HYUNDAI MOTOR COMPANY V. VASQUEZ: THE TEXAS SUPREME COURT BROADENS THE CLASS OF IMPERMISSIBLE COMMITMENT QUESTIONS IN CIVIL VOIR DIRE

James Phelan*

I. INTRODUCTION

Voir dire is one of the most important phases of a trial. Indeed, an attorney's effectiveness in questioning the jury panel may very well determine the outcome of the case. Although voir dire is crucial to the parties, trial courts with over-crowded dockets are increasingly limiting the time attorneys may spend questioning the panel.[1] Because of the importance of ensuring that the parties receive a fair and impartial jury, and the relatively short time that attorneys have to question the jurors that will ultimately decide the case, it is vitally important that attorneys understand the bounds of permissible questioning. In *Hyundai Motor Company v. Vasquez*,[2] the Texas Supreme Court recently attempted to clarify what constitutes improper voir dire. Before we address *Hyundai* and the law that preceded it, consider the following hypotheticals:

Hypothetical A:

Plaintiff's attorney summarizes the facts in a suit brought under the Insurance Code for alleged unfair claim settlement practices. The jurors[3] are asked if either party is "starting out ahead" in their minds. Defendant objects on the ground the question improperly seeks to preview the jurors'

* Candidate for Juris Doctor, Baylor University School of Law, April 2007; B.B.A., Management, *magna cum laude*, University of Wisconsin–Green Bay, 2003.

[1] *See, e.g.*, McCoy v. Wal-Mart Stores, Inc., 59 S.W.3d 793, 795, 801 (Tex. App.—Texarkana 2001, no pet.) (trial court did not abuse discretion in restricting each attorney to thirty-minute voir dire).

[2] 189 S.W.3d 743 (Tex. 2006).

[3] Throughout this Note, I will refer to potential jurors as "jurors." *Id*. at 747 n.6 ("We refer to persons assigned to a court but not yet selected on a jury as 'jurors,' as this term is generally the one used in court rules.") (citations omitted).

verdict by asking whether either party is starting out ahead after a preview of the evidence from the case.

Hypothetical B:

In a negligence case arising out of an auto accident, Defendant's attorney inquires of the jury panel: "What I need to know is, does anyone here feel that they could not be fair and impartial if it is shown that my client had one or two alcoholic drinks before driving the night of the accident?" and "Who would decide this case against my client based on that one fact, no matter what else the evidence is?" Plaintiff's attorney objects, claiming that the questions prejudice the jurors by asking them to agree not to consider the fact that Defendant was drinking in determining the verdict.

Hypothetical C:

In a mesothelioma case, Plaintiff's attorney asks jurors whether any of them are familiar with or feel they would be prejudiced by the recent negative media coverage regarding asbestos and silica exposure cases. Defendant's attorney objects, claiming that the question tends to prejudice the jurors by seeking to preview their verdict before they hear the evidence at trial.

Hypothetical D:

Defendant's attorney asks, "Does anyone feel that they could not be fair and impartial if it is shown that the Plaintiff is a priest?" in a Deceptive Trade Practices Act case based upon an alleged oral misrepresentation during a car sale. Plaintiff's attorney objects on the ground the question, in substance, improperly commits jurors against considering the priest's testimony at trial, and that the question is too broad to produce any useful answers. Defendant claims that the question only attempts to discover possible bias or prejudice in favor of a party in the case, the priest.

Hypothetical E:

Plaintiff's attorney in a medical malpractice action asks the potential jurors: "Is there anyone here that could not award mental anguish, pain and suffering, or other 'soft damages' if proven to the required legal standard?" Defendant's attorney objects on the ground the question improperly attempts to preview the damages the jurors would award.

Hypothetical F:

This is a medical malpractice case involving a child born with severe, permanent brain injuries. The child's condition has been mentioned several times previously during voir dire. Defendant's attorney asks jurors: "Do any of you believe that you could not hear this case and deliver a verdict without being influenced by any sympathy you may feel for this child?" Plaintiffs' attorney objects, arguing that the question improperly commits jurors not to consider the child's injuries in their deliberations.

In *Hyundai*, the Texas Supreme Court clarified the scope of permissible voir dire questioning and further defined the discretion enjoyed by trial courts in conducting voir dire. The court held improper a question asking jurors in a crashworthiness case whether they could be fair and impartial to the plaintiffs' claims given that the girl killed in the accident was not wearing a safety belt.[4] The question was an improper attempt to elicit the weight jurors would give in their deliberations to a piece of relevant evidence—an attempt to preview the jurors' likely verdict by committing them to a particular result before trial.[5] This Note explains the bounds of permissible questioning, in order to aid attorneys in making the most effective use of their time in front of the jury panel. First, the Note describes the broad scope of voir dire in Texas and the discretion that trial courts enjoy in conducting it. Second, the Note details the problems that appellate courts have faced in separating proper questions from those that are improper in civil cases. Third, the Note explains the Texas Court of Criminal Appeals' approach to determining whether a given question is permissible. Fourth, the Note discusses the facts of *Hyundai* and the court's holding. Finally, the Note sets out the implications of the court's holding and explains the probable results of the hypotheticals posed above.

II. Background

A. The Scope of Voir Dire in Texas

The Texas Constitution guarantees the right to trial by a fair and impartial jury.[6] Voir dire protects this right by giving counsel the

[4] *Id.* at 758. For the precise questions asked or proposed by Plaintiffs, see *infra* note 89 and text accompanying note 91.

[5] *Id.*

[6] TEX. CONST. art. I, § 15 ("The right of trial by jury shall remain inviolate. The Legislature

opportunity to (1) discover possible bias and prejudice that may lead to statutory disqualification[7]—a challenge for cause[8]—and (2) to acquire information that aids in exercising peremptory challenges.[9] The "primary purpose of voir dire is to inquire about specific views that would prevent or substantially impair jurors from performing their duty in accordance with their instructions and oath."[10] Because a constitutional right is implicated, attorneys are given "broad latitude" in conducting voir dire examination.[11] This freedom during questioning is necessary so that attorneys may exercise challenges intelligently and ensure that both sides receive a fair, impartial jury.[12]

Although voir dire is necessarily a flexible process, it is nevertheless subject to reasonable trial court control.[13] The trial judge has sound discretion over the manner in which voir dire is conducted.[14] As such, the trial court's rulings during voir dire are subject to abuse of discretion

shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency.").

[7] *Hyundai*, 189 S.W.3d at 749 (citing McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554 (1984)); TEX. GOV'T CODE ANN. § 62.105(4) (Vernon 2005) (jurors disqualified for "bias or prejudice in favor of or against a party in the case"). Jurors that are biased against the subject matter of a suit are also subject to disqualification. Compton v. Henrie, 364 S.W.2d 179, 182 (Tex. 1963) (citing Houston & T.C. Ry. Co. v. Terrell, 69 Tex. 650, 7 S.W. 670, 672 (1888); Couts v. Neer, 70 Tex. 468, 9 S.W. 40, 41 (1888)). The Texas Supreme Court has defined bias and prejudice:

Bias, in its usual meaning, is an inclination toward one side of an issue rather than to the other, but to disqualify, it must appear that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality. Prejudice is more easily defined for it means prejudgment, and consequently embraces bias; the converse is not true.

Compton, 364 S.W.2d at 182.

[8] *See* TEX. R. CIV. P. 228 (challenge for cause alleges "some fact which by law disqualifies him to serve as a juror in the case or in any case . . .").

[9] *Hyundai*, 189 S.W.3d at 750; *see also* TEX. R. CIV. P. 232.

[10] *Hyundai*, 189 S.W.3d at 749.

[11] *See* Babcock v. N.W. Mem'l Hosp., 767 S.W.2d 705, 709 (Tex. 1989); *see also* Campbell v. Campbell, 215 S.W.2d 134, 137 (Tex. Civ. App.—Dallas 1919, writ ref'd) ("[T]he utmost freedom on examination on voir dire should be permitted in order to discover any interest, bias, opinion, or other fact tending to disqualify or affect the impartiality of prospective jurors towards or concerning the controversy which they are to determine or the parties thereto . . .").

[12] *Babcock*, 767 S.W.2d at 709 (citing Lubbock Bus Co. v. Pearson, 277 S.W.2d 186, 190 (Tex. Civ. App.—San Antonio 1955, writ ref'd n.r.e.)).

[13] Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87, 92 (Tex. 2005).

[14] *Babcock*, 767 S.W.2d at 709 (citing Texas Employers Ins. Ass'n v. Loesch, 538 S.W.2d 435, 440 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.)).

review.[15] A court abuses its discretion when it refuses to allow a proper question, if the refusal prevents an attorney from determining whether grounds exist for a challenge for cause or denies intelligent use of peremptory challenges.[16] But a court does not abuse its discretion when it disallows a question that attempts to pretest a juror's likely verdict.[17] These are commonly called "commitment" questions and they are improper because they attempt to commit prospective jurors to a particular view based upon only selected facts—creating prejudice amongst them before hearing the evidence at trial.[18] This statement of the rule is easy to repeat, but it can be difficult to determine whether a given question is improper.

The discretion enjoyed by trial judges has lead to conflicting Texas case law regarding exactly which types of questions are permissible. One commentator has noted that the same question may be asked in two different voir dire examinations, yet one appellate court may hold that the judge properly allowed the question, while another court may determine that a judge properly *dis*allowed the question.[19] This unpredictability creates difficulties for practicing attorneys. How does one know which questions may properly be asked of a juror when attempting to expose bias and prejudice? Despite this uncertainty, improper commitment questions may be grouped into two general types: (1) those that commit a juror to a particular verdict amount,[20] and (2) those that commit a juror to give

[15] Goode v. Shoukfeh, 943 S.W.2d 441, 446 (Tex. 1997) ("A trial court abuses its discretion if its decision 'is arbitrary, unreasonable, and without reference to guiding principles.'") (quoting Mercedes-Benz Credit Corp. v. Rhyne, 925 S.W.2d 664, 666 (Tex. 1996)).

[16] *Babcock*, 767 S.W.2d at 709 (holding that trial court abused its discretion by refusing questions about the "liability crisis" and the "lawsuit crisis" because they were directed at exposing bias or prejudice resulting from media coverage of the tort reform controversy).

[17] *See, e.g.*, Standefer v. State, 59 S.W.3d 177, 183 (Tex. Crim. App. 2001); Lassiter v. Bouche, 41 S.W.2d 88, 90 (Tex. Civ. App.—Dallas 1931, writ ref'd); Campbell v. Campbell, 215 S.W. 134, 137 (Tex. Civ. App.—Dallas 1919, writ ref'd). Additionally, the court may place reasonable limits on the time available for questioning and limit duplicative or irrelevant questioning. *See Cortez*, 159 S.W.3d at 92 (Tex. 2005) (citing Rios v. State, 122 S.W.3d 194, 197 (Tex. Crim. App. 2003); Howard v. State, 941 S.W.2d 102, 108 (Tex. Crim. App. 1996); Dickson v. Burlington N.R.R. 730 S.W.2d 82, 85 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.); Gulf States Util. Co. v. Reed, 659 S.W.2d 849, 855 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.)).

[18] *See, e.g.*, *Cortez*, 159 S.W.3d at 94; *Standefer*, 59 S.W.3d at 183; *Lassiter*, 41 S.W.2d at 90; *Campbell*, 215 S.W. at 137.

[19] John T. Bibb, Comment, *Voir Dire: What Constitutes an Impermissible Attempt to Commit a Prospective Juror to a Particular Result*, 48 BAYLOR L. REV. 857, 860 (1996).

[20] This type of commitment question is beyond the scope of this article. For a thorough

particular weight or effect to certain evidence.[21] Because the Texas Supreme Court in *Hyundai* clarified what constitutes an impermissible question concerning the weight jurors will give to relevant evidence, this Note focuses on the latter group of questions.

B. The Fine Line between Proper and Improper Questioning in Pre-Hyundai Civil Cases

1. Campbell v. Campbell

Campbell v. Campbell contains an early example of an improper commitment question. In a will contest, the executor's attorney asked the jury panel whether the fact that testator left several family members out of his will would "influence [them] in finding a verdict in this case?"[22] The Dallas Court of Appeals held that this question was improper because it sought to commit jurors to a particular view based upon one relevant fact—that the decedent left several family members out of his will.[23]

The court explained that this question isolated a relevant fact from the case, which the jurors would have to consider in determining whether the testator had testamentary capacity.[24] Inquiring during voir dire whether that fact would "influence" the jurors in finding their verdict was an impermissible attempt to determine the jurors' verdict before they were exposed to all of the evidence.[25] The court explained:

A juror that will not be influenced by any material fact, properly admitted and tending to disclose or illuminate the motives or emotions that induced a given course, is an uncommon person. All material and admissible facts ought and are presumed to influence the juror, notwithstanding some will outweigh and exercise greater influence than others. He is supposed to consider and necessarily be influenced by every

discussion, see Bibb, *supra* note 19, at 862–70.

[21] *See, e.g.*, *Cortez*, 159 S.W.3d at 94; *Standefer*, 59 S.W.3d at 183; *Lassiter*, 41 S.W.2d at 90; *Campbell*, 215 S.W. at 137.

[22] *Campbell*, 215 S.W. at 136–37.

[23] *Id.* at 137 ("[T]he will offered by [the executor] was claimed to be invalid because the testator was without testamentary capacity at the time of its execution. . . . [I]n ascertaining the testator's testamentary capacity the provisions of the will on the disposition made of the estate may be considered by the jury . . .").

[24] *Id.*

[25] *See id.*

fact, and from them all draw the inferences and deductions they warrant, and reach a conclusion from the whole. To require him to say that he will or that he will not let a given material fact influence him in reaching a conclusion, if chosen, is simply to commit him to or against that material fact in advance.[26]

Thus, this type of question tends to prejudice jurors before they hear the rest of the evidence. Having refused to allow the disclosed fact to influence them in finding their verdict, the jurors during deliberations could have refused to consider any facts that would have justified the testator in leaving certain family members out of his will.[27] If jurors did so, they would not be fulfilling their obligation to consider all of the evidence and follow the court's instructions.

2. Lassiter v. Bouche

Lassiter v. Bouche is another case in which counsel asked an improper commitment question during voir dire.[28] The plaintiff attempted to establish an oral trust agreement and the defendants relied upon a written deed.[29] Plaintiff's counsel asked the jurors "whether there existed any prejudice against the use of an oral agreement to dispute the terms of such written documents."[30] The attorney explained to the jury that the plaintiff would be relying upon an alleged oral agreement at trial and that the defendants would rely upon a written document.[31] Each juror responded that they had no bias or prejudice against the plaintiff in that type of case.[32] Defendants objected on the ground the question was an attempt to elicit jurors' opinions on the evidence before trial, and the trial court disallowed the question.[33]

The Dallas Court of Appeals held that the question was improper because it sought to commit jurors as to the weight they would give to

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[26] *Id*. In fact, after extensive questioning one juror was committed to giving substantial weight to the fact that testator left family members out of the will, eventually agreeing that "unless a good reason for disinheriting one child was shown it would influence his verdict." *Id.*

[27] *Id*.

[28] 41 S.W.2d 88, 90 (Tex. Civ. App.—Dallas 1931, writ ref'd).

[29] *Id*. at 88–89.

[30] *Id*. at 90.

[31] *Id*.

[32] *Id*.

[33] *Id*.

particular facts before hearing all of the evidence at trial.[34] "Counsel should not be permitted, by questions to a prospective juror, to commit such juror, in advance of the evidence, as to the weight he would give any certain evidence."[35] By asking jurors whether they held any "prejudice" against the plaintiff's proof of the oral agreement,[36] the attorney attempted to commit the jurors to giving that evidence weight in their deliberations. This was improper voir dire because the jurors could have properly determined during deliberations that the plaintiff's proof was entitled to little or no weight.

3. Airline Motor Coaches, Inc. v. Bennett

Texas Courts of Appeal have sometimes taken the opposite view of questions that appear very similar to those held improper in *Campbell* and *Lassiter*.[37] In *Airline Motor Coaches, Inc. v. Bennett*, Plaintiffs' counsel asked jurors: "Would the mere presence of a quart of rum [in plaintiffs' car] . . . prejudice you at all in this case?"[38] The trial court allowed the plaintiffs to ask the question.[39] Defendant argued on appeal that the question committed the jurors not to consider any of its evidence that the plaintiffs were intoxicated at the time of the accident.[40]

The Beaumont Court of Appeals held that the trial court properly allowed the question.[41] The jurors' answers to the question did not amount to a commitment that they would not consider the defendant's evidence.[42]

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[34] *Id.*

[35] *Id.*

[36] *See id.*

[37] *See, e.g.*, Grey Wolf Drilling Co. v. Boutte, 154 S.W.3d 725, 746 (Tex. App.—Houston [14th Dist.] 2004, pet. granted, judgm't vacated w.r.m.) ("Anybody not going to listen to all the evidence and focus only on the fact that Mr. Boutte [plaintiff] was experienced and he knew it was slippery?" was a proper question); Flowers v. Flowers, 397 S.W.2d 121, 122 (Tex. Civ. App.—Amarillo 1965, no writ) (question asking whether the fact that plaintiff drank socially and got drunk once or twice would prejudice jurors in awarding custody was a proper question); City Transp. Co. v. Sisson, 365 S.W.2d 216, 219 (Tex. Civ. App.—Dallas 1963, no writ) (citations omitted) (question whether jurors would have bias or prejudice against a party if evidence of past narcotics use and convictions were introduced was a proper inquiry).

[38] 184 S.W.2d 524, 528 (Tex. Civ. App.—Beaumont 1944, no writ).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

The court explained that "[the] question does not require the juror to state what he would do with certain evidence which would be offered in the case nor to state what his verdict thereon would be."[43] This question appears to be very similar to the ones that were held improper in *Campbell* and *Lassiter*. In the cases, the jurors were asked whether they would be "influenced"[44] or "prejudice[d]"[45] by a specific piece of evidence, with different results depending upon the appellate court. These cases illustrate that it can be difficult to determine whether a given question properly seeks to uncover bias or prejudice, or instead improperly commits a juror to a specific result based upon facts from the case.

4. Cortez v. HCCI-San Antonio, Inc.

In addition to commitment questions that pretest a juror's likely verdict based upon one specific fact, inquiring whether a party is "starting out ahead" is also improper when the question follows a preview of the evidence in the case. In *Cortez*, the Texas Supreme Court made clear that such a question is an improper attempt to elicit a juror's opinion on the evidence, in order to preview the juror's probable verdict.[46] The plaintiff's attorney asked a juror whether the defendants "would be starting out ahead," after the attorney had made "an extended and emotional opening statement summarizing the facts of the case" to the jurors.[47] The trial court refused to strike a juror for cause who answered that the defendant would be starting out ahead in his mind.[48]

The supreme court held that the question was an improper attempt to preview the juror's likely vote.[49] Inquiring whether a party is "ahead" or whether a juror is leaning toward either side is often an attempt to elicit from a juror a comment on the evidence.[50] While this type of question may

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[43] *Id*.

[44] *See* Campbell v. Campbell, 41 S.W.2d 88, 90 (Tex. Civ. App.—Dallas 1931, writ ref'd).

[45] *See Lassiter*, 184 S.W.2d at 528.

[46] 159 S.W.3d 87, 94 (Tex. 2005).

[47] *Id*.

[48] *Id*. at 90.

[49] *Id*. at 94. Additionally, the court held that jurors may be "rehabilitated" by further questioning after expressing an apparent bias or prejudice. *See id*. at 92–93. Thus, a juror that appears biased upon answering a given question may not be challengeable for cause if further questioning reveals that the juror can be fair. *Id*.

[50] *See id*. (citing Scott A. Brister, *Lonesome Docket: Using the Texas Rules to Shorten Trial and Delay*, 46 BAYLOR L. REV. 525, 538 (1994)); *see also* El Hafi v. Baker, 164 S.W.3d 383, 385

be permissible before any evidence from the case has been disclosed, asking the question after a preview of the evidence does not seek to uncover any external biases or prejudices the jurors may hold.[51] Because a juror's response to this type of question "merely indicates an opinion about the evidence," the answer to this question, without more, cannot disqualify the juror.[52] Importantly, the court stated: "the relevant inquiry is not where jurors *start* but where they are likely to *end*. An initial 'leaning' is not disqualifying if it represents skepticism rather than an unshakeable conviction."[53] As a result, "leaning" questions, so common in Texas voir dire up until *Cortez*, have been effectively eliminated as a source of viable challenges for cause.[54]

C. The Texas Court of Criminal Appeals' Approach

1. Standefer v. State

The Texas Court of Criminal Appeals[55] has on several occasions addressed the issue of what constitutes an improper commitment question. The court has taken a somewhat different approach from the flexible analysis used in civil cases. In *Standefer v. State*, the court adopted a two-part test for determining whether a question is permissible.[56] First, the court

(Tex. 2005) (juror that admitted he would see things more from perspective of defense because of career as defense attorney was not biased as a matter of law) (citing *Cortez*, 159 S.W.3d at 93).

[51] *Cortez*, 159 S.W.3d at 94.

[52] *Id*. (citing Jim M. Perdue, *A Practical Approach to Jury Bias*, 54 TEX. B.J. 936, 940 (1991)).

[53] *Cortez*, 159 S.W.3d at 94 (citing Feldman v. State, 71 S.W.3d 738, 747 (Tex. Crim. App. 2002)).

[54] *See* Randy Wilson, *Texas Voir Dire: The Rules Have Changed*, 69 TEX. B.J. 512, 517–18 (Jun. 2006).

[55] Texas has a system of dual high courts—the Texas Supreme Court for civil cases and the Texas Court of Criminal Appeals for criminal cases.

[56] 59 S.W.3d 177, 182-83 (Tex. Crim. App. 2001). Before adopting the *Standefer* test, the court had stated the rule in a manner similar to the language used in civil cases: "[A]n attorney cannot attempt to bind or commit a prospective juror to a verdict based on a hypothetical set of facts." *Id*. (quoting Allridge v. State, 850 S.W.2d 471, 480 (Tex. Crim. App. 1991)). For additional analysis of the *Standefer* opinion and its effects on Texas criminal practice, see Esperanza Guzman, Comment, Standefer v. State: *The Creation of the Criminal Defendant's Diminished Right to a Trial By a Fair and Impartial Jury*, 37 ST. MARY'S L.J. 477, 491–98, 501–07 (2006); 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*

determines whether the question is a commitment question.[57] A commitment question is defined as one that "commit[s] a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact."[58] For example, this is a commitment question: "If the evidence, in a hypothetical case, showed that a person was arrested and they had a crack pipe in their pocket, and they had a residue amount in it . . . is there anyone who could not convict a person, based on that[?]"[59] This question asks jurors whether they would resolve the issue of guilt based upon the fact that crack and drug paraphernalia were found in the person's possession.[60] However, the following is not a commitment question: "[I]f the victim is a nun, could [the prospective juror] be fair and impartial?"[61] This does not ask jurors to resolve any issue in the case based on the fact that the victim is a nun.[62]

Second, if it is a commitment question, it must contain only those facts that lead to a valid challenge for cause.[63] If the question contains facts in addition to those necessary to establish a challenge for cause, it is an improper commitment question.[64] Essentially, the only commitment questions that attorneys may properly ask jurors are those that would result in a commitment that the law requires.[65] Questions regarding a juror's ability to consider all of the evidence or to consider the full range of punishment in a given case are examples of proper commitment questions.[66]

At issue in *Standefer* was the question: "Would you presume someone guilty if he or she refused a breath test on their refusal alone?"[67] The trial court prohibited counsel from asking the question, and Defendant was

Trials, 54 BAYLOR L. REV. 581, 585–604 (Fall 2002).

[57] *Standefer*, 59 S.W.3d at 182.

[58] *Id*. at 179.

[59] *Id*.

[60] *Id*.

[61] *Id*. at 180 (quoting Nunfio v. State, 808 S.W.2d 482, 484 (Tex. Crim. App. 1991)).

[62] *Standefer*, 59 S.W.3d at 180.

[63] *Id*. at 182.

[64] *Id*.

[65] *Id*. at 181 ("The distinguishing factor is that the law requires jurors to make certain types of commitments. When the law requires a certain type of commitment from jurors, the attorneys may ask the prospective jurors whether they can follow the law in that regard.").

[66] *See id*. ("The question 'Can you consider probation in a murder case?' commits a prospective juror to keeping the punishment options open . . . in a murder case.") (citations omitted).

[67] *Id*. at 179.

convicted of driving while intoxicated.[68] Applying its new test, the court found that the question was an improper commitment question. First, it was a commitment question because it asked whether jurors would resolve the issue of guilt against the defendant if they learned of a particular fact—that the defendant refused a breathalyzer test.[69] Second, the question was improper because it contained facts that would not lead to a valid challenge for cause.[70] The fact that the defendant refused a breath test is admissible evidence from which jurors could properly presume guilt, so they would not be challengeable for cause if they answered the question affirmatively.[71]

2. Barajas v. State

In addition to questions that are too fact-specific, questions that are overly broad may be impermissible. In *Barajas v. State*, the defendant's attorney attempted to ask potential jurors whether they could be fair and impartial in a case in which the victim was nine years old.[72] The court held that the question was impermissible because it "is a license to go fishing, without providing any concrete information for the intelligent use of peremptory or for-cause challenges."[73] Questions which ask "could you be fair and impartial under a given set of facts?" could be repeated to include every fact in a given case without producing any useful information.[74]

The court overruled *Nunfio v. State*,[75] which held that the question "can you be fair and impartial if the victim in this case is a nun?" was a proper question meant to uncover bias or prejudice in favor of the victim.[76] Consequently, voir dire in criminal cases must be "specific and tailored to get to an issue relevant to the case"—in proper form—and must not ask the

[68] *Id*.

[69] *Id*. at 183.

[70] *Id*.

[71] *Id*. (citing TEX. TRANSP. CODE ANN. § 724.061 (Vernon 1999)).

[72] 93 S.W.3d 36, 37 (Tex. Crim. App. 2002). The defense also attempted to ask whether jurors could consider probation in a case in which a victim was eight to ten years old. *Id*. at 38. That question was improper because *Standefer* held that jurors may not be asked whether they could consider probation under the particular facts of the case beyond those contained in the indictment. *Id*. at 38 n.1 (citing *Standefer*, 59 S.W.3d at 181). For additional commentary on *Barajas*, see Guzman, *supra* note 56, at 497–500; Gillespie, *supra* note 56, at 599–601.

[73] *Id*. at 41.

[74] *Id*.

[75] 808 S.W.2d 482 (Tex. Crim. App. 1991) (en banc).

[76] *Barajas*, 93 S.W.3d at 40 (overruling *Nunfio*, 808 S.W.2d at 484–85).

jurors to make an improper commitment.[77] For example, a question asking whether jurors could not believe that a police officer would lie is a proper question in a proper form.[78] It does not seek to commit jurors to a conclusion based upon specific facts and, importantly, it focuses on a relevant issue—whether jurors would determine the officer's credibility as a witness based solely on his occupation.[79] "Fair and impartial" questions, on the other hand, do not properly address any relevant issue from the case, such as determining guilt or witness credibility.[80]

Justice Meyers dissented, arguing that the majority had done nothing but further complicate its voir dire jurisprudence.[81] A proper question in criminal cases now lies somewhere between the fact-specific and the overly vague, though the court did not set out any standard to aid judges or attorneys in determining where that line is.[82] Indeed, *Standefer* held that "fair and impartial" questions are not commitment questions because they do not ask jurors to resolve or refrain from resolving an issue in the case after learning a specific fact.[83] Justice Meyers concluded that the question at issue was proper because it was meant to determine whether jurors would be biased in favor of the State because of the victim's age.[84]

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[77] *Barajas*, 93 S.W.3d at 41.

[78] *See id*. (citing Hernandez v. State, 508 S.W.2d 853, 854 (Tex. Crim. App. 1974)).

[79] *See Barajas*, 93 S.W.3d at 41.

[80] *See id*. at 39–40.

[81] *Id*. at 45 (Meyers, J., dissenting).

[82] *Id*. ("[T]he majority . . . effectively transforms voir dire into an impossible guessing game by holding that the same question that was too vague or imprecise to be proper was also an improper attempt to commit the jury.") (citation omitted). *See also* Guzman, *supra* note 56, at 507–08 (criticizing the *Barajas* decision as turning criminal voir dire into an "impossible guessing game" and "creat[ing] substantial confusion for litigants").

[83] *See Barajas*, 93 S.W.3d at 47 (citing Standefer v. State, 59 S.W.3d 177, 180 (Tex. Crim. App. 2001)).

[84] *Id*. at 49 ("I can think of no question more diligently directed at uncovering bias than 'Can you be fair and impartial?'").

III. THE TEXAS SUPREME COURT CLARIFIES WHAT CONSTITUTES AN IMPROPER COMMITMENT QUESTION IN *HYUNDAI MOTOR CO. V. VASQUEZ*

A. Background

1. Facts of the Case

Four-year-old Amber Vasquez was killed when the passenger-side airbag in her aunt's Hyundai deployed during a low-speed traffic collision.[85] The girl was not belted at the time and was sitting in the front seat, despite the manufacturer's warnings that children should not be seated in the front seat.[86] Amber's parents sued Hyundai, claiming that the airbag was placed incorrectly and deployed with too much force.[87] Hyundai countered that the airbag was not defective, claiming that a child wearing a seat belt as the law requires or sitting in the back seat would not have been injured when the airbag deployed.[88]

2. Procedural History

The trial judge dismissed the first two jury panels in the case after many jurors indicated that the fact Amber was not wearing a seat belt would determine their verdict, regardless of the other evidence the plaintiffs would present.[89] A jury was eventually seated from the third panel.[90] During the voir dire of that panel, Plaintiffs' attorney proposed a question to the trial court: "Your Honor, I need to know whether or not they would be predisposed regardless of the evidence to-Their preconceived notion is that if there is no seat belt in use, no matter what else the evidence is, that they

[85] Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 747 (Tex. 2006).

[86] *Id*.

[87] *Id*.

[88] *Id*. (quoting TEX. TRANSP. CODE ANN. § 545.413(b)(2) (Vernon Supp. 2006)).

[89] *Hyundai*, 189 S.W.3d at 747. During the first voir dire, Plaintiffs' attorney asked: "Is there anyone here that regardless of what the evidence is, once you hear [Amber] wasn't wearing a seat belt your mind is made up?" *Id*. at 748 n.7. During the second voir dire, the trial judge informed the panel that the girl was not belted "and asked the jurors to raise their hand if they would 'decide this case . . . based on that one fact alone.'" *Id*. at 748 n.8.

[90] *Id*. at 747.

could not be fair and impartial."[91] Hyundai objected, arguing that the question sought to pretest the jurors' opinions on the facts of the case.[92] Although the court had allowed similar questions during the first two voir dire examinations, the trial judge sustained the objection, foreclosing all further questioning on seat belts.[93] Consequently, the plaintiffs were not allowed to ask any questions concerning jurors' personal belting habits when riding with children and the jurors were not informed during voir dire that Amber was not belted at the time of the accident.[94]

The San Antonio Court of Appeals originally affirmed the trial court's ruling,[95] but later reversed the decision en banc.[96] The court, in an opinion written by current Texas Supreme Court Justice Paul W. Green, held that "[the] question clearly focuse[d] on the ability of the jurors to be fair" and did not seek to pretest jurors' opinions on the evidence.[97] Rather than seeking to determine the weight jurors would give to certain facts, the question, as phrased, focused upon the ability of the jurors to be "fair and impartial."[98] Additionally, unlike the broad questions the trial court allowed about jurors' personal belting habits, the disallowed question "directly addressed what had manifestly become the crucial question [during voir dire]: whether any potential jurors were biased against non-users of seat belts"—particularly when children were involved.[99]

B. The Supreme Court Reverses the San Antonio Court of Appeals

The Supreme Court reversed, holding in a six to three decision that the question improperly sought to preview the verdict rather than attempting to discover potential jurors' external biases and prejudices.[100] Looking to the

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[91] *Id*. at 755.

[92] *Id*.

[93] *Id*. The judge stated: "All right. I'm going to sustain the objection. We are not going to go any further into seat belts . . ." *Id.*

[94] *See id*. at 748. Inquiries regarding whether jurors ensured that their own children were belted were originally reserved for individual questioning that was to follow the group questioning during this voir dire. *Id*. at 748 n.11.

[95] *See id*. at 749.

[96] Vasquez v. Hyundai Motor Co., 119 S.W.3d 848, 856 (Tex. App.—San Antonio 2003) (en banc).

[97] *Id*.

[98] *See id*.

[99] *See id*.

[100] Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 756 (Tex. 2006). Two justices were

"basic substance" of the question, the court concluded it improperly attempted to test the weight jurors would give to a relevant fact—that Amber was not wearing her seat belt at the time of the accident.[101] Importantly, the court held that trial courts have considerable discretion when determining whether to allow questions that seek to determine the weight jurors would give to particular facts, apparently employing a challenge-for-cause test similar to that employed by the Court of Criminal Appeals.[102] A court does not abuse its discretion by disallowing such a question because jurors' answers cannot give rise to a valid challenge for cause, but it may choose to allow jurors to answer the question.[103] However, any answers that are given cannot give rise to a challenge for cause[104]—though such answers would certainly be useful in exercising peremptory challenges. Despite its phrasing as an arguably proper commitment question seeking to commit jurors to fairly consider all the evidence, the question was improper for two reasons.

First, the question isolated a single fact material to the case.[105] Assuming that the lack of a seat belt is relevant, admissible evidence,[106]

recused, Chief Justice Jefferson and Justice Green (who had written the appellate court's opinion in this case). *Id*. at 747 n.1. Justice Jane Bland of the First District (Houston) Court of Appeals and Chief Justice John Cayce of the Second District (Fort Worth) Court of Appeals sat by commission of the governor. *Id*. Justice Bland wrote the court's opinion in this case. *Id*. at 746. Given that Justices Bland and Cayce were members of the majority, *Id*., and that this was a six to three decision, it is difficult to predict whether the court will follow *Hyundai* in future cases. Nevertheless, as this is the most recent expression of the court's approach to voir dire, it is vitally important that attorneys understand what is and what is not permissible in light of the case.

[101] *See id*. at 756 ("[T]he trial court reasonably could have determined that the question seeks to gauge the jurors' verdicts and therefore we disagree with the court of appeals.").

[102] *Id*. ("We disagree that trial courts *must* allow such questions. They do not present a basis for juror disqualification . . . The trial court in this case reasonably could have concluded that the substance of the proposed question did not present a basis for disqualifying a juror for cause . . .") (citations omitted). *See also* Wilson, *supra* note 56, at 516–17.

[103] *See Hyundai*, 189 S.W.3d at 756. The Vasquezes cited several court of appeals cases for the proposition that this was a proper commitment question. *Id*. at 757. The court distinguished those cases on the ground they *deferred* to the trial court's decision—unlike the San Antonio court in this case, which reversed the trial judge's ruling. *Id*. (citing City Transp. Co. v. Sisson, 365 S.W.2d 216, 219 (Tex. Civ. App.—Dallas 1963, no writ); Rothermel v. Duncan, 365 S.W.2d 398, 402 (Tex. Civ. App.—Beaumont 1963), *rev'd on other grounds*, 369 S.W.2d 917 (Tex. 1963); Airline Motor Coaches, Inc. v. Bennett, 184 S.W.2d 524, 528 (Tex. Civ. App.—Beaumont 1944), *rev'd on other grounds*, 144 Tex. 36, 187 S.W.2d 982 (1945)).

[104] *See Hyundai*, 189 S.W.3d at 757-58.

[105] *Id*. at 756.

[106] *Id*. at 756 n.57 (citing Vasquez v. Hyundai Motor Co., 119 S.W.3d 848, 851 n.2 (Tex.

jurors could have based their verdict on that fact alone.[107] The defense argued at trial that Hyundai's air bags would not have harmed a child belted in the front seat or sitting in the back seat.[108] Because the question sought to determine whether jurors would give weight to that specific fact in their deliberations, the trial court was correct in disallowing the question.[109] The court stated:

By isolating this fact, the question seeks to identify those jurors who agree that the one fact overcomes all others. As reasonable jurors, however, it is within their province to so conclude. The question thus asks the jurors' opinion about the strength of this evidence, and does not cull out any external bias or prejudice.[110]

Second, asking whether jurors can be "fair and impartial" and incorporating phrases like "no matter what else the evidence is" does not transform into a permissible question one that, in substance, seeks a comment on the evidence.[111] The Vasquezes argued that the question was a proper commitment question because it merely sought to have jurors consider all of the evidence and follow the court's instructions, as the law requires.[112] However, because the question as phrased isolated a single relevant fact from the case, it instead sought to commit jurors against giving that fact any weight in their deliberations.[113] Importantly, asking whether jurors would ignore all of the relevant facts, and asking whether they would ignore all of the facts but one, are two very different questions.[114] The court explained:

The emphasis of the question is not ameliorated by asking in it whether jurors could be fair and impartial. "Called as they are from all walks of life,

App.—San Antonio 2003) (en banc)). The court of appeals held that Amber's failure to wear a seat belt was admissible evidence. *Id*. For the opinion, the supreme court assumed that the evidence was admissible and, therefore, a relevant voir dire topic. *Hyundai*, 189 S.W.3d at 756 n.57.

[107] *Hyundai*, 189 S.W.3d at 756.

[108] *Id*.

[109] *Id*.

[110] *Id*. (citing Campbell v. Campbell, 215 S.W. 134, 137 (Tex. Civ. App.—Dallas 1919, writ ref'd)).

[111] *Hyundai*, 189 S.W.3d at 756.

[112] *Id*. at 757 (citing TEX. R. CIV. P. 226a, sec. II).

[113] *Hyundai*, 189 S.W.3d at 757.

[114] *Id*. ("[A]n affirmative answer to the former reflects bias or prejudice, but an affirmative answer to the latter, without more, reflects that jurors think a presented fact is most important, based upon what they have been told by counsel.").

many [jurors] may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges." In *Cortez*, we held that fair jurors do not leave their knowledge and experience behind, but nonetheless must approach the evidence with an open mind. However, if an inquiry suggests that, to be "fair," jurors must not decide the case based on a relevant fact, then a trial court reasonably could conclude that the question seeks a response that reveals nothing about a juror's potential fairness, but instead attempts to guess about his potential verdict.[115]

Thus, courts must look beyond the form of a given question when determining whether it, on one hand, seeks to discover disqualifying bias or prejudice, or instead seeks to have jurors make an improper commitment.[116]

Additionally, the court held that trial courts should not foreclose all questioning on a relevant topic when sustaining an objection to an improper voir dire inquiry.[117] A court abuses its discretion when it does so without allowing counsel to reformulate the question.[118] However, "the trial court is not required to formulate the question."[119] Attorneys must "propose a different question or specific area of inquiry to preserve error on the desired line of inquiry . . ."[120] Because Plaintiffs' attorney proposed only the improper question concerning seat belts, and did not propose any "alternative approach" that would not seek to pretest the weight jurors would give to relevant evidence, the court held that Plaintiffs had not preserved error as to the trial court's ruling.[121]

Three justices dissented, arguing that the majority had misstated the issue in the case as the impropriety of one question.[122] Rather, the important issue was "whether the trial court abused its discretion when it

[115] *Id*. (citing Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87, 93 (Tex. 2005); McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 555 (1984)).

[116] *Hyundai*, 189 S.W.3d at 757-58 ("The substance of a question, not its form, determines whether it probes for prejudices or previews a probable verdict."). Though the court cited *Standefer* for the proposition that "previewing jurors' votes piecemeal is not consistent with the jurisprudence of our sister court," note that the court did not adopt the *Standefer* test. *Id*. at 752-53 ("As the statutory standards for bias or prejudice in civil and criminal cases are the same, voir dire standards should remain consistent.") (citing TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(9) (Vernon Supp. 2006); Smith v. State, 907 S.W.2d 522, 530 (Tex. Crim. App. 1995)).

[117] *Hyundai*, 189 S.W.3d at 758.

[118] *See id*.

[119] *Id*.

[120] *Id*. at 759.

[121] *See id*.

[122] *Id*. at 763–64 (Medina, J., joined by Wainwright and Johnson, JJ., dissenting).

cut off questioning about seat belts . . ."[123] The dissenters agreed with the majority that Plaintiffs' proposed question was improper as phrased, and that courts should not prematurely cut off questioning on a relevant topic.[124] However, they concluded that Plaintiffs preserved error by stating that they would like to ask questions "much akin to what" they asked in the first voir dire—essentially giving the court a list of questions already contained in the record.[125] The dissenters noted that the court has in the past held that an objecting party need not present a list of each intended voir dire question, but need only timely and adequately inform the trial court of the grounds for the objection.[126] Justice Wainwright stated:

"[I]t is unclear what the Court requires to preserve error for restricting voir dire questioning. . . . Perhaps the safest approach would be to provide the trial court with a list of questions, in writing or on the record, every time the trial court discusses the preclusion of a category of questions."[127]

IV. CONDUCTING VOIR DIRE AFTER *HYUNDAI*

A. Implications of the Court's Holding

As *Hyundai* and *Cortez* illustrate, the Texas Supreme Court is exercising increasing deference to trial court rulings during voir dire. Importantly, the *Hyundai* court stated:

It can be a close question whether a juror's response indicates a prejudice due to personal animus or bias, rather than a fair judgment of the previewed evidence. Similarly, it can be a close question whether a voir dire inquiry focuses on the former or the latter, as the question presented for a ruling in this case reflects. Determining whether jurors' answers assume or ignore the evidence disclosed to them turns on the courtroom context, and perhaps the looks on their faces. So, too, does the import of counsel's questions, and whether as phrased they seek external information or a

[123] *Id*. at 764.

[124] *Id*. at 765–66. However, note that two of the dissenters would not adopt the Court of Criminal Appeals' test as set forth in the *Standefer* decision: "I ultimately agree with the [*Standefer*] dissent that *Standefer* provides no bright-line test for distinguishing an improper commitment question from a proper bias question." *Id*. at 765. Justice Wainwright expressly gave no opinion on the *Standefer* test. *Id*. at 760 n.1.

[125] *Id*. at 761–63 (Wainwright, J., joined by Johnson, J., dissenting).

[126] *Id*. at 763 (citing Babcock v. N.W. Mem'l Hosp., 767 S.W.2d 705, 707–08 (Tex. 1989)).

[127] *Hyundai*, 189 S.W.3d at 763.

preview of a potential verdict. The trial judge is in a better position to evaluate the reasonableness of both aspects-the question and the answer.[128]

Because it is increasingly unlikely that a trial court's decision to disallow a question will be overturned on appeal, it is crucial that attorneys understand the boundaries of permissible questioning in order to make the most effective use of their time in front of the jury panel. Several principles may be gleaned from *Hyundai* and the case law that preceded it:

First, incorporate as few case-specific facts as possible when asking hypothetical questions. More general inquiries into jurors' personal habits and views are appropriate ways to discover bias or prejudice,[129] but any question that seeks to determine the weight a juror would give to a fact from the case is improper.[130] A court may, within its discretion, allow counsel to ask an inappropriate weight-of-the-evidence question, but the answer cannot give rise to a valid challenge for cause.[131] However, some discussion of the facts is often necessary in order to probe for biases and prejudices.[132] "Not all questions or areas of inquiry involving the facts of a case will impermissibly attempt to pre-test the weight jurors will give those facts."[133] For example, in *Hyundai* the trial court could not have disallowed questions concerning jurors' personal seat belt habits—including whether they make sure their own children are belted on short trips—or questions concerning specific views jurors may have about products liability or personal injury lawsuits.[134] Additionally, the way in which a question is phrased becomes important. Although the plaintiffs' proposed question in *Hyundai* was improper as phrased, as Justice Medina suggests, "any prospective juror in an automobile product liability action who had such strong feelings about unbelted occupants as would preclude that juror from

[128] *Id*. at 754–55 (majority opinion) (citing Golden Eagle Archery, Inc. v. Jackson, 24 S.W.3d 362, 373 (Tex. 2000); Bibb, *supra* note 19, at 874).

[129] *Hyundai*, 189 S.W.3d at 759.

[130] *Id*. at 753. ("If the voir dire includes a preview of the evidence, a trial court does not abuse its discretion in refusing to allow questions that seek to determine the weight to be given (or not to be given) a particular fact or set of relevant facts.") (citing Cortez v. HCCI-San Antonio, 159 S.W.3d 87, 94 (Tex. 2005)).

[131] *See Hyundai*, 189 S.W.3d at 757.

[132] *See id*. at 758. *See also id*. at 765 (Medina, J., dissenting) ("[B]ias and prejudice cannot be probed in a vacuum, and therefore some discussion of the evidence is inevitable. And it may occasionally happen that a material piece of evidence which strongly favors one party coincides with a bias or prejudice of a particular prospective juror.").

[133] *Id*. at 759 (majority opinion).

[134] *See id*.

listening to all the evidence and following the court's instructions would be subject to challenge."[135] By phrasing the question differently—referencing in more explicit terms the jurors' ability to follow the court's instructions and to consider all the evidence—the plaintiffs' question may have been proper and allowed them to uncover the type of disqualifying bias they were attempting to expose.[136]

Second, adding "fair and impartial," "no matter what else the evidence is," or other phrases often associated with a proper commitment question, will not validate an otherwise improper weight-of-the-evidence question.[137] After *Hyundai*, courts must look beyond the form of a given question, particularly when it incorporates a specific fact from the case.[138] Thus, asking whether a fact "prejudices" jurors or whether they are "biased" for or against a particular fact are no longer permissible inquiries when a fact from the case is incorporated in the question. However, attorneys must remember that some commitment questions are proper and should be asked. Jurors must commit to following the law and the court's instructions.[139] For example, "Does anyone here feel that they could not rule in favor of my client because he is an Iranian citizen?" is a proper question. Because a juror that answered affirmatively would be challengeable for cause, the question properly commits jurors not to consider one party's race in determining the verdict.[140]

Third, object when the court cuts off questioning on a topic and important questions remain to be asked. The court must allow counsel to

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[135] *Id*. at 766 (Medina, J., dissenting).

[136] For an example of a question that may be proper, see the answer to Hypothetical B, text accompanying note 152.

[137] *Id*. at 757 (majority opinion).

[138] *See* In re Commitment of Barbee, 192 S.W.3d 835, 846 (Tex. App.—Beaumont 2006, no pet. h.). In *Barbee*, a post-*Hyundai* case, the Beaumont Court of Appeals upheld the trial court's disallowance of the question: "Who could not be a fair and impartial juror if the evidence showed that the crimes for which [defendant] was convicted involved children of tender age." *Id*. at 844, 846. The court held that the question improperly sought to determine the weight jurors would give to defendant's prior criminal convictions and, therefore, the trial court did not abuse its discretion. *Id*. at 846.

[139] TEX. R. CIV. P. 226a, sec. II (admonitory instructions to jury panel and jury). The Plaintiffs in *Hyundai* unsuccessfully argued that their question sought only to properly commit jurors to follow the law. 189 S.W.3d at 757.

[140] *See* TEX. GOV'T CODE ANN. § 62.105(4) (Vernon 2005) (jurors disqualified for "bias or prejudice in favor of or against a party in the case").

reformulate a disallowed question on a relevant topic.[141] In order to preserve error, a party should supply a list of proposed questions to the court. Otherwise, one runs the risk that a reviewing court will conclude that the objecting party did not suggest a proper "alternative approach" to questioning on the topic.[142] However, it is important to note that asking further seat belt-related questions may have had only limited effectiveness in *Hyundai*. If jurors knew that the girl was not belted in the case, it is rather unlikely that any of their responses to questions about their personal belting habits or opinions could give rise to a valid challenge for cause. The trial court could have reasonably concluded that jurors were not expressing bias or prejudice, but instead making judgments using the previewed evidence.[143] Further questioning would certainly have been helpful in exercising peremptory challenges, and may have lead to valid challenges for cause if the questions were asked before jurors were told that the girl was not belted. Questioning before disclosing the facts of the case would tend to focus more on external biases and prejudices—those views jurors held before entering the courtroom.

Finally, it is important to be aware of what *Hyundai* did not address. Questions which ask whether jurors could be "fair and impartial" knowing one party's profession or some other personal trait are still likely permissible. Such questions should be considered a proper attempt to discover bias or prejudice either for or against one of the parties. The Texas Supreme Court did not express any opinion regarding the Texas Court of Criminal Appeals' holding in *Barajas v. State* that such questions are impermissible because they constitute a "global fishing expedition."[144] Adopting this approach would be unwise and unnecessarily complicate the court's approach to voir dire.[145] Inquiring whether a juror can be fair when a suit involves, for example, a nun or a police officer, is not overly broad questioning—it asks directly whether jurors are biased either for or against

[141] *See Hyundai*, 189 S.W.3d at 758 ("A trial court may not foreclose a proper line of questioning, presuming that the actual questions posed are proper.") (citations omitted).

[142] *See id*. at 759 ("The proposed question is virtually the same inquiry that the trial court perceived had caused confusion . . . [I]t was incumbent on the Vasquezes to request alternative approaches to avoid the problems the trial court was addressing by its ruling."). *See also Barbee*, 192 S.W.3d at 846 (holding defendant failed to preserve error by proposing only improper questions to the trial judge).

[143] *See Hyundai*. 189 S.W.3d at 756.

[144] *See* 93 S.W.3d 36, 41 (Tex. Crim. App. 2002).

[145] *See id*. at 45 (Meyers, J., dissenting).

one of the parties, and whether they can follow the law and the court's instructions. Additionally, as the *Barajas* dissent argued, improper voir dire questions are usually those that are too fact-specific, and not those that are somewhat vague or overbroad.[146] Importantly, questions of this type are not even commitment questions because they do not ask jurors to resolve or refrain from resolving any issue from the case.[147] Because this type of question does not seek to pretest jurors' opinions about the evidence, it is a proper form of questioning. However, attorneys must remember that a juror that expresses views concerning one of the parties may not be genuinely biased or prejudiced—they may be "rehabilitated."[148] After *Cortez*, such jurors should be questioned further to determine if they are firmly biased before challenging them for cause.[149]

B. The Hypotheticals

Hypothetical A:

The court is faced with a question asking whether either party is "starting out ahead" in jurors' minds. A trial court would not abuse its discretion if it disallowed this question. As the Texas Supreme Court held in *Cortez*, asking if either party is starting out ahead after a preview of the evidence is often an attempt to pretest the potential jurors' verdict.[150] This type of question prejudices the jury by attempting to commit jurors to a specific result based on the facts as presented, before they have heard all the evidence at trial. However, the question may be permissible if posed before jurors are told any of the facts from the case.[151]

Hypothetical B:

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[146] *Id*.

[147] *See* Standefer v. State, 59 S.W.3d 177, 179 (Tex. Crim. App. 2001).

[148] *See* Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87, 92–93 (Tex. 2005) ("Statements of partiality may be the result of inappropriate leading questions, confusion, misunderstanding, ignorance of the law, or merely 'loose words spoken in warm debate.'") (citations omitted).

[149] *Id*. ("If the initial apparent bias is genuine, further questioning should only reinforce that perception; if it is not, further questioning may prevent an impartial veniremember from being disqualified by mistake.").

[150] *Id*. at 94.

[151] *See id*. ("Asking which party is 'ahead' may be appropriate before any evidence or information about the case has been disclosed . . .") (citing Shepard v. Ledford, 962 S.W.2d 28, 34 (Tex. 1998)).

The judge must determine whether to allow a question which seeks to find out whether jurors can be fair given that the defendant drank alcohol before the accident. This is the type of question held improper in *Hyundai*, so the court should require counsel to rephrase the question. It improperly attempts to commit jurors against considering the fact that Defendant drank before driving the night of the accident. Because jurors must be free to decide whether to give weight to that fact or not in determining the verdict, this question prejudices them at this stage of the proceedings. Asking whether the jurors could be "fair and impartial" and adding "no matter what else the evidence is" to the question does not transform it into a proper question. Though a court would not necessarily commit error by allowing the question, any juror that responds affirmatively should not be excused for cause. However, the question *may* be permissible and give rise to a valid challenge for cause if rephrased: "Are there any of you who have such strong feelings about drinking and driving that it would preclude you from listening to all of the evidence and following the court's instructions?"[152]

Hypothetical C:

The trial judge is faced with a question regarding whether jurors would be influenced media coverage of mesothelioma cases. A court would abuse its discretion if it disallowed this question. This question properly inquires about jurors' external biases and prejudices by seeking out specific views the jurors may have about a class of lawsuits before entering the courtroom. This is similar to the question in *Babcock v. Northwest Memorial Hospital*, where the court held it was error to disallow questions concerning media coverage of the "lawsuit crisis" and the "medical malpractice crisis."[153]

Hypothetical D:

The judge must decide whether to allow a question inquiring whether jurors could be fair and impartial given that one of the parties is a priest. This type of question should be permissible because it properly attempts to discover bias or prejudice in favor of one of the parties. A juror that is so biased that they could not believe that a priest would be untruthful, and could not believe Defendant's testimony if it conflicted with the priest's, should be challengeable for cause. However, the Texas Supreme Court has

[152] Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 766 (Tex. 2006) (Medina, J., dissenting); *see also* Gerald R. Powell, *Jury Selection in Texas after Hyundai and Cortez*, Address to the Texas Association of Defense Counsel Spring Meeting, May 5, 2006.

[153] 767 S.W.2d 705, 708–09 (Tex. 1989).

not yet addressed this type of question. It is possible that the court could follow the Court of Criminal Appeals' approach in *Barajas* and hold that the question is impermissibly broad.

Hypothetical E:

The court is faced with a question regarding whether jurors could award noneconomic damages. This is a familiar, proper question that commits jurors to following the law and the court's instructions. Because noneconomic damages are a proper element of damages in a bodily injury case, the law requires that jurors remain open to awarding them if properly proven. However, attorneys must remember that questions regarding damages could be improper commitment questions if phrased differently. For example, "Under what facts would you award pain and suffering damages?" is an improper commitment question."[154] Although most impermissible commitment questions ask for "yes" or "no" answers, asking jurors to set hypothetical parameters for their decision-making is also an improper inquiry.[155]

Hypothetical F:

The court must determine whether to allow a "sympathy" question after jurors have heard the facts of a negligence case involving a brain-damaged child. This is a common question in personal injury and other cases, as jurors may not deliver a verdict based in any part upon sympathy.[156] However, after *Hyundai* the court may require defendant's counsel to rephrase the instant question more narrowly. Certainly, jurors may not determine liability or damages based upon sympathy for the child.[157] But this question, asked after a preview of the facts from the case, in substance seeks to commit jurors against considering the child's injuries at all in determining their verdict. Of course, there is a difference between being influenced by sympathetic feelings and considering the *fact* of the child's

[154] *See, e.g.,* Standefer v. State, 59 S.W.3d 177, 180 (Tex. Crim. App. 2001).

[155] *Id.* (holding "What circumstances in your opinion warrant the imposition of the death penalty?" an improper open-ended commitment question).

[156] TEX. R. CIV. P. 226a, sec. III (requiring jury instruction: "Do not let bias, prejudice or sympathy play any part in your deliberations."). *See also* General Motors Corp. v. Burry, 203 S.W.3d 514, 546–47 (Tex. App.—Fort Worth 2006, no pet. h.) (question by Defendant inquiring whether any of the jurors would have "a problem with sympathy [toward plaintiff's] family . . . and putting that aside in dealing with the facts of the airbags in this case").

[157] *See* TEX. R. CIV. P. 226a, sec. III.

injuries when they are relevant to the case. However, this may be a technical distinction that may be lost on many jurors.[158] As the *Hyundai* court stated: "Called as they are from all walks of life, many [jurors] may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges."[159] The instant question is problematic because jurors must consider the extent of the child's injuries in determining damages, should they find the defendant liable. By seeking to commit jurors against considering the child's condition, the question tends to create prejudice against the plaintiffs. A more narrowly tailored question may avoid this problem by focusing on an issue where the extent of the child's injuries is not particularly relevant—where the mere *fact* of injury is all that is required. For example: "Do any of you feel that you would be influenced in any way by sympathy for this child in determining whether any negligence on my client's part caused her injuries?" This question narrows the jurors' focus to the liability issue and may prevent counsel from committing jurors against considering the extent of the child's injuries in determining damages.

[158] *See* Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 757 (Tex. 2006).

[159] *Id*. (quoting McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 555 (1984)).