. Other appellate courts permit remand, adopting the better reasoned view that section 660 does not apply to proceedings on a new trial motion on remand after an appeal. (Compare *Barrese v. Murray* (2011) 198 Cal.App.4th 494, 507 (*Barrese*) with *Lippold v. Hart* (1969) 274 Cal.App.2d 24, 27 (*Lippold*) ["It would be inappropriate for us to attempt to revive [the trial court's] jurisdiction"], and typed opn. 36 ["we cannot remand"].) The Court of Appeal here simply decided itself that there was no prejudice rather than remanding that issue to the trial court. (Typed opn. 37–47.)

In doing so, the Court of Appeal held that even where the trial court *has* found prejudice—as it did here with respect to B.K.'s ineligibility—that finding should be reviewed de novo. That contradicts this Court's guidance that "a deferential standard of appellate review" should apply because "[a] trial court's finding of prejudice is based, to a significant extent, on ' "first-hand observations made in open court," ' which that court itself is best positioned to interpret." (*Ault*, *supra*, 33 Cal.4th at pp. 1267–1268.) Here, the trial court observed first-hand that B.K. was "obstinate, untruthful, obstreperous, contemptuous," and "loud, opinionated and intimidating in jury deliberations." (13 AA 3652.) Had the Court of Appeal remanded, there is little doubt the trial court would have found bias based on his concealment of his history in court and violation of court orders, just as it did as to his ineligibility. Review is needed to resolve

the conflict on this common and fundamental procedural question.

Third, this case presents an issue of great concern to litigants and to the procedural fairness of trials statewide—whether a defendant, by failing to object before the jury is discharged, forfeits a challenge to the verdict as inadequate to support judgment on the plaintiff's claim. The Court of Appeal found Chevron forfeited its challenge to the $47 million prejudgment interest award by not objecting to the verdict form's omission of specific required factual findings by the jury, which the *plaintiff* bears the burden of proving. (Typed opn. 79–85.) The Courts of Appeal are divided on whether and when such an objection must be made. (Compare *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 131 (*Jensen*) [failure to object to verdict-form defect when verdict was read forfeited argument verdict did not resolve whether defendant violated predicate statute] with *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 531 (*Behr*) [forfeiture rule does not apply to "the absence of a factual finding necessary to support a cause of action"] and *All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1220 (*All-West*) [objection to verdict form timely raised for first time in posttrial motion].) The Court of Appeal's opinion deepens this split of authority, holding Chevron forfeited its contention by failing to object "until after the verdict was returned." (Typed opn. 80.) Review should be granted to provide clarity on this issue.

STATEMENT OF THE CASE

A. B.K. sexually abuses a child and is convicted of a felony. He also files civil lawsuits.

In 1981 and 1982, B.K. sexually abused a child about once a week for four months, while he lived with the girl and her mother in Washington. (10 AA 2649, 2651, 2710–2712.) B.K. was charged with the felony of "indecent liberties" (Wash. Rev. Code Ann., § 9A.44.100, subd. (1)(b)), for engaging in "sexual contact" with a minor under 14. (10 AA 2648–2649.)

B.K. pled guilty. (10 AA 2649–2651, 2716–2720.) While on probation, he failed a polygraph examination by denying that he had "sexually fondled" his victim or any other underage girl since his conviction. (13 AA 3588–3592.) In 1987, after postconviction probationary supervision, the prosecutor dismissed B.K.'s criminal case. (10 AA 2751.)

In 2012, after moving to California, B.K. and his wife filed a personal injury lawsuit in Kern County. (10 AA 2657–2662; 12 AA 3450.) B.K. was also sued for breach of contract, leading to a default judgment in 2017. (10 AA 2675–2676.)

B. During voir dire, B.K. falsely denies having prior court appearances or filing lawsuits.

Before trial, each prospective juror completed a questionnaire under penalty of perjury. (See, e.g., 8 AA 2188–2189.)

Question 1.26 asked, "if you have ever been to court for any other reason (excluding divorce), explain." (8 AA 2199–2200, capitalization omitted.) B.K. first wrote "no" and then crossed it

out and stated, "traffic court found not guilty." (8 AA 2200, capitalization omitted.) B.K. left blank question 1.30 asking, "if you or anyone close to you has ever made any type of claim for money damages, explain." (*Ibid.,* capitalization omitted.)

C. After a jury verdict for TRC, the trial court grants TRC's prejudgment interest motion based on new postverdict evidence.

A dispute between TRC and Chevron over responsibility for arrested oil extraction operations was tried before a jury. By an eleven-to-one vote, the jury returned a verdict finding Chevron liable to TRC and awarding damages of $73,039,191, as well as prejudgment interest (without specifying the amount of interest, the dates on which interest began to run, or to which categories of TRC's damages it applied). (8 AA 2150–2151; 62 RT 6799:18–6800:28.)

After the verdict, TRC moved for a prejudgment interest award, relying on a posttrial declaration by its expert not shown to the jury to establish the factual basis for the amount. (4 RA 1055, 1060–1061; see 13 AA 3636.) Chevron objected to the declaration, arguing this was a jury question on which no evidence was presented at trial and it was improper for the trial court to make these findings. (5 RA 1274–1282, 1328–1330.) The trial court relied on the declaration to conclude that Chevron owed $47,456,101 in prejudgment interest. (13 AA 3638–3639.)

D. Chevron seeks a new trial, arguing B.K.'s sex abuse conviction and false answers during voir dire constitute prejudicial juror misconduct.

Chevron filed a new trial motion based on juror misconduct. (8 AA 2160–2181.) The motion noted that B.K. had denied having appeared in court (other than traffic court), even though court records demonstrated that he had been convicted in Washington of a felony and that he had been in court in other matters. (8 AA 2179.) A supporting declaration from juror R.O. explained that during deliberations, B.K. used profane language, "was angry and hot headed," "forcefully confronted all of the jurors," prevented R.O. from sharing his views that Chevron was not liable through constant interruption, and shared that B.K. strongly disliked one of Chevron's attorneys and "wanted to hit him every time" the attorney spoke. (8 AA 2157; see 8 AA 2178–2179.)

Chevron argued that B.K.'s felony conviction required him to register as a sex offender pursuant to Penal Code section 290 when he moved to California, rendering him statutorily ineligible for jury service. (10 AA 2693–2696; see 12 AA 3412–3424.)

In response, TRC filed a declaration from B.K. asserting that he did not understand the question about prior court appearances to include his felony sex abuse conviction. (10 AA 2859.) His declaration did not discuss his personal injury action. (*Ibid.*)

E. The trial court grants a new trial and finds that B.K. committed misconduct prejudicial to Chevron.

The trial court granted a new trial. (13 AA 3645–3653.) It found that B.K.'s failure to disclose his felony conviction was misconduct: "The court finds that the juror's 'lack of understanding' is pretext. . . . No one forgets such serious charges. Undoubtedly he did not answer to avoid embarrassment. The court offered all jurors the opportunity to discuss their answers confidentially. [B.K.] had a duty to disclose this information." (13 AA 3648.) The court also found B.K.'s failure to disclose his personal injury action was misconduct as it was "a willful failure to disclose" in response to an on-point question in the jury questionnaire. (*Ibid.*)

The court also determined that B.K. was required to register as a sex offender when he moved to California and was thus ineligible to serve as a juror. (13 AA 3649–3651.)

Turning to prejudice, the court found that B.K.'s misconduct created a presumption of prejudice that TRC failed to overcome. (13 AA 3651–3653.) B.K. "displayed a self-entitled and contemptuous attitude" during trial, and he "was not only untruthful in his voir dire, but he is now also untruthful in the explanation or lack of explanation he provides in his current declaration." (13 AA 3652.) In short, B.K. "was irascible and openly defiant in court." (13 AA 3647; see *ibid.* [B.K. disobeyed court requirement to wear a mask]; 13 AA 3652 [B.K. engaged in a standoff with the jury services bus driver for refusal to wear a

mask]; 65 RT 6933:22–6934:2 [B.K. was a "scofflaw" who refused to act impartially and to follow the law].)

The court found B.K. was biased because he was an "obstinate, untruthful, obstreperous, contemptuous, ineligible and entitled juror, refusing the orders of the court, who was loud, opinionated and intimidating in jury deliberations, and whose participation influenced the outcome." (13 AA 3652, fn. omitted; see *ibid.* ["He intimidated [juror R.O.] from freely discussing the conduct of TRC in causing damages"].) B.K. "showed a strong inclination to ignore the reasonable commands of the court" and did not act as an impartial factfinder in good faith. (13 AA 3652–3653.)

F. The trial court confirms the grant of new trial after reconsideration.

TRC filed a motion for reconsideration. (13 AA 3655–3661.) The court ultimately did not revisit its decision to grant a new trial because B.K.'s misconduct created a presumption of prejudice and his "prominent participation in jury deliberations is sufficient to 'infect' the verdict and the integrity of the trial warranting a grant of the motion for new trial." (13 AA 3720–3722.) Because the trial court found B.K.'s ineligibility prejudiced Chevron requiring a new trial, it did not reach whether Chevron was prejudiced by B.K.'s misconduct in concealing his prior conviction and personal injury lawsuit and disobeying court orders. (13 AA 3720.)

G. The Court of Appeal reverses the new trial order and affirms the reinstated judgment for TRC.

1. The opinion concludes B.K. was eligible for jury service and alternatively that Chevron was not prejudiced by any ineligibility.

In a published opinion, the Court of Appeal concluded that B.K. was eligible to serve on the jury. (Typed opn. 15–30.) The opinion reasoned that Code of Civil Procedure section 203, subdivision (a)(11) bars from service only "[p]ersons who are currently required to register as a sex offender pursuant to Section 290 of the Penal Code based on a felony conviction," and that Penal Code section 290.005 triggered B.K.'s registration requirement, not Penal Code section 290. (Typed opn. 21–30 & fn. 11.)

The Court of Appeal alternatively held that even if B.K. were ineligible to serve, TRC rebutted the presumption of prejudice from that misconduct. (Typed opn. 47–50.) The court reviewed de novo whether B.K. was biased, giving no deference to the trial court's extensive findings that he was. (Compare typed opn. 37–46 with typed opn. 47–50.)

2. The Court of Appeal finds B.K. committed misconduct through concealment during voir dire but concludes it lacks authority to remand for the trial court to determine prejudice from that misconduct.

The Court of Appeal found that B.K.'s lies during voir dire about his prior conviction and lawsuit constituted misconduct.

(Typed opn. 30–31.) Because the trial court's prejudice determination was explicitly based on its finding B.K. was ineligible, the opinion concluded the trial court erred in failing to determine whether B.K.'s concealment was prejudicial. (Typed opn. 32.)

The Court of Appeal noted that "normally the preferred course" would be to remand for the trial court to make that determination in the first instance "based on a correct understanding of the law." (Typed opn. 32.) But it noted "a split on this issue in published cases," with some courts holding that remand is available for reconsideration of a new trial motion and others concluding Code of Civil Procedure section 660 deprived the trial court of jurisdiction even after appellate review, siding with the latter authorities. (Typed opn. 35–36.)

3. The opinion holds that Chevron forfeited its contention the verdict's findings and TRC's trial evidence are not adequate to support the prejudgment interest award.

The Court of Appeal concluded that, by failing to object to the verdict form before the jury was discharged, Chevron forfeited its contention it was error for the trial court to engage in postverdict factfinding to support TRC's prejudgment interest award. (Typed opn. 79–85.) The opinion mischaracterized the verdict as general, which was "significant to [its] analysis because a general verdict 'implies a finding in favor of the prevailing party of every fact essential to the support of his action or defense.' " (Typed opn. 56.)

The court noted the "suggest[ion] [of] a split of authority among the Courts of Appeal" on when an objection to a verdict must be raised, with some courts holding an objection must precede discharge of the jury and others finding timely objections made for the first time in posttrial motions. (Typed opn. 80–81.) The opinion attempted to reconcile the split by dismissing the statement in *All-West, supra*, 183 Cal.App.3d at page 1220—that a challenge to the verdict form is " 'timely preserved' " if raised in a posttrial motion—as "applying an exception to the general rule that objections are untimely if not raised before the jury is discharged." (Typed opn. 82.) The opinion did not explain the nature or scope of that "exception" or why it did not apply to Chevron's challenge to the prejudgment interest award.

4. The Court of Appeal denies Chevron's petition for rehearing.

Chevron petitioned for rehearing to correct several misstatements in the Court of Appeal's opinion. The petition identified the opinion's failure to consider B.K.'s disobedience of court orders to disclose sensitive information in chambers and continuing lies to the court in his postverdict declaration. (PFRH 8–10.) The petition challenged the opinion's statement that the parties did not dispute B.K. " 'was not required to register as a sex offender pursuant to section 290 of the Penal Code.' " (PFRH 14–17.) And it challenged the opinion's omission of the trial court's reliance on the postverdict expert declaration to award prejudgment interest and its omission of Chevron's argument that factual findings may not be implied to support the verdict's

special prejudgment interest finding. (PFRH 18–21.) The Court of Appeal denied rehearing.

LEGAL ARGUMENT

I. This Court should grant review to determine whether people required to register as sex offenders based on an out-of-state felony conviction may serve on juries.

A. Sex offenders are barred from jury service.

"Persons who are currently required to register as a sex offender pursuant to Section 290 of the Penal Code based on a felony conviction" may not serve on juries. (Code Civ. Proc., § 203, subd. (a)(11).) There is no dispute that B.K. was "currently required to register as a sex offender" and the requirement was "based on a felony conviction." (*Ibid.*; see typed opn. 21.) The only question is whether B.K. was required to register "pursuant to Section 290 of the Penal Code."

The Court of Appeal said no because the Washington felony conviction that triggered B.K.'s obligation to register falls under Penal Code section 290.***005***. But both the text of that provision and the broader statutory structure make clear that whatever section triggers the obligation to register, registration itself occurs "pursuant to Section 290." The Court of Appeal's contrary conclusion clashes with the Legislature's purpose in enacting Code of Civil Procedure section 203, subdivision (a)(11)—to ensure that people subject to ongoing supervision by the legal system, and who may therefore harbor biases against that system, do not serve on juries.

Because the composition of juries is fundamental to our justice system, and because many other statutes turn on whether an individual must register as a sex offender "pursuant to Section 290 of the Penal Code," this Court should grant review to "settle [this] important question of law." (Cal. Rules of Court, rule 8.500(b)(1).)

B. The Court of Appeal's holding conflicts with the plain text of the Penal Code and the Legislature's intent in enacting Code of Civil Procedure section 203, subdivision (a)(11).

"In interpreting a statutory provision, '[a court's] task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results.' " (*Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, 1385.) "[S]tatutory language typically is the best and most reliable indicator of the Legislature's intended purpose," including "the ordinary meaning of the language in question as well as the text of related provisions, terms used in other parts of the statute, and the structure of the statutory scheme." (*Larkin v. Workers' Comp. Appeals Bd.* (2015) 62 Cal.4th 152, 157.)

The text and structure of the Penal Code make clear that ***all*** individuals who must register as a sex offender do so "pursuant to Section 290 of the Penal Code," even if some other provision triggers that registration requirement. Section 290 contains four substantive provisions. Subdivision (a) establishes

that section 290 and its ensuing provisions are part of an integrated legislative scheme: "Sections 290 to 290.024, inclusive, shall be known, and may be cited, as the Sex Offender Registration Act." (§ 290, subd. (a).) Subdivision (b) then defines the registration requirement: sex offenders "shall register with the chief of police of the city in which the person is residing . . . within five working days of coming into, or changing the person's residence within," the jurisdiction. (*Id.*, § 290, subd. (b).) Subdivision (c) identifies certain individuals who "shall register" because they have been convicted of violating California law. (*Id.*, § 290, subd. (c).) And subdivision (d) specifies the duration of each offender's registration. (*Id.*, § 290, subd. (d).)

Section 290 is followed by provisions identifying other people who must register as sex offenders. That includes section 290.005, which states that a person convicted "of any offense that, if committed or attempted in this state, . . . would have been punishable as one or more of the offenses described in" section 290, subdivision (c) "shall register in accordance with the Act."

B.K. was among the classes of people identified in section 290.005 who "shall register in accordance with the Act." The term "in accordance with" is synonymous with "pursuant to." (See Black's Law Dict. (12th ed. 2024) [defining "pursuant to" as "[i]n compliance with; in accordance with; under"]; Garner's Modern English Usage (4th ed. 2016) p. 755 ["pursuant to" defined as "in accordance with; under; in carrying out"].) And as noted above, " 'the Act' " refers to "Sections 290 to 290.024,

inclusive." (§ 290, subd. (a).) In other words, section 290.005 required B.K.to register as a sex offender "pursuant to" "Sections 290 to 290.024, inclusive."

This makes sense. Although section 290.005 identifies certain "persons [who] shall register in accordance with the Act," it does not provide any details about *how* to register—when, where, and with whom. Those details are contained entirely in section 290, subdivision (b). As a result, any person who is required to register as a sex offender—whether under section 290, subdivision (c) or any of the ensuing sections—necessarily registers "pursuant to" section 290, subdivision (b).

Nor does Penal Code section 290.005 say anything about for *how long* a covered person must register. That information is contained solely in Penal Code section 290, subdivision (d). And because Code of Civil Procedure section 203, subdivision (a)(11) excludes from jury service only "[p]ersons who are *currently required* to register as a sex offender" (emphasis added), the provision necessarily references the registration requirements of Penal Code section 290, subdivision (d). (See *Doe v. Finke* (2022) 86 Cal.App.5th 913, 925, fn. 10 (*Finke*) [noting that Code of Civil Procedure section 203, subdivision (a)(11) "excludes from jury service only those persons convicted of felony sex offenses who are *currently* required to register as sex offenders," and that Penal Code section 290, subdivision (d) "establishe[s] a three-tiered scheme for sex offender registration" delineating the duration of different offenders' registration obligations].)

This plain-text reading is consistent with the legislative purpose underlying Code of Civil Procedure section 203, subdivision (a)(11)—namely, protecting the impartiality of juries by excluding those most likely to harbor a bias against the legal system. This Court upheld an earlier iteration of Code of Civil Procedure section 203 that barred from jury service all felons. (*Rubio*, *supra*, 24 Cal.3d at p. 105.) The Legislature subsequently amended the statute to exclude a narrower subset of felons, including those "incarcerated in any prison or jail," those "currently on parole, postrelease community supervision, felony probation, or mandated supervision," and those "currently required to register as a sex offender pursuant to Section 290 of the Penal Code." (Code Civ. Proc., § 203, subd. (a)(9)–(11).)

As the First Appellate District explained in sustaining these amendments against an equal protection challenge, "the Legislature reasonably could be concerned that these groups . . . are more likely to harbor bias than persons convicted of felonies generally on account of their *ongoing* supervision and legal obligations." (*Finke*, *supra*, 86 Cal.App.5th at p. 925; see *ibid.* ["a sex offender might harbor a continuing resentment and bias against the system that has imposed the ongoing registration requirement, which subjects the person to ' "continued public surveillance," ' " quoting *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 877]; see also *Rubio*, *supra*, 24 Cal.3d at p. 101 ["a person who has suffered the most severe form of condemnation that can be inflicted by the state—a conviction of

felony and punishment therefor—might well harbor a continuing resentment against 'the system' that punished him"].)

The trial court found that B.K. exhibited precisely this type of bias against the legal system. (See *ante*, pp. 10–11.) And although the Court of Appeal held that even if B.K. were ineligible, "the outcome here would remain the same" because "there was no prejudice to Chevron from [B.K.'s] service on the jury" (typed opn. 47), this alternative holding turned on a flagrant disregard of this Court's command that "a deferential standard of appellate review" applies to a trial court's finding of prejudice. (*Ault*, *supra*, 33 Cal.4th at p. 1268; see *ante*, p. 12; *post*, § II.)

C. This issue presents an important and unsettled question of law.

More than 120,000 Californians are currently required to register as a sex offender. (See Cal. Dept. of Justice, *California Sex Offender Registry* <https://tinyurl.com/4j5dh3v6> [as of July 30, 2024].) Which of these individuals, if any, may serve on a jury is a vital question affecting litigants' fundamental rights. "The Constitution guarantees both criminal and civil litigants a right to an impartial jury." (*Warger v. Shauers* (2014) 574 U.S. 40, 50 [135 S.Ct. 521, 190 L.Ed.2d 422].) And as noted above, the Legislature's purpose in excluding from jury service those individuals identified in Code of Civil Procedure section 203 was "to protect the right to trial by an impartial jury." (*Rubio*, *supra*, 24 Cal.3d at p. 101.)

The Legislature's concerns about impartiality were well-founded. B.K. repeatedly "ignored the orders of the court" (13 AA 3651–3652), was "untruthful in his voir dire" and "untruthful in the [posttrial] explanation or lack of explanation he provide[d]" (13 AA 3652), and his claim to have forgotten about his conviction or misunderstood the jury questionnaire was "pretext" (13 AA 3648). Once empaneled, B.K. "played a large role in jury deliberations by being loud and opinionated," and he intimidated another juror "from freely discussing the conduct of TRC in causing damages." (13 AA 3652.) The trial court summarized its findings: "This court took pains to impress upon the jurors their duty to act as impartial judges and follow the law in rendering a verdict based upon the facts as the jury objectively found to be true. Juror No. 10 ('BK') is proven demonstrably unsuited to perform this task, not simply prejudicially to Chevron, but to the judicial system itself." (13 AA 3652–3653.)

Whether registration takes place "pursuant to Section 290 of the Penal Code," regardless of the statutory section that triggers the registration requirement, is also an important question because it lies at the heart of many other statutes. For instance:

- Various occupational licenses must be denied or revoked for "any person who has been required to register as a sex offender pursuant to Section 290 of the Penal Code" (Bus. & Prof. Code, § 2523 [licensed midwives]; see *id.*, § 1687 [dentists]; *id.*, § 2660.5

[physical therapists]; *id.*, § 2953 [research psychoanalysts]);

- Wards of the juvenile court and the Department of Youth and Community Restoration cannot "perform any function that provides access to personal information of private individuals" if they are "required to register as a sex offender pursuant to Section 290 of the Penal Code" (Welf. & Inst. Code, § 219.5, subds. (a) & (b)(3));
- The Department of Justice must "make available information concerning persons who are required to register pursuant to Section 290 to the public via an internet website" (Pen. Code, § 290.46, subd. (a)(1));
- Any person "for whom registration is required pursuant to Section 290" is barred from "resid[ing] within 2000 feet of any public or private school, or park where children regularly gather" (*id.*, § 3003.5, subd. (b)).

Under the decision below, these statutes apply only to those required to register as a sex offender based on a felony identified in section 290, subdivision (c)—registrants like B.K. may live as close to a school or playground as they wish, serve as dentists or midwives, and need not be included in the Department of Justice's public sex-offender registry. The Legislature simply cannot have intended for out-of-state sex offenders to have such free and unfettered access to such sensitive positions and locations.

This question is also unsettled. More than a decade ago, this Court telegraphed an answer in *In re E.J.*, *supra*, 47 Cal.4th 1258. In that case, four individuals who had been convicted of sex-crime felonies challenged the constitutionality of section 3003.5, which prohibits "any person for whom registration is required pursuant to Section 290" from residing within a minimum distance from public schools or parks. (*Id.* at p. 1263.) One of the challengers "was convicted of indecent exposure in Texas." (*Id.* at p. 1269.) Yet this Court concluded that he was subject to the residency restrictions, which it upheld. But as the Court of Appeal noted, "the opinion contained no discussion as to whether the statutory language of section 3003.5 also applied to such registrants [based on out-of-state convictions], as the issue was not raised by any party." (Typed opn. 29.)

The Courts of Appeal have struggled to interpret this statutory language not only under Code of Civil Procedure section 203, subdivision (a)(11), but other provisions as well. (Compare *In re J.C.* (2017) 13 Cal.App.5th 1201, 1212 ["[I]t is questionable whether [Penal Code] section 290.45 even applies to juveniles, because by its terms it applies only to 'a person required to register as a sex offender pursuant to Section 290.' Here, we are addressing registration pursuant to section 290.008, not section 290."], with *Doe v. Brown* (2009) 177 Cal.App.4th 408, 415 [adopting the view that, "pursuant to section 290.007, . . . Doe is required to register as a sex offender pursuant to section 290"].) This Court's intervention is necessary to resolve this important question of law.

II. Review is necessary to resolve the split of authority over whether an appellate court may, consistent with Code of Civil Procedure section 660, remand to the trial court to reconsider its new trial order based on the appellate court's guidance.

A. Appellate courts have broad authority to fashion dispositions, and Code of Civil Procedure section 660 does not limit it.

By statute, reviewing courts are vested with broad powers in the disposition of appeals, including authority to "affirm, reverse, or modify any judgment or order appealed from" or to "direct a new trial *or further proceedings to be had*." (Code Civ. Proc., § 43, emphasis added; accord, *id.*, § 906 ["the reviewing court may review . . . any order on motion for a new trial, . . . and may, if necessary or proper, direct a new trial *or further proceedings to be had*" (emphasis added)]; *In re J.R.* (2022) 82 Cal.App.5th 569, 582 [sections 43 and 906 "confer broad discretion in formulating an appellate disposition"].)

This Court has long recognized the power of a reviewing court to remand to the trial court for resolution of fact sensitive issues, including to reconsider a new trial motion. (See *Krouse v. Graham* (1977) 19 Cal.3d 59, 81–82 ["it is appropriate simply to vacate the order denying new trial and to direct the trial court to admit the declarations and, weighing them in conjunction with all other relevant matters, to reconsider the motion"]; *Jehl v. Southern Pac. Co.* (1967) 66 Cal.2d 821, 835 [remanding for trial court to exercise discretion whether to order an additur]; see also *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 825 ["The

cause is remanded with directions to remand to the trial court for reconsideration of CH2M Hill's motion for a new trial"].)

Notwithstanding the Legislature's clear grant of authority to reviewing courts to fashion dispositions appropriate to the circumstances of each case, the Courts of Appeal are divided over whether an appellate court may, consistent with Code of Civil Procedure section 660, remand for a trial court to reconsider a new trial order based on the appellate court's guidance. (Compare *Lippold, supra,* 274 Cal.App.2d at pp. 26–27 [considering "a remand to the trial court with directions to rehear the motion for new trial" but concluding it "would be inappropriate for us to attempt to revive" the trial court's jurisdiction] with *Barrese, supra*, 198 Cal.App.4th at p. 507 ["Section 660 cannot have any application to proceedings on a motion for new trial that take place after the conclusion of the appeal and upon remand of the case to the trial court by the appellate court"].)

Code of Civil Procedure section 660 sets a 75-day period in which the trial court must rule on a new trial motion. (Code Civ. Proc., § 660, subd. (c).) If the trial court does not rule within that period, the new trial motion is denied by operation of law. (*Ibid.*) But this scheme says nothing about what may happen after an appellate court reviews a new trial order. As the *Barrese* court explained, nothing in section 660 suggests it applies to remanded proceedings following resolution of an appeal. (*Barrese*, *supra*, 198 Cal.App.4th at p. 507.) This Court has cautioned that "courts should not presume the Legislature in the enactment of statutes

intends to overthrow long-established principles of law unless that intention is made clearly to appear either by express declaration or by necessary implication." (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 779 (*Torres*).)

The courts that have concluded remand is unavailable have overlooked the Legislature's vestiture of power in reviewing courts to fashion appropriate dispositions. And they have done so based on a misreading of this Court's precedents. Like the court below, they have misconstrued *Mercer v. Perez* (1968) 68 Cal.2d 104 (*Mercer)* to prohibit remand. But *Mercer* interpreted Code of Civil Procedure section 657's express limitation on appellate review of orders granting a new trial for insufficient evidence. (See Code Civ. Proc., § 657 ["on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence . . . it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons"]; *Mercer*, at p. 119 [section 657 contains "a presumption limiting the scope of review"].) When the trial court has failed to specify its reasons for granting a new trial on the ground of insufficient evidence, the order granting a new trial cannot be affirmed on that ground on appeal. (*Mercer*, at p. 119.) And the trial court's omission cannot be cured on remand because the trial court lacks jurisdiction to specify its reasons in the first instance after the jurisdictional period had run. (*Id.*, at p. 121 ["the 10-day period has long since expired, and the court thus has no further power in this regard"]; cf. *Siegal v. Superior Court of Los Angeles County* (1968) 68 Cal.2d

97, 101 [order issued after expiration of Code of Civil Procedure section 660 period was void as motion was denied by operation of law].)

But when the trial court has properly acted within the jurisdictional period to grant a new trial motion, no statute deprives the reviewing court of authority to order the trial court to reconsider that ruling based on appellate guidance. Code of Civil Procedure section 660, unlike section 657, does not limit (or even mention) the power of the appellate court, and it therefore should not be interpreted to limit longstanding powers of the appellate court to fashion appropriate remedies on appeal. (See *Torres*, *supra*, 15 Cal.4th at p. 779.)

B. Some Courts of Appeal have contrived exceptions to the supposed lack of jurisdiction for remand, and review is necessary to resolve the confusion.

Attempting to reconcile the conflicting case law, some courts have referenced a "judicially created exception" to the supposed limitation on a reviewing court's power to remand a new trial order. (See, e.g., *Delos v. Farmers Group, Inc.* (1979) 93 Cal.App.3d 642, 667–668.) These cases hold that a reviewing court may remand for reconsideration of a new trial motion only when "the governing law changed from the time of hearing on the motion for new trial to the determination of the appeal." (*Clemens v. Regents of University of California* (1970) 8 Cal.App.3d 1, 21.)

But this purported exception does not resolve the split of authority; it only makes it more confusing. There can be no

"judicially created exception" to a jurisdictional bar, no matter if the law has changed or the reviewing court has clarified the applicable standard. "[I]n the absence of subject matter jurisdiction, a trial court has no power 'to hear or determine [the] case.' " (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196 [judgment rendered during pendency of appeal void for lack of subject matter jurisdiction].)

C. The Court of Appeal ignored the historical power of appellate courts to fashion an appropriate remedy.

The Court of Appeal acknowledged that, given the trial court's failure to assess the prejudicial effect of B.K.'s lies, "the preferred course" would be to "remand[ ] to the trial court for redetermination based on a correct understanding of the law." (Typed opn. 32.) This is because "the trial court is generally best situated" to determine whether B.K.'s lies were prejudicial, "having observed the entire case." (Typed opn. 32, citing *In re Mesner's Estate* (1947) 77 Cal.App.2d 667, 677 ["the atmosphere of the court room during the trial . . . is something that cannot be adequately reflected in a printed record"].) But based on a misreading of *Mercer*, the Court of Appeal "interpret[ed] existing case law as foreclosing this option." (Typed opn. 32.) Thus, the court concluded that Code of Civil Procedure section 660's time limit applies even after appellate review, precluding remand. (Typed opn. 33–34.)

But even where the trial court *did* assess prejudice—as it did here with respect to B.K.'s statutory ineligibility—the Court

of Appeal failed to show the deference demanded by this Court's precedent, applying the de novo standard of review this Court specifically rejected in *Ault* on this exact issue. (See typed opn. 47 [reasoning that "the outcome here would remain the same" even if B.K. "was ineligible to serve on the jury" because "there was no prejudice to Chevron"]; *ante*, p. 12.) In *Ault*, this Court observed that the trial court "has a 'first-person vantage' on the *effect* of trial errors or irregularities on the fairness of the proceedings in that court," and that this is especially so "in cases of juror misconduct, when the trial court has taken evidence, including the testimony of the jurors themselves, for the specific purpose of determining whether misconduct gave rise to a substantial likelihood that one or more panelists were actually biased." (*Ault*, *supra*, 33 Cal.4th at p. 1267, citation omitted.) Because "[a] trial court's finding of prejudice is based, to a significant extent, on ' "first-hand observations made in open court," ' which that court itself is best positioned to interpret," this Court held that "a deferential standard of appellate review" applies. (*Id.* at pp. 1267–1268.) Here, the trial court observed first-hand that B.K. was "obstinate, untruthful, obstreperous, contemptuous," and "loud, opinionated and intimidating in jury deliberations." (13 AA 3652.) On remand, the trial court most likely would find B.K. was biased based on his lies and disobedience of court orders for the same reasons the trial court already found he was biased based on his ineligibility.

Yet the court's opinion here ignored the trial court's finding that Chevron was prejudiced by B.K.'s service on the jury

because, among other things, B.K. refused to follow court orders in failing to disclose his felony conviction during voir dire, continued to lie about his litigation history postverdict, and falsely claimed not to have disclosed his conviction because he misunderstood the question on the jury questionnaire. (13 AA 3648, 3651–3652; see PFRH 8–10.) And the opinion improperly limited its bias analysis to B.K.'s disregard of masking rules, ignoring the trial court's findings that B.K. was a "scofflaw" who refused to act impartially and to follow the law. (65 RT 6933:22–6934:2, 6939:11–25; see PFRH 10–14.) These findings supported the trial court's ultimate determination that B.K. was "proven demonstrably unsuited to [act impartially], not simply prejudicially to Chevron, but to the judicial system itself." (13 AA 3652–3653.) That the Court of Appeal ignored these findings shows why it is not well-suited to competently assess the nature or impact of B.K.'s behavior. (See *Ault*, *supra*, 33 Cal.4th at p. 1267 ["Though assessments of prejudice may, and often do, involve the application of law to facts, they depend heavily on the unique circumstances of the particular case"].) The trial court should make that determination.

This issue is one of great importance to litigants and to the administration of the trial and appellate courts, as new trial motions are often filed after verdicts and appellate courts often analyze the issues differently than did the trial judges. (See, e.g., *Baker v. American Horticulture Supply, Inc.* (2010) 186 Cal.App.4th 1059, 1068.)

Given the split of authority, the courts' muddled attempts at reconciliation, and the importance of the issue, this Court should grant review to give much needed guidance to lower courts and litigants. (See Cal. Rules of Court, rule 8.500(b)(1).)

III. Review is necessary to resolve the split of authority over whether a party forfeits its challenge to the sufficiency of a verdict's findings to support the judgment by not objecting before the jury is discharged.

A. The Court of Appeal's opinion deepens a split of authority over whether a party must object to the adequacy of the verdict in the trial court.

The Court of Appeal's opinion acknowledged the "suggest[ion] [of] a split of authority" on when an objection to a defective verdict form must be raised. (Typed opn. 80.) It compared, on the one hand, the holding in *Jensen*, *supra*, 35 Cal.App.4th at page 131, that an objection to a special verdict form must be raised before the court discharges the jury, with the holding in *All-West, supra*, 183 Cal.App.3d at page 1220, that such an objection is timely if raised in posttrial motions. (Typed opn. 80–81.)

The Court of Appeal failed to appreciate that Chevron's claim of error was not that the verdict form was ambiguous, indefinite, or internally contradictory. (See, e.g., *Woodcock v. Fontana Scaffolding & Equipment Co.* (1968) 69 Cal.2d 452, 456 [" 'If the verdict is ambiguous the party adversely affected should request a more formal and certain verdict. Then, if the trial judge has any doubts on the subject, he may send the jury out, under proper instructions, to correct the informal or insufficient

verdict.' "].) Instead, Chevron contends the trial court erred in making factual findings based on evidence not before the jury to supplement the inadequate verdict, thereby usurping the discretion conferred on the jury by Civil Code section 3288. (See CACI No. 3935 [when a jury awards damages for multiple categories of past economic loss, the jury may decide to award prejudgment interest "on all, some, or none of [the] past economic damages"].)

Chevron did not waive or forfeit that issue, nor *could* it have done so. (See *Behr*, *supra*, 193 Cal.App.4th at p. 531 [lack of finding to support claim was "not an ambiguity that needed clarification; it [was] simply the absence of a factual finding"]; *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 327 (*Saxena*) [rejecting plaintiffs' argument that physician had waived right to challenge special verdict form, noting that physician was "not challenging the special verdict form as such" but was claiming verdict did not support judgment of battery]; but see *Jensen*, *supra,* 35 Cal.App.4th at p. 131 [contention verdict did not resolve whether defendant violated predicate statute forfeited by failure to object when verdict was read].)

The Court of Appeal sidestepped Chevron's argument by wrongly treating the verdict as a general one from which factual findings in TRC's favor may be implied. (Typed opn. 56 ["the parties' election to use a general verdict is significant to our analysis because a general verdict 'implies a finding in favor of the prevailing party of every fact essential to the support of his action or defense' "]; see PFRH 18–20.) But the verdict was a

hybrid, and the verdict's question on prejudgment interest was a special interrogatory from which no implied findings may be made. (*Plyler v. Pacific Portland Cement Co.* (1907) 152 Cal. 125, 134 ["special verdicts and special findings are identical in everything except the name"]; *Behr*, *supra*, 193 Cal.App.4th at p. 531 ["When a special verdict is used and there is no general verdict, we will not imply findings in favor of the prevailing party"].)

The Court of Appeal's forfeiture holding turned the burden of proof on its head by requiring Chevron to object that the verdict form failed to include a factual finding essential to the opposing party's claims, and it contravenes better-reasoned authorities like *Behr* and *Saxena*.

B. Even if an objection in the trial court is required, review should be granted to resolve whether an objection made in posttrial motions is timely.

During posttrial proceedings, Chevron raised the inadequacy of the verdict to support the prejudgment interest award for TRC. (5 RA 1271–1284 [opposition to TRC's motion for prejudgment interest].) This was the appropriate time to object because TRC submitted new evidence never heard by the jury to support its prejudgment interest motion. (4 RA 1055, 1060–1061; see *Morales v. 22nd Dist. Agricultural Assn.* (2016) 1 Cal.App.5th 504, 534–535 ["An objection to the form of questions in a special verdict must be raised in the trial court," which includes raising it in posttrial motions]; *All-West*, *supra*, 183 Cal.App.3d at p. 1220 [appellants "timely preserved [challenge to verdict forms]

by raising it at their motion for new trial," even though they "fail[ed] to argue against them prior to their submission to the jury"]; *Mixon v. Riverview Hospital* (1967) 254 Cal.App.2d 364, 376–377 [collecting cases].)

That the trial court considered and relied on the postverdict expert declaration in awarding TRC prejudgment interest shows the inadequacy of both the jury's findings and TRC's trial evidence to support the prejudgment interest award. The trial court relied on the postverdict declaration to set the date prejudgment interest began to run, to determine the specific amount of damages awarded to TRC that were subject to prejudgment interest, and to calculate the amount of prejudgment interest to award. (13 AA 3638–3639.) Each of these factual findings must be made by the jury, not the judge. (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1586 ["It is always the trier of fact that determines the issue of damages and this is true with regard to prejudgment interest pursuant to [Civil Code] section 3288"].) And the postverdict declaration procedure upheld by the Court of Appeal deprives a litigant of its right to cross-examine an adverse witness and to argue to a jury that the plaintiff has failed to meet its burden of proof at trial.

The issue is one of great importance to litigants, who wish to preserve their legal rights without being required to act as co-counsel to the opposition by identifying every hole in their opponents' case and allowing them the opportunity to craft a plug. And the lower courts have reached differing results, making the issue worthy of review. The Court should grant

review to dispel the confusion now compounded by the Court of Appeal's published opinion, which creates a new split of authority with *Behr* and *Saxena*. (See Cal. Rules of Court, rule 8.500(b)(1).)

CONCLUSION

For the reasons explained above, this Court should grant review.

July 31, 2024

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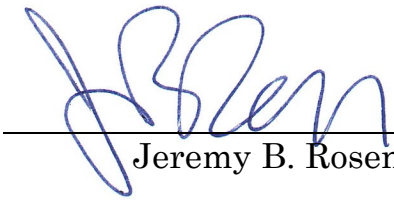
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 8,342 words as counted by the program used to generate the petition.

Dated: July 31, 2024



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