

**IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION**

IN RE: *ENGLE* PROGENY CASES
TOBACCO LITIGATION

Case No.: 09-CA-000493

DIVISION: A

Pertains To: Claudette Campbell, et al.

**DEFENDANTS' MOTION FOR MISTRIAL
DUE TO IMPROPER JURY SELECTION PROCEDURES**

Defendants Philip Morris USA Inc. and R.J. Reynolds Tobacco Company (“Defendants”) respectfully submit this motion for mistrial based on the Court’s jury selection procedure, which required Defendants to exercise their peremptory challenges without having before them the full panel to which those challenges were to be made.

A mistrial is required because the Court’s procedure violated the rule, articulated by the Florida Supreme Court, that “[t]he only fair [jury selection] scheme is to allow the parties to exercise their challenges . . . so that, before a party exercises a peremptory challenge, he has before him the full panel from which the challenge is to be made” — a panel that does not include “those excess persons over the number of needed jurors plus the number of allowable peremptories . . . [a]fter challenges for cause are made.” *Ter Keurst v. Miami Elevator Co.*, 486 So. 2d 547, 549 (Fla. 1986).

BACKGROUND

The Court’s jury selection procedure was conducted as follows: Following hardship considerations and *voir dire*, the Court figuratively “called” six of the remaining 55 panel members “into the jury box.” The Court proceeded to rule upon any cause challenges that the

parties might have as to those six prospective jurors. The Court then replaced any of those six prospective jurors who were stricken for cause with new members from the panel. This process continued until six prospective jurors were seated in the box against whom the parties had no cause challenges. The Court then asked the parties to exercise any peremptory challenges to that group of six. The Court filled those vacant slots, again, with new members from the panel. The parties were then asked to make any cause challenges, then peremptory challenges, to those new members. This process continued until there were six prospective jurors sitting in the box against whom none of the parties had any cause or peremptory challenges. *See generally* Trial Tr., Volumes I-IV.

Defendants objected repeatedly to the jury selection process on the grounds that it required them to exercise peremptory challenges before the Court ruled on all potential challenges for cause and before they were able to consider the full panel from which the jury could be selected. *See, e.g.*, Trial Tr. at 494, 496-97, 502-03, and 548 (Ex. A). Indeed, as a result of this process, PM USA exercised its three peremptory challenges *before* it was permitted to make all of its cause challenges. The Court denied PM USA's request for additional challenges. *Id.* at 542. Defendants objected once again to the seating of the jury before it was sworn in by the Court. *Id.* at 562.

ARGUMENT

The Florida Supreme Court has instructed trial judges that, in structuring jury selection procedures, “[t]he only fair scheme is to allow the parties to exercise their challenges, singularly, alternately, and orally *so that, before a party exercises a peremptory challenge, he has before him the full panel from which the challenge is to be made.*” *Ter Keurst*, 486 So. 2d at 549.

(emphasis added).¹ Violation of this rule, where there has been an appropriate objection, constitutes reversible error. *See Tedder v. Video Elecs., Inc.*, 491 So. 2d 533, 535 (Fla. 1986) (affirming reversal of a jury verdict and holding that, “absent exceptional circumstances, a trial judge may not selectively swear individual jurors *prior* to the opportunity of counsel *to view as a whole the entire panel from which challenges are to be made*”).

The Supreme Court’s application of the rule in *Ter Keurst* is particularly relevant here. In *Ter Keurst*, the parties each had three peremptory challenges, and the trial court required that all sixteen prospective jurors be examined collectively as the parties worked toward assembling a six person jury. *Id.* at 548. Although the court dismissed one prospective juror for cause, it did not dismiss any other prospective jurors before the parties began exercising their peremptory challenges despite the fact that, given the parties’ six total peremptory challenges, there was no possibility that three of the prospective jurors would have served on the jury. *Id.* at 549. The Supreme Court held that this procedure was error and instructed that “[a]fter challenges for cause are made, those excess persons over the number of needed jurors plus the number of allowable peremptories should be excused so that counsel may know who will serve if not excused.” *Id.*²

The Court’s statement that excess jurors should be excused “*after* challenges for cause” and *before* peremptory challenges confirms that the trial court must address all for cause challenges before addressing any peremptory challenges. Otherwise, there is no way to

¹ *See also, e.g., Van Sickle*, 807 So. 2d 182, 185 (Fla. 2d DCA 2002) (“A litigant is entitled to view the panel as a whole in order to intelligently and effectively use his or her peremptory challenges.”); *Fla. Rock Indus., Inc. v. United Building Sys., Inc.*, 408 So. 2d 630, 632 (Fla. 5th DCA 1981) (“A party litigant . . . is entitled to consider the panel as a whole at any time that litigant has peremptory challenges remaining . . .”).

² In *Ter Keurst* judgment was not reversed, but only because counsel in that case did not object to the jury as finally composed. *Id.* at 550.

determine which, if any, of the prospective jurors are included in “those excess persons over the number of needed jurors plus the number of allowable peremptories.” *Id.*

As in *Ter Keurst*, the Court’s approach to jury selection here seeks to expedite the selection process at the expense of the parties’ right to review the full panel from which the jury so that counsel can use peremptory challenges intelligently. Just as failing to dismiss the three extra jurors before the parties exercised peremptory challenges in *Ter Keurst* was error because the parties could not determine which jurors were “in play” before exercising their strikes, it was likewise reversible error for this Court to force the parties to guess as to which panel members not seated in the “box of six” would or would not be “in play” later in the selection procedure by delaying ruling on cause challenges as to those members. *See Carratelli v. State*, 915 So. 2d 1256, 1259 (Fla. 4th DCA 2005) (“jury selection is a dynamic, evolving process where a lawyer’s evaluation of jurors turns on those who have been seated and those potential jurors who might be called if a challenge is exercised”).

The Court’s jury selection procedure violated Florida Supreme Court precedent, irreparably prejudiced Defendants, and is reversible error. Defendants objected appropriately and in a timely manner to this process. Proceeding with trial under these circumstances would be waste of the time and resources of this Court, Defendants *and* Ms. Campbell. A mistrial should be granted accordingly.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant a mistrial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was served by Electronic Mail on Plaintiffs' counsel listed below and by other agreed means on Defendants' counsel listed below this 6th October, 2010.

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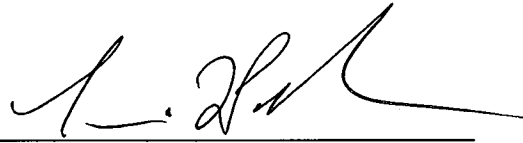
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