

No. 18A-183

IN THE  
**Supreme Court of the United States**

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PHILIP MORRIS USA INC.,

*Petitioner,*

*v.*

MARY BROWN, AS PERSONAL REPRESENTATIVE OF  
THE ESTATE OF RAYFIELD BROWN,

*Respondent.*

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APPLICATION FOR AN EXTENSION OF TIME  
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI  
TO THE FLORIDA FIRST DISTRICT COURT OF APPEAL

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TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Pursuant to this Court's Rule 13.5, Philip Morris USA Inc. ("PM USA") respectfully requests a 35-day extension of time, to and including October 26, 2018, within which to file a petition for a writ of certiorari to the Florida First District Court of Appeal.\*

This is PM USA's second extension application in this case. The first application requested a 25-day extension of time because PM USA was evaluating whether to file a petition for a writ of certiorari in *Philip Morris USA Inc. v. Boatright*, 217 So. 3d 166

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\* Pursuant to this Court's Rule 29.6, undersigned counsel state that PM USA is a wholly owned subsidiary of Altria Group, Inc. No publicly held company owns 10% or more of Altria Group, Inc.'s stock.

(Fla. Dist. Ct. 2017), a case that raises the same due-process issue that is raised in this case regarding the preclusive effect of jury findings from the class action prospectively decertified in *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (per curiam). PM USA explained that *Boatright* is a better vehicle for plenary review than this case because, unlike the *per curiam* affirmance issued by the Florida First District Court of Appeal in this case, the Florida Second District Court of Appeal in *Boatright* issued a written opinion affirming the judgment. PM USA further stated that, if it files a petition for a writ of certiorari in *Boatright*, it plans to file a petition in this case asking the Court to hold this case pending the Court's disposition of the petition in *Boatright*. On August 27, 2018, the Court entered an order granting PM USA's extension application and setting a new deadline of September 21, 2018, for the filing of a petition for a writ of certiorari.<sup>1</sup>

PM USA is filing this second extension application because, last week, the U.S. Court of Appeals for the Eleventh Circuit issued a decision in a case that raises the same due-process issue presented in this case and in *Boatright*. *See Searcy v. R.J. Reynolds Tobacco Co.*, \_\_ F.3d \_\_, No. 13-15258, 2018 WL 4214594 (11th Cir. Sept. 5, 2018). In *Searcy*, an *Engle* progeny case tried in federal court that culminated in a judgment against PM USA and co-defendant R.J. Reynolds Tobacco Co., the Eleventh Circuit concluded that affording preclusive effect to the *Engle* jury's generalized findings

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<sup>1</sup> This Court has jurisdiction to review the First District Court of Appeal's decision in this case under 28 U.S.C. § 1257(a). A copy of the First District's decision is attached hereto as Exhibit A; a copy of its order denying rehearing is attached as Exhibit B.

does not violate due process. The Eleventh Circuit nevertheless acknowledged that “multiple acts of concealment had been presented to the *Engle* jury, and their general finding did not indicate which acts of concealment may have underlain their finding versus which allegations of concealment they might have rejected,” which creates a “difficult[y]” in “determin[ing] whether the *Engle* jury’s basis for its general finding of concealment” was the same theory pursued by an individual *Engle* plaintiff. *Id.* at \*7.

PM USA intends to file simultaneous petitions for a writ of certiorari in *Searcy* and *Boatright*, and has separately requested an extension of time to file the petition in *Boatright* until November 19, 2018. PM USA believes that this Court’s consideration of the due-process issue would be facilitated by the simultaneous filing of the petitions in *Searcy* and *Boatright*, which would enable the Court to consider the reasoning of the Florida state and federal courts at the same time and to receive a full picture of how the due-process issue is being treated by those courts. PM USA further intends to file a petition for a writ of certiorari asking this Court to hold this case pending its disposition of *Searcy* and *Boatright*.

An additional extension of time until October 26, 2018, to file the petition in this case is warranted to permit PM USA to take account of the recent decision in *Searcy* and to file the petition in this case as close in time as possible to the forthcoming petitions in *Searcy* and *Boatright*.

## CONCLUSION

PM USA respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari by 35 days, to and including October 26, 2018.

Respectfully submitted.

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September 11, 2018

**Exhibit A**

FIRST DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

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No. 1D15-2337

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PHILIP MORRIS USA INC.,

Appellant/Cross-Appellee,

v.

MARY BROWN, as personal  
representative of the Estate of  
Rayfield Brown,

Appellee/Cross-Appellant.

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On appeal from the Circuit Court for Duval County.  
Harvey L. Jay, III, Judge.

April 18, 2018

PER CURIAM.

AFFIRMED.

B.L. THOMAS, C.J., and BILBREY, J., concur; WINSOR, J., dissents  
with opinion.

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*Not final until disposition of any timely and  
authorized motion under Fla. R. App. P. 9.330 or  
9.331.*

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WINSOR, J., dissenting.

The main question in this case is what happens when a deadlocked jury is instructed to reach whatever partial verdict it can—and to do so without any further deliberations. On the unusual facts of this case, I would hold that such an instruction leaves the jury incapable of producing a valid verdict. From the time jury deliberations begin until the time the jury reaches its final decision, jurors must be free to weigh and consider arguments and evidence, to consider other jurors' points of view, to attempt to persuade fellow jurors, to argue and debate—in other words, the jury must be free to deliberate until the very end. Because this jury did not have that opportunity, we should reverse and remand for a new trial.

Mary Brown filed a wrongful-death action against Phillip Morris USA, Inc., alleging that her husband died from smoking-related illnesses. She alleged strict liability, negligence, fraudulent concealment, and conspiracy to commit fraudulent concealment. The litigation lasted years: One trial was continued during jury selection, and another ended in a mistrial after this court granted a writ of prohibition, *see Philip Morris USA Inc. v. Brown*, 96 So. 3d 468 (Fla. 1st DCA 2012). A third trial ended with a deadlocked jury.

In the next trial—the trial at issue here—the jury's verdict form asked (among other things) whether Philip Morris's actions legally caused the husband's death, the amount of any compensatory damages, the relative percentages of fault, and whether punitive damages were warranted. After deliberating for approximately four or five hours, the jury sent out a note saying it was “stuck on the percentage” and asking “[w]hat are our options?”

After conferring with counsel, the court told the jury to follow instructions already given. The jury continued deliberating for some two additional hours before sending out another note. This one explained that jurors “have not been able to agree on question #4 [regarding comparative fault] and therefore we cannot go any further.” After more discussion with counsel, the court delivered a

standard *Allen*<sup>1</sup> charge, asking the jury to continue its deliberations. But after roughly an hour more, the jury sent out another note: “Now hung on question #2 [regarding fraudulent concealment]. Some have change[d] their mind. It started out on question #4. Some say yes, and some no. Now need white out for question #2. Yesterday it was yes now today it hung [sic].”

Lawyers for both sides offered their views on how the court should proceed. Both sides agreed the court could not give a second *Allen* charge.<sup>2</sup> Philip Morris argued the court should grant a mistrial since the jury could not reach consensus after its *Allen* charge. Mrs. Brown, though, argued that the court should accept a partial verdict on the issues the jury did decide. Ultimately, the court brought the jury back and told them to return to the jury

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<sup>1</sup> An *Allen* charge is a supplemental instruction courts frequently give when a jury struggles to reach a verdict. *Gahley v. State*, 567 So. 2d 456, 459 (Fla. 1st DCA 1990) (citing *Allen v. United States*, 164 U.S. 492 (1896)).

<sup>2</sup> In *Tomlinson v. State*, 584 So. 2d 43 (Fla. 4th DCA 1991), the Fourth District followed *United States v. Seawell*, 550 F.2d 1159 (9th Cir. 1977), and adopted a *per se* rule that giving a second *Allen* charge is fundamental error. No other district in this state has adopted this rule, *Nottage v. State*, 15 So. 3d 46, 49 (Fla. 3d DCA 2009), and many federal courts have explicitly rejected it, *see, e.g.*, *United States v. Davis*, 779 F.3d 1305, 1313 (11th Cir. 2015) (“We have never adopted a *per se* rule against successive *Allen* charges. Other circuits have held there is *not* a *per se* rule.” (collecting cases)). Florida’s standard jury instructions do include a comment that the deadlock instruction “should be given only once,” but that comment is based solely on *Tomlinson*, Fla. Std. Jury Instr. (Civ.) 801.3, and standard jury instructions are not binding precedent, *BellSouth Telecomm., Inc. v. Meeks*, 863 So. 2d 287, 292 (Fla. 2003); *see also In re Std. Jury Instrs. in Civil Cases—Report No. 09-01 (Reorganization of the Civil Jury Instrs.)*, 35 So. 3d 666, 671 (Fla. 2010) (cautioning “that any comments associated with the instructions reflect only the opinion of the Committee and are not necessarily indicative of the views of this Court as to their correctness or applicability”).

room, to white out verdict-form responses on which the jury was no longer unanimous, and to fill in answers where there was unanimity. The court specifically told the jurors to not deliberate any further in doing so.

After about six minutes in the jury room, the jury returned with a partial verdict, answering two of the verdict form's six questions. The jury agreed that the husband was a member of the *Engle* class, *see Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246 (Fla. 2006), and that Philip Morris's conspiracy to conceal was a legal cause of the husband's death. Because the jury found liability on one intentional-tort theory, its inability to provide verdicts on other theories or on comparative-fault percentages was not critical, *see* § 768.81(4), Fla. Stat. (2013); *see also Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So. 3d 294, 304 (Fla. 2017) ("[T]he comparative fault statute does not apply to *Engle* progeny cases in which the jury finds for the plaintiff on the intentional tort claims."). But there remained the unanswered questions of the amount of compensatory damages and whether punitive damages were warranted.

Over Philip Morris's objection (and motion for mistrial), the court accepted the partial verdict and scheduled another trial to resolve the remaining issues. At the end of that trial, the jury awarded compensatory damages but found Philip Morris not liable for punitive damages. Philip Morris appealed, contending that the trial court was wrong to accept the partial verdict.

On appeal, Philip Morris's opening position is that Florida does not recognize partial civil verdicts, that courts must declare mistrials whenever juries cannot agree on all issues. Philip Morris argues that no Florida appellate court has ever sanctioned a partial verdict like this one. But neither has Philip Morris cited a Florida appellate decision explicitly precluding the practice. Partial verdicts are routinely used in Florida criminal cases, *see, e.g., State v. Muhammad*, 148 So. 3d 159, 159-60 (Fla. 1st DCA 2014); *Avilla v. State*, 86 So. 3d 511, 513 (Fla. 2d DCA 2012), and they have been accepted in civil cases in federal courts, *see, e.g., Kerman v. City of New York*, 261 F.3d 229, 242 n.9 (2d Cir. 2001) ("Kerman also argues that [the] decision to accept a partial verdict was error because there is no authority for this procedure. We

disagree. In the absence of authority prohibiting such a partial verdict in a civil case, and Kerman cites none, we believe that at the very least a trial judge, in the exercise of sound discretion, may follow such a course.”); *see also Bristol Steel & Iron Works v. Bethlehem Steel Corp.*, 41 F.3d 182, 190 (4th Cir. 1994); *Bridges v. Chemrex Specialty Coatings, Inc.*, 704 F.2d 175, 180 (5th Cir. 1983).

Regardless of whether partial verdicts are categorically prohibited, I would hold that the specific circumstances of this case warrant a new trial. With any partial verdict, there is a “risk that the jury will ‘premature[ly] conver[t] . . . a tentative jury vote into an irrevocable one,’ *United States v. Moore*, 763 F.3d 900, 911 (7th Cir. 2014); *accord United States v. Wheeler*, 802 F.2d 778, 781 (5th Cir. 1986), and when a jury had been unanimous on certain points and is later told to return to the jury room to answer whatever questions they can—without further deliberating—some jurors will feel compelled to vote consistent with their earlier position.

“It has long been the law that a trial court should not couch an instruction to a jury or otherwise act in any way that would appear to coerce any juror to reach a hasty decision or to abandon a conscientious belief in order to achieve a unanimous position.” *Thomas v. State*, 748 So. 2d 970, 976 (Fla. 1999). In deciding whether a court’s instructions have violated this principle, we examine *de novo* the totality of the circumstances to see if the instructions “create a serious risk of coercion.” *Id.* at 978. Considering the totality of the unique circumstances here, a new trial is warranted.

While attorneys argued about how to handle the jury’s last note, the jury, having already changed its collective mind on some issues, remained together in the jury room. And there is no reason to suppose the jurors’ fluid deliberations stopped while the attorneys argued. *Cf. United States v. Byrski*, 854 F.2d 955, 962 (7th Cir. 1988) (noting that “the state of jury deliberations is ever-changing”). When later told to end their deliberations (essentially to memorialize where they left off earlier), reasonable jurors might not have understood their options. They might not have understood that they were not locked into the positions they held immediately before sending their last note—that their vote could

accommodate any new view intervening discussions produced. They might not have understood that their remaining duty was more than a ministerial duty to record their earlier positions. *Cf. Harrison v. Gillespie*, 640 F.3d 888, 899 (9th Cir. 2011) (explaining that jurors' preliminary votes can play important roles in the deliberative process but that these informal polls "do not constitute a final verdict"); *cf. also Brutton v. State*, 632 So. 2d 1080, 1083 (Fla. 4th DCA 1994) ("The court's questioning created an impression that the juror did not have an absolute right to recede from her vote in the jury room during the polling process.").

When the jurors' last note told the court they were "hung" on some issues, no juror was then obligated to maintain his or her tentative vote on any issue. *See United States v. Straach*, 987 F.2d 232, 243 (5th Cir. 1993) ("[A] jury has not reached a valid verdict until deliberations are over . . . ." (quoting *United States v. Taylor*, 507 F.2d 166, 168 (5th Cir. 1975))). Yet any juror wanting to explain (or even identify) his or her changed view would feel restricted by the court's specific instruction to cease deliberations. To the point of the final instruction, juror deliberations had been fluid—the jury found (and then lost) agreement on some issues—but by precluding further deliberations, the court precluded further opportunities for additional changed minds. *Cf. Straach*, 987 F.2d at 243 (noting that "continuing deliberations may shake views expressed on counts previously considered" (quoting *Taylor*, 507 F.2d at 168)).

It is no answer to say that the jury was polled, with each juror announcing that the verdict was his or her own. The question is not whether all jurors did, in fact, vote for the ultimate verdict; the question is whether all jurors did so knowing they could change their minds—or try to change others' minds. The subsequent poll offers therefore no cure. *See Moore*, 763 F.3d at 910 (determining that trial court's error in instructing jury to return a partial verdict while deliberations were ongoing was not cured by polling of the jury).

For these reasons, I would reverse and remand for a new trial. This would make it unnecessary to address Philip Morris's independent argument that alleged juror misconduct requires a new trial. As to Mrs. Brown's conditional cross appeal, I would

reject Philip Morris's *Topsy Coachman* arguments, and I would hold that Mrs. Brown may seek punitive damages on her negligence and strict-liability claims in a new trial. *See Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219, 1221 (Fla. 2016). But Mrs. Brown asserted she would abandon her cross appeal if she prevailed in the main appeal, which—despite my view—she now has.

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Amir C. Tayrani of Gibson, Dunn & Crutcher LLP, Washington, DC; Geoffrey J. Michael of Arnold & Porter LLP, Washington, DC; Hassia Diolombi and Kenneth J. Reilly of Shook, Hardy & Bacon LLP, Miami; and W. Edwards Muñiz of Shook, Hardy & Bacon LLP, Tampa, for Appellant/Cross-Appellee.

John S. Mills and Courtney Brewer of The Mills Firm, PA, Tallahassee; and John S. Kalil of Law Offices of John S. Kalil, P.A., Jacksonville, for Appellee/Cross-Appellant.

**Exhibit B**

**DISTRICT COURT OF APPEAL, FIRST DISTRICT**  
2000 Drayton Drive  
Tallahassee, Florida 32399-0950  
Telephone No. (850)488-6151

May 29, 2018

**CASE NO.: 1D15-2337**  
L.T. No.: 2007-CA-11175-BXXX-M

Philip Morris USA Inc. v. Mary Brown, as Personal Representative etc.

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Appellant / Petitioner(s), Appellee / Respondent(s)

**BY ORDER OF THE COURT:**

Appellant's motion filed May 3, 2018, for rehearing, rehearing en banc, written opinion and certification is denied.

**I HEREBY CERTIFY** that the foregoing is (a true copy of) the original court order.

Served:

John S. Mills	Dana G. Bradford
John S. Kalil	Courtney Brewer
Kenneth Reilly	W. Edward Muniz
Geoffrey J. Michael	Hassia Diolombi
Leslie J Bryan	Michael L. Walden
Amir C. Tayrani	

jm

  
KRISTINA SAMUELS, CLERK

