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Standefer v. State: The Creation of the Criminal Defendant's Diminished Right to a Trial by a Fair and Impartial Jury.

Esperanza Guzman

COMMENTS

STANDEFER v. STATE: THE CREATION OF THE CRIMINAL DEFENDANT'S DIMINISHED RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY

ESPERANZA GUZMAN

I. INTRODUCTION

In 1789, the great founding father Thomas Jefferson, in a letter to Thomas Paine, wrote: "I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[1] Jefferson's words illustrate that the right to a trial by jury has been etched in the history of the United States from its very inception. In one sentence, Jefferson captured the importance of a trial by jury as a safeguard to ensure that the government does not extend an overreaching arm and erroneously deprive a criminal defendant of life or liberty.[2] Perhaps the paramount example of this concept is found in the Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy a right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process witnesses in his favor, and to have the [a]ssistance of [c]ounsel for his defense.[3]

In Texas, the right of an accused to have an impartial jury also exists and is firmly grounded in the voir dire process, the definitive goal of which is to empanel a fair and impartial jury.[4] The right to a fair and impartial jury is bolstered by the voir dire examination when prospective

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1. THE WRITINGS OF THOMAS JEFFERSON 408 (Library ed., Thomas Jefferson Mem'l Ass'n 1903).

2. *Cf.* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting) (noting "the right of trial by jury . . . [is] an important bulwark against the tyranny" in our society).

3. U.S. CONST. amend. VI.

4. *See* Johnson v. State, 92 Tex. Crim. 458, 244 S.W. 518, 519 (1922) (acknowledging the right to trial by a fair and impartial jury applies to grave offenses and offenses in which there is great animosity against the offender); *see also* Duncan v. State, 79 Tex. Crim. 206, 184 S.W. 195, 196 (1916) (stressing that a defendant has a right to a trial by a fair and impartial jury, and where doubt has been raised as to whether the defendant has received such a trial, it should be decided in the defendant's favor). The Texas Court of Criminal Appeals notes that impartial means "not partial, not favoring one party more than another, unprejudiced, disinterested, equitable, just." *Id.* Impartiality also requires that a party, and the party's cause or issue, is not prejudged. *Id.*; Conn v. H.E. Butt Grocery Co., No. 13-96-090-CV, 1997 Tex. App. LEXIS 6416, at *6 (Tex. App.—Corpus Christi Dec. 11, 1997, no pet.) (not designated for publication) (declaring, "the purpose of voir dire is to seat a fair and impartial jury"); Clemments v. State, 940 S.W.2d 207, 210 (Tex. App.—San Antonio 1996, pet. ref'd) (concluding, "voir dire is intended to expose bias or prejudice which might prevent full and fair consideration of the evidence that is to be presented at trial"). During the voir dire process, the trial court should ensure that a fair and impartial jury is selected. *Id.* at 211.

jurors are questioned on multiple issues in an effort to determine any bias that may prevent them from providing the accused with a neutral and unprejudiced jury.[5] In fact, Texas courts have recognized that "one improper juror will destroy the integrity of the verdict [rendered]."[6]

There has been a great deal of discrepancy over the types of questions that can be asked during the voir dire process.[7] In 2001, the Texas Court of Criminal Appeals, in *Standefer v. State*,[8] attempted to simplify the voir dire examination by instituting a test for determining which types of questions are proper.[9] However, the court's attempt to simplify the process of differentiating between proper and improper voir dire questions has "muddied the issue" for court participants, and has resulted in the deprivation of a criminal defendant's Sixth Amendment right to a fair and impartial jury.[10]

In particular, during the voir dire examination there has been much confusion over commitment questions and when such questions are proper.[11]

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5. *See* Menchaca v. State, 901 S.W.2d 640, 645 (Tex. App.—El Paso 1995, pet. ref'd) (deciding that a defendant has a constitutional right to examine prospective jurors in an effort to determine if any one of them has an attitude that would lead to a challenge for cause or make them undesirable to sit on the jury). In a criminal trial, this constitutional right to examine prospective jurors extends to both the state and the defendant; however, both must yield to the discretion of the trial court. *Id.*; *see also* Trlica Cosby, Note, *Strictly Speaking: Viewing* J.E.B v. Alabama ex rel. T.B. *As Sub Silencio Application of Strict Scrutiny to Gender-Based Classifications*, 32 HOUS. L. REV. 869, 877 (1995) (explaining that voir dire is a process which permits the attorneys, trial judge, or both to question potential jurors about personal information and other issues relevant to the case).

6. Reynolds v. State, 163 Tex. Crim. 496, 294 S.W.2d 108, 110 (1956); Duncan v. State, 79 Tex. Crim. 206, 184 S.W. 195, 196 (1916); Sorrell v. State, 79 Tex. Crim. 505, 169 S.W. 299, 303 (1914).

7. *See* Clark v. State, 608 S.W.2d 667, 669 (Tex. Crim. App. 1980) (asserting that the trial court has sound discretion over the voir dire examination, and the trial court may place reasonable restrictions on the voir dire examination). The Texas Court of Criminal Appeals has placed very few restrictions on the trial court's discretion over the voir dire examination; therefore, it can logically be inferred that discrepancies have arisen over the types of questions that trial courts may allow. However, one area in which the Texas Court of Criminal Appeals has recently taken a staunch position is in the area of commitment questions. *See generally* Standefer v. State, 59 S.W.3d 177 (Tex. Crim. App. 2001) (discussing the requirements for proper commitment questions).

8. 59 S.W.3d 177 (Tex. Crim. App. 2001).

9. *See* Standefer v. State, 59 S.W.3d 177, 179 (Tex. Crim. App. 2001) (exploring the types of questions posed during the voir dire process that lead to an improper commitment on the part of a prospective juror).

10. *See id.* at 186 (Johnson, J., joined by Meyers, Price, & Holcomb, JJ., dissenting) (lamenting that the court's decision has not clarified the issue of "what constitutes a commitment question").

11. *See id.* at 179 (commenting that "[Texas] case law has not always been clear and consistent"). However, the court has been consistent in its definition of a commitment

> Commitment questions are those that commit a prospective juror to resolve or refrain from resolving an issue a certain way after learning a particular fact. Often, such questions ask for a 'yes' or 'no' answer, in which one or both of the possible answers commits a jury to resolving an issue a certain way.[12]

Under *Standefer*, it has become more difficult to distinguish between proper and improper commitment questions. The following two questions demonstrate just how complicated it has become: (1) "Would you presume someone guilty if he or she refused a breath test on their refusal alone?" and (2) "Could you find someone guilty upon the testimony of one witness?"[13] While both of these questions appear to commit the jury to a given proposition, only the first question is deemed improper under the two-prong test adopted in *Standefer*.[14]

The standard adopted in *Standefer* presents a threat to a fair and impartial jury because, in deciding which types of commitment questions are proper, the Texas Court of Criminal Appeals appears to be limiting the right to use a peremptory challenge[15]—which is solidly grounded in the process of empanelling a fair and impartial jury.[16] In addition to restricting counsel's right to use their peremptory challenges in the voir dire ex-

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question, even though it has not always had a bright-line test to decipher when such a question is proper. *Id.*; *cf.* Atkins v. State, 951 S.W.2d 787, 789 (Tex. Crim. App. 1997) (holding that hypothetical questions cannot be used to commit the potential jurors to a particular set of circumstances).

12. *Standefer*, 59 S.W.3d at 179.

13. *See id.* at 186 (Johnson, J., joined by Meyers, Price, & Holcomb, JJ., dissenting) (lamenting the minimal difference in questions deemed permissible by the majority and those deemed illegal).

14. *See id.* (Johnson, J., joined by Meyers, Price, & Holcomb, JJ., dissenting) (posing both questions in juxtaposition in order to show the lack of differentiation).

15. *See* Gonzales v. State, 2 S.W.3d 600, 602-03 (Tex. App.—Texarkana 1999, pet. ref'd) (explaining that while the right to exercise peremptory challenges is not an explicit constitutional right, the right to effective counsel is; therefore, the right to effective counsel implicitly provides counsel the constitutional right to exercise peremptory challenges).

16. *See* Linnell v. State, 935 S.W.2d 426, 428 (Tex. Crim. App. 1996) (asserting that it is proper to question prospective venire broadly in an effort to determine whether to exercise peremptory challenges, and that questioning cannot be unnecessarily limited); *see also* Burress v. State, 20 S.W.3d 179, 185 (Tex. App.—Texarkana 2000, pet. ref'd) (asserting, "the right to question the members of the venire in order to intelligently exercise peremptory challenges is essential to the constitutional right to an impartial jury under both the state and federal constitutions"). When a defendant is deprived of a voir dire examination that allows questioning, which will lead to the intelligent exercise of strikes, the defendant suffers harm. *Id.*; Gonzales v. State, 2 S.W.3d 600, 602-03 (Tex. App.—Texarkana, 1999 pet. ref'd) (stating that in both the federal and state constitutions, the right to counsel implicitly gives the defendant a constitutional right to exercise peremptory challenges). There is a deeply embedded notion that the right to defense counsel includes the right to question veniremembers in order to make a peremptory strike. *Id.*

amination, it appears that defendants in civil cases are afforded more rights than defendants in criminal cases.[17] This is because *Standefer* is limited to criminal cases; hence, there are no such limitations on the counsel's right to use peremptory challenges in civil cases.[18]

In essence, while the majority in *Standefer* attempted to simplify the practice of deciding which types of commitment questions are proper, the opinion seems to generate more confusion and results in a deprivation of the rights of criminal defendants. This Comment begins with a broad overview of the voir dire process, including the goals behind it not only in Texas, but on the federal level as well. After the overview, this Comment discusses the standard that was in place before *Standefer*, and what caused the *Standefer* court to execute a change. Next, it addresses the test adopted in *Standefer*, along with its positive and negative ramifications. This analysis includes an in-depth discussion of the criticism that the *Standefer* decision has received from the legal community. In particular, the criticism focuses on the dissenting opinions in *Standefer* and the subsequent decision, *Barajas v. State*.[19] Finally, this Comment proposes use of the voir dire process adopted by Virginia, which minimizes the problems caused by *Standefer*.

II. BACKGROUND

Before looking at the pre-*Standefer* standard, as well as the standard adopted in *Standefer*, it is important to explain the purpose and function of the voir dire process in Texas. By fully understanding the objectives and mechanisms of the voir dire process, the dissenting opinions' disagreement with the majority opinion in *Standefer* will become clear. Understanding the dissenting opinions in *Standefer* is crucial because they not only provide a basis for disagreement with the standard adopted by

17. *See Standefer*, 59 S.W.3d at 182 (requiring that a proper commitment question "give rise to a valid challenge for cause"). *But cf.* Babcock v. Nw. Mem'l Hosp., 767 S.W.2d 705, 709 (Tex. 1989) (stating that broad latitude should be given to an attorney during the voir dire process to uncover biases or prejudices of the prospective jurors in order to intelligently exercise a peremptory challenge). However, the trial court has sound discretion over the questioning of the prospective jurors. *Id.*

18. *See* Wilkins v. Riesman, 803 S.W.2d 822, 824 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (commenting that the right to a trial by jury is violated when the trial court does not allow questions that would unleash a prospective juror's bias or prejudice); Lubbock Bus Co. v. Pearson, 277 S.W.2d 186, 190 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.) (concluding that the trial court has sound discretion over the voir dire examination, but should provide litigants with broad latitude to ask questions which will lead to peremptory challenges); Fort Worth & D.C.R. Co. v. Kiel, 195 S.W.2d 405, 410 (Tex. Civ. App.—Fort Worth 1946, writ ref'd n.r.e.) (holding that the law does not require any specific type of questioning during the examination of prospective jurors).

19. 93 S.W.3d 36 (Tex. Crim. App. 2002).

Standefer, but they also are an essential component of this Comment's proposal.

A. *The Voir Dire Process and Its Relationship to the Sixth Amendment*

The United States Supreme Court has stated that the voir dire process is a "critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored."[20] This view of the voir dire process has existed in the United States since the late 1800s.[21] In accordance with this view, the Court has recognized that it is the trial court's responsibility to eliminate all prospective jurors who, through their inability to follow the court's instruction and evaluate the evidence before them in the case, would lead to the empanelment of a partial jury.[22] A trial court can achieve this function of empanelling an impartial jury, as required by the Sixth Amendment, because the Court has given trial courts broad discretion over the types of questions that may be asked to prospective jurors.[23]

Texas courts have also recognized the correlation between the voir dire process and the Sixth Amendment right to a fair and impartial jury, which has been set forth in various cases decided by the Texas Court of Criminal Appeals.[24] In fact, in Texas, the voir dire process finds its origins in arti-

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20. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981). The Court went on to proclaim that it is the trial court's responsibility to remove potential jurors who cannot be impartial. *Id.*; *see also* Georgia v. McCollum, 505 U.S. 42, 58 (1992) (justifying the trial court's removal of a prospective juror "whom the defendant [had a] specific reason to believe would be incapable of confronting [or] suppressing their racism").

21. *See* Connors v. United States, 158 U.S. 408, 413 (1895) (declaring that an accused is entitled to an impartial jury, such that jurors possess no bias or prejudice that would prevent them from following the law and rendering a verdict accordingly). In both criminal and civil cases, it is necessary to allow the courts extensive discretion over the questioning of the prospective jurors. *Id.* Nevertheless, the trial court must afford litigants great leeway in questioning prospective jurors to expose any bias, prejudice, or opinions that would adversely affect a defendant's right to a fair and impartial jury. *Id.*

22. *Rosales-Lopez*, 451 U.S. at 188; *Connors*, 158 U.S. at 413.

23. *See id.* at 189 (finding, "federal judges have been accorded ample discretion in determining how best to conduct the voir dire [process]"); *see also* Ham v. South Carolina, 409 U.S. 524, 528 (1973) (agreeing that trial courts are accorded broad discretion in conducting the voir dire process); Aldridge v. United States, 283 U.S. 308, 310 (1931) (recognizing the trial court's sound discretion over the voir dire process, but that its discretion must meet the demands of fairness to the accused).

24. *See* Delrio v. State, 840 S.W.2d 443, 445-46 (Tex. Crim. App. 1992) (explaining that the Texas Constitution provides an accused with a right to "trial by an impartial jury"). A defendant may be entitled to a reversal of a conviction if the jury contained a single partial juror. *Id.* at 445. Reversal of a conviction can also be obtained if the litigant was denied the right to ask prospective jurors proper questions calculated to expose a prospective juror's bias or prejudice. *Id.* at 446 n.3; *see also* Bolt v. State, 112 Tex. Crim. 267, 16 S.W.2d 235, 236 (1929) (deciding that, since "[t]he jury acts as a unit," the disqualification

cle I, section 15, of the Texas Constitution, which provides the defendant with the right to a fair and impartial jury.[25] In *McCoy v. Wal-Mart*,[26] the Sixth District Court of Appeals in Texas recognized that "voir dire questioning is possibly the most important part of the jury trial and that the parties in any given case should be afforded full opportunity to examine the jury panel with no more interference from the trial court than necessary."[27] Additionally, various Texas courts, including the Texas Court of Criminal Appeals, have recognized that the trial courts have sound discretion over the way the voir dire process is conducted.[28] As such, the Texas Court of Criminal Appeals has recognized four areas in which the trial court can correctly impose reasonable limits on the voir dire process: (1) imposing time limits on the voir dire process,[29] (2) preventing repetitive questions,[30] (3) precluding questions which have an improper form,[31] and (4) limiting questions that pertain to a prospective juror's personal habits.[32]

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of one juror can lead to a reversal of the verdict); Counts v. State, 78 Tex. Crim. 410, 181 S.W. 723, 725 (1916) (analyzing a criminal defendant's right to a trial by jury as guaranteed by the Texas Constitution).

25. TEX. CONST. art. V, § 15.

26. 59 S.W.3d 793 (Tex. App.—Texarkana 2001, no pet.).

27. McCoy v. Wal-Mart Stores, Inc., 59 S.W.3d 793, 801 (Tex. App.—Texarkana 2001, no pet.); *see also* Sydney Gibbs Ballestros, *Don't Mess with Texas Voir Dire*, 39 HOUS. L. REV. 201, 208 (2002) (noting that the litigants are afforded great leeway in their inquiry of prospective jurors, but must yield to the trial court's reasonable limitations).

28. *See* Rivera v. State, 82 S.W.3d 64, 66 (Tex. App.—San Antonio 2002, pet. ref'd) (asserting that voir dire decisions rest within the discretion of the trial court); Garza v. State, 18 S.W.3d 813, 819 (Tex. App.—Fort Worth 2000, pet. ref'd) (adhering to the general rule that trial courts should be given sound "discretion in conducting and controlling the voir dire [process]").

29. *See* Barrett v. State, 516 S.W.2d 181, 182 (Tex. Crim. App. 1974) (opining that a trial court may impose time limits "in order to avoid undue and unnecessary prolongation of the trial").

30. *See* Smith v. State, 513 S.W.2d 823, 827 (Tex. Crim. App. 1974) (recognizing that because voir dire can be the lengthiest part of the trial, it is within the trial court's discretion to limit duplicate questions).

31. *See* Hernandez v. State, 508 S.W.2d 853, 854 (Tex. Crim. App. 1974) (announcing that a defendant suffers no harm when a court denies a question that is improperly framed); Hunter v. State, 481 S.W.2d 137, 138 (Tex. Crim. App. 1972) (holding that the trial court can properly prevent questions that attempt to commit jurors).

32. *See* Densmore v. State, 519 S.W.2d 439, 440 (Tex. Crim. App. 1975) (stating that the trial court was correct in permitting the defendant's attorney to ask prospective jurors about their moral opposition to alcohol consumption, but that the defendant's attorney cannot ask the prospective jurors about their personal drinking habits).

B. *The Importance of Challenges for Cause and Peremptory Challenges in the Voir Dire Process*

Another purpose of the voir dire examination is to extract facts that will enable counsel to intelligently challenge a juror for cause or exercise a peremptory challenge.[33] Counsel for both parties will employ their challenges for cause or peremptory challenges after asking questions of the prospective jurors.[34] Therefore, a complete understanding of what constitutes proper questioning of prospective jurors is vital to understanding the entire purpose of the voir dire process.[35]

Generally, the rules regarding peremptory challenges and challenges for cause are the same on the federal level and in Texas.[36] A peremptory challenge is one in which the counsel making the challenge is not required to give a reason for it.[37] Importantly, however, such a challenge cannot be based on race[38] or gender alone.[39] Peremptory challenges

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33. *Cf.* Eason v State, 563 S.W.2d 945, 947 (Tex. Crim. App. 1978) (stressing that the voir dire examination of potential jurors is a vital step to criminal prosecution); *see also* Goodspeed v. State, 120 S.W.3d 408, 411 (Tex. App.—Texarkana 2003, pet. granted) (concluding, "[t]he purpose of voir dire questioning is to determine whether a potential juror should be challenged for cause or peremptorily, or whether he or she should be accepted by the examining party for service on the jury"). The court held that the voir dire process may be the most vital component of the jury trial. *Id.* Jurors who assess guilt, and in some cases punishment, are selected during voir dire; hence the voir dire process infiltrates every stage of the trial. *Id.*

34. *See Goodspeed*, 120 S.W.3d at 411 (explaining how the voir dire process works).

35. *See id.* (asserting that full knowledge of voir dire is essential to a fair exercise of challenges).

36. Johnson v. State, 43 S.W.3d 1, 4 (Tex. Crim. App. 2001).

37. TEX. CODE CRIM. PROC. ANN. art. 35.14 (Vernon 2004); *Johnson*, 43 S.W.3d at 6; Ross v. State, 157 Tex. Crim. 371, 246 S.W.2d 884, 885 (1952).

38. *See* Batson v. Kentucky, 476 U.S. 79, 88 (1986) (expounding that "the Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice, [and therefore] the State may not draw up its jury lists pursuant to neutral procedures but then resort to discrimination at other stages in the selection process"). Initially, the defendant has the burden of establishing a prima facie case of purposeful discrimination. *Id.* at 93-94. Next, the burden shifts to the State to establish a neutral reason for its selection criteria. *Id.* at 94; *see also* Rijo v. State, 721 S.W.2d 562, 564 (Tex. App.—Amarillo 1986, no pet.) (adopting the *Batson* test for determining whether a prospective juror has been peremptorily excluded because of race).

39. *See* J.E.B. v. Alabama, 511 U.S. 127, 146 (1994) (opining that the Equal Protection Clause of the Fourteenth Amendment forbids a jury selection process that excludes a prospective juror on the basis of gender). However, not every jury must be composed of "representatives of all the economic, social, religious, racial, political and geographical groups of the community." *Id.* at n.19. For the jury selection process to be constitutional under the Fourteenth Amendment, it must be without intentional exclusion of the aforementioned groups. *Id.*; *see also* Fritz v. State, 946 S.W.2d 844, 847 (Tex. Crim. App. 1997) (finding that when a prospective juror is excluded from serving on a jury on the basis of gender, the Equal Protection Clause of the Fourteenth Amendment is violated).

based solely on race or gender violate the Fourteenth Amendment to the United States Constitution.[40]

Unlike peremptory challenges, which do not require a specific reason to be given, "[a] challenge for cause is an objection made to a particular juror, alleging some fact which renders him incapable or unfit to serve on the jury."[41] Generally, a litigant can make a challenge for cause for a variety of reasons, including: (1) when a prospective juror is biased or prejudiced, whether it be in favor or against the defendant; (2) when a prospective juror's opinion will influence the verdict; (3) when a prospective juror is biased or prejudiced with respect to a particular law that is applicable to the case at hand; and (4) when the veniremember is simply incapable or unfit to serve as a juror.[42] Challenges for cause may also be made if the potential juror has been convicted of any felony, is insane, or possesses any mental or physical defect that renders the individual unfit to sit on a jury.[43]

Texas courts have recognized that while the voir dire examination rests, in large part, within the discretion of the trial court,[44] a trial court may abuse its discretion when it denies a litigant the right to exercise a challenge for cause or denies an intelligent use of a peremptory challenge.[45]

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40. *See J.E.B.*, 511 U.S. at 140 (stating, "[d]iscrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process"); *see also* Guzman v. State, 85 S.W.3d 242, 245 (Tex. Crim. App. 2002) (affirming that the Equal Protection Clause as provided in the Fourteenth Amendment prohibits a litigant from exercising a peremptory challenge based on race, ethnicity, or gender).

41. TEX. CODE CRIM. PROC. ANN. art. 35.16(a) (Vernon 2004); Ellison v. State, 432 S.W.2d 955, 956 (Tex. Crim. App. 1968).

42. *See generally* TEX. CODE CRIM. PROC. ANN. art. 35.16 (Vernon 2004) (listing a variety of reasons that both the state and the defendant can utilize their challenges for cause).

43. TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(2), (4)-(5) (Vernon 2004).

44. *See* Clark v. State, 608 S.W.2d 667, 669 (Tex. Crim. App. 1980) (deciding that the voir dire process is largely within the discretion of the trial court, and that the trial court's decisions are only reversed when there is abuse of such discretion); *see also* Weaver v. State, 476 S.W.2d 326, 327 (Tex. Crim. App. 1972) (affirming the lower court's decision to excuse a potential juror who could not vote for life in prison or a ninety-nine year prison term); Cartmell v. State, 784 S.W.2d 138, 139-40 (Tex. App.—Fort Worth 1990, no pet.) (refusing to implement a bright-line time limit for the voir dire process, but nevertheless holding that the trial court abused its discretion by imposing a twenty-minute time limit on the voir dire process).

45. *See* Gonzales v. State, 2 S.W.3d 600, 603 (Tex. App.—Texarkana 1999, pet. ref'd) (emphasizing that the trial court abuses its discretion when it denies a litigant the right to ask a proper question; as a result, a defendant is harmed when he or she is deprived of the right to ask a question that may lead to an intelligent use of a strike). In this case, the defendant was not harmed when his attorney was not allowed to question prospective jurors about the necessity defense. *Id.* at 606.

Furthermore, the correlation between both types of challenges and the function of the voir dire process was best illustrated by the Supreme Court of Texas, which reasoned that the purpose of the voir dire process is not only to enable a litigant to expose potential jurors who are challengeable for cause, but also to make an intelligent use of peremptory challenges.[46]

C. *The Types of Questions That Can Be Asked During the Voir Dire Process and the Problems That Have Arisen Since the Adoption of the Test in* Standefer

In Texas, judges may impose reasonable limits on the practices that occur in the voir dire process.[47] One such limit is restricting the type of questions that may be asked by counsel during the voir dire examination.[48] Accordingly, the trial court may restrict questions when they seek

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46. Babcock v. Nw. Mem'l Hosp., 767 S.W.2d 705, 709 (Tex. 1989). It is important to observe that this is a Texas Supreme Court case, but the Texas Court of Criminal Appeals has also recognized the importance of a litigant having the ability to exercise their challenges for cause and peremptory challenges. Menchaca v. State, 901 S.W.2d 640, 645 (Tex. App.—El Paso 1995, pet. ref'd).

47. *See* Boyd v. State, 811 S.W.2d 105, 115-16 (Tex. Crim. App. 1991) (concluding that the trial court was correct in refusing to allow the defense counsel to continue questioning prospective jurors after the forty-five minute time limit imposed on voir dire questioning had expired); *see also* Mays v. State, 726 S.W.2d 937, 949 (Tex. Crim. App. 1986) (supporting the trial court's decision to prohibit the defense counsel from asking prospective jurors about their views on homosexuality). Only the defendant's confession had a reference to homosexuality, but this reference was deleted from the confession before it was offered and admitted into evidence. *Id.* Since the issue of homosexuality was not an issue in the case that was being decided by the jurors, the questions pertaining to the potential juror's opinion of homosexuality was properly excluded. *Id.*; Mason v. State, 116 S.W.3d 248, 253 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (upholding the lower court's decision to allow the state's three voir dire questions, which were all proper commitment questions under the two-prong test of *Standefer*).

48. *See* Bonilla v. State, 740 S.W.2d 583, 584 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd) (reporting that the trial court did not err when it prevented the defense counsel from questioning the potential jurors "about their ability to recommend probation when the defendant [was] an illegal alien"). While a litigant is entitled to question prospective jurors on any issue relevant to the case, the litigant in *Bonilla* incorrectly asserted that the defendant was an illegal alien based on the fact that he was not carrying a valid passport. *Id.*; *see also* Chastain v. State, 667 S.W.2d 791, 797 (Tex. App.—Houston [14th Dist.] 1983, pet. ref'd) (protecting the lower court's ability to deny repetitive questions). After the defense spent an hour questioning a prospective juror about the state's burden of proof, the court cleared up the prospective juror's confusion and refused to allow the defendant's attorney to ask additional questions, which the attorney believed would lead to a strike for cause. *Id.* The court held it would be repetitive to further question the prospective juror when the issue had already been cleared and the court was already satisfied with the juror's answer. *Id.*

to commit a prospective juror to a specific set of facts.[49] However, this limitation does not allow the trial judge to limit questions that seek to discover a prospective juror's views on issues that are relevant to the case.[50]

As previously mentioned, appellate courts have recognized that a trial court abuses its discretion over the voir dire process when it denies counsel the right to ask proper voir dire questions. Such a denial prevents counsel from determining whether to exercise a peremptory challenge[51] or a challenge for cause.[52]

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49. *See* McGee v. State, 35 S.W.3d 294, 298 (Tex. App.—Texarkana 2001, pet. ref'd) (emphasizing, "a party cannot ask veniremembers to commit themselves prior to trial as to how they would consider certain testimony, nor may a prospective juror be asked what he or she would do at any particular stage of the trial under a given set of facts"). In *McGee*, the defense counsel was correct in asking potential jurors about their ability to disregard a written confession by the defendant if it could be shown that the confession was incorrectly obtained through police misconduct. *Id.* at 298-99. The questions by the defense counsel did not attempt to bind the potential jurors; rather, the questions were asked to see if the potential jurors could follow an instruction by the trial court instructing them to disregard an involuntary statement. *Id.* at 299; *see also* DeLeon v. State, 867 S.W.2d 138, 140 (Tex. App.—Corpus Christi 1993, pet. ref'd) (favoring the long held notion that voir dire questions should not commit potential jurors to decide an issue at trial one way or the other). The lower court was justified in preventing the defense counsel from questioning potential jurors on whether the passage of three or four months was too long for a witness to be able to identify the defendant. *Id.* There was no abuse of discretion when the court prohibited the question, which was asked for the purpose of pledging a potential juror to a particular response. *Id.*

50. McCarter v. State, 837 S.W.2d 117, 121 (Tex. Crim. App. 1992); *Boyd*, 811 S.W.2d at 118; Smith v. State, 703 S.W.2d 641, 643 (Tex. Crim. App. 1985), *vacated*, 761 S.W.2d 22 (Tex. Crim. App. 1988), *and rev'd on other grounds*, 830 S.W.2d 926 (Tex. Crim. App. 1991).

51. *See* Gonzalez v. State, 638 S.W.2d 132, 133 (Tex. App.—Corpus Christi 1982, no pet.) (reiterating the general rule that the trial court possesses broad discretion over the voir dire system, but that questioning prospective jurors is permissible when it is done to facilitate a peremptory challenge). The court erred in preventing the defense counsel from asking the prospective jury panel whether any of them "had ever served on a grand jury." *Id.* The trial court abused its discretion because prior service on a grand jury was relevant to the case. *Id.*

52. *See* Ramirez v. State, 87 S.W.3d 703, 705 (Tex. App.—San Antonio 2002, no pet.) (emphasizing, "[i]f a venireperson ultimately states that she can follow the court's instructions and render a verdict according to the evidence, that venireperson is not challengeable for cause, even if she originally equivocated on her answers"). The trial court correctly denied the defendant's challenge for cause when the juror said she could be fair if the State proved beyond a reasonable doubt that the defendant drank before he drove on the night in question; hence, the trial court did not abuse its discretion. *Id.* at 705-06; *see also* Morales v. State, 875 S.W.2d 724, 725 (Tex. App.—Fort Worth 1994, no pet.) (asserting that it is a function of a trial court to rule on a challenge for cause to a potential juror). In *Morales*, a DWI case, the court did not abuse its discretion when it refused to grant defense

In *Standefer*, the Texas Court of Criminal Appeals adopted a standard which aims to distinguish between proper and improper commitment questions.[53] However, "[t]he majority's attempt to clarify what constitutes a commitment question simply muddies the issue more by attempting to create a bright-line standard."[54] Additionally, both dissenting opinions filed by the sharply divided Texas Court of Criminal Appeals indicate that there is a greater right to question prospective jurors in a civil suit than there is in a criminal suit.[55] The discrepancy between civil lawsuits and criminal lawsuits stems from the fact that the *Standefer* standard is primarily concerned with challenges for cause and states nothing about peremptory challenges, which are an essential component of a right to a fair and impartial jury.[56] As such, it appears that a defendant in a civil lawsuit has a greater right to a fair and impartial jury than a defendant in a criminal lawsuit.

Perhaps the greatest goal of the voir dire examination is to afford the defendant with a right to a fair and impartial jury.[57] This right is deeply embedded in the Sixth Amendment,[58] and is adopted in Texas not only

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counsel a challenge for cause for a prospective juror who did not show prejudice against the defendant or those who consume alcohol. *Id.* at 725-26.

53. *See* Standefer v. State, 59 S.W.3d 177, 182-83 (Tex. Crim. App. 2001) (describing the two-prong test for determining when a commitment question is proper).

54. *Id.* at 186 (Johnson, J., joined by Meyers, Price, & Holcomb, JJ., dissenting).

55. *Id.* (Price, J., dissenting) (arguing that civil defendants who only have property rights in jeopardy are given more leeway in questioning prospective jurors than criminal defendants who have their liberty at stake). In her dissent, Judge Johnson detailed the negative impact the *Standefer* test has on a criminal defendant's right to utilize their peremptory challenges, as well as the test's conflicts with earlier case law. *Id.* at 187 (Johnson, J., joined by Meyers, Price, & Holcomb, JJ., dissenting). Judge Johnson's dissent appears to indicate that this negative impact gives criminal defendants fewer rights than a civil defendant. *Id.*

56. *See id.* at 182 (limiting proper commitment questions to those that lead to valid challenges for cause); *see also* Franklin v. State, 138 S.W.3d 351, 354 (Tex. Crim. App. 2004) (commenting that the right to an impartial jury is guaranteed by the Sixth Amendment to the U.S. Constitution; the right to an impartial jury entails the right to question prospective jurors in an effort to exercise both peremptory challenges and challenges for cause).

57. *See* Vasquez v. Hyundai Motor Co., 119 S.W.3d 848, 855 (Tex. App.—San Antonio 2003, no pet.) (considering whether the litigant could question prospective jurors about their views on non-users of seat belts). The plaintiffs were suing the manufacturers of an air bag that deployed and killed their four-year-old daughter. *Id.* at 850. The manufacturers claimed the child's failure to wear a seat belt contributed to her death. *Id.* The court of appeals decided the trial court erred in refusing to allow the plaintiffs to question the prospective jurors about their views regarding non-users of seat belts; the trial court's decision denied the plaintiffs their right to a trial by a fair and impartial jury. *Id.* at 850, 856.

58. *See* U.S. CONST. amend. VI (providing that in all criminal proceedings the accused is entitled "to a speedy and public trial, by an impartial jury of the State and district" where the crime was committed).

by its constitution,[59] but also through case law.[60] However, the right to be judged by a fair and impartial jury appears to be in jeopardy under *Standefer*'s analysis for determining proper and improper commitment questions. Thus, the goal of this Comment is to determine a method that will not only help trial courts and litigants distinguish between proper and improper questions, but will also assure the defendant *in both* civil and criminal cases the constitutional right to have a fair and impartial jury.

III. Analyzing a Proper Voir Dire Question Prior to *Standefer*

Before *Standefer*, Texas courts recognized that a voir dire question was proper when its purpose was "to discover a juror's view on an issue applicable to the case."[61] This general view was extended to include hypothetical situations.[62] Texas courts also asserted that attorneys could use a hypothetical as a voir dire question, even if the hypothetical question was similar to the facts of the case.[63] Various courts have authorized using

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59. *See* Tex. Const. art. I, § 15 (declaring that a trial by jury is to remain inviolate and that the legislature has the responsibility to "maintain its purity and efficiency").

60. *Franklin*, 138 S.W.3d at 354; Duncan v. State, 79 Tex. Crim. 206, 184 S.W. 195, 196 (1916); Holmes v. State, 52 Tex. Crim. 353, 106 S.W. 1160, 1161 (1908); Dobbs v. State, 51 Tex. Crim. 629, 103 S.W. 918, 920 (1907); Rodgers v. State, 47 Tex. Crim. 195, 82 S.W. 1041, 1042 (1904); Collum v. State, 96 S.W.3d 361, 365 (Tex. App.—Austin 2002, no pet.); Clemments v. State, 940 S.W.2d 207, 211 (Tex. App.—San Antonio 1996, pet. ref'd).

61. Atkins v. State, 951 S.W.2d 787, 789 (Tex. Crim. App. 1997) (quoting *Ex parte* McKay, 819 S.W.2d 478, 482 (Tex. Crim. App. 1990)); *see also Clemments*, 940 S.W.2d at 210 (justifying the defense counsel's questions asking potential jurors if they "had been either a victim of child abuse or actively involved in the prevention of child abuse"). These questions were proper because the defendant was charged with the injury and death of her child; therefore, such questions were not only relevant to the case, but also would aid her counsel in intelligently exercising a peremptory challenge. *Id.*; Henry v. State, 800 S.W.2d 612, 616 (Tex. App.—Houston [14th Dist.] 1990, no pet.) (holding that the prosecution's questions were not an attempt to commit the jurors, but instead were used to expose any bias of the prospective jurors and explain the definition of bodily injury in the robbery statute; therefore, the questions were asked to uncover the prospective juror's view on an issue relevant to the case).

62. *See* Paustian v. State, 992 S.W.2d 625, 627-28 (Tex. App.—El Paso 1999, pet. ref'd) (approving the use of hypothetical questions to explain the law but not to determine how a prospective juror would respond to a certain situation). Prospective jurors can properly be questioned about their "views and sentiments on social and moral subjects generally, [but] the courts do not permit a hypothetical case to be submitted, nor do they allow questions designed to bring out the juror's views on the case to be tried." *Id.* at 628.

63. *See Atkins*, 951 S.W.2d at 789 (enforcing the general rule that hypothetical questions can be based on facts similar to the case; however, in this case the State improperly used the questions to commit the potential jurors to a specific set of facts in the case). Although the state posed the hypothetical to the potential jurors in different forms, each time it served no other purpose than to attempt to commit the potential jurors to the facts

such a hypothetical fact situation during the voir dire examination "if it is used *to explain the application of law*. However, it is improper to inquire how a venireman would respond to particular circumstances as presented in a hypothetical question."[64]

Because Texas courts allowed pertinent hypothetical situations, the trial courts were required to determine if the hypothetical was used to simply explain the law or if the hypothetical was used to commit a juror to a particular set of circumstances.[65] Deciphering whether the question attempted to commit the potential juror to a particular set of facts or explain the law was the test which was in effect prior to *Standefer*.[66] While the pre-*Standefer* test provided vague guidance to litigants when dealing with fact-specific hypothetical questions, it did not provide any other indication as to whether questions outside of fact-specific hypothetical situations were proper.[67] The vague test used prior to *Standefer* posed many difficulties for both the trial court and counsel for both parties because there was no particular guideline to follow when determining the validity of a fact-specific hypothetical.[68]

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of the case. *Id.*; *see also* White v. State, 629 S.W.2d 701, 706 (Tex. Crim. App. 1982) (explaining that the lower court did not err when it refused to provide the defense counsel with an opportunity to ask the potential jurors if they would be able to give a sentence of life in prison if it was proved that the defendant robbed a store and shot a woman at close range).

64. *Atkins*, 951 S.W.2d at 789 (emphasis added); *see also* Lydia v. State, 109 S.W.3d 495, 497 (Tex. Crim. App. 2003) (indicating that as a general rule, an attorney is not permitted "to bind or commit a venire member to a verdict based on a hypothetical set of facts"); Davis v. State, 967 S.W.2d 476, 480 (Tex. App.—Beaumont 1998, no pet.) (stating that while hypothetical fact situations may be used to explain the law, they may not be used "to determine how a venireperson would respond to particular circumstances"); Cadoree v. State, 810 S.W.2d 786, 789 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd) (holding that "it is improper to inquire how a venireman would respond to particular circumstances presented in a hypothetical question"); *Henry*, 800 S.W.2d at 616 (reviewing three hypothetical questions and determining that they were permissible because they were only used "to explain the application of principles of law" and not "to commit the jurors to the facts of the case").

65. *See* Thompson v. State, 95 S.W.3d 537, 541 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (recognizing that a trial court's ruling on a hypothetical question is reviewed under an abuse of discretion standard).

66. *See* John. R. Gillespie, *Fear of Commitment? In* Standefer v. State *the Texas Court of Criminal Appeals Clarifies the Role of Commitment Questions in Jury Selection in Criminal Trials*, 54 BAYLOR L. REV. 581, 585 (2002) (explaining that "before *Standefer*, the court allowed fact hypotheticals if they sought to explain the law to the panel or if they sought to uncover a potential bias on the part of a prospective juror").

67. *See id.* (emphasizing that pre-*Standefer* case precedent did not provide a clear test for determining whether a hypothetical question was proper).

68. *Id.*

Additionally, whether a fact-specific hypothetical was proper had no particular bearing on whether it led to a challenge for cause or a peremptory challenge.[69] This aspect of the former test differs from the *Standefer* test, which states that a challenge for cause is a vital part of the analysis.[70] Consequently, while hypothetical questions were viewed to be an appropriate part of the voir dire examination, their use was curtailed by the trial court and could be used only to explain the law and not to commit the jurors to a particular set of facts.[71]

IV. THE CURRENT TEST: *STANDEFER V. STATE*

A. *The Two-Prong Test of* Standefer

In *Standefer*, the Texas Court of Criminal Appeals implemented a test to determine when questions are proper during the voir dire examination.[72] Specifically, the two-prong inquiry addresses the issue of when questions commit prospective jurors to a particular set of facts.[73] In *Standefer*, the court reiterated the general rule that was in existence prior to its decision: an attorney can not use a hypothetical set of questions to commit or bind "a prospective juror to a verdict."[74] However, not all

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69. *See* Cuevas v. State, 742 S.W.2d 331, 336 n.6 (Tex. Crim. App. 1987) (indicating that fact-specific hypothetical questions are appropriate to explain the relevance of particular laws to the case; but such hypotheticals should not be used to inquire how veniremen would answer such questions). There is no requirement under the former test that the hypothetical questions lead to a valid challenge for cause or peremptory challenge. *Id.*

70. *See* Standefer v. State, 59 S.W.3d 177, 183 (Tex. Crim. App. 2001) (limiting proper questions to only those that lead to a valid challenge for cause).

71. *See, e.g.*, Stallings v. State, 47 S.W.3d 170, 174 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (warning that voir dire questions based on a hypothetical fact situation are improper if they encompass extensive facts of the case); McCoy v. State, 996 S.W.2d 896, 898 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (noting that hypotheticals are properly used to explain the law to prospective jurors; alternatively, they are inappropriate for the purpose of committing prospective jurors to a "specific set of facts"); Porter v. State, 938 S.W.2d 725, 729 (Tex. App.—Houston [1st Dist.] 1996, pet. ref'd) (clarifying that while hypotheticals can be used to explain relevant points of law, they should not be a tool for discovering "how a venireperson would respond to particular circumstances presented in [that] hypothetical").

72. *See Standefer*, 59 S.W.3d at 179 (determining whether the following question posed during voir dire was an improper commitment question: "Would you presume someone guilty if he or she refused a breath test on their refusal alone?").

73. *See id.* (commenting that certiorari was granted in order to determine when commitment questions will be deemed improper).

74. *Id.*; *see also* Allridge v. State, 850 S.W.2d 471, 480 (Tex. Crim. App. 1991) (advancing the view that in addition to prohibiting the litigant from attempting to bind a potential juror to a verdict based on hypothetical facts, it is improper for litigants to ask a potential juror to set "hypothetical parameters for their decision making"). In *Allridge*, the Texas Court of Criminal Appeals found that the trial court did not abuse its discretion when it

commitment questions are improper, but rather only those that commit a venireperson to a verdict.[75] Furthermore, *Standefer*'s two-prong test applies only in criminal cases.[76]

Again, not all commitment questions are automatically improper.[77] A trial court seeking to determine the appropriateness of such a question must apply the two-prong test fashioned in *Standefer*. The first step of the test asks whether the question is indeed a commitment question.[78] The second step inquires into whether the "question include[s] facts—and only those facts—that lead to a valid challenge for cause?"[79] If the answer to the first question is "no," the *Standefer* test does not apply because the test was only designed for commitment questions; hence, no further analysis is needed.[80] Alternatively, if the answer to the first question is "yes" and the answer to the second question is "no," the question is deemed an improper commitment question, and should therefore be excluded by the trial court.[81] However, if the answer to both questions is

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denied the defense attorney the opportunity to ask a potential juror under what circumstances he would consider implementing the death penalty. *Id.* at 480-81; *see also* Prewitt v. State, 133 S.W.3d 860, 867-68 (Tex. App.—Amarillo 2004, pet. ref'd) (allowing a hypothetical question asked to explain the effect of a motive because it did not commit the jurors to a particular verdict based on the facts of the hypothetical situation).

75. *Standefer*, 59 S.W.3d at 181; *see also* Lydia v. State, 109 S.W.3d 495, 498 (Tex. Crim. App. 2003) (paraphrasing *Standefer* and reaffirming that "[c]ommitment questions are improper when (1) the law does not require a commitment or (2) when the question adds facts beyond those necessary to establish a challenge for cause").

76. *See Standefer*, 59 S.W.3d at 185 (Price, J., dissenting) (detailing the differences that exist between civil and criminal defendants in their right to a fair and impartial jury). Justice Price's dissenting statements regarding these differences illustrate that the test in *Standefer* applies only to criminal defendants. *Id.* at 185-86. Additionally, because *Standefer* was issued by the Texas Court of Criminal Appeals, it is only binding in criminal cases. *Id.*

77. *See id.* at 181 (acknowledging that determining whether a question is indeed a commitment question is only half of the problem, because a commitment question can still be proper).

78. *Id.* at 182-83.

79. *Id.* at 182.

80. *See id.* at 180 (limiting its decision to only those voir dire questions that are commitment questions). In *Standefer*, the court stated that asking a potential juror whether they could be fair and impartial when the victim was a nun was not a commitment question. *Id.* The Texas Court of Criminal Appeals in a later case stated that questions inquiring about whether a juror can be "fair and impartial" will often be too vague to be considered a proper commitment question. Barajas v. State, 93 S.W.3d 36, 41 (Tex. Crim. App. 2002).

81. Standefer v. State, 59 S.W.3d 177, 182-83 (Tex. Crim. App. 2001).

"yes," the question is a proper commitment question that the judge should allow.[82]

Though the aforementioned test appears to be straightforward, it is not without its problems.[83] In particular, this two-part inquiry, as established by the majority decision, has been criticized on the grounds that it deprives defendants in criminal cases of their Sixth Amendment right to a fair and impartial jury by opening the door for biased jurors to serve.[84]

B. *What Constitutes a Commitment Question?*

The *Standefer* court defined commitment questions as "those that commit a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact."[85] Generally, commitment questions elicit "yes" or "no" answers and such questions are usually phrased to extract that type of answer.[86] However, according to the *Standefer* court, this is not the only way in which a commitment question arises.[87]

A commitment question can arise when a "prospective juror [is asked] to set the hypothetical parameters for his decision-making."[88] The *Standefer* court indicated that an example of such a commitment question

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82. *See id.* at 181-83 (holding that proper commitment questions must lead to a valid challenge for cause and contain only those facts which will establish the challenge for cause).

83. *See* John. R. Gillespie, *Fear of Commitment? In* Standefer v. State *the Texas Court of Criminal Appeals Clarifies the Role of Commitment Questions in Jury Selection in Criminal Trials*, 54 BAYLOR L. REV. 581, 591-92 (2002) (highlighting the difficulties encountered when the *Standefer* test is applied to circumstantial evidence as well as the unnecessary burdens that are consequently imposed on attorneys).

84. *See Standefer*, 59 S.W.3d at 187 (Johnson, J., joined by Meyers, Price, & Holcomb, JJ., dissenting) (critiquing the majority's opinion insofar as it restricts the voir dire process and conflicts with case precedent); John. R. Gillespie, *Fear of Commitment? In* Standefer v. State *the Texas Court of Criminal Appeals Clarifies the Role of Commitment Questions in Jury Selection in Criminal Trials*, 54 BAYLOR L. REV. 581, 595 (2002) (contending that the *Standefer* opinion essentially "justifies a prospective juror's bias against an entire category of evidence"); *cf.* Vasquez v. Hyundai Motor Co., 119 S.W.3d 848, 854-55 (Tex. App.—San Antonio 2003, no pet.) (concluding that a trial court abuses its discretion when its denial of an attorney's question thwarts an attempt to determine whether grounds exist to either challenge for cause or use a peremptory challenge).

85. *Standefer*, 59 S.W.3d at 179.

86. *Id.*

87. *See id.* at 180 (explaining that commitment questions are asked if the prospective juror is forced to define personal decision-making parameters).

88. *Id.*; *see also* Garcia v. State, No. 04-03-00404-CR, 2004 Tex. App. LEXIS 11187, at *40-43 (Tex. App.—San Antonio Dec. 15, 2004, pet. ref'd) (not designated for publication) (supporting *Standefer* by recognizing that a commitment question occurs when a potential juror is asked "to set hypothetical parameters for his or her decision-making").

is: "What circumstances in your opinion warrant the imposition of the death penalty?"[89] In a footnote, the *Standefer* court cautioned that questions which ask a prospective juror to set hypothetical parameters should not be confused with questions that are merely asked to discover a prospective juror's thoughts on mitigating factors.[90] The court offered the following example of such a question: "Do you think there might be circumstances that would mitigate against the death penalty?"[91] Thus, questions that reveal a prospective juror's mitigating factors are permissible and are not considered commitment questions because such questions do not require a juror to consider evidence in a specific manner.[92]

Often times, words such as "would" as opposed to "could" illustrate a greater level of commitment; conversely, the mere insertion of the word "could" in place of "would" does not automatically convert a question into a commitment question.[93] An example of this scenario is asking the potential jurors if they "could" convict without the child-victim testifying in court if other evidence convinced them beyond a reasonable doubt.[94] In contrast, when a voir dire question has the word "consider" it usually signifies that the question is a commitment question.[95]

Despite the *Standefer* court's best efforts, it is still quite difficult to determine if a commitment question posed during voir dire is in fact proper. Although determining what constitutes a commitment question is essential to applying the standard adopted in *Standefer,* it is only half of the process in determining whether the commitment question can be properly allowed by the trial court.[96] Under the two-prong test of *Standefer*, if

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89. *Standefer*, 59 S.W.3d at 180.

90. *Id.* at 180 n.7.

91. *Id.*

92. *See id.* (allowing, but not requiring, jurors to share their thoughts on mitigating factors).

93. Standefer v. State, 59 S.W.3d 177, 180 n.9 (Tex. Crim. App. 2001).

94. *See* Mason v. State, 116 S.W.3d 248, 254 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd) (interpreting three of the State's voir dire questions to be commitment questions). The State asked the potential jurors if they could convict without medical evidence or DNA evidence if the State was able to prove guilt beyond a reasonable doubt. *Id.* 253-54. The State also asked the potential jurors if they could convict when the child complainant did not testify at trial. *Id.* at 254. Finally, the State asked the potential jurors if they could give the defendant probation if it could be shown the child complainant initiated the sexual encounter. *Id.* The court found all three of the State's questions to be commitment questions. *Id.* It is interesting to note that all three of the questions that were deemed to be commitment questions began with the word "could" as opposed to "would."

95. *See Standefer*, 59 S.W.3d at 180 (recognizing that the word "consider" often indicates a commitment question).

96. *See id.* at 182 (enumerating a two-part test for determining whether a commitment question is proper).

the first prong is not satisfied, there is no further analysis because the question is deemed to be proper.[97]

C. *When Commitment Questions Are Improper*

Because not all commitment questions are improper, once a question is deemed to be a commitment question, *Standefer* requires that the court determine if the commitment question is proper.[98] In order for the commitment question to be proper, it must include "facts—and only those facts—that [will] lead to a valid challenge for cause."[99] This challenge-for-cause test is essential in deciding when a commitment question is proper;[100] at least one of the possible answers has to lead to a valid challenge for cause.[101]

Challenges for cause are those in which there is some fact that renders the juror "incapable or unfit to serve on the jury."[102] While there are a number of challenges for cause that both the defense and the state can rely upon, the ones that appear to be most pertinent to empanelling a fair and impartial jury are as follows—a challenge for cause may be made when: (1) the prospective juror shows a bias or prejudice against an area

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97. *Id.* at 182-83.

98. *See id.* at 182 (providing that a commitment question is proper when the law itself requires a commitment, when it leads to a valid challenge for cause, and when it contains only those facts necessary to establish a challenge for cause); *see also* Smith v. State, 703 S.W.2d 641, 643 (Tex. Crim. App. 1985) (finding that "the trial court . . . can, and should, control the scope of voir dire by exercising . . . sound discretion to limit improper questioning"), *vacated*, 761 S.W.2d 22 (Tex. Crim. App. 1988), *rev'd on other grounds*, 830 S.W.2d 926 (Tex. Crim. App. 1991); Rivera v. State, 82 S.W.3d 64, 66 (Tex. App.—San Antonio 2002, pet. ref'd) (explaining that the trial court is afforded sound discretion in conducting voir dire). It is logical to glean from the *Rivera* decision that the trial court solely determines when a commitment question is proper. The judgment of the trial court will only be reversed if it is determined beyond a reasonable doubt that the trial court's error contributed to the punishment. *Id.* at 67.

99. *Standefer*, 59 S.W.3d at 182-83.

100. *See* John. R. Gillespie, *Fear of Commitment? In* Standefer v. State *the Texas Court of Criminal Appeals Clarifies the Role of Commitment Questions in Jury Selection in Criminal Trials*, 54 BAYLOR L. REV. 581, 586 (2002) (writing that the "challenge-for-cause test [is] the touchstone for determining whether a commitment question is improper").

101. *Standefer*, 59 S.W.3d at 182-83 (emphasizing that a commitment question must lead to a valid challenge for cause in order to be proper); *see also* John. R. Gillespie, *Fear of Commitment? In* Standefer v. State *the Texas Court of Criminal Appeals Clarifies the Role of Commitment Questions in Jury Selection in Criminal Trials*, 54 BAYLOR L. REV. 581, 586 (2002) (summarizing the challenge-for-cause test that was established in *Standefer*).

102. *See generally* TEX. CODE CRIM. PROC. ANN. art. 35.16(a) (Vernon 1989) (listing the various reasons why a prospective juror would be unfit to serve on a jury). Such reasons include: the prospective juror has committed a felony, is under indictment, or is insane. *Id.* art. 35.16(a)(2)-(4).

of law upon which either the state or defense is entitled to rely;[103] or (2) the prospective juror has already decided on the defendant's guilt or punishment, or both;[104] or (3) the prospective juror has a bias in favor of (or against) the defendant.[105]

As a corollary to these proper challenges for cause, the *Standefer* court found the following to be a proper commitment question: "Can you consider probation in a murder case?"[106] Likewise, the court reasoned that it was proper for an attorney to ask a prospective juror if he or she "could follow a law that requires them to disregard illegally obtained evidence?"[107] The court then concluded that these two questions led to valid challenges for cause because a prospective juror must be able to take into account the full range of punishment for a given offense,[108] and certain laws require the jurors to make commitments.[109]

Even if a commitment question passes the challenge-for-cause test, the question may still be deemed improper if it includes additional facts that are not necessary to lead to a valid challenge for cause.[110] An example of such a question would be: "Could you consider probation for murder, when the victim was a ninety-year-old, handicapped lady?" Such a question furnishes more facts than necessary to establish a valid challenge for

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103. *See id.* art. 35.16(b)(3), (c)(2) (Vernon 1989 & Supp. 2004) (indicating that a juror may be challenged for cause when he or she possesses a bias against a part of the law which the state has a right to rely on for a conviction, or when the potential juror has a bias against a part of the law in which the defendant is entitled to rely on as a defense or for mitigation purposes).

104. *See id.* art. 35.16(a)(10) (Vernon 1989) (authorizing exclusion of a prospective juror if the juror has decided the defendant's guilt, including if the prospective juror's belief is grounded in hearsay).

105. *Id.* art. 35.16(a)(9).

106. *See* Standefer v. State, 59 S.W.3d 177, 181 (Tex. Crim. App. 2001) (opining that the question is a commitment question because it "commits a prospective juror to keeping the punishment options open in . . . a murder case"). In such an instance, the prospective jurors are being asked to refrain from deciding a punishment issue in a particular way. *Id.*

107. *See id.* at 181 n.16 (examining commitment questions that are asked because the law itself requires a commitment). When the law requires a commitment from the juror, litigants are free to ask potential jurors whether "they can follow the law in that regard." *Id.* at 181. Likewise, when the law does not require a commitment, a commitment question is improper. *Id.*

108. *Id.* at 181; *see also* Wyle v. State, 777 S.W.2d 709, 716 (Tex. Crim. App. 1989) (asserting that a prospective juror who cannot consider the full range of punishment associated with a crime may properly be excluded by a litigant who exercises a challenge for cause or a peremptory challenge).

109. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a) (Vernon 2005) (codifying the exclusionary rule). The exclusionary rule requires that any evidence obtained in violation of the laws or constitutions of the United States or Texas should not be admitted into evidence at trial. *Id.*

110. *Standefer*, 59 S.W.3d at 182.

cause; alternatively, the question: "Could you consider probation for a murder?" would have been a proper commitment question that would have adequately determined if the potential juror could follow the law.

It is under this portion of the analysis that most of the criticism of the *Standefer* test has been directed. In particular, this is the part of the analysis in which the dissent raises its concerns regarding the defendant's right to a fair and impartial jury.[111] However, despite the fact that the *Standefer* court only listed two prongs, the test appears to be modified by the later case of *Barajas v. State*.[112]

D. *The Saga Continues:* Barajas v. State

Approximately one year after the Texas Court of Criminal Appeals in *Standefer* formulated the two-prong test for determining when a commitment question was proper, it further added to the confusion of the test in *Barajas v. State*.[113] The question posed to the prospective jurors in *Barajas*, a child indecency case, was whether they "could be fair and impartial in a case [where] the victim was [only] nine years old?"[114] The court concluded this was not a proper commitment question.[115]

The majority opinion acknowledged that a commitment question is proper when its purpose is to discover a juror's views on issues that are relevant to the case.[116] Additionally, the *Barajas* court recognized that, under *Standefer*, proper questions may be impermissible when they seek to bind a juror to a particular verdict based on a certain set of facts or

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111. *See id.* at 187 (Johnson, J., joined by Meyers, Price, & Holcomb, JJ., dissenting) (challenging the majority's opinion and the second prong of the test it adopted by stating that the requirement that a proper commitment question lead to a valid challenge for cause ignores more than fifty years of case law). Judge Johnson's dissent specifically asserts that the majority decision conflicts with case law which indicates that peremptory challenges exist to both "remove jurors who should have been removed for cause" and to eliminate jurors who are "unacceptable, though not objectionable." *Id.*

112. 93 S.W.3d 36 (Tex. Crim. App. 2002).

113. *See* Barajas v. State, 93 S.W.3d 36, 37 (Tex. Crim. App. 2002) (applying the *Standefer* test to voir dire questions that asked the prospective jurors "if they could be fair and impartial in a case in which the victim was nine years old").

114. *Id.*

115. *Id.* at 39.

116. *See id.* at 38-39 (summarizing the legal background of commitment questions); *see also* Smith v. State, 703 S.W.2d 641, 643 (Tex. Crim. App. 1985) (exploring the types of questions the defense attorney could ask to uncover the prospective jurors' views on the insanity defense), *vacated*, 761 S.W.2d 22 (Tex. Crim. App. 1988), *rev'd on other grounds*, 830 S.W.2d 926 (Tex. Crim. App. 1991); Brooks v. State, No. B14-90-00977, 1992 Tex. App. LEXIS 898, at *5-6 (Tex. App.—Houston [14th Dist.] Apr. 2, 1992, pet. ref'd) (not designated for publication) (concluding that there was no abuse of discretion in the case because the defendant had the burden to show the voir dire question was proper, but failed to do so).

when the question lists extraneous facts.[117] The *Barajas* majority also affirmed the challenge-for-cause component of the *Standefer* test.[118] However, their analysis went further than the court in *Standefer* inasmuch as the opinion discussed the impropriety of commitment questions that are overly vague,[119] to the point of constituting a "global fishing expedition."[120]

When the *Barajas* court prohibited vague questions that could be construed as a license for a fishing expedition, it was reaffirming a notion that had been adopted by the Texas Court of Criminal Appeals for some time.[121] In *Boyd v. State*,[122]—decided prior to *Standefer*—the question asked of the prospective jurors was which factors they believed would influence their vote in a verdict.[123] Had *Boyd* been decided under the *Standefer* test, the question would have been deemed a commitment question because it required the prospective jurors to set the parameters

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117. *Barajas*, 93 S.W.3d at 38-39 (citing Standefer v. State, 59 S.W.3d 177, 181 (Tex. Crim. App. 2001)).

118. *See id.* at 39 (affirming that questions are proper if asked for the purpose of exercising a challenge for cause). Additionally, the *Barajas* court recognized that questions are proper when asked in an effort to intelligently exercise a peremptory challenge. *Id.*

119. *Id.*

120. *See id.* (implying that the two-prong test of *Standefer* is expanded by recognizing that questions that are too vague or broad are improper).

121. *See Smith*, 703 S.W.2d at 645 (classifying the defense counsel's questions regarding the prospective jurors' thoughts about the insanity defense as too broad, insofar as they constituted a fishing expedition and were improper). The court further stated that the "question does not seek particular information from a particular panel member; rather, it presents a general topic for discussion." *Id.* Due to the fact that the discussion was not specific, it would make the voir dire process unnecessarily lengthy; therefore, the court was correct in not allowing the question. *Id.*; *see also* Dhillion v. State, 138 S.W.3d 583, 589 (Tex. App.—Houston [14th Dist.] 2004, pet. struck) (commenting that a voir dire question concerning the potential jurors' "thoughts" on alcohol and the effects of alcohol on the human body was a general discussion and was not narrowly construed); Cooper v. State, 959 S.W.2d 682, 684 (Tex. App.—Austin 1997, pet. ref'd) (prohibiting the defense counsel, during an aggravated sexual assault case, from questioning prospective jurors about the "Salem witch trials and the Spanish Inquisition"); Bowser v. State, 865 S.W.2d 482, 484-86 (Tex. App.—Corpus Christi 1993, no pet.) (deciding that the trial court did not abuse its discretion when it prevented the defense counsel from asking prospective jurors about "what things" they believed were important in making a determination about assessing the death penalty); T.K.'s Video, Inc. v. State, 832 S.W.2d 174, 177 (Tex. App.—Fort Worth 1992, pet. ref'd) (adhering to the general rule that questions that are too broad are improper, and stating that the trial court was correct in not allowing the counsel to question potential jurors about their "feelings" pertaining to sexually explicit movies).

122. 811 S.W.2d 105 (Tex. Crim. App. 1991).

123. *See* Boyd v. State, 811 S.W.2d 105, 119 (Tex. Crim. App. 1991) (detailing defense counsel's questions concerning the factors that would influence their vote on whether the ultimate punishment should be imposed).

of their decision making.[124] Ultimately, the *Boyd* court held that the question above was improper because it was impermissibly broad.[125]

In *Smith v. State*,[126]—another pre-*Standefer* case—the defense counsel asked venirepersons their thoughts on the insanity defense.[127] The *Smith* court deemed this line of questioning an improper fishing expedition because the questions presented a topic for discussion and were not directed to find certain information about a particular prospective juror.[128] Similarly, in *Gonzales v. State*,[129] the Texas Court of Criminal Appeals further elaborated on the need for specific questions during voir dire and stated that counsel has "an obligation to ask questions calculated to bring out the information which might be said to indicate a juror's inability to be impartial, truthful, and the like."[130] In essence, *Barajas* further complicated the *Standefer* test by stating that if a commitment question is overly vague or broad—so that it could constitute a fishing expedition—it is improper.[131]

Barajas overruled a prior decision that dealt with voir dire questions framed in terms of the juror's ability to be "fair and impartial."[132] The

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124. *See* Standefer v. State, 59 S.W.3d 177, 180 (Tex. Crim. App. 2001) (defining commitment questions and including in that definition open-ended questions which require the potential jurors to set parameters for their decision).

125. *Boyd*, 811 S.W.2d at 119-20.

126. 703 S.W.2d 641 (Tex. Crim. App. 1985), *vacated*, 761 S.W.2d 22 (Tex. Crim. App. 1988), *rev'd on other grounds*, 830 S.W.2d 926 (Tex. Crim. App. 1991).

127. Smith v. State, 703 S.W.2d 641, 645 (Tex. Crim. App. 1985), *vacated*, 761 S.W.2d 22 (Tex. Crim. App. 1988), *rev'd on other grounds*, 830 S.W.2d 926 (Tex. Crim. App. 1991).

128. *See id.* (warning that broad questions can unnecessarily prolong the voir dire process; hence, the trial court can use its discretion to reasonably limit the questions that are so broad that they constitute a global fishing expedition).

129. 3 S.W.3d 915 (Tex. Crim. App. 1999).

130. *See* Gonzales v. State, 3 S.W.3d 915, 917 (Tex. Crim. App. 1999) (determining "the extent to which counsel may rely on information provided in written juror questionnaires").

131. *See* Barajas v. State, 93 S.W.3d 36, 38-42 (Tex. Crim. App. 2002) (implying that a third requirement must be met for a commitment question to be deemed proper). In addition to attorneys meeting the *Standefer* test, they must now satisfy the "additional" requirement that is found in *Barajas*—the question must not be overly vague. *Id.* While the court did not explicitly state that *Barajas* was a third component of *Standefer*, it must be considered along with the two-prong *Standefer* test to determine if commitment questions are correct.

132. *See id.* at 40 (overruling Nunfio v. State, 808 S.W.2d 482 (Tex. Crim. App. 1991), because the case was deemed to be badly reasoned and unworkable); *see also* John. R. Gillespie, *Fear of Commitment? In* Standefer v. State *the Texas Court of Criminal Appeals Clarifies the Role of Commitment Questions in Jury Selection in Criminal Trials*, 54 BAYLOR L. REV. 581, 601 (2002) (commenting that the *Nunfio* decision "set forth an unworkable standard that provided no reasonable limitation on the parties' ability to ask questions"). In his article, Gillespie explains that the *Standefer* court did not overrule *Nunfio* because

Barajas majority further stated that a court may overrule previous cases when those cases are deemed to be unreasonable or unworkable.[133] In *Barajas*, the court determined that its decision in *Nunfio v. State*[134] was both unreasonable and unworkable; therefore, it was overruled.[135] In *Nunfio*, the question that was posed to prospective jurors was whether they could be fair and impartial when the victim was a nun.[136] Similarly, the question posed in *Barajas* asked the prospective jurors if they could be fair and impartial when the victim was a nine-year-old child.[137] In *Nunfio*, the court held the trial court abused its discretion when it refused to allow the "fair and impartial" question to be asked because it was a proper question that was sought to determine any possible "bias or prejudice in favor of the victim by virtue of her vocation."[138]

In its reasoning, the *Barajas* court stated that the standard adopted in *Nunfio* provided no reasonable limits on the ability of the parties to ask questions, because questions that are framed within the context of "can you be fair and impartial under a given set of facts?" can be repeated over and over again, until every fact of the case is eventually included.[139] Hence, the *Barajas* court concluded that these "fair and impartial" questions were "licenses for fishing expeditions," which the court had expressly prohibited by its rulings in previous cases.[140]

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the facts in *Standefer* did not bring the *Nunfio* decision within its purview. *Id.* at 601. However, the facts of *Barajas* provided the Texas Court of Criminal Appeals with the opportunity to reexamine its previous holding in *Nunfio*. *Id.*

133. *Barajas*, 93 S.W.3d at 40; *see also* Proctor v. State, 967 S.W.2d 840, 844-45 (Tex. Crim. App. 1998) (recognizing that "the doctrines of stare decisis and law of the case should generally be followed, because they promote judicial efficiency and consistency, they foster reliance on judicial decisions, and they contribute to the actual perceived integrity of the judicial process"). However, court decisions that are based on faulty reasoning or are deemed to be unworkable, do not bind the court to follow precedent. *Id.*

134. 808 S.W.2d 482 (Tex. Crim. App. 1991).

135. *Barajas*, 93 S.W.3d at 40.

136. Nunfio v. State, 808 S.W.2d 482, 483-84 (Tex. Crim. App. 1991).

137. *Barajas*, 93 S.W.3d at 37.

138. *See Nunfio*, 808 S.W.2d at 484-85 (declining to apply the harm-error analysis to the issue of whether the trial court erred in denying the "fair and impartial" question). When the trial court denies a litigant the opportunity to ask prospective jurors a proper question, it denies the litigant the constitutional right to ask questions which may lead to the exercise of a challenge for cause or a peremptory challenge. *Id.* at 485. Due to this denial of a constitutional right, the court refused to adopt the harm-error analysis and instead opted to analyze the situation in terms of whether the trial court abused its discretion. *Id.* Applying a harm-error analysis would be fruitless because the denial of a constitutional right is harm in and of itself. *Id.*

139. *See Barajas*, 93 S.W.3d at 41 (asserting that "fair and impartial questions" can lead to every fact in the case being revealed).

140. *See id.* (affirming previous case law which had held that fishing expeditions may not be conducted during the voir dire process); *see also* Godine v. State, 874 S.W.2d 197,

V. THE UNDESIRABLE EFFECTS OF THE *STANDEFER* TEST

The *Standefer* court attempted to simplify the voir dire process; in particular, it aspired to create a simple test to distinguish proper commitment questions from improper commitment questions.[141] However, the test has spawned criticisms and inconsistencies.[142] The criticism raised

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201 (Tex. App.—Houston [14th Dist.] 1994, no pet.) (opining that the trial court was correct in denying the litigant more time to ask potential jurors' questions about their "thoughts" and "feelings" on self-defense and bodily injury). Additionally, the litigant asked potential jurors about their "beliefs" on whether they thought the defendant is favored by the criminal justice system and whether the Rodney King verdict had changed their mind. *Id.* These questions were deemed to be too open ended; thus, the trial court was correct in utilizing its discretion to preclude the questions that constituted a global fishing expedition. *Id.*; Bethune v. State, 803 S.W.2d 390, 392 (Tex. App—Houston [14th Dist.] 1990, no pet.) (finding no error was committed by the trial court when it refused to permit the defense counsel's question concerning the prospective jurors' "observations" of the defendant's failure to testify). There was no abuse of discretion because the question was so broad that it constituted a global fishing expedition. *Id.* Additionally, the court reasoned that the defendant was provided with the opportunity to question the prospective jurors about the effect that the defendant's failure to testify would have on their decision-making through the use of other questions that were not considered to be fishing expeditions. *Id.*; Strong v. State, 805 S.W.2d 478, 483 (Tex. App.—Tyler 1990, pet. ref'd) (justifying the lower court's decision to limit the defense counsel's speechmaking and repetitive questions).

141. *See* Standefer v. State, 59 S.W.3d 177, 179 (Tex. Crim. App. 2001) (clarifying "when a voir dire question calls for an improper commitment").

142. *See id.* at 185 (Price, J., dissenting) (comparing the rights of civil defendants with those of criminal defendants). Additionally, Judge Johnson's dissent condemns the majority's opinion because it ignores the vital role peremptory challenges have played in the voir dire process. *Id.* at 187 (Johnson, J., joined by Meyers, Price, & Holcomb, JJ., dissenting); *see also Barajas*, 93 S.W.3d at 45 (Meyers & Holcomb, JJ., dissenting) (criticizing the majority's opinion by stating that it is in direct contradiction with the second prong of the *Standefer* test, which invalidates a commitment question that provides too much factual detail). It is important to mention that footnote 28 within the *Standefer* decision also illustrates the difficulties of the *Standefer* standard. *Standefer*, 59 S.W.3d at 183 n.28. The majority holds that "[t]he trial court properly prohibited defense counsel from asking the question." *Id.* at 183. Thereafter, the majority opinion proceeds to attack Judge Johnson's dissent in footnote 28. *Id.* at 183 n.28. In her dissent, Judge Johnson asserts that the "majority's attempt to clarify what constitutes a question simply muddies the issue by attempting to create a bright-line standard." *Id.* at 186 (Johnson, J., joined by Meyers, Price, & Holcomb, JJ., dissenting). Judge Johnson then points out that the *Standefer* majority would consider the following question in a child molestation case to be a proper commitment question: Whether the prospective jurors could or would believe that no child would lie? *Id.* In footnote 28, the majority agreed that the question at issue was proper because prospective jurors who have bias or prejudices against an entire group of witnesses or evidence would lead to a valid challenge for cause. *Id.* at 183 n.28. The majority compared the question that Judge Johnson raised to the question that was asked in *Hernandez v. State*, in which the court permitted a question asking whether jurors believed a law enforcement officer would ever lie on the stand. *Id.* The *Hernandez* court deemed the question proper because it would lead to a valid challenge for cause. *Hernandez v. State*, 536 S.W.2d 947,

950 (Tex. Crim. App. 1978). The inconsistency of footnote 28 arises because, after the majority acknowledged that the two questions above were proper, it then went on in the same footnote to find two similar commitment questions in *Castillo v. State* and *Garrett v. State* improper. *Standefer*, 59 S.W.3d at 183 n.28.

The *Castillo* court found that a prospective juror is not challengeable for cause because the juror would be unable to convict on the testimony. *Castillo v. State*, 913 S.W.2d 529, 530, 533-34 (Tex. Crim. App. 1995). If analyzed under the *Standefer* test, the question in *Castillo* would be improper because it fails to lead to a valid challenge for cause. *See Standefer*, 59 S.W.3d at 183 n.28 (stating that under the *Standefer* formulation, the question in *Castillo* would be improper). Similarly, the *Garrett* court found that a potential juror was not challengeable for cause when he required more than the legal minimum—circumstantial evidence—to find guilt. *Garrett v. State*, 851 S.W.2d 853, 859-60 (Tex. Crim. App. 1995). Hence, the question in *Garrett* would be deemed improper under *Standefer* because its second prong would not be met. *See Standefer*, 59 S.W.3d at 183 n.28 (asserting the same).

Additionally, the two questions posed in *Castillo* and *Garrett* are not proper because "[a] party isn't entitled to commit a juror on whether he can convict based on one witness nor is he entitled to commit a juror to a certain disposition if only circumstantial evidence is presented." *Id.* at 183 n.28. This is troubling because under both sets of questions, meaning those considered proper in *Hernandez* and improper in *Castillo* and *Garrett*, the juror was expressing bias or prejudice against an entire group of evidence, and the Texas Court of Criminal Appeals in *Castillo* and *Garret* justify it. John R. Gillespie, *Fear of Commitment? In* Standefer v. State *the Texas Court of Criminal Appeals Clarifies the Role of Commitment Questions in Jury Selection in Criminal Trials*, 54 BAYLOR L. REV. 581, 595 (2002). In his article, John Gillespie explains the court's reasoning clearly: "[J]urors who would never be persuaded beyond a reasonable doubt based on the testimony of a single [witness] or based upon circumstantial evidence are not challengeable for cause; rather, [such jurors] just have a higher standard of reasonable doubt." *Id.*

The Texas Court of Criminal Appeals has stated that just because a venireman has established his threshold reasonable doubt standard at a higher level than the minimum level required to sustain a jury verdict, this is not an indicator he is biased against the law. *Murphy v. State*, 112 S.W.3d 592, 597 (Tex. Crim. App. 2003). This appears to contradict prior case law, which states that a juror can be properly challenged when the juror requires the state to meet a higher standard than "beyond a reasonable doubt." *Coleman v. State*, 881 S.W.2d 344, 360 (Tex. Crim. App. 1994). When a prospective juror requires the state to meet a higher standard than guilt beyond a reasonable doubt, the prospective juror should be challengeable for cause because this indicates that the juror may not be able to follow the law that requires the state to prove guilt beyond a reasonable doubt. *Mason v. State*, 116 S.W.3d 248, 255 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd). In *Castillo*, when a juror could not be convinced beyond a reasonable doubt if the only testimony was that of one witness, the juror was not demonstrating a higher degree of reasonable doubt, but instead was demonstrating a bias against a bona fide category of evidence. John R. Gillespie, *Fear of Commitment? In* Standefer v. State *the Texas Court of Criminal Appeals Clarifies the Role of Commitment Questions in Jury Selection in Criminal Trials*, 54 BAYLOR L. REV. 581, 594-95 (2002). Likewise, in *Garrett*, when the juror could not convict a defendant when the only available evidence was circumstantial, the court concluded that a juror who exhibits bias toward sufficient legal evidence should be excluded. *Id.* at 595-96.

While footnote 28 does not illustrate a problem with the form of the question, it does illustrate how the hair-splitting technicalities of the *Standefer* test have led to "proper" commitment questions that allow prospective jurors to be biased against an entire group of

can be seen in *Standefer*'s dissenting opinions.[143] Furthermore, the inconsistencies of the *Standefer* decision are revealed in the dissenting opinion in *Barajas*.[144] Each of these criticisms and inconsistencies surrounding the *Standefer* test will be discussed separately.

A. *Comparing the Criminal Defendant's Right to a Trial by a Fair and Impartial Jury with a Civil Defendant's Right to a Trial by a Fair and Impartial Jury*

In the *Standefer* dissents, both Judge Price and Judge Johnson discussed the *Standefer* test's effects on a defendant's right to utilize peremptory challenges.[145] Judge Price wrote: "Voir dire is not only to ferret out potential jurors who are challengeable for cause, but also to make intelligent use of peremptory challenges."[146] Judge Price pointed out that while the *Standefer* test permits parties to exercise their peremptory challenges, the test "does not require that trial judges allow the parties to ask questions for the intelligent exercise thereof."[147] Judge Johnson, in a separate dissenting opinion, wrote that when the majority in *Standefer* required proper commitment questions to lead to valid challenges for cause, it completely disregarded the reasons for voir dire.[148] It has long been recognized that one reason for voir dire is to afford a party the right to acquire information of prospective jurors, so that the party can exercise intelligently both its challenges for cause *and* its peremptory challenges.[149] Judge Johnson criticized the *Standefer* test because it limits

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proper evidence—being able to be convinced of the defendant's guilt beyond a reasonable doubt based on the testimony of only one witness.

143. *See Standefer*, 59 S.W.3d at 185 (Price, J., dissenting) (attacking the second prong of *Standefer*, which requires proper commitment questions to lead to a valid challenge for cause).

144. *See Barajas*, 93 S.W.3d at 45 (Meyers & Holcomb, JJ., dissenting) (addressing the majority's lack of clarity in stating when a commitment question is too vague or contains too much detail).

145. *See* Standefer v. State, 59 S.W.3d 177, 185, 187 (Tex. Crim. App. 2001) (Price, J., dissenting, & Johnson, J., joined by Meyers, Price, & Holcomb, JJ., dissenting) (criticizing the second prong of the *Standefer* test which requires only that a valid commitment question lead to a valid challenge for cause).

146. *Id.* at 185 (Price, J., dissenting).

147. *Id.* at 185-86 (emphasis omitted) (challenging the majority's requirement that a proper commitment question result in a valid challenge for cause, because the Texas Court of Criminal Appeals has recognized that deprivation of a right to use a peremptory challenge is a loss of a substantial right).

148. *See id.* at 187 (explaining that the voir dire process provides litigants with an opportunity to ask potential jurors questions that will lead to the intelligent exercise of both peremptory challenges and challenges for cause).

149. *Id.*; *see also* Franklin v. State, 138 S.W.3d 351, 354 (Tex. Crim. App. 2004) (noting that the right to question prospective jurors about issues that will lead to the intelligent

proper commitment questions to only those that lead to challenges for cause, which is adverse to established Texas precedent that had recently been reaffirmed by the Texas Court of Criminal Appeals.[150]

In addition to limiting a party's right to exercise its peremptory challenges, Judge Price believed that the *Standefer* test affords a civil defendant a greater right to a fair and impartial jury than a criminal

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exercise of peremptory challenges and challenges for cause, which in turn lead to the empanelment of a fair and impartial jury, has its roots in the Sixth Amendment to the United States Constitution); Powell v. State, 631 S.W.2d 169, 170 (Tex. Crim. App. 1982) (considering whether the trial court erred in denying the defense attorney the opportunity to question potential jurors about their beliefs regarding the various theories of incarceration); Mathis v. State, 576 S.W.2d 835, 836-37 (Tex. Crim. App. 1979) (en banc) (detailing how the lower court erred in refusing the defense counsel the right to question potential jurors about their feelings toward probation as a possible punishment for murder, which would have led to the intelligent exercise of a peremptory challenge or challenge for cause); Abron v. State, 523 S.W.2d 405, 407 (Tex. Crim. App. 1975) (recognizing that the state and defense counsel have a right to question the prospective jurors during the voir dire process). During voir dire, the State and the defense are entitled to question potential jurors on areas that may lead to the intelligent use of peremptory challenges or to establish a challenge for cause. *Id.* at 407-08. The court held that the trial court erred when it precluded the defense counsel from questioning potential jurors about "the existence of racial prejudice" because it prevented the intelligent exercise of a peremptory challenge. *Id.* at 406-07, 409; De La Rosa v. State, 414 S.W.2d 668, 671 (Tex. Crim. App. 1967) (asserting, "[t]he voir dire process is designed to insure [sic]—to the fullest extent possible—that an intelligent, alert and impartial jury will perform the duty assigned to it by our judicial system"). Litigants attain an impartial jury by asking questions that will lay the foundation for a challenge for cause or peremptory challenge. *Id.*; Wilkinson v. State, 120 Tex. Crim. 284, 47 S.W.2d 819, 819-20 (1932) (finding that the lower court committed error by preventing the litigant to question voir dire members individually).

150. *See Standefer*, 59 S.W.3d at 187 (citing Johnson v. State, 43 S.W.3d 1, 6 (Tex. Crim. App. 2001) (criticizing *Standefer* for ignoring the stare decisis set forth in fifty years of case law)). In *Johnson*, the court held the accused not only has the privilege to exclude potential jurors who are unfit to serve on a jury, but also has the privilege to exclude from the jury list those individuals "who, by reason of politics, religion, environment, association, or appearance, or by reason of the want of information with reference to them, the accused may object to their service upon the jury to which the disposition of his life or liberty is submitted." Johnson v. State, 43 S.W.3d 1, 6 (Tex. Crim. App. 2001); *see also* Trevino v. State, 572 S.W.2d 336, 336-37 (Tex. Crim. App. 1978) (emphasizing that the accused has a right to question potential jurors about issues which will lead to peremptory challenges and generally great latitude should be given to the accused for such interrogation); Belcher v. State, 96 Tex. Crim. 382, 257 S.W. 1097, 1098 (1924) (defining peremptory challenges and holding an accused has the right to interrogate potential jurors in an effort to intelligently exercise a peremptory challenge); Contreras v. State, 56 S.W.3d 274, 278 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd) (holding that the right to question potential jurors for the purpose of utilizing a peremptory challenge is vital to the constitutional right to a fair and impartial jury); McGee v. State, 35 S.W.3d 294, 298 (Tex. App.—Texarkana 2001, pet. ref'd) (mandating that the Sixth Amendment guarantees the right to an impartial jury, and essential to this right "is the right to question veniremembers in order to intelligently exercise peremptory challenges and challenges for cause").

defendant.[151] In *Babcock v. Northwest Memorial Hospital*,[152] the Supreme Court of Texas addressed the issue of whether a trial court abused its discretion by not allowing the hospital's counsel to inquire during voir dire examination about the potential juror's bias or prejudice toward a tort reform controversy.[153] The court asserted that broad latitude should be afforded to a litigant during the voir dire process.[154] By allowing broad latitude during the voir dire process, parties may uncover prospective jurors' biases or prejudices, thereby resulting in the parties exercising their peremptory challenges intelligently.[155]

Furthermore, the court in *Babcock* stated that while trial courts have wide discretion during the voir dire process, this discretion is abused when the court denies proper questions that would help the parties determine not only a challenge for cause *but also* a peremptory challenge.[156] The purpose of voir dire is to ask questions that reveal any bias and prejudice of potential jurors; for the court to deny such questions is equivalent to the denial of the defendant's fundamental right to a fair and impartial jury.[157] Hence, due to the fact that the Supreme Court of Texas

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151. *See Standefer*, 59 S.W.3d at 185-86 (Price, J., dissenting) (construing that the test adopted by the majority furnishes the criminal defendant with fewer rights than a civil defendant, who has less at stake).

152. 767 S.W.2d 705 (Tex. 1989).

153. *See* Babcock v. Nw. Mem'l Hosp., 767 S.W.2d 705, 707-09 (Tex. 1989) (detailing that the trial court impermissibly prevented voir dire questions directed to uncover the potential jurors' views concerning the liability insurance crisis).

154. *See id.* at 708 (proclaiming that the trial courts should "permit a broad range of inquiries on voir dire"); *see also* Texas Employers Ins. Ass'n v. Loesch, 538 S.W.2d 435, 440 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (opining that although the trial court is afforded broad discretion over the voir dire process, a litigant should be granted great latitude in examining the prospective jurors in order to exercise a peremptory challenge); Green v. Ligon, 190 S.W.2d 742, 747 (Tex. Civ. App.—Fort Worth 1945, writ ref'd n.r.e.) (holding, "in cases where a jury trial is demanded, both litigants are entitled to a jury composed of men free of bias and prejudice and without an interest in the subject matter in litigation"). Therefore, trial courts should be very liberal in allowing a vast amount of inquiries, in order to afford the litigants their right to exercise a peremptory challenge. *Id.*

155. *Babcock*, 767 S.W.2d at 709; *cf.* Lubbock Bus Co. v. Pearson, 277 S.W.2d 186, 190 (Tex. Civ. App.—Amarillo 1955, writ ref'd n.r.e.) (explaining that before a prospective juror can be asked questions to determine fitness to serve on a jury, the prospective juror must be told the "nature of a case and the contentions of the respective parties").

156. *Babcock*, 767 S.W.2d at 709; *see* Dickson v. Burlington N. R.R., 730 S.W.2d 82, 85 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.) (authorizing the trial court to exercise discretion over the scope of the voir dire examination, but discretion is abused when a litigant is denied the opportunity to ask potential jurors proper questions which would lead to the use of a peremptory challenge).

157. *See Babcock*, 767 S.W.2d at 709 (expounding that when the plaintiffs were denied the chance to ask questions which would expose the potential jurors' bias or prejudice over the tort reform controversy, the plaintiffs were denied their "right to trial by a fair and impartial jury"); *see also* Benefield v. State, 994 S.W.2d 697, 701 (Tex. App.—Houston [1st

provides broad latitude in the types of questions that are allowed during the voir dire examination, Judge Price, in his dissent, concluded that civil defendants who typically have only property rights at stake are afforded a greater right to a fair and impartial jury than a criminal defendant, whose life or liberty is at stake.[158]

In all fairness, the majority in footnote 28 addresses Judge Johnson's claims that the *Standefer* test ignores the purpose of voir dire, which is to divulge a prospective juror's bias and prejudices through the intelligent use of peremptory challenges and challenges for cause.[159] The majority points out that the challenge-for-cause test is not applicable to all questions; it is *only applicable* to *commitment questions*.[160] The majority states that tort reform questions, like the one in *Babcock*, are not commitment questions.[161] The majority in *Standefer* explains that non-commitment questions are not limited to challenges for cause, and that litigants may still exercise their peremptory challenges on these questions.[162]

This attempt by the majority to reconcile the disparity of rights given to the criminal defendant as opposed to those given to the civil defendant appears to fall short. By stating that *only* commitment questions require the challenge-for-cause test, the court is still allowing the civil defendant to have a greater right to a fair and impartial jury. It would seem necessary, as Judge Price indicates, in cases where a defendant's life and liberty are at stake and not simply the defendant's property, that the Texas Court

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Dist.] 1999, pet. ref'd) (warning that it is an abuse of discretion when a trial court denies a proper question which would lead to the use of a peremptory challenge). When a litigant is denied the opportunity to ask a proper question to potential jurors, it is always reversible error. *Id.*; Clemments v. State, 940 S.W.2d 207, 211 (Tex. App.—San Antonio 1996, pet. ref'd) (summarizing that the voir dire examination is designed to ensure the accused is given a trial by an impartial jury). Voir dire is the process that uncovers any bias or prejudice of prospective jurors that would prevent them from considering evidence introduced during the trial in a fair manner. *Id.* at 210; Tobar v. State, 874 S.W.2d 87, 89 (Tex. App.—Corpus Christi 1994, pet. ref'd) (describing two purposes of voir dire). One purpose of the voir dire examination is to uncover any bias or interest a potential juror might harbor that would prevent him or her from fairly evaluating the evidence during a trial. *Id.* "Another purpose [of voir dire] is to test the qualifications of the jurors." *Id.*

158. *See* Standefer v. State, 59 S.W.3d 177, 186 (Tex. Crim. App. 2001) (Price, J., dissenting) (referring to the fact that in civil cases, a litigant's right to utilize a peremptory challenge is not limited).

159. *Id.* at 183 n.28.

160. *See id.* (clarifying its two-prong test and stating that there is no requirement that non-commitment questions must lead to a valid challenge for cause).

161. *See id.* at 184 (restating that the majority's opinion only prohibits "those questions that call for improper commitments").

162. *See id.* (manifesting, "there are many questions that can be asked for the purpose of exercising peremptory challenges").

of Criminal Appeals would institute a standard that allows the parties vast latitude to delve into prospective jurors' biases or prejudices. This would furnish criminal defendants with a "true" right to a fair and impartial jury, just as their civil counterparts have already been given. Therefore, while the dissenting opinions in *Standefer* do not deal with an inconsistency in the applicability of the test itself, they point out a standard that is inconsistent with the right to a fair and impartial jury, as envisioned in the United States and Texas Constitutions.[163]

B. *The Impossible Guessing Game Generated by the* Barajas *Decision*

The dissent in *Barajas* addressed the inconsistency in the majority's holding that commitment questions are improper when the questions are so vague that they constitute a fishing expedition.[164] Judge Meyers, in his dissenting opinion, remarked that when the majority holds that overly vague commitment questions are improper, it is directly contrary to the test provided in *Standefer*.[165] Judge Meyers explained that in *Standefer*, the majority was trying to adopt the long held notion that the voir dire examination is to focus "on whether or not [the] question[s] contained too *much* detail."[166]

In *Barajas*, the court held that "fair and impartial" questions were too broad to be proper commitment questions.[167] Yet, in *Standefer* the court held that a question which contained too many facts was regarded to be improper.[168] Judge Meyers correctly explained that the majority in

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163. *See* U.S. CONST. amend. VI (providing the accused in all criminal proceedings with "the right to a speedy and public trial, by an impartial jury of the State and district" where the crime was committed); *see also* TEX. CONST. art. I, § 15 (supporting a defendant's right to a trial by a fair and impartial jury). Once again, while peremptory challenges are not guaranteed in the Constitution, the right to counsel implicitly gives the defendant a constitutional right to effective assistance of counsel. Ratliff v. State, 690 S.W.2d 597, 599 (Tex. Crim. App. 1985).

164. *See* Barajas v. State, 93 S.W.3d 36, 45 (Tex. Crim. App. 2002) (Meyers & Holcomb, JJ., dissenting) (challenging the majority's decision to make a question improper when it is too vague or imprecise).

165. *See id.* at 45 (explaining that the majority in *Standefer* attempted to adopt a test that would require questions to have as little detail as necessary). The focus has generally been on whether the voir dire question contained too many facts or details. *Id.*

166. *See id.* (implying that the second prong of the *Standefer* test was an affirmation of the long held notion that the focus of voir dire questions is concerned with whether the voir dire question contains too many details to be proper).

167. *See id.* at 41 (analyzing fair and impartial questions and determining that questions framed in such a way are a license for the litigant to go on a fishing expedition). Such action has been expressly prohibited during the voir dire process. *Id.*

168. *See* Standefer v. State, 59 S.W.3d. 177, 182 (Tex. Crim. App. 2001) (requiring proper commitment questions to include only those facts necessary to establish a challenge for cause).

Barajas "[was n]ot content to merely create its new law, . . . [so it] effectively transforms voir dire into an impossible guessing game by holding that . . . [a] question too vague or imprecise to be [correct] was also an improper attempt to commit the jury."[169] Judge Meyers correctly showed that the "simplified" rule the majority tried to achieve in *Standefer* is now a guessing game because of the addition of the holding in *Barajas*.[170] With the holding in *Barajas*, it is now difficult for parties to distinguish between proper and improper commitment questions, because the modified *Standefer* test now requires that commitment questions lie somewhere between fact-specific and vague. However, the majority in *Barajas* never says, with absolute certainty, where the proper medium lies.[171]

VI. PROPOSAL

Standefer has generated many inconsistencies both in its application and in its relationship to a criminal defendant's right to have a fair and impartial jury.[172] The inconsistencies could be reduced if the Texas Court of Criminal Appeals clarified the "impossible guessing game" dilemma that resulted from *Barajas*[173] by articulating the appropriate medium a commitment question has to meet in order to be considered proper.

If the Texas Court of Criminal Appeals clarified *Barajas* it would be easier to apply the *Standefer* test, but it would not address the constitutional issues *Standefer* has generated.[174] Even if the court addresses the two issues above, there will still be an immense disparity between the criminal defendant and the civil defendant when it comes to the right to a

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169. *Barajas*, 93 S.W.3d at 45 (Meyers & Holcomb, JJ., dissenting).

170. *See id.* (warning that the majority's ruling, that a commitment question is improper if it is too vague or imprecise, needlessly creates an impossible guessing game).

171. *See id.* (indicating the difficulties litigants will now face because of the inexact standard produced by the majority's decision).

172. *See Standefer*, 59 S.W.3d at 186 (Johnson, J., joined by Meyers, Price, & Holcomb, JJ., dissenting) (asserting that *Standefer* ignores fifty years of Texas case law, first by requiring a proper commitment question to lead to a valid challenge for cause, and then by essentially ignoring the role of peremptory challenges); *see also Barajas*, 93 S.W.3d at 45 (Meyers & Holcomb, JJ., dissenting) (addressing the impossible guessing game instituted by the majority's lack of distinction between commitment questions that contain excessive facts and those that contain too few facts).

173. *See Barajas*, 93 S.W.3d at 45 (Meyers & Holcomb, JJ., dissenting) (comparing the majority's holding against overly broad and imprecise voir dire questions, with the *Standefer* court's holding against too much factual detail). The dissent correctly asserts that the majority never addresses this inconsistency. *Id.*

174. *See Standefer*, 59 S.W.3d at 186 (Johnson, J., joined by Meyers, Price, & Holcomb, JJ., dissenting) (questioning the effect that the majority's holding will have on the criminal defendant's right to a fair and impartial jury—in comparison with the civil defendant's).

fair and impartial jury. One approach to making the voir dire examination simpler and more effective, as well as more constitutionally attuned, can be found in Virginia case law.

In Virginia, trial courts are required to "afford a party a 'full and fair' opportunity to ascertain whether prospective jurors stand indifferent."[175] Although a party cannot ask any question he wishes, or infinitely extend the voir dire process, a trial court must afford counsel ample opportunity to pose relevant questions to prospective jurors.[176] Relevant questions are those that are sufficient to provide the defendant with a fair and impartial jury.[177] The Supreme Court of Virginia, in *Schmitt v. Commonwealth*,[178] stated that deference is given to the trial court over the voir dire process, and this discretion will not be disturbed unless it can be shown that the trial court abused its discretion.[179] The *Schmitt* court held that in deciding a prospective juror's qualifications to sit on a jury, the court should consider a "prospective juror's entire *voir dire*, rather than isolated statements made by the prospective juror."[180] The voir dire process and its subsequent abuse of discretion analysis make absolutely no reference to the form of voir dire questions.

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175. Buchanan v. Commonwealth, 384 S.E.2d 757, 764 (Va. 1989).

176. Skipper v. Commonwealth, 477 S.E.2d 754, 758 (Va. Ct. App. 1996) (citing *Buchanan*, 384 S.E.2d at 764 and Chichester v. Commonwealth, 448 S.E.2d 638, 647 (Va. 1994)).

177. *See Skipper*, 477 S.E.2d at 758 (noting that the trial court is given discretion over the scope of voir dire, but must allow questions that will "preserve a defendant's right to trial by a fair and impartial jury" (quoting Buchanan v. Commonwealth, 384 S.E.2d 757, 764 (Va. 1989))).

178. 547 S.E.2d 186 (Va. 2001).

179. *See* Schmitt v. Commonwealth, 547 S.E.2d 186 (Va. 2001) (pointing out that "the trial court is in a superior position to determine" whether a potential juror harbors some type of bias or interest that would prevent him from performing the duties required of a juror). The trial court is in a superior position because it is able to view and hear all potential jurors' responses to the questions asked. *Id.*; *see also* Green v. Commonwealth, 546 S.E.2d 446, 451 (Va. 2001) (expounding that the prospective juror must provide the criminally accused with a trial that is fair and impartial). Deference is given to the trial court in its determination of excluding a prospective juror who is partial and prejudiced. *Id.*; Lovitt v. Commonwealth, 537 S.E.2d 866, 875 (Va. 2000) (acknowledging that discretion is afforded to the trial court because of its ability to observe not only the questions posed to the prospective jurors, but also the prospective jurors' corresponding answers); *cf.* Griffin v. Commonwealth, 454 S.E.2d 363, 364 (Va. Ct. App. 1995) (asserting that "[t]rial courts primarily determine whether a venireperson is free from partiality and prejudice through meaningful *voir dire*").

180. *Schmitt*, 547 S.E.2d at 195 (emphasis added); Wise v. Commonwealth, 337 S.E.2d 715, 717 (Va. 1985); DeLeon v. Commonwealth, 565 S.E.2d 326, 327 (Va. Ct. App. 2002); Swanson v. Commonwealth, 442 S.E.2d 702, 704 (Va. Ct. App. 1994); Mullis v. Commonwealth, 351 S.E.2d 919, 923 (Va. Ct. App. 1987).

Under Virginia's voir dire process, the court does not consider whether a question is a commitment question. During the examination, Virginia courts do not try to devise a bright-line test to determine when questions are proper. Virginia courts acknowledge that "the trial court is in a superior position to determine whether a prospective juror[ ] . . . would be prevented or impaired in performing the duties of a juror."[181] Additionally, the standard of allowing a broad range of voir dire questions and considering prospective jurors' answers as a whole appears to be more in line with the constitutionally based right to a fair and impartial jury. By allowing the parties to have broad range in the types of questions they may ask prospective jurors, the parties are better able to utilize their peremptory challenges and challenges for cause.

Conversely, Texas courts seem less concerned with extracting relevant information from prospective jurors and tend to focus on whether the question was phrased correctly.[182] Under *Standefer*, it appears that Texas courts are more concerned with ensuring that questions are solicited correctly, rather than focusing on whether the questions could uncover a prospective juror's biases and prejudices.[183] By focusing on the form of commitment questions, it appears that Texas courts have moved away from the true meaning of voir dire, which is to empanel a fair and impartial jury.[184]

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181. *Schmitt*, 547 S.E.2d at 195; *Lovitt*, 537 S.E.2d at 875; *see also* Bradbury v. Commonwealth, 578 S.E.2d 93, 95 (Va. Ct. App. 2003) (stressing that the appellate courts provide trial courts much deference in their decision to retain or exclude a prospective juror and the trial court will only be reversed if there is a showing of manifest error); *cf. Skipper*, 477 S.E.2d at 758 (reiterating that the voir dire examination is an integral part of ensuring that the juror, in a criminal trial, is impartial, and that the trial court uses its discretion to determine if the potential juror is one who will provide the accused with a fair and impartial jury).

182. *Cf.* Hernandez v. State, 508 S.W.2d 853, 854 (Tex. Crim. App. 1974) (deciding that there is no error committed when the trial court denies the litigant an opportunity to ask a voir dire question which is improperly framed).

183. *See* Standefer v. State, 59 S.W.3d 177, 182-83 (Tex. Crim. App. 2001) (requiring proper questions to meet a bright-line rule). The bright-line rule created in *Standefer* limits a criminal defendant's ability to expose a potential juror's bias and prejudice.

184. *See* Salazar v. State, 562 S.W.2d 480, 482 (Tex. Crim. App. 1978) (explaining that a prospective juror who withholds information hampers the voir dire process and its purpose of empanelling a fair and impartial jury); *see also* Clemments v. State, 940 S.W.2d 207, 210-11 (Tex. App.—San Antonio 1996, pet. ref'd) (noting that a purpose of voir dire is discovering whether a potential juror's bias or prejudice that would prevent him or her from furnishing the criminally accused with a fair and impartial jury); Granberry v. State, 695 S.W.2d 71, 73 (Tex. App.—Beaumont 1985, pet. ref'd) (writing, "the voir dire process is designed to insure [sic], to the fullest extent possible, that an intelligent, alert, disinterested and impartial jury will perform the duty assigned to it").

Although Texas courts are similar to Virginia courts in that both give broad discretion to the trial court over the voir dire examination, Texas courts are greatly confined by the *Standefer* decision in the types of questions that can be asked to unveil a prospective juror's bias or prejudice. Virginia courts allow a greater range of questions to be asked to potential veniremembers because its courts are more concerned with the potential juror's voir dire answers as a whole, rather than how the questions are presented to the juror. As a result, it appears that Virginia courts provide greater opportunities for criminal defendants to receive a fair and impartial jury. In essence, the Virginia standard is applied more generally than the Texas standard adopted in *Standefer*. The Virginia courts do not scrutinize how voir dire questions are posed; they allow attorneys the opportunity to ask a broad range of relevant questions. The Texas standard, in combination with the holding in *Barajas*, makes it nearly impossible for an attorney to exercise a challenge for cause.

Texas courts should eliminate the method launched in *Standefer* and follow the method employed by the Virginia Supreme Court. In Texas, during both civil and criminal cases, attorneys for both parties should be given vast latitude when questioning prospective jurors during voir dire. The focus of the voir dire process should shift from the form of the questions to the substance of the prospective jurors' responses. Furthermore, one answer alone, to a particularly phrased question, should not automatically disqualify a prospective juror from sitting on a jury; instead, the prospective juror's answers as a whole should be used to determine the person's qualification. Accordingly, challenges for cause *and* peremptory challenges should be a vital part of the criminal voir dire process. Hence, by allowing more expansive voir dire and eliminating the bright-line standard of *Standefer*, criminal defendants will be given the same right to a fair and impartial jury as civil defendants.

Since the adoption of the *Standefer* test by the Texas Court of Criminal Appeals, the court has continuously reaffirmed the test in the cases that followed it; therefore, it seems unlikely that it will be willing to adopt a standard similar to that advocated by the Virginia courts.[185] However, if the Texas Court of Criminal Appeals were to do this, the ultimate purpose of voir dire—the right to a fair and impartial jury—would no longer be an elusive concept for criminal defendants.

185. Lydia v. State, 109 S.W.3d 495, 496 (Tex. Crim. App. 2003); Wingo v. State, 143 S.W.3d 178, 185 (Tex. App.—San Antonio 2004, pet. granted); Harris v. State, 122 S.W.3d 871, 879 (Tex. App.—Fort Worth 2003, pet. ref'd); Mason v. State, 116 S.W.3d 248, 253 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd); Freeman v. State, 74 S.W.3d 913, 915 (Tex. App.—Amarillo 2002, pet. ref'd).

VII. Conclusion

It is apparent that the Texas Court of Criminal Appeals had good intentions when it adopted *Standefer* and later when it modified the test in *Barajas*. The court attempted to simplify the process of determining when a question improperly commits a prospective juror to a particular verdict; however, in doing so, the court deprived criminal defendants of the right to a fair and impartial jury. With the adoption of the *Standefer* test and later with its modification in *Barajas*, criminal defendants are greatly hindered in their efforts to uncover bias or prejudices of prospective jurors that will aid them in utilizing their peremptory challenges. When the court in *Standefer* required proper commitment questions to lead to valid challenges for cause, it ignored one of most important purposes of the voir dire examination—questioning prospective jurors so that litigants can intelligently exercise *both* challenges for cause and peremptory challenges.

Additionally, the holding in *Barajas,* creates substantial confusion for litigants attempting to extract any bias or prejudice of potential jurors who would deny the criminal defendant the right to a fair and impartial jury. In *Barajas*, the court fails to provide litigants with guidance as to whether the question they seek to ask is too factually detailed or overly broad. Instead the court transforms its "simplified" test into an impossible guessing game that further deprives a criminal defendant of his already diminished right to a fair and impartial jury.

The problem, which is a by-product of the *Barajas* holding, can be solved by the court simply addressing the issue and providing a clearer guideline. Meanwhile, the problem created by the original *Standefer* test, which requires only a valid challenge for cause for proper commitment questions, thereby ignoring the importance of peremptory challenges, is not so easily reconciled. One possible remedy to this problem is to adopt the voir dire process that exists in Virginia. In the Virginia voir dire process, the court is less concerned with the form of questioning for prospective jurors and therefore allows counsel greater leeway in questioning prospective jurors in order to discover any bias or prejudices that may prevent them from providing the defendant with the right to a fair and impartial jury. In essence, since the focus is not on the form of the questions and is instead on the answers of the potential jurors, Virginia courts provide criminal defendants with the right to a fair and impartial jury, guaranteed by the Sixth Amendment to the United States Constitution.

Until the Texas Court of Criminal Appeals addresses the inconsistency produced by its decision in *Standefer*, the criminal defendant will always be at a disadvantage in comparison with its civil counterpart. If this situation is allowed to continue, one of the greatest rights afforded to Texas criminal defendants by both the United States Constitution and the Texas

Constitution—the right to a fair and impartial jury—will continue to allude defendants where their liberties, and in some cases their lives, are at stake. Therefore, the Texas Court of Criminal Appeals should take substantial steps to make the right to a fair and impartial jury a reality to criminal defendants, instead of an elusive concept that exists only in the text of the United States and Texas Constitutions, and in various parts of Texas case law.