THE LAW ON VOIR DIRE

BY:

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CHAPTER 1

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Introduction:

The Texas Bill of Rights guarantees litigants a right to trial by a fair and impartial jury and authorizes the Legislature to pass laws "to maintain its purity and efficiency." *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 749 (Tex. 2006), *citing* Tex. Const. art. I, sec. 15. "To that end, the Legislature has established general juror qualifications relating to age, citizenship, literacy, sanity, and moral character...and bases for juror disqualification, including those relating to witnesses, relatives, and interested parties." *Id*. Among these , the Legislature has disqualified from jury service anyone who has a bias or prejudice in favor of or against a party in the case. "Voir dire examination protects the right to an impartial jury by exposing possible improper juror biases that form the basis for statutory disqualification." *Id.* "Thus, 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." *Id.*

Courts are constantly called on to interpret and apply these concepts. This paper attempts to discuss all legal issues with regard to jury selection and juror conduct following selection, with an emphasis on bias and prejudice, *Batson* challenges and commitment questions. In so doing, several exchanges between jurors, attorneys and the court are included for example and entertainment. Also, many unpublished cases have been referenced as they provide additional interpretations.[1]

Who controls:

Voir dire examination falls within the sound discretion of the trial court. *Cortez v. HCCI-San Antonio, Inc.,* 159 S.W.3d 87 (Tex. 2005). However, a party should be allowed broad latitude during voir dire examination so as to enable the party to discover any bias or prejudice by potential jurors and intelligently exercise peremptory challenges. *Hyundai, supra, Cortez, supra.* A trial court abuses its discretion in controlling voir dire if its denial of the right to ask a proper question prevents the determination of when grounds exist to challenge for cause or denies intelligent use of peremptory challenges. *Hyundai, supra*; *McCoy v. Wal-Mart Stores, Inc.*, 59 S.W.3d 793, 797 (Tex. App-Texarkana 2001, no pet.); *Southwestern Elec. Power Co. v. Martin*, 844 S.W.2d 229 (Tex. App.– Texarkana 1992, writ denied); *TEIA v. Loesch*, 538 S.W.2d 435 (Tex. App.–Waco 1976, writ ref'd n.r.e.). Trial judges are encouraged to permit counsel a liberal and probing examination of the panelists through proper and relevant voir dire questions.

Using veniremembers from earlier voir dire

Linnell v. State

In a case of first impression for the Court of Criminal Appeals, the constitutionality of interim jury service was addressed in *Linnell v. State*, 935 S.W.2d 426, 430 (Tex. Crim. App. 1996). Interim jury service occurs when a juror serves on a separate jury during the period between selection as a juror in the defendant's trial and the commencement of the defendant's trial. Linnell, accused of possession of a deadly weapon in a penal institution, was required to conduct voir dire and exercise his peremptory strikes before the interim jury service. Eight jurors in Linnell's trial had served as jurors in another inmate's trial where that inmate was convicted of assault on a correctional officer. Linnell moved to quash the jury contending that the interim jury service deprived him of the intelligent exercise of his peremptory challenges.

The court noted that by picking two juries from the same venire, it was impossible to question the interim jurors concerning jury service which they had yet to experience. "No amount of voir dire can determine the effects of sitting in a trial which has not yet taken place." Consequently, the court held that interim jury service denies the parties the intelligent exercise of their peremptory challenges. *Citing United States v. Mutchler*, 559 F.2d 955, 958 (5th Cir.1977)(by permitting jurors to serve on another jury during the interim between voir dire and trial, the trial judge rendered the parties' peremptory challenges all but meaningless.).

The court acknowledged that repeat jury service may be necessary in some jurisdictions because of their small population. However, even in those jurisdictions the constitutional right to counsel encompasses the right to question prospective jurors in order to intelligently exercise peremptory challenges. Therefore, the court held that if the trial judge intends to select more than one jury from a single venire, the veniremembers selected to serve as jurors must be excluded from the venire from which the other jurors will be selected.

Ballard v. State

In *Ballard v. State*, 2-07-027-CR, 2008 WL 204270 (Tex. App.—Fort Worth Jan. 24, 2008, pet. ref'd, untimely filed)(mem. op., not designated for publication) several members of the venire panel in Ballard's DWI

[1]Unpublished civil cases (about 75% of the pre-2003 civil cases) have no precedential value but may be cited with the notation "(not designated for publication)". TRAP 47.2 prohibits unpublished civil cases after December 2002. Unpublished criminal cases have no precedential value and must not be cited as authority.

sentencing case had also participated in voir dire in an unrelated case earlier that morning in the same court with the same presiding judge. The prosecutor in Ballard's case had also participated in this earlier voir dire. It appeared from the record that Ballard's counsel was present at the morning voir dire session because in her opening remarks to the venire panel in Ballard's case, she referenced the panel's participation in the morning voir dire session. She also referenced her notes and observations from the morning session, noting whether certain panel members had already answered her standard questions. Ballard's counsel did not object to this process at any time during Ballard's case. At the conclusion of the punishment phase, the jury assessed punishment at 99 years' confinement, and the trial court sentenced Ballard accordingly.

Ballard argued that the trial court erred by conducting voir dire in a manner that violated article 33.03 of the Texas Code of Criminal Procedure. Article 33.03 states in pertinent part that "in all prosecutions for felonies, the defendant must be personally present at the trial...." Tex. Code Crim. Proc. Ann. art. 33.03 (Vernon 2006). Under Article 33.03, an accused's right to be present at his trial is unavailable until such a time as the jury "has been selected." *Id.; Citing Miller v. State,* 692 S.W.2d 88, 91 (Tex. Crim. App. 1985). Ballard contended that by allowing the adoption of those responses received in the earlier voir dire session for use in choosing Ballard's jury, the trial court erroneously made the previous voir dire session a part of Ballard's trial. Thus, Ballard argued that because he was not present at the earlier voir dire session, he was not present at his trial.

The court relied on *Lain v. State,* for the proposition that an earlier voir dire involving the same prosecutor and many of the same venire panel members did not constitute voir dire in Ballard's case for the purposes of article 33.03. *Lain v. State,* No. 2-06-00325-CR, 2007 WL 2331017, at *3 (Tex.App.--Fort Worth Aug.16, 2007, no pet.) (mem.op.) (not designated for publication) (citing *Adanandus v. State,* 866 S.W.2d 210, 217 (Tex. Crim. App. 1993), *cert. denied,* 510 U.S. 1215, 114 S.Ct. 1338, 127 L.Ed.2d 686 (1994)). The court pointed out that Ballard was given full opportunity to voir dire the entire panel, including those members that participated in the earlier voir dire. *Citing Adanandus v. State,* 866 S.W.2d at 217 ("Appellant's absence for part of the voir dire examination was essentially ''undone'' due to re-examination in appellant's presence of the eight venirepersons that had been voir dired in his absence. Because appellant was provided the opportunity to fully voir dire in his presence each of the venirepersons who were previously voir dired in his absence, the purposes of the statute were met and no error occurred.")

Ballard cited *Jasper v. State,* in which the court of criminal appeals held that the defendant's trial began during general assembly because the judge that had already been assigned to the defendant's case also served as judge for the general assembly and addressed exemptions, qualifications, and excuses with prospective jurors that had already been assigned to the defendant's case. *Jasper v. State,* 61 S.W.3d 413, 423-24 (Tex. Crim. App. 2001). Thus, Ballard argued that his trial began during the morning voir dire because the judge in Ballard's case presided over both trials and knew that some prospective jurors in the morning voir dire would also participate in Ballard's voir dire. However, because of the holdings in *Adanandus* and *Lain,* the court rejected Ballard's argument.

Same holding: *Roden v. State*, 338 S.W.3d 626 (Tex. App.--Fort Worth 2011, pet. ref'd); *Lain v. State,* No. 02-06-00325-CR, 2007 WL 2331017 at *3 (Tex. App.-Fort Worth Aug. 16, 2007, no pet. (mem. op., not designated for publication); *Cuevas v. State*, NO. 2-08-014-CR, 2008 WL 4531702 (Tex. App.-Fort Worth Oct 09, 2008, pet. ref'd)(mem. Op., not designated for publication); *Martinez v. State*, 276 S.W.3d 75 (Tex. App.-San Antonio 2008, pet. ref'd)

Jury Shuffle:

A trial court must grant a jury shuffle if one is timely requested (after panel assignment but before voir dire). *See* TEX. R. CIV. P. 223; *Brown v. State*, 270 S.W.3d 564 (Tex. Crim. App. 2008)(three requests to shuffle were all untimely since made not only after the trial judge had begun his voir dire, but after individual voir dire questioning of the prospective jurors had concluded, and after the trial judge had already excused many prospective jurors for cause or by agreement); *Whiteside v. Watson*, 12 S.W.3d 614, 618 (Tex. App.–Eastland 2000, pet. denied); *but see Miller-El v. Cockrell*, 537 U.S. 322 (2003) and *Miller-El v. Dretke,* 545 U.S. 231 (2005)(jury shuffle can be considered when applying *Batson* analysis). When requested, the names of the members of the panel must be placed in a receptacle, shuffled, drawn, and transcribed on the jury list in the order drawn. TEX. R. CIV. P. 223. The bailiff or other court personnel can perform this task. Only one shuffle is allowed in each case. *See, e.g.*, *Whiteside v. Watson*, 12 S.W.3d 614, 618 (Tex. App.–Eastland 2000, pet. denied).

Wamsley v. State

In *Wamsley v. State*, 2008 WL 706610 (Tex. App.--Fort Worth 2008, pet. ref'd)(mem. op., not designated for publication), the court addressed the issue of whether *Batson v. Kentucky* applies to a request for jury shuffle. The State requested a shuffle of the panel after the venire was assembled and Wamsley objected to the shuffle on the basis of *Batson,* arguing that the motive for the shuffle was not race-neutral due to the disproportionate number of minorities in the first seventy-five panel members. The trial court overruled the objection.

On appeal Wamsley argued that *Batson* was applicable to jury shuffles, but the court noted it could not find any case law that directly applied *Batson* to a jury shuffle. In contrast, the court noted that the court of criminal appeals averred in *Ladd,* albeit in dicta, that it does not endorse the view that *Batson* applies to jury shuffles. (Citing *Ladd v. State,* 3 S.W.3d 547, 563 n. 9 (Tex. Crim. App. 1999) (stating in a footnote that it does not endorse the view that *Batson* extends to jury shuffles), *cert. denied,* 529 U.S. 1070 (2000); *see also Ashorn v. State,* 77 S.W.3d 405, 408 (Tex.App.-Houston [1st Dist.] 2002, pet. ref'd) (stating that the court of criminal appeals has declared that its footnotes are dicta). Wamsley argued, to no avail, that *Miller-El v. Dretke,* 545 U.S. 231 (2005) supported his position, claiming the United States Supreme Court held that the prosecutor's jury shuffle request was a clue indicating his intent to use his peremptory challenges in a discriminatory fashion. The court agreed that *Dretke* demonstrates that the prosecution's use of a jury shuffle may be examined in determining whether broader patterns of discriminatory practice are used during jury selection, but then pointed out that the court did not definitively hold that a *Batson* challenge extends beyond peremptory challenges and into the realm of jury shuffles.

Same holding: *Williams v. State*, No. 02-13-00040, 2014 WL 584892 (Tex. App.–Fort Worth 2014, no pet.)(mem. op., not designated for publication); *Ramey v. State*, 2009 WL 335276 (Tex. Crim. App. 2009)(not designated for publication).

BNSF Ry. Co. v. Wipff

In *BNSF Ry. Co. v. Wipff,* 408 S.W.3d 662 (Tex. App-Ft. Worth 2013, no pet.), the court held that BNSF timely requested shuffle of potential jurors before voir dire began, even though case-specific jury questionnaires had been completed and reviewed by defense counsel, where defense counsel had not viewed the venire prior to requesting jury shuffle, and trial court had not given veniremembers admonitory instructions before defendant requested jury shuffle. In performing a harm analysis, the court distinguished *Jackson, infra* and *Rivas v. Liberty Mut. Ins. Co.*, 480 S.W.2d 610, 612 (Tex.1972) (rejecting presumed harm from denial of jury shuffle because no showing litigant "was required to accept a juror which it otherwise would have stricken had it not been for the trial court's ruling"), by holding that it could not know for certain that the objectionable jurors' inclusion did not affect the verdict. (BNSF's counsel, after exercising peremptory strikes, stated on the record that it found two jurors who been seated objectionable). *Citing Cortez,*159 S.W.3d at 91. The court reversed and remanded for a new trial.

Jackson v. Williams Bros. Const. Co., Inc.

In *Jackson v. Williams Bros. Const. Co., Inc.*,364 S.W.3d 317 (Tex. App.--Hous. [1st Dist.] 2011, pet. denied) the trial court announced that voir dire would begin when the attorneys received the juror information sheets. The court also indicated that it would deny a shuffle if it were requested after the attorneys received and looked at the cards. The attorneys reviewed the juror information cards for approximately 15 minutes. After reviewing the cards but before the jury entered the courtroom for the first time, Jackson's attorney requested that the panel be shuffled. The trial court denied the request, and the panel was seated for questioning. The court, in a lengthy analysis, without deciding if this denial was error, found no harm. It noted that Jackson complained only that, because the panel was not shuffled, she did not get a new random order from which to pick the jury. Specifically, Jackson complained:

> If there had been a jury shuffle ... there was a strong likelihood that [a more preferable juror] would have had a lower number on the venire panel and would have been chosen as a member of the petit jury, and that [Jackson] would have been able to use a peremptory challenge against [two less preferable jurors who were seated on the panel] or others.

The court noted, however, that the exclusion of particular jurors is not the purpose or even the necessary effect of a jury shuffle. It cited Rule 223 which does not bestow upon a litigant the right to have a particular person seated on the jury or to have a particular person fall within the strike zone. In conclusion, the court held that Jackson

did not present grounds for a reversal under either the traditional or relaxed standards of harm analysis.

Trejos v. State

In *Trejos v. State,* 243 S.W.3d 30 (Tex. App.-Houston [1 Dist.] 2007, pet. ref'd), appellant asserted that the trial court erred by allowing a shuffle of the venire "after voir dire had effectively commenced." The court noted that a motion to shuffle is untimely if presented after voir dire has commenced. *Citing Davis v. State,* 782 S.W.2d 211, 214 (Tex. Crim. App. 1989). The court pointed out the distinction between capital and non-capital cases in determining when voir dire has commenced:

> Determination of when voir dire has commenced depends on whether the trial is a capital trial in which the State is seeking the death penalty or a non-capital trial. In a non-capital case, as here, a motion to shuffle is timely as long as the motion is made before the State actually starts questioning the jurors in its portion of the voir dire...Voir dire begins in a capital felony case in which the State seeks the death penalty when the court, rather than the parties, begins questioning the venire.

Citing DeLeon v. State, 731 S.W.2d 948, 949 (Tex. Crim. App. 1987); *Williams v. State,* 719 S.W.2d 573, 577 (Tex. Crim. App.1986); *Davis,* 782 S.W.2d at 215. Regardless of the length or detail of the trial court's questions to the venire panel in a non-capital case, the bright-line rule is that the motion to shuffle the venire is timely when it is made before the State begins questioning the potential jurors. *Citing Williams,* 719 S.W.2d at 577.

The court held that the State's motion to shuffle was timely in this non-capital case because it was made before the State began its voir dire.

Ford v. State

In *Ford v. State,* 73 S.W.3d 923 (Tex. Crim. App. 2002) the trial court refused Ford's request for a jury shuffle. On appeal, the Court of Criminal Appeals noted that the Texas Code of Criminal Procedure, Art. 35.11 requires that the seating order of the venire be randomly shuffled at the request of either party and therefore acknowledged error on the part of the trial judge. However, the court noted that because the right to a jury shuffle is statutory in nature, any error in connection therewith must be evaluated for harm under the standard for nonconstitutional errors. *Id.* at 926. That standard provides: "Any other error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." *Id.* at 924-25. The lower court held that concluding that the violation of a mandatory statute is harmless would "invite judicial activism of the worst sort and transform a mandatory duty of the trial court into a completely discretionary act." *Id.* at 925. The Court of Criminal Appeals disagreed and felt the lower court's logic would "re-establish automatic reversible error, contrary to the language and purpose of Rule 44.2." *Id.* The court held that under its harmless error rule the violation of a mandatory statute does not, by itself, call for the reversal of a conviction: "If an appellate court is in 'grave doubt' about the harmlessness of the error, then the judgment must be reversed. But if the record shows that a defendant was not harmed by an error, then the error must be disregarded." *Id.* at 925.

The court noted that the jury shuffle is designed to ensure the compilation of a random list of jurors and that although the jury shuffle may sometimes be used by the parties as a strategic tool, the purpose of the statute is merely to ensure that the members of the venire are listed in random order. *Id.* at 925-26. The court stated that the applicable rules and statutes already require that panels be listed randomly from the outset as the jury pool is drawn from the names of all persons currently registered to vote, all citizens currently holding a valid driver's license, and all citizens currently holding a valid personal identification card. *Id.* at 926; *see* TEX. GOV'T CODE §§ 62.001(a)-(a)(B). "Randomness is ensured by statutes directing the drawing of names, by the certification of the jury list, and by provisions for electronic or mechanical methods of selection." *Id.* (citing TEX. GOV'T CODE §§ 62.00, 62.004, 62.006 and 62.011). The court referenced the Texas Code of Criminal Procedure, Article 33.09 and Texas Rules of Civil Procedure 223, 224 as rules by which individual panels are drawn and noted they further serve to achieve randomness. *Ford*, 73 S.W.3d at 925-26.

The court then held that because the law requires that venire panels be assembled in random order, a trial judge's failure to order a shuffle does not, by itself, indicate a nonrandom listing of the venire. *Id.* at 926.

> Nothing in the record of this trial indicates that the procedures outlined in the applicable statutes and rules were disregarded, that the panel was reordered after being assembled, or that the process of assembling a jury panel was subverted in some fashion to

achieve a nonrandom listing of the venire. Under the record in the present case, the error in refusing to allow a jury shuffle has been shown to be harmless under Rule 44.2(b).

Invoking the Rule

Cockburn v. State

In *Cockburn v. State,* 2-07-062-CR, 2008 WL 110494 (Tex. App.—Fort Worth Jan. 10, 2008, no pet.) (mem. op., not designated for publication), one of the State's witnesses entered the courtroom and observed ten to fifteen minutes of voir dire. Appellant objected and requested that the witness be prevented from testifying. The State's attorney explained that he did not recognize the witness when the witness entered the courtroom because all his prior contact with the witness had been over the telephone, and he had never met the witness in person. The trial court denied Appellant's request, stating that he did not think the State's intent was malicious and that he couldn't "see any impact that voir dire examination would have in regards to testimony of this witness," so there was no harm in allowing him to testify.

The court observed that the purpose of placing witnesses under the sequestration rule is to prevent the testimony of one witness from influencing the testimony of another witness. *Citing Bell v. State,* 938 S.W.2d 35, 50 (Tex. Crim. App. 1996), *cert. denied,* 522 U.S. 827, 118 S.Ct. 90, 139 L.Ed.2d 46 (1997). In conclusion, the court held that it is well settled that this rule does not apply to the exclusion of witnesses during voir dire and before any testimony has begun. *Citing Creel v. State,* 493 S.W.2d 814, 820 (Tex. Crim. App. 1973); *Price v. State,* 626 S.W.2d 833, 834 (Tex. App.--Corpus Christi 1981, no pet.); *Hudson v. State,* No. 14-03-01253-CR, 2005 WL 81631, at *3 (Tex.App.-Houston [14th Dist.] Jan. 6, 2005, pet. ref'd) (mem. op., not designated for publication)(holding that the Rule does not apply to exclusion of witnesses during opening statements). Therefore, the court held that the witness's presence in the courtroom during voir dire prior to the commencement of any testimony did not violate Rule 614.

Party presence during voir dire

Sumrell v. State

In *Sumrell v. State*, 326 S.W.3d 621 (Tex. App. - Dallas 2009), *pet. dism'd, improvidently granted,* 320 S.W.3d 338 (Tex. Crim. App. 2010)(per curiam), the court acknowledged that as part of the right of confrontation under both state and federal constitutions, a defendant has a constitutional right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings, and the jury-selection process is one of those stages. The court also noted that this right can be waived by failing to show up or return to the trial, or being excluded as a result of being disruptive.

Sumrell, who was in the State's custody, was somewhat disruptive during the State's voir dire which was discussed by the court during a break. Thereafter, he was absent for part of the voir dire including challenges for cause at the bench and peremptory strikes. The State asserted on appeal that there was no constitutional violation because there was no indication in the record that appellant's absence was not voluntary. The court, after finding the defendant was in custody during the trial, concluded that the appellant's presence or absence from the courtroom was not within his control. Further, the court would not presume on the record before them that appellant's absence was voluntary. Citing *Bledsoe v. State*, 936 S.W.2d 350, 351 n. 2 (Tex.App.-El Paso 1996, no pet.). The court also found that the defendant's exclusion was harmful because it bore a substantial relationship to the opportunity to defend himself. The court concluded that the exclusion of the defendant violated his constitutional right to be present in court during jury selection and reversed for a new trial. *Citing Hodges v. State,* 116 S.W.3d 289, 296 (Tex.App.-Corpus Christi 2003, pet. ref'd).

But see *Haywood v. State*, No. 14-12-00102 CR, 2013 WL 5969461, at *6 (Tex. App. Nov. 7, 2013)(mem. op., not designated for publication) (appellant was present at the commencement of voir dire and throughout the trial court's questioning of the venire. Appellant voluntarily chose to not return to the courtroom for the completion of the voir dire process following the lunch recess. Because appellant was physically present when the trial commenced, his Sixth Amendment right to be present was not violated as a result of the trial court's decision to continue with voir dire following his voluntary absence.). *See also Smith v. State*, 534 S.W.3d 87 (Tex. App.—Corpus Christi 2017, pet. ref'd)(removal of murder defendant from courtroom during voir dire violated his constitutional and statutory rights, but was harmless; defendant's removal was only temporary because court allowed him to return to courtroom upon his assurance that he would conduct himself appropriately, court took steps to enable defendant to listen to proceedings and consult with his attorney concerning trial strategy and peremptory strikes, and every venire person that expressed a potential bias

against defendant because of his actions was struck for cause).

Public access to voir dire

Presley v. Georgia

In *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721, 175 L. Ed. 2d 675 (2010), the United States Supreme Court addressed the question of whether the right to a public trial in criminal cases (Sixth Amendment) extends to the jury selection phase of trial, and in particular the *voir dire* of prospective jurors. In that case, the Georgia trial judge excluded an uncle of the defendant noting the lack of space in the courtroom to accommodate both the public and the venire panel and the prospect of improper communications. The court, noting it had previously held that the First Amendment demands that the *voir dire* of prospective jurors must be open to the public (*Press-Enterprise Co. v. Superior Court of Cal., Riverside Cty.,* 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)) and that the Sixth Amendment right to public trial extends to a pretrial hearing on a motion to suppress (*Waller v. Georgia,* 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984)) held that although the right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information, such circumstances will be rare and the balance of interests must be struck with special care. *Presley,* 130 S. Ct. at 724. In conclusion, the court held that the Sixth Amendment did apply to voir dire proceedings and absent findings specific enough that a reviewing court could determine whether the closure order was properly entered, which were absent in the case at bar, the case must be reversed and remanded for a new trial. *Presley,* 130 S. Ct. at 725.

Steadman v. State

In *Steadman v. State*, 360 S.W.3d 499, 510 (Tex. Crim. App. 2012) the Court of Criminal Appeals reversed the Eastland Court of Appeals which found the trial court's findings regarding the size and configuration of the courtroom so as to exclude four relatives of defendant satisfied *Presley*. The Court held that although the trial court identified two interests in closure of the appellant's voir dire that could well prove sufficient to override a defendant's right to a public trial in the abstract (jury-panel contamination and courtroom security), the trial court never articulated any substantive "threat" to either of these interests and failed to supply "findings specific enough that a reviewing court can determine" that closure of the courtroom during the appellant's voir dire was warranted. Nor did the trial court satisfy the "obligat[ion]" that both *Presley* and *Waller* unequivocally impose upon trial courts "to consider all reasonable alternatives to closure." It therefore held that the Steadman suffered a violation of his Sixth Amendment right to a public trial, reversed and remanded for a new trial.

Cameron v. State

In Cameron v. State, 482 S.W.3d 576 (Tex. Crim. App. 2016) the Court, in reversing the court of appeals, held that defendant had initial burden of proof to show that her trial was closed to the public, before the appellate court could consider whether the closure was justified, and that the appellate court was required to defer to the trial court's findings of fact that were supported by the record, in resolving whether defendant met her burden to show her trial was closed to the public.

See Also *Benson v. State*, 04-12-00159-CR, 2013 WL 1149028 (Tex. App.—San Antonio 2013, no pet.)(mem. op., not designated for publication)(Sixth Amendment right to a public trial was violated when the trial court excluded Defendant's parents from voir dire); *Garcia v. State*, 401 S.W.3d 300 (Tex. App.—San Antonio 2013, pet. ref'd)(trial court's exclusion of three of defendant's family members from the courtroom during voir dire of prospective jurors without considering all reasonable alternatives to closing the courtroom to the public violated defendant's Sixth Amendment right to a public trial in prosecution for felony murder and aggravated assault with a deadly weapon; although court expressed concern that venire panel filled courtroom to maximum capacity under fire code, court failed to make specific findings of fact in support of closure, court improperly rejected alternatives of rescheduling voir dire or moving voir dire to an alternate location, and court failed to consider dividing the venire panel, which would have reduced the number of people in the courtroom so that defendant's family members and members of venire panel could be present in courtroom without exceeding maximum capacity under fire code). In *Lilly v. State*, 365 S.W.3d 321 (Tex. Crim. App. 2012) the Court held that trial court's closure of defendant's trial (a plea bargained bench trial), which took place in chapel courtroom of maximum security prison pursuant to statute authorizing a district judge to hear certain nonjury matters at a correctional facility, violated defendant's Sixth Amendment right to a public trial.

Questionnaires:

Bancroft v. State

In *Bancroft v. State*, 2011 WL 167070, No. 02-10-00040-CR , (Tex. App.-Ft. Worth 2011, pet. ref'd) (mem. op., not designated for publication) the court held that Defendant failed to demonstrate that he was prejudiced by a trial court's denial of additional time to review questionnaires during voir dire. Defendant's counsel did not receive the jurors' questionnaires until the morning of voir dire, even though the prosecution had possessed the questionnaires one day earlier. Defendant's counsel asked for a recess until later in the afternoon in order to review the questionnaires, but such request was denied. Defendant argued that the denial was tantamount to ineffective assistance of counsel but the court held that Defendant failed to allege how his counsel would have conducted voir dire any differently. He also failed to show that counsel was denied the ability to intelligently and effectively exercise his peremptory challenges.

In re C.H.

In *In re C.H.,* 412 S.W.3d 67 (Tex. App. 2013, rev. den'd), a juvenile proceeding, the court noted that jury questionnaires are not included in the list of items required by rule to be included in the appellate record (*citing* TRAP 34.6(f)). Furthermore, the jury questionnaires were neither admitted nor treated as evidence in the *Batson* hearing and therefore would not be considered upon review of Batson claim on appeal of delinquency adjudication for murder.

Time of examination:

Ratliff v. State

In *Ratliff v. State*, 690 S.W.2d 597 (Tex. Crim. App. 1985), the Court of Criminal Appeals established a three prong analysis in order to determine whether the trial court abused its discretion by imposing a certain time limitation on voir dire: 1. whether the party attempted to prolong the voir dire, 2. whether the questions that the party was not permitted to ask were proper voir dire questions, and 3. whether the party was not permitted to examine prospective jurors who actually served on the jury.

In *Ratliff,* the trial court initially advised counsel for the State and counsel for appellant that they each had one hour in which to conduct the voir dire. The judge informed the jury about certain principles of law including the presumption of innocence, the burden of proof, the defendant's right not to testify, and trial procedure. The State spent a total of 43 minutes lecturing the jurors on certain principles of law; questioning them as a whole about their ability to assess the maximum punishment; and questioning them individually about background information such as occupation. Appellant began his voir dire by telling the jury about certain principles of law. Then, he questioned the panel as a whole, row by row, about whether they knew the prosecutors or any of the State's witnesses; whether any of them or any member of their family had been a victim of a crime; whether their family or close friends were in law enforcement or had served on a grand jury; and, depending on the various answers, whether they could act as fair and impartial jurors and render a verdict based only upon the evidence heard in the courtroom. During the course of the voir dire appellant challenged three veniremembers for cause and questioned a fourth at the bench for several minutes. Two of the challenged veniremembers were excused. After appellant had examined three veniremembers individually the court told him that his hour was "up", but that the court would give him fifteen more minutes. The court actually allowed him twenty-one more minutes, during which he questioned seven more veniremembers individually. The court then told appellant he could have fifteen minutes to make a closing statement. Appellant objected to the action of the court in limiting his voir dire. He perfected a bill of exception in which he stated that he had only questioned eleven veniremembers. He offered a list of fifteen questions that he wanted to ask and which he alleged were necessary so that he could exercise his peremptory challenges and provide adequate representation.

The Court of Criminal Appeals reviewed prior cases analyzing voir dire time limits, including *De La Rosa v. State,* 414 S.W.2d 668 (Tex.Cr.App.1967), and, after applying its three prong analysis, held that the trial court's voir dire time limit was unreasonable and reversed.

McCoy v. Wal-Mart Stores, Inc.

The Texarkana Court of Appeals was the first to apply the *Ratliff* prongs to a civil case. *McCoy v. Wal-Mart Stores, Inc.*, 59 S.W.3d 793 (Tex.App.-Texarkana 2001, no pet.). In *McCoy*, appellant contended that the trial court abused its discretion by not allowing the plaintiff to ask further questions of the jury panel to discover any bias or prejudice. The court examined the type of questions asked by counsel for plaintiff and held that his voir dire examination had the effect of unnecessarily prolonging voir dire resulting in the trial

court denying his request to ask further questions of the jury panel beyond the 30-minute time limit set by trial court. The court noted that plaintiff's counsel spent considerable time asking individual panel members open-ended questions even after the trial court warned counsel, ten minutes into his exam, that he was wasting too much time. The court noted that even after such warning, counsel persisted in asking open-ended questions.

The *McCoy* court also held that attorneys have a duty to appropriately budget their time for voir dire questioning within the reasonable limits set by the trial court and that additional questioning by plaintiff's counsel of jury panel members as to two members' acquaintance with one of defendant's attorneys, and as to one member's bad experience involving defendant, which were elicited by defense counsel during voir dire, was not warranted after the voir dire time limit set by court had expired. The court indicated that plaintiff's counsel was not prohibited from pursuing those matters during his own voir dire exam, and the only reasons for his failure to do so were that he ran out of time, or it did not occur to him to ask about those matters.

In apparent recognition that the trial court's ruling bordered on infringement of due process, the court held that the parameters set for voir dire questioning should always be fair and reasonable, and should take into consideration the complexity and uniqueness of each case and that these boundaries should also be flexible, subject to exceptions as justice and the circumstances require.

McCarter v. State

In *McCarter v. State*, 837 S.W.2d 117 (Tex. Crim. App. 1992), at trial appellant's attorney conducted his voir dire of the prospective jurors subject to a thirty minute time limit. During the appellant's voir dire, the trial judge informed appellant's attorney when five minutes, and two minutes, remained in the 30 minutes allotted for appellant's voir dire. When the trial court informed the appellant's trial attorney that the time had expired, the following exchange occurred:

> [APPELLANT'S ATTY]: At this time I would request more time. I have more important topics of people that have problems with drugs in their immediate family. I have two questions of prior criminal jury experience and I would have a question of police officers that are involved, whether they personally know these police officers, and I have a question of people that have been accused, also, accused by police officers. She did not go into the question sufficiently enough for me to make a decision on it.
> THE COURT: Well, I'm sorry. Your request will be denied for any more time. I am going to let you finish this question you are on now. For the record, I want the record to reflect that the way in which you conducted this voir dire you knew in advance you were going to have a 30 minute limit on this voir dire and there are certain people who have raised their hands who said they could not be fair and impartial jurors and you continued to speak to those people knowing full well that we are going to come up here and talk about their inability and on one occasion, 18, you have gone back to him number 18 and number 18 disqualified whenever I was voir diring and you continued to go back and ask him questions which is a waste of this Court's time on voir dire. So your request is denied.
> [APPELLANT'S ATTY]: For the record, I wanted to question these jurors that had a negative experience with police officers and those jurors number 10.
> THE COURT: Well, do finish the voir dire. You will be able to talk to anybody you want to try to challenge for cause after we finish the voir dire.
> [APPELLANT'S ATTY]: Your Honor, may I?
> THE COURT: You will be allowed to finish this question you are on now.
> [APPELLANT'S ATTY]: For the record, Judge, that is the question of who had problems with drugs and their immediate family. I can question the rest of the panel.
> THE COURT: You can question whoever you were questioning.

The Court of Criminal Appeals found that appellant's attorney did not attempt to prolong the voir dire and that the questions appellant's attorney sought to ask were proper; therefore the Court of Appeals erred by holding the trial judge did not abuse his discretion in limiting appellant's voir dire. The court then suggested that should a trial judge determine that either party is prolonging the voir dire, the simple and effective remedy

is to call the attorneys to the bench and instruct them to expedite the process. The court then observed, citing Tex.R.App. P. 81(b)(2), the denial of a proper question which prevents the intelligent exercise of one's peremptory challenges is not subject to a harm analysis.

Everitt v. State

In *Everitt v. State,* 01-15-01023-CR, 2017 WL 3389638, at *4–6 (Tex. App.—Houston [1st Dist.] Aug. 8, 2017, pet. filed), the court analyzed a 30 minute time limit on counsel voir dire, a limit announce by the court before voir dire began. The court first noted the trial court conduced a one hour voir dire covering introductions, whether any members of the venire knew her or the attorneys, asked whether any members had previously served on a grand jury or on a jury in a criminal trial, read the indictment, noted the elements of the offense, and discussed various types of witnesses, asking whether any venire member would grant a witness "automatic believability or credibility" simply because the witness wore a uniform or had special credentials. The trial court further discussed the "one witness rule," illustrated it with a hypothetical, and asked whether any venire member would be unable to follow the law. The court explained that a defendant need not present evidence, and asked whether any venire member would require it to prove its case "beyond all doubt."

The State also discussed the types of evidence one might expect in a child-sexual-assault case, the admissibility of videotaped statements and offense reports, and the likelihood of finding evidence of injuries or DNA. It explained the effects of a delayed outcry on the ability to gather evidence and the "one witness rule." And it asked venire members by row about their ability to convict based on the testimony of a single witness. The State also inquired as to whether venire members would wait until they heard all of the evidence before drawing any conclusions. It asked which venire members worked with children, for venire members' thoughts on children and lying, and why children might have trouble with timelines. The State asked whether any venire member would hold a child to a higher standard than an adult in regard to recalling the details of a sexual assault. And it then asked each venire member a scaled question regarding the likelihood that a child might be influenced to make false allegations of sexual assault.

Appellant's trial counsel began his voir dire with a lengthy hypothetical and asked the venire, "Has anyone here ever had something really bad said about you [that] other people just assumed it to be true?" He discussed with venire member number one how it "ma[d]e her feel that somebody had believed something ... bad about [her]." Counsel asked if anyone had "ever been a victim of gossip" and for venire members to raise their hands if they agreed that "being sexually abused" or "being sexually assaulted as a child would be just a horrible, unspeakable thing?" Counsel then asked the venire members to "think of one word to describe" what it "must ... be like to be accused of something like [sexual assault] if you didn't do it," and he individually questioned the first thirty venire members.

Appellant's trial counsel then discussed the State's burden of proof, asking the venire, collectively, "Do we need more than one reasonable doubt in a case for the Government not to have met its burden? How many people say, yeah? How many people say one ...? How many people are not sure?" He then asked the venire, collectively, various iterations of: "If you have a reasonable doubt as to whether this happened, they're saying these terrible things that [appellant] did to somebody, if you have a reasonable doubt on that, what would your verdict be?" After speaking with individual venire members, counsel asked the venire, collectively, "If you have even one reasonable doubt as to any elements of the offense at the end of the case, raise your hand if the verdict is not guilty. If you have one reasonable doubt at the end of the trial after the evidence is over, stand up if your verdict is not guilty ...." He then questioned individual venire members 17, 35, and 38, who did not stand up, about whether, if they had "a reasonable doubt as to some elements of the offense," they could "envision a scenario" in which they "would still find [appellant] guilty."

Appellant's trial counsel then, as the trial court had previously done, compared the reasonable-doubt standard to the standards of reasonable suspicion, probable cause, preponderance of the evidence, and clear and convincing proof. He presented a lengthy discussion, comparing the standards to "five cabins in the woods." And counsel asked individual venire members to explain why a criminal case "require[s] more evidence for a conviction that the Government has to [present] in a family law case where they're claiming abuse or neglect."

Appellant's trial counsel then asked the venire, collectively, whether "young kids know more about sex today than they used to," and he individually questioned several venire members about potential sources of such information. After the trial court announced a one-minute warning, counsel began asking venire members why a child might make a false accusation of sexual abuse against an adult.

After the trial court announced that appellant's time for voir dire had expired, appellant's counsel requested additional time and presented a bill of

exceptions then asked for additional time to ask the venire members, collectively and individually:

• About the types of evidence they would expect to see in an alleged case of child sexual assault;
• Whether they would view some forms of evidence as being more persuasive than another;
• How venire members might be affected by emotional or disturbing testimony.
• Whether venire members would be more inclined to believe a child witness over an adult witness or to believe a police officer or medical professional over another witness;
• The reasons why an accused might choose not to testify;
• Whether any venire member, or a family member or close friend, had ever been employed in law enforcement or with the district attorney's office;
• Whether any venire member, or a family member or close friend, had ever participated in the investigation of a criminal case, been a witness in a criminal case, or was involved with CrimeStoppers.

Further, appellant's trial counsel submitted to the trial court a list of additional questions that he had intended to ask the venire, such as what were their favorite television shows; whom did they most and least admire; what were their religious affiliations; whether they knew anyone with post-traumatic stress disorder, bipolar disorder, or addiction problems; whether they had had any "experience, training, or education" in any one or more of fourteen subject areas, including pornography, human sexuality, bipolar disorder, and the internet; and whether any venire member, or a family member or close friend, had ever been treated for a mental illness. He also submitted a list of 23 true-or-false questions, most of which related to false allegations by children, suggestive questioning of children, and the dynamics of memory and recall. His questions included certain specialized topics, such as whether research has demonstrated certain concepts, whether "confirmatory bias" has been associated with inaccurate statements, and whether "overly sexualized behavior in children is linked to bipolar disorder." The trial court denied counsel's request for more time to ask his additional questions, noting that counsel "could have asked all [of his] questions [in the time allotted...and] didn't."

The court held that the trial court could have reasonably concluded that appellant's trial counsel did not appropriately budget the time that he was allotted for voir dire and could have asked his omitted questions, had he focused on his time.

Arrendo v. State

In *Arrendo v. State*, 08-08-00226-CR, 2010 WL 337678 (Tex. App.—El Paso Jan. 29, 2010, pet. ref'd)(not designated for publication) the parties were allotted 40 minutes each in a cocaine possession case. On appeal, defendant identified several legitimate areas of inquiry he was precluded from pursuing as a result of the time constraint. The court of appeals held, however, that instead of covering new topics or following up with a few questions on the topics already covered by the State, trial court, or written questionnaires, defense counsel spent half of his time on the fact that the State, not the defendant, maintains the burden of proof. While the court agreed that the burden of proof is a proper topic for inquiry, they found that a few follow-up questions from the State's voir dire or another simple poll of the jury on whether they could hold the State to its burden would have been sufficient. The court noted that counsel went over the different standards of proofs in civil cases, child-support cases, and criminal cases, engaged in a lengthy discussion and hypothetical to explain why the burden of proof was on the State, and questioned whether the prospective jurors thought that was fair. The court wrote that rather than engage in lengthy discussions about their personal views, the focus of the voir dire should be on whether they can follow the law. In summary, the court found that the different burdens of proof, why the burden of proof was on the State, and the lengthy hypothetical was unnecessary, and therefore counsel had improperly attempted to prolong voir dire.

Morgan v. State

In *Morgan v. State*, 07-07-0429-CR, 2009 WL 1361578 (Tex. App.—Amarillo May 14, 2009, no pet.)(mem. op., not designated for publication), Appellant was permitted in excess of an hour to voir dire prospective jurors. He was warned a number of times that his time was expiring but given additional time to complete his questioning. His last request was for an additional fifteen to twenty minutes which the trial court denied but nonetheless granted five additional minutes. Appellant objected but did not state why he required additional time in this particular case or proffer specific questions that he was prevented from asking the prospective jurors. He simply submitted his *voir dire* outline consisting of eight pages of questions-many of which were open-ended.

The court held that because Appellant did not narrow the scope of his need for further inquiry beyond the eight page outline, a wide range of specific questions-both proper and improper-could have been

asked. "Given the broad nature of this request, it is impossible for this Court to determine whether Appellant's further inquiry would have been appropriately phrased, non-repetitive and/or relevant." *Citing Hart v. State,* 173 S.W.3d 131, 139 (Tex.App.-Texarkana 2005, no pet.).

Odom v. Clark

In *Odom v. Clark*, 215 S.W.3d 571 (Tex. App.-Tyler 2007, pet. denied), Appellants filed a motion to enlarge time for voir dire, which did not include any potential questions but merely stated broad areas of inquiry. The trial court ruled that the parties would have no more than one hour per side to conduct their voir dire examination and the parties did not object to this ruling. At the end of the one hour time limit, the appellants' counsel asserted that he had not been given enough time. The court permitted two additional questions then ended counsel's voir dire. Counsel then reasserted the motion to enlarge time for voir dire, indicating that he had not yet had an adequate opportunity to question the venire about 10 areas of inquiry. The trial court denied the request. Counsel did not present the trial court with the questions he wished to ask.

The Tyler Court held that the issue was not preserved for review under Tex. R. App. P. 33.1(a) because the trial court was not timely presented with any information that would have identified the nature of the potential questions. The court noted that the questions were neither before the trial court nor apparent from the context in which the areas of inquiry were stated. *Accord, Cordova v. State*, 296 S.W.3d 302 (Tex.App.-Amarillo 2009, pet. struck).

Mack v. State

In *Mack v. State*, No. 07-05-0154-CR, 2006 Tex. App. LEXIS 6128 (Tex. App.–Amarillo, no pet.)(not designated for publication) defendant argued that the trial court erred by denying counsel reasonable time for voir dire. The reviewing court applied the two-pronged *McCarter* test *(McCarter v. State*, 837 S.W.2d 117, 121 (Tex.Crim.App.1992)(applying two-prong test when defendant was in process of asking questions to entire panel, not individual members)), finding that counsel should have been allowed, following her allotted time, to ask the one question she requested (whether jurors had any relationship to law enforcement). The court found that the request was not merely an attempt to prolong voir dire because the questions counsel asked during the allotted time were not irrelevant or repetitious. Second, the court found that the question was proper. Although both the court and the prosecutor asked questions on bias, defense counsel had the right to question prospective jurors in her own manner. As a result, the court held there was a violation of defendant's right to an impartial jury under the Sixth Amendment and Tex. Const. art. 1, §§ 10. The court then conducted a harmless error analysis for constitutional error under Tex. R. App. P. 44.2(a) and could not conclude beyond a reasonable doubt that the error did not contribute to the conviction. The court found that the error precluded counsel from investigating two unidentified venire members who responded to the court's initial inquiry regarding relationships to police officers. The court reversed and remanded for a new trial.

State v. Reina

In *State v. Reina*, 218 S.W.3d 247 (Tex.App.-Hous. [14th Dist.] 2007, no pet.), the trial court, after conferring with the parties, imposed time limits when the trial exceeded four days to complete. The court noted that the State used most of its time questioning witnesses and as a result, had only six minutes for closing arguments. The court found that the State never objected to the trial court's imposition of the time limits or the court's frequent reminders regarding time. Thus, the State waived its complaints regarding the time limits under Tex. R. App. P. 33.1. The court also found that the State presented no extenuating circumstances that was unanticipated at the time it agreed to the self-imposed time limitation to justify an extension of time.

Greer v. Seales

In *Greer v. Seales*, No. 09-05-001 CV, 2006 WL 439109 (Tex. App.–Beaumont 2006, no pet.)(mem. op., not designated for publication) the court considered the following objection to time limits imposed by the trial court by counsel for plaintiff:

> Your Honor, prior to making my challenges for cause, I'd like to make a record on not having sufficient time for voir dire. . . . I think the case law requires me to tell the Court what issues I have not had a chance to voir dire on and why. I'd like to make a record on that to protect my record. . . . We are requesting more time for voir dire. Because of the answers from this panel, we have not had sufficient time to voir dire the jury. The jury panel had a great deal of folks who identified particular

> bias and mind sets that would normally exclude them, including pain and suffering, prior accidents, a great deal of things that we worked as fast as we could to identify those folks.
>
> As the Court is aware and, in my experience, the most efficient way to do that is identify those with a particular bias and mind set and then ask the excluding question that would exclude them and then see how many others agree to that. That took up a great deal of time with regard to pain and suffering. As a result of that, of no fault of Plaintiff, I was not able to voir dire the jury on many, many serious issues, including frivolous lawsuits, chiropractic care, burden of proof, pre-existing injury - all of which are issues in this case.
>
> As far as chiropractic, burden of proof, and pre-existing injuries, all of which are serious issues in this case, several different veniremen... espoused an opinion about frivolous lawsuits that would make them biased. I did not, because of time constraints and not having enough time, have enough time to expound on that and see if there were other veniremen that have problems with frivolous lawsuits.... I am requesting more time to voir dire the jury on those issues and others....

Id. at 17-18. The Beaumont Court affirmed the trial court's overruling of plaintiff's counsel's objection holding that he failed to identify specific questions he was not permitted to ask. *Id.* at 19. *See also Dewalt v. State*, 307 S.W.3d 437 (Tex. App.--Austin 2010, pet. ref'd).

Glanton v. State

In *Glanton v. State,* No. 05-00-01844-CR, 2002 Tex. App. LEXIS 4296, 2002 WL 1308804 (Tex. App.–Dallas 2002, pet. denied)(not designated for publication), the appellant contended the trial court erred by imposing an arbitrary time limit on voir dire examination. *Id.* at *1. He complained that due to the lack of adequate time, he was unable to ask the venire five questions crucial to the proper selection of a jury in a driving while intoxicated case. *Id.* at *6-7.

The trial judge called up two panels of twenty people each before the attorneys even began their questioning of the potential jurors. After the first panel was brought into the courtroom, the trial court went over general matters and then specifically questioned the venire on the burden of proof, appellant's right not to testify in the case and the requirement that the jury not consider such failure to testify for any purpose, and their ability to weigh the credibility of police officer and lay witness testimony equally. *Id.* at *6. After a discussion off the record, the trial court excused seven Veniremembers who indicated they would either consider appellant's failure to testify as evidence of his guilt or would give greater credence to police testimony. Because of the low number of jurors remaining, another panel of twenty people was called to the court. With the agreement of both sides, the remaining members of the first panel and the new panel were combined, new lists prepared, both sides told they would be again allowed to shuffle, and voir dire began again. No time was taken during voir dire to discuss punishment matters as the defense elected to go to the court for punishment. *Id.* at *7.

The trial court gave the State thirty minutes to conduct its voir dire examination and gave the defense thirty-five minutes. At different times during voir dire, each side was admonished as to how much time remained. *Id.* at *7-8. Defense counsel was told when he had ten minutes remaining and later to "wrap it up." At the conclusion of voir dire, the trial court allowed the defense to individually question four Veniremembers, who were ultimately excused for cause by the trial court.

Defense counsel then asked the trial court to either sustain challenges for cause or to give him additional time to question certain panelists if they were reached because "each one of these Veniremembers stated that, as they sit there now, prior to trial, they would presume the [intoxilyzer] machine to be accurate and that absent the defense proving that the breath test machine is inaccurate in this case, they would assume that it is accurate and would convict on that basis." *Id.* Although the defense described two other potential jurors as having vacillated on the issue of whether they would presume the intoxilyzer to be accurate, he waived further questioning of the two. The trial court found these Veniremembers did not have a "bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely" and denied the request for additional time for voir dire examination. *Id.* at *8.

The defense then objected to the trial court's "shortening the time on voir dire" and asked for additional time to voir dire the entire jury panel. Eighteen proposed questions covering a variety of fairly

complicated, alcohol-related issues were included in the record. The trial court denied the request for additional time on voir dire.

Appellant argued this ruling was reversible error. In particular, he complained that he was not allowed to ask potential jurors: (1) whether a close friend or relative had been the victim of an intoxicated driver and how that would affect them; (2) whether any jurors did not drink alcoholic beverages and if that would influence their verdict; (3) whether they were involved with organizations such as MADD or SADD; (4) whether any had direct or indirect connections to law enforcement; and (5) whether any had been personally affected by a person with an alcohol problem.

The court found that the disallowed questions are the type of basic inquiries that most lawyers would consider asking in the first minutes of voir dire. It found that the responsibility rests on trial counsel to gauge the subject matter at hand, to weigh the relative importance of the legal issues sought to be addressed during voir dire examination, and then to budget the time allowed by the trial court to cover those issues.

Second, although the record contained the additional questions appellant wanted to ask of the venire, the court found that a skilled lawyer could always find more questions that are proper to ask prospective jurors. *Id.* at *11 (citing *Whitaker v. State*, 653 S.W.2d 781, 782 (Tex. Crim. App. 1983)). The fact that counsel could think of one more proper question should not transform a reasonable time limit into an unreasonable one. *Id.*

Third, the record did not show that appellant was precluded from examining prospective jurors who actually served on the jury. It noted that appellant complained that he wanted to ask all of the questions to each member of the venire. The court pointed out that he had not argued, much less shown on appeal, that the trial court precluded him from asking one of the five questions of any particular Veniremember who sat on the jury. *Id.*

Barajas v. State

In *Barajas v. State*, 93 S.W.3d 36 (Tex. Crim. App. 2002), the court noted that the trial court has broad discretion over the process of selecting a jury, including time limits. *Id.* (citing *Allridge v. State,* 762 S.W.2d 146, 167 (Tex. Crim. App. 1988). "The main reason for this is that voir dire could go on forever without reasonable limits." *Id.* at 38 (citing *Faulder v. State,* 745 S.W.2d 327, 334 (Tex. Crim. App. 1987)). "We leave to the trial court's discretion the propriety of a particular question and the trial court's discretion will not be disturbed absent an abuse of discretion." *Id.* at 38 (citing *Allridge,* 762 S.W.2d at 163*; Faulder,* 745 S.W.2d at 334). "A trial court's discretion is abused only when a proper question about a proper area of inquiry is prohibited." *Id.*; *contra Glanton,* 2002 Tex. App. LEXIS 4296, at *6-8.

Diaz v. State

In *Diaz v. State*, No. 14-00-01217-CR, 2002 Tex. App. LEXIS 7647, 2002 WL 31398949 (Tex. App.–Houston [14th Dist.] 2002, pet. denied)(not designated for publication), Diaz claimed the trial court abused its discretion by limiting his counsel's time to conduct voir dire, thus preventing his counsel from asking certain questions in violation of his right to counsel. The court noted that the constitutionally guaranteed rights to counsel encompass the right to question prospective jurors in order to "intelligently and effectually exercise peremptory challenges and challenges for cause during the jury selection process." *Id.* at *6-7 (citing U.S. CONST. amend. VI; TEX. CONST. art. I, § 10; *Ex parte McKay,* 819 S.W.2d 478, 482 (Tex. Crim. App. 1990)). The court noted, however, that this right must be harmonized with the trial court's right to impose reasonable restrictions on the exercise of voir dire examination. *Id.* (citing *McCarter v. State,* 837 S.W.2d 117, 119-20 (Tex. Crim. App. 1992)). Therefore, review of a trial court's decision to limit the time for questioning during voir dire is an abuse of discretion. *Id.* (citing *McKay,* 819 S.W.2d at 482).

The *Diaz* court first noted that the appellant failed to preserve error. *Id.* at *7. The trial court's docket sheet indicated that appellant conducted voir dire for fifty minutes, which covered fifty pages of the reporter's record. *Id.* at *7-8. Twenty-nine pages into the transcript of appellant's voir dire, the trial court gave appellant's counsel a five-minute warning. Nine pages later, the trial court told appellant's counsel to "wrap it up." *Id.* at *8. After another six pages, the court told her, "Your time is up. You need to hurry up." *Id.* at *8. Finally, six pages later, the court instructed appellant's counsel to stop. At no time did appellant's counsel object to the court's admonitions to finish her voir dire, nor did she ever request additional time. *See id.* Although appellant's counsel later asked to "make a record on some questions I didn't get to," appellant never specifically objected to the court's imposition of time limits on voir dire examination. *See id.* Accordingly, the court held that appellant did not preserve his complaint for appeal. *See* TEX. R. APP. P. 33.1(a).

The court also distinguished the facts before it from those in *Taylor v. State,* 939 S.W.2d 148 (Tex. Crim. App. 1996), where the court held error was preserved on a claim of improper limits on voir dire. In

Diaz, appellant's counsel did not advise the court in any way that she had questions she did not get to ask until *after* thanking the jury and *after* sitting down. At no point did appellant's counsel actually ask for more time. Additionally, not until after the court and parties had made their strikes for cause did she advise the court what those unasked questions were. At that time, appellant's counsel informed the court of two questions she "would have asked if the court allowed [her] additional time." One was the issue of punishment (whether or not the jury would consider the goal of punishment to be rehabilitation or retribution–pertaining to electing between judge or jury for punishment), and the second regarding whether individual jurors had personal experiences with drugs or victims - or had been victims themselves of drug-related crimes and whether that would affect their fairness to serve on a drug delivery case. *Diaz*, 2002 Tex. App. LEXIS 7647, at *9 n.2. The State conceded that both of these questions would have been proper. The court held, however, that even if appellant's complaint had been preserved, there was no error. The court noted that the trial court's broad discretionary power to control voir dire examination is well established. *See, e.g.*, *McCarter,* 837 S.W.2d at 120. This discretion includes the ability to place reasonable limits on the voir dire "for various reasons, among them to curb the prolixity of what can become the lengthiest part of a criminal proceeding." *Diaz*, 2002 Tex. App. LEXIS 7647, at *10-11 (citing *Guerra v. State,* 771 S.W.2d 453, 467 (Tex. Crim. App. 1988)). "A skilled lawyer can always find more questions that are proper to ask prospective jurors. The fact that counsel can think of one more proper question should not transform a reasonable time limit to an unreasonable one." *Id.*(citing *Whitaker v. State,* 653 S.W.2d 781, 782 (Tex. Crim. App. 1983) (plurality opinion)).

The *Diaz* court noted that in reviewing a contention that the trial court abused its discretion in terminating voir dire during collective questioning of the venire, one must examine (1) whether counsel attempted to prolong voir dire and (2) whether the court prohibited proper questions.

> Here, the voir dire transcript reveals that appellant's counsel chose to ask open-ended, discussion-type questions about 'why we are here,' following the rules, 'what is important to you,' the 'ability to make decisions without hesitation,' and 'what type of evidence was expected.' She also made editorial comments about a television show featuring lawyers. Many questions were so open-ended that venire responses often strayed from eliciting information that would be material to the informed exercise of challenges in a drug-delivery case.

Id. The court observed that the trial court warned appellant's counsel three times that she was running out of time and opined that she could have heeded the court's warning and adjusted her voir dire examination to accommodate the court's parameters. *Id.* The court stated:

> We are not judging the effectiveness of the voir dire or counsel's style of eliciting relevant information from the prospective jurors. Rather, we conclude that if the two unasked questions were so important to appellant's strategy in culling unqualified jurors from the jury panel, appellant's counsel needed to be more judicious with her time during voir dire. While the length of time allowed is not conclusive, we note that appellant had approximately twenty more minutes than the State for a total of about fifty minutes of questioning. This should have been sufficient time to examine the jury and to enable counsel to intelligently exercise challenges for cause and peremptory challenges.

Id. at *11 n.3. The *Diaz* court held that the record supported the conclusion that appellant's counsel attempted to prolong voir dire, and, as a result, that the court did not abuse its discretion in limiting appellant's time for voir dire. *Id.* (citing *Godine v. State,* 874 S.W.2d 197, 202 (Tex. App.--Houston [14th Dist.] 1994, no writ) (finding no abuse of discretion in voir dire time limit where appellant's counsel did not effectively budget his time)).

Challenges for cause:

Counsel may challenge a juror for cause during voir dire or after its completion. TEX. R. CIV. P. 229. Jurors are less likely to figure out what they need to say to be excused if challenges are made at the conclusion of voir dire at the bench.

Grounds:

The "cause" is any fact which by law disqualifies the juror to serve on the case or in the court's opinion

renders the juror unfit to sit on the jury. TEX. R. CIV. P. 228. The cause is usually based on the statutes governing the qualification of jurors and is usually obvious (bias, interest, medical impairment, etc.). However, a juror may be excused for other reasons. *See Tex. Power & Light Co. v. Adams*, 404 S.W.2d 930 (Tex. Civ. App.–Tyler 1966, no writ); *Guerra v. Wal- Mart Stores, Inc*., 943 S.W.2d 56 (Tex. App.–San Antonio 1997 writ den'd). Counsel must elicit the offensive information from the challenged juror to challenge for cause. *Bailey v. Rains*, 485 S.W.2d 837 (Tex. Civ. App.–Waco 1972, writ ref'd n.r.e.). There is no limit to the number of challenges for cause.

Broad excusals for cause:

Rarely will a judge order juror excusals on broad allegations of bias or interest. Rather, a showing of the particular interest on the part of the juror or jurors sought to be excluded must be presented.

Examples of challenges for cause:

Some commonly recognized grounds for challenging a juror "for cause" are that (1) the juror is not a United States citizen, (2) the juror was a member of a jury that heard the same evidence in a previous case, (3) a lawsuit is pending against the juror, or the juror is prosecuting a suit against someone or has an interest in the outcome of the case, (4) the juror is related to, or a friend of, a party, a party's attorney, or a witness, (5) a juror has animosity toward a party or a party's attorney, (6) a juror has personal knowledge of the facts of the case, (7) a juror is the insured of an insurance company party or a stockholder of a corporate party, (8) the ability of the juror to award a certain sum of money if that sum is warranted by the evidence, and (9) whether a juror has a physical incapacity that could prevent him or her from effectively performing a juror's functions. *See Cavnar v. Quality Control Parking, Inc.,* 678 S.W.2d 548, 555 (Tex. App.–Houston [14th Dist.] 1984, *rev'd in part on other grounds,* 696 S.W.2d 549 (Tex. 1985). However, the ADA prohibits the courts from automatically excluding persons from a jury on the grounds of disabilities. *See* 42 U.S.C. § 12132. *See also* TEX. GOV'T CODE ANN. §§ 62.104(a)-(c)(2).

Examples of interests too remote for a successful challenge for cause include: (1) employee of government entity party, (2) member of a cooperative buying club belonging to a party, (3) taxpayer residents of a city or county, or (4) a casual friend who had former business relationship with one of the parties.

Citizenship:

Mayo v. State

The court in *Mayo v. State,* 4 S.W.3d 9 (Tex. Crim. App. 1999) considered whether "county citizenship" was an absolute juror qualification under section 62.102 of the Texas Government Code and whether it could be waived by failing to challenge a prospective juror for cause under article 35.16 of the Code of Criminal Procedure. *Id. at 12*. The court determined that the requirement that a juror be a county citizen is not an absolute requirement that cannot be waived. *Id.* at 12. In making this determination, the Court noted that the legislature did not mandate that any of the section 62.102 qualifications could not be waived, and that section 62.102 does not require a court of appeals to reverse a conviction rendered by a disqualified juror even if the error was not preserved. *Id.* Although *Mayo* concerned a criminal trial, this reasoning has been applied to civil cases as well. *See e.g.*, *Mercy Hosp. of Laredo v. Rios,* 776 S.W.2d 626, 628 (Tex. App.–San Antonio 1989, writ denied) (stating that appellant waived any complaint as to literacy by accepting a juror and then waiting until an unfavorable verdict was rendered to complain, notwithstanding appellant's argument that it could not have known of juror's illiteracy until after post-verdict interview); *Fish v. Bannister,* 759 S.W.2d 714, 722 (Tex. App.–San Antonio 1988, no writ) (finding failure to raise issue of juror disqualification based on jury misconduct in motion for new trial waived issue on appeal).

Same holding: *Hill v. State*, 475 S.W.3d 407 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd) (the trial court erred when it *sua sponte* discharged a juror during deliberations and replaced her with an alternate on the grounds that she was not qualified for service because she was not a citizen of county, but the error did not constitute reversible error).

Bias/Prejudice/Impartiality:

In the 1963 case of *Compton v. Henrie*, 364 S.W.2d 179 (Tex. 1963) the Texas Supreme Court originally adopted the definition of bias and prejudice we still use today. In *Compton*, the court provided the following definitions: "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."

See also, *Houghton v. Port Terminal R.R. Ass'n*, 999 S.W.2d 39, 46 (Tex. App.–Houston [14th Dist.] 1999, no pet.) (citing *Goode v. Shoukfeh*, 943 S.W.2d 441, 453 (Tex.1997)). Proper solicitation of bias extends to bias or prejudice against the law (*Smith v. State*, 513 S.W.2d 823, 826 (Tex. Crim. App. 1974)), bias or prejudice against a party (TEX. GOV'T CODE ANN. §62.105(3)-(4)), bias or prejudice against the attorneys (*Gum v. Schaeffer*, 683 S.W.2d 803, 807-08 (Tex. App.–Corpus Christi 1984, no writ)) and bias or prejudice against a witness (*Employer's Mut. Liab. Ins. Co. v. Butler*, 511 S.W.2d 323, 325 (Tex. Civ. App.–Texarkana 1974, writ ref'd n.r.e.)). To disqualify a potential juror for bias as a matter of law, the record must conclusively show that the potential juror's state of mind led to the natural inference that he or she would not act with impartiality. *Houghton* at 46. In other words, a court of appeals must find that the trial court capriciously disregarded competent evidence of the prospective jurors' bias or prejudice. *Id.* (citing *Molina v. Pigott*, 929 S.W.2d 538, 541 (Tex. App.–Corpus Christi 1996, writ denied)). Before a prospective juror can be excused for cause based on bias or prejudice that would substantially impair the ability to carry out the oath and instructions in accordance with law, the court must explain the law to the prospective juror and ask whether the juror can follow that law regardless of personal views. *Feldman v. State*, 71 S.W.3d 738 (Tex. Crim. App. 2002).

Once the existence of bias or prejudice is established, the juror must be dismissed. TEX. GOV'T CODE ANN. § 62.105(4); *Houghton* at 46; *Shepherd v. Ledford*, 962 S.W.2d 28, 34 (Tex. 1998). This disqualification extends to bias or prejudice against the subject matter of the suit as well as against the litigants. *Houghton* at 46. The juror cannot be rehabilitated by averring that he or she could try the case fairly. *Sullemon v. U.S. Fidelity & Guaranty Co.*, 734 S.W.2d 10, 14 (Tex. App.–Dallas 1987, no writ); *Carpenter v. Wyatt Const. Co.*, 501 S.W.2d 748 (Tex. Civ. App.–Houston [14th Dist.] 1973, writ ref'd n.r.e.). *But see Cortez, infra.* The court must disregard any declaration from the panelist that he or she will set aside the bias or prejudice and render a verdict based on the evidence. *White v. Dennison*, 752 S.W.2d 714 (Tex. App.–Dallas 1988, writ denied). *But see Cortez, infra.*

A person is not qualified to serve as a juror in a particular case if he is interested, directly or indirectly, in the subject matter of the case. *See* TEX. GOV'T CODE ANN. § 62.105(2). It has been recognized that a stockholder is necessarily interested in the subject matter of the case, when the stockholder's corporation is a party to the litigation. *Tex. Power & Light Co. v. Adams,* 404 S.W.2d 930, 943 (Tex. Civ. App.–Tyler 1966, no writ). Thus, a stockholder is subject to a challenge for cause, due to the fact that he owns an interest in the corporation. What constitutes bias or prejudice is at best an inexact science. Much of this paper is devoted to bias and prejudice.

Cortez v. HCCI-San Antonio, Inc.

In *Cortez v. HCCI-San Antonio, Inc.,* 159 S.W.3d 87 (Tex. 2005), the plaintiff complained that the trial court erred in not discharging a certain Veniremember, Mr. Snider, who was an insurance company claims adjustor. The majority of the San Antonio court of appeals felt that Snider was somewhat equivocal on whether he would favor one side over the other. Snider said that because he was a claims adjustor, he "would be very uncomfortable" sitting on a case that involved an insurance claim and might have "preconceived notions" on the nature of the case. On the other hand, Snider said he felt the case "could almost go either way" and although he would "feel bias," he could not "answer anything for certain." When the court asked Snider if one party started ahead of the other, he replied, "In a way, yes." However, Snider said he would try to listen to all the evidence, follow the court's instructions, and decide the case on the law and evidence. *Id.* at 90.

Court of Appeals:

The San Antonio Court in *Cortez* defined "bias" as an inclination toward one side of an issue rather than to the other. *Cortez v. HCCI-San Antonio, Inc.,* 131 S.W.3d 113, 117 (San Antonio 2003, affirmed 159 S.W.3d 87 (Tex. 2005)). To disqualify a potential juror for bias as a matter of law, the record must conclusively show that the potential juror's state of mind led to the natural inference that he or she would not act with impartiality. *Id.* at 118. If a prospective juror's bias is established as a matter of law, the trial court must disqualify that person from service. On the other hand, if bias or prejudice is not established as a matter of law, whether the juror is sufficiently biased or prejudiced to merit disqualification is a factual determination to be made by the trial court. *Id.*

The San Antonio Court deferred to the trial court and found no abuse of discretion in failing to disqualify Snider, holding that his responses were equivocal and bias was not established as a matter of law. *Id.* The majority emphasized that it was especially critical for courts of appeals to defer to the trial court when reviewing a record that demonstrates uncertainty in a venire person's responses because the trial court is in the

best position to evaluate the prospective juror's sincerity and ability to be fair and impartial. *Id.*

San Antonio Justice Alma Lopez's dissenting opinion in *Cortez* countered with case law holding that a trial court must excuse jurors who admit bias or prejudice even where the juror is rehabilitated through the efforts of counsel or the court by stating that he would decide the case on the evidence and be fair to both sides. *Id.* at 124. In Justice Lopez's view of the record, Snider's bias was established as a matter of law and he could not therefore be rehabilitated. *Id.*

Texas Supreme Court:

When the Texas Supreme Court granted writ, many assumed it would reverse the San Antonio Court consistent with, arguably, over forty years of Texas jurisprudence that established that once a veniremember expresses bias, he or she cannot be rehabilitated or questioned further to determine whether he or she can be fair. (*But see Excel Corp. v. Apodaca, infra*, *disapproved in Cortez, supra*, at 91). Instead, in an 8-0 opinion by Justice David Medina (Justice Paul Green did not participate) the Court affirmed the San Antonio Court giving trial court judges more discretion in determining just who is and is not biased.

Justice Medina wrote:

> But what courts most often mean by "rehabilitation" is further questioning of a veniremember who expressed an apparent bias. And there is no special rule that applies to this type of "rehabilitation" but not to other forms of voir dire examination.

Cortez , 159 S.W.3d at 92.

Justice Medina continued:

> 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. Similarly, we do not believe the discretion accorded trial judges in ruling on challenges for cause is arbitrarily limited in cases involving rehabilitation. Because trial judges are actually present during voir dire, they are in a better position . . . to evaluate the juror's sincerity and his capacity for fairness and impartiality.
>
> As we long ago stated, "bias and prejudice form a trait common in all men," but to disqualify a veniremember "certain degrees thereof must exist." *Compton, 364 S.W.2d at 181-82*. "Bias, in its usual meaning, is an inclination toward one side of an issue . . . 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." *Id. at 182* (emphasis added). Accordingly, 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.

Id. at 93-94.

The supreme court affirmed the trial judge's denial of the challenge for cause. *Id.* at 95.

Post-Cortez:

Cases subsequent to *Cortez* reflect the extent to which "rehabilitation" is permitted and, in addition, the extent to which the appellate courts defer to the trial court's discretion in voir dire. For example, in *McMillin v. State Farm Lloyds,* 180 S.W.3d 183 (Tex. App.--Austin 2005, no pet.) the trial court refused to disqualify three potential jurors who expressed considerable skepticism over plaintiff's case. Veniremember Roberts said that the mold crisis in homes was "very much overstated," that such lawsuits could raise her premiums which "could bias" her, and that the plaintiffs were starting out behind. But, she also said she could listen to the facts and could award $5 million in damages if the evidence supported it. Veniremember Emmons, among other things, said that plaintiff would have to bring more than 51 percent proof before she would award mental anguish damages and proof beyond all doubt to award punitive damages. But, she also said she could follow the judge's instructions concerning the burden of proof. Finally, veniremember Flores said he could not award the full amount of damages "no matter what," but later said he could award damages if proven. For all these potential jurors, the trial court denied the motion to disqualify and the court of appeals affirmed, stating that this was the type of rehabilitation approved by *Cortez*. *McMillin* 180 S.W.3d at 196.

Other courts have affirmed the trial court's discretion in refusing to disqualify potential jurors who, at first blush, appear to express bias or prejudice. *See,*

e.g., Jones v. Lakshmikanth, 2005 Tex. App. LEXIS 6937 (Tex. App.--Corpus Christi 2005, no pet.) (veniremember not struck for cause notwithstanding statement that she would have trouble acting fairly since she felt medical malpractice lawsuits hurt patient care); *Silsbee Hospital, Inc. v. George,* 163 S.W.3d 284 (Tex. App.--Beaumont 2005, pet. den.)(no error for trial court to refuse to strike a potential juror who said that she "would have trouble not giving [plaintiff] money--something, anyway" even if he didn't carry his burden of proof); *Weaver v. State*, 355 S.W.3d 911 (Tex. App.-Ama. 2011, pet. ref'd)(trial court acted within its discretion in denying defendant's challenge for cause with respect to jurors who answered "no" in response to voir dire question as to whether they could recommend probation as sentence in the event of conviction for indecency with a child; answers would change depending upon which attorney asked the question and what words were being used or whether they were being asked if they could keep an open mind or if they could levy a specific punishment, and jurors ultimately stated they could consider the full range of punishment).

Buntion v. State

This case illustrates the extent of non-reversible juror rehabilitation. In *Buntion v. State*, 482 S.W.3d 58 (Tex. Crim. App. 2016), cert. denied, 136 S. Ct. 2521, 195 L. Ed. 2d 851 (2016), a capital murder case, appellant's counsel made eleven challenges for cause, used peremptories on all the complained of panelists, denied additional peremptories after he was granted two additional, and forced to accept an identified objectionable juror (thereby preserving error). The following statements were made by panelists in their questionnaires: 1. strongly favored death penalty, had a brother who was a police officer, and was unable or unwilling to consider any mitigating circumstance other than remorse (but later stated that he was neutral and open to hearing all of the evidence before answering mitigation special issue, testified that the fact that his brother was a police officer would not affect his ability to serve on the jury, and juror did not indicate, after law had been explained to him, that he was unable to set aside his views and follow the law if it conflicted with how he felt); 2. favored death penalty and that death penalty was appropriate for defendant who had been found guilty of capital murder for the intentional killing of a police officer (but also indicated on her questionnaire that her decision on whether to assess death penalty depended on facts and circumstances of the particular case, stated that she was able to follow the law as it had been explained to her, and later modified one of her questionnaire responses that indicated that she was strongly in favor of death penalty); 3. stated her aunt had been murdered and her uncle was a police officer and she had tendency to believe police officers over civilian witnesses (but also stated that she was able to follow the law and set aside any personal bias); 4. was somewhat biased because she had worked as a probation officer, that she did not want to be on the jury, and that she would be distracted during trial, and whose responses to juror questionnaire indicated that she would have required defendant to present evidence before answering special issues in his favor; although juror expressed concern about her busy schedule during voir dire (but also indicated that her personal responsibilities would not substantially impair her ability to serve as juror, and also stated that she was able to follow the law and set aside any personal bias); 5. associated with police officers and stated in his juror questionnaire that he believed that death penalty was appropriate when someone killed a police officer (but also said that his contacts with police officers would not affect his ability to make a punishment decision); 6. stated that anyone who committed capital murder should pay with his life and who allegedly stated that deliberate did not mean anything more than intentional (but the record reflected that juror generally understood the distinction between intentional and deliberate, although she was momentarily confused by the prosecutor's questioning, and juror did not express inability to set aside her personal opinions and follow the law).

See also, Thomas v. State, AP-77,052, 2018 WL 739093, at *29 (Tex. Crim. App. Feb. 7, 2018).

Hafi v. Baker

In *Hafi v. Baker*, 164 S.W.3d 383 (Tex. 2005), the Texas Supreme Court applied the *Cortez* holding when it reviewed a challenge for cause denial. In *Hafi*, a medical malpractice case, a veniremember worked as a defense attorney in medical malpractice actions. The veniremember protested the suggestion during voir dire that the plaintiffs were starting a race a little bit behind, he disagreed with every suggestion that he could not be fair and objective, and his most "biased" statements were his affirmative answers to leading questions suggesting that, because of his career as a defense attorney, he could relate to the defendants' attorneys and could see things more from the defendants' perspective.

The court reversed the Corpus Christi Court of Appeals finding his answers did not reflect a disqualifying bias.

Petetan v. State

In *Petetan v. State,* AP-77,038, 2017 WL 2839870, at *38 (Tex. Crim. App. Mar. 8, 2017), reh'g denied (Oct. 18, 2017), reh'g granted, AP-77,038, 2017 WL 4678670 (Tex. Crim. App. Oct. 18, 2017), the trial court denied a challenge for cause following this exchange regarding whether police officers are more believable than other people, less believable, or the same: "I believe they are more believable. I really do. I believe that—besides having a brother that is a police officer, I've ridden with him, I've been with other police officers. As a general rule, I believe that profession is up front and as good as they can be." When asked whether police officers "are going to be more believable than other people, just a person off the street who has no training like that," the panelist further responded, "As far as answering questions as to their expertise, yes, I believe that they will be more believable. As far as general questions, personalities, that kind of thing, they have no training that way, they have no—I have no reason to believe that they are any better at it than anybody else."

The court held that a prospective juror "who cannot impartially judge the credibility of witnesses is challengeable for cause for having a bias or prejudice in favor of or against a defendant." Impartiality with respect to the credibility of witnesses does not, however, mean that a juror must have no views on what characteristics make a witness more or less credible. Rather, it means that the person is genuinely open-minded and subject to persuasion, "with no extreme or absolute positions regarding the credibility of any witness." Being more or less skeptical of a certain category of witness does not make a prospective juror challengeable for cause. Although this panelist expressed the view that police officers were more believable than other witnesses when it came to matters within their expertise, but even as to those matters, he did not express any extreme or absolute positions regarding police officers' credibility. The trial court did not abuse its discretion in denying the challenge for cause.

Taber v. Rousch

In *Taber v. Roush*, 316 S.W.3d 139, 164-65 (Tex. App.--Hous. [14th Dist.] 2010, no pet.), Taber argued that venire member number five was disqualified as a matter of law due to his background: "He was a lawyer for Shell Oil and a former insurance/med mal defense lawyer who had worked on cases like this one, had friends working for the defense firm and close friends who are doctors or nurses." The COA disagreed noting he stated that he did not know any of the attorneys participating in voir dire and there was nothing in the record indicating that his professional background or relationships with doctors and nurses would have precluded him from being a fair and impartial juror. To the contrary, he said he could be "fair and impartial" and "would be a good juror".

In her motion for rehearing, Taber also argued that venire member number five "demonstrated a bias against out-of-state experts." Taber's counsel asked during voir dire, "[I]s there anybody that feels that since the plaintiff would have an out-of-state expert and the defense would have an in-state expert, that before you hear any of the evidence, you would have difficulty giving the same weight to an out-of-state expert as an in-state expert?" Venire member number five raised his hand in response to this question.

The Court noted that bias is not established as a matter of law merely because venire members raise their hands in response to a general question addressed to the entire panel. *Citing Smith v. Dean,* 232 S.W.3d 181, 191 (Tex.App.-Fort Worth 2007, pet. denied); *Sosa v. Cardenas,* 20 S.W.3d 8, 12 (Tex.App.-San Antonio 2000, no pet.). "General questions usually are insufficient to satisfy the diligence required in probing the mind of a venire member with respect to a legal disqualification for bias or prejudice." *Citing Murff,* 249 S.W.3d 407, 411 (Tex. 2008); *Gant v. Dumas Glass and Mirror, Inc.*, 935 S.W.2d 202, 208 (Tex. App.–Amarillo 1996, no writ). The Court noted that at most, venire member number five indicated that he would have "difficulty" giving the same weight to an out-of-state expert as an in-state expert, he never expressed an inability to find in favor of Taber if she proved her case, or an inability to make his decision based on the evidence and the law. "Any asserted bias expressed by venire member number five towards out-of-state experts was equivocal at best", which the Court found was not a ground for disqualification. *Citing Cortez v. HCCI–*San Antonio,* 159 S.W.3d 87, 94 (Tex.2005).

Note: this case also discussed under commitment questions at end of *K.J. v. USA Water Polo, Inc. infra*.

Brooks v. Armco, Inc.

In *Brooks v. Armco, Inc.*, 194 S.W.3d 661, 663 (Tex. App.-Texarkana 2006, pet. denied) the plaintiff sued the defendant over her husband's death from mesothelioma, allegedly caused by his asbestos exposure at work. During the plaintiff's voir dire questioning regarding the burden of proof, three panel members stated that they would use the criminal "beyond a reasonable doubt" standard instead of preponderance. The plaintiff moved to strike those members for cause.

The trial court instructed the jury on the proper burden of proof, and upon further questioning, all members stated that they could follow the trial court's instructions. The trial court denied the strikes for cause. The court of appeals affirmed stating:

> For a bias to disqualify a juror, it must appear that the state of the mind of the juror leads to the natural inference that he will not or cannot act with impartiality. . . . [W]e find that [the panel members] were not biased as a matter of law, and the trial court did not abuse its discretion in refusing to strike them for cause. A reasonable construction of the record is that the prospective jurors in question simply stated what they thought the law ought to be on the burden of proof requirement, but when the trial court explained that it would instruct them as to the burden of proof required in this case, they indicated to counsel for both sides that they had no problem applying the burden of proof the court said they must use and that they would not try to apply any higher burden of proof. None indicated they could not or would not follow the law on the burden of proof as given to them by the trial court.

Id. at 664. The court affirmed the judgment for the defendant. *Id.* at 667.

GMC v. Burry

In *Gen. Motors Corp. v. Burry*, 203 S.W.3d 514 (Tex. App.--Fort Worth 2006, pet. denied), the plaintiff sued GM on a products liability claim after the plaintiff was severely injured in an accident. After the jury returned a verdict for the plaintiff, the defendant appealed arguing, among other issues, that the trial court erred in failing to excuse two venire members for cause. The trial court denied a for cause strike to one member who had a brother die in an accident and who subsequently had a "fight" with GM. When asked if he would be against GM, however, the member stated that he had no idea. The court of appeals affirmed the trial court's decision to not strike the member for cause as his statements did not show an unequivocal bias.

Another veniremember had a relative die in a car accident and had sympathy for the plaintiff. When GM asked her whether she could set aside her sympathy, she said, "I don't think I can." The court of appeals held that the member's statement could be interpreted as proof of unequivocal bias, but technically, the statement was equivocal. The court stated that the trial court was in the best position to decide whether the member had unequivocal bias because the trial court could review the member's demeanor, expressions, tone, and voice inflection. *Id.* At 546.

Smith v. Dean

In *Smith v. Dean*, 232 S.W.3d 181 (Tex.App.--Fort Worth 2007, pet. den.), Dr. Smith, a dentist, underwent aortic valve replacement surgery to correct a blood flow problem that Dr. Dean had helped diagnose. During the surgery, which was performed by Dr. Dean and Dr. Olyn M. Walker, Dr. Smith suffered an injury due to inadequate blood flow. Consequently, Dr. Smith required a heart transplant, which he received eight days later. Because of these injuries, he filed a medical malpractice suit alleging direct and vicarious health care liability claims.

At voir dire, Smith's trial counsel questioned several of the venire members about their feelings regarding medical malpractice claims and the burden of proof required to find economic damages:

> VENIREPERSON HUFFSTUFLER: I don't know what kind of money we're talking about or what, it needs to be more than 50 percent sure if we're going to make him pay-I'm sure it's a substantial amount of money, I don't know, but if you're going to make him pay that, I'd like to think that if I was sitting up there, that the jury was more than 50 percent sure that I messed up before they're going to make me pay.
> MR. BRILEY: Okay. Let me get this straight. You think that it ought to be more than 50 percent. Do you think it ought to be more than some higher number?
> VENIREPERSON HUFFSTUFLER: I would think in order for us to find him-to pay him money, we would need to be 100 percent sure that he made a mistake. Because if we're not, who says he is liable for whatever happened?
> MR. BRILEY: Who agrees with Mr. Huffstufler, that its got to be 100 percent? Keep your hands up please.

Twenty-nine venire members raised their hands in response. Of this group, seven jurors ended up on the jury.

Mr. Briley attempted to clarify the response by asking the following question:

> For the folks that raised their hand that I called off the number, my question is this: Even if the Judge instructs you that the standard that I have to prove the case is a preponderance of the evidence, that is the greater weight and degree of credible evidence, 51 percent, are all of the folks that raised their hands, is your attitude that you cannot follow the Court's instructions because you need more than 51 percent to prove a breach of the standard of care in a medical negligence case? Is there anyone that disagrees with that?

None of the venire members raised their hands or otherwise indicated their agreement or disagreement with the question.

Appellant next questioned the venire members regarding the burden of proof required for noneconomic damages:

> MR. BRILEY: I want to switch gears a little bit more, and Mr. Huffstufler, I think, zeroed in on this. Some folks may say, you know, It's okay, I feel comfortable with this burden of proof at this greater weight and degree thing, this 51 percent thing if we're talking about reimbursment of, say, medical expenses, something that you've lost.
> How many here on the panel feel that I would have to prove the case beyond the preponderance if we're seeking damages like pain and suffering or non-economic damages? Is there anyone that feels that way?
> Mr. Huffstufler, how do you feel if I'm seeking a million dollars or whatever the number is for non-economic damages? What level of proof would you hold me to?
> VENIREPERSON HUFFSTUFLER: I wouldn't feel comfortable making him pay anything unless I was 100 percent sure that he should, that it was his fault, whatever happened. And like I say, I'm going to be 100 percent sure. Who am I to make him pay for something that I'm not completely certain that he owes him that?

Mr. Briley then asked a final question, which regarded damages in general:

> Okay, Now I apologize if I have to go through this one by one, but who of you-if you'll raise your hands-agree with Mr. Huffstufler? That is, that you feel you cannot award money for any damages unless you're 100 percent certain that the doctor made the mistake? Raise your hands, please?

Thirty-three venire members responded affirmatively to this question. Of this group, eight jurors ended up on the jury. These venire members represent the "block group" that the trial court referred to throughout the hearing on challenges for cause.

Mr. Briley then addressed the instruction that all jurors set aside bias, sympathy, and prejudice in deciding the facts of the case:

> We had a lot of people that said, like Mr. Huffstufler, that you have to be absolutely sure before you can award any damages. What I want to find out is if there's somebody here who's not quite as strong as Mr. Huffstufler, who says, I can award some damages but there are other types of damages that I can't award unless you prove by an absolute certainty or 100 percent that the doctor did something wrong? Okay, are you with me?
> And I understand Mr. Huffstufler's position, but is there someone who says, Well, I can award economic damages loss of wages or medical expenses on this preponderance standard, but when you want something for like non-economic damages, that you have to show me more? Is there anyone who feels that way?
> VENIREPERSON RAYMOND SMITH: Yes.
> MR. BRILEY: Mr. Smith. How do you feel about it?
> VENIREPERSON RAYMOND SMITH: Well, I'm stronger than a

> preponderance of the evidence but not beyond a shadow of a doubt type situation. I'd have to have some kind of gross negligence or something like that.
> MR. BRILEY: Okay. So in order for me to get you to award non-economic damages, pain and suffering for example, it would have to be more than a preponderance of the evidence. Is that correct?
> VENIREPERSON RAYMOND SMITH: Yes, sir.

Mr. Briley asked the panel who agreed with Venireperson Smith. The only venire member who responded affirmatively and who ended up being seated on the jury was Sherry Baker (# 26).

Mr. Chamblee, counsel for Dr. Sudarshan (not a party to the appeal), explained to the venire members the importance of following the trial court's instructions in applying the correct burden of proof. Mr. Chamblee explained that the trial court would define "preponderance of the evidence" and then addressed the panel's previous responses to Mr. Briley's questions:

> Now here's the question. Some of y'all raised your hand in response to questions saying, for instance, you raised your hand and said, Oh, I just personally believe I need to be certain. I need 100 percent. And It's okay to think, you know, just personally, I just would like to see and have more.
> The question is more detailed than that, and that is this: Regardless of your personal belief or what you might like the law to be or what you might like to see, will you abide by or disregard the Court's instructions?
> Do you understand the question I'm now asking you?
> First row, do y'all understand the question?
> Second row, do you understand the question I'm asking you? Third row? Fourth row? Fifth row?
> Here's my question. A bunch of you raised your hand in response to questions asked by Mr. Briley, said 100 percent. If you want to find someone at fault, 100 percent. I'm discussing with you if the Court instructs you, you are to be guided by the preponderance of the evidence in finding yes to any question asked, and preponderance of the evidence is greater weight and degree of credible evidence, and he instructs you to follow it, is there anybody here who needs to raise their hand and tell me, I will, because of my personal opinions, my personal beliefs, I will disregard what the Court is instructing me to do? I won't follow it, I'll do my own thing? Is there anybody here who says and needs to raise their hand to say, that's what I'm going to do?

Venireperson Grieb asked for clarification about whether refusal to follow the instructions constituted a crime. The trial court responded as follows:

> Let me help answer that just a moment, if I could. The answer to that is no, and the purpose of this proceeding and this part of the proceeding or voir dire is to really find out if you can or cannot follow that kind of instruction, and it's okay again if you can't.
> If you say, My [sic] personal conviction is such that even if the Judge tells me to do one thing, my personal conviction is that I can't do that, then that's the purpose of this part of the trial is to say, I really can't do that.
> And I think that's supposed to be the purpose that we're all trying to get to is to find out if you have such a strong held conviction that if I give you an instruction on a certain thing whether it's burden of proof, whether it's the law in some other area, whether or not you can follow that instruction.
> But if you have personal convictions that say, I just can't follow that instruction, then nothing is going to happen to you. It's just that this is the time to let everybody know that so what we'll be able to find out about that. Does that help?
> VENIREPERSON GRIEB: That helps, yes, sir.

Mr. Chamblee then questioned the panel on whether they could follow the trial court's instructions on the burden of proof:

> All right. Now, with that being said, I'm going to go row by row real quick so I understand. In other words, the Judge will give you the instruction. It's okay to have a personal feeling, but he's going to tell you in our judicial system, this is what shall guide you in this case.
> The question is if you have some personal belief, can you set it aside and follow his instruction with regard to preponderance of the evidence?

By raising their hands, seven venire members indicated that they would disregard the trial court's instructions and require a heightened burden of proof. Six of those seven were from the original block group: The seventh was Henry Grieb (#28). Although Venireperson Simmons eventually said that she could follow instructions, the trial court still granted appellants' challenge for cause for her.

The trial court next conducted a hearing on challenges for cause outside the presence of the jury. Appellants first challenged the seven venire members who said they could not follow the trial court's instructions on the burden of proof even after the trial court and Mr. Chamblee clarified the process. The trial court granted these challenges. The trial court also granted appellants' challenge to Venireperson Huffstufler, who was the first from the "block group" to say that he would require 100 percent certainty before making appellees pay any type of damages. The trial court then addressed appellants' challenges for cause to those venire members in the "block group" who raised their hands in agreement with Venireperson Huffstufler.

> Well, part of the problem I have with the way you did it was, it was a little fuzzy because one person says-and the person that started it, I granted the challenge to. But then all of a sudden, one person says it and it's, Me too, Me too, Me too, and you've got half the room that raises their hand.

The trial court further stated that at least one of the questions was not predicated on whether or not the jurors could follow the court's instructions on the burden of proof. The trial court also expressed concern that the proper definition for "preponderance of the evidence" was not given and gave his opinion on the overall questioning.

> I think-the problem I have, I think mass hysteria took over when that one guy stood up and started talking, and that's what I'm having a problem with.

The trial court stated that Mr. Chamblee had rehabilitated the "block group" when he explained the burden of proof and the importance of following the trial court's instructions. The trial court next noted that appellate courts have accepted rehabilitation and offered to bring in any of the complained-of jurors for the appellants to examine; appellants declined this opportunity. Subsequently, the trial court held that the "block group" was rehabilitated with the exception of the seven venire members who had already been stricken for cause.

The trial court next heard the parties' peremptory challenges. Appellants complained that they would have insufficient peremptory challenges because the trial court would not grant challenges for cause for twelve venire members from the "block group" (Appellants identified these veniremembers). After providing this list to the trial court, appellants asked for five additional peremptory challenges. The trial court denied this request.

Appellants used peremptory strikes on venire members 19 and 20, but did not use any of their remaining peremptory strikes on the venire members from the "block group" identified as having survived their challenges for cause. Eight of the venire members who were part of the "block group" that appellant challenged for cause ended up on the jury. The jury returned a verdict for appellees.

Appellees claim that appellants did not properly preserve the jury selection error. The Fort Worth court agreed in part. The court noted that Appellants started with six peremptory challenges. When the trial court refused to strike twelve venire members from the "block group," appellants stated that they would not have enough peremptory challenges and requested five more. The trial court denied this request. Eight of the twelve challenged venire members made it onto the jury panel. Appellants used two peremptory challenges on venire members 19 and 20, individuals that they had previously challenged for cause unsuccessfully. The court held that because appellants did not use their remaining four peremptory challenges on the complained-of jurors from the "block group," they waived their objection to these four jurors. *Citing Cortez,* 159 S.W.3d at 90 *and McMillin,* 180 S.W.3d at 194 (holding that appellants waived error for as many objectionable jurors as they did not strike with peremptory challenges).

However, the court held that appellants preserved error as to the remaining four jurors because, even if they had used all of their peremptory challenges to strike the complained-of jurors, *four* objectionable jurors still would have remained on the panel. *Citing Cortez,* 159 S.W.3d at 90 *and McMillin,* 180 S.W.3d at 194-95 (explaining that appellants must show the trial court committed error as to one more juror than the appellants preserved error for in order to show harm).

However, although the jurors from the "block group" expressed some bias during voir dire, the court held that by the end of the questioning, they were rehabilitated. The court noted that Mr. Chamblee and the trial court spent time explaining the law and the burden of proof to the panel. After his explanation, Mr. Chamblee asked each row if they understood the law and then asked if they could follow it and the trial court's instructions. None of the jurors from the "block group" who were ultimately empaneled raised their hands or otherwise indicated that they could not follow the instructions or the law. The court held that this further questioning and explanation allowed the jurors empaneled from the "block group" to show that they had been successfully rehabilitated.

Appellants argued that *Shepherd* was controlling in this case because Mr. Chamblee attempted to rehabilitate through silence. *Shepherd,* 926 S.W.2d at 412 (holding that jury member who expressed bias in questioning could not be rehabilitated through silence). The court disagreed distinguishing *Shepherd* by noting that the juror expressly stated, in individual questioning, that he would be biased in the case, thus establishing bias as a matter of law.

> Here, unlike the juror in *Shepherd,* the jurors empaneled from the "block group" merely raised their hands in agreement with another juror. *See id.* This is not bias as a matter of law; thus, the jurors here were able to be rehabilitated. *See Cortez,* 159 S.W.3d at 92; *Shepherd,* 926 S.W.2d at 412. Because the trial court was in a better position to judge the venire members' sincerity and capacity for fairness, it acted within its discretion by concluding that the "block group" of jurors who raised their hands as if to say, "Me too, Me too" had been rehabilitated.

Citing Cortez, 159 S.W.3d at 93 (holding that if further questioning of an apparently biased venire member shows that the bias no longer exists, then the venire member need not be disqualified).

In summary the court affirmed holding that because the jurors were not biased as a matter of law and were successfully rehabilitated by appellees' counsel and the trial court, the trial court did not abuse its discretion in overruling appellants' challenges for cause.

Villegas v. State

In *Villegas v. State,* Nos. 04-07-00109-CR, 04-07-00110-CR, 04-07-00111-CR, 2008 WL 441755 (Tex. App.--San Antonio 2008 no pet.)(not designated for publication), during general voir dire, the prosecutor asked "[w]hat does a person look like who has committed child abuse? Sexual child abuse? What does that person look like? Anyone?" One venire member replied "Depressed," another "Withdrawn," another "Normal," and then panel member 45 stood up and said "Something like him," pointing at the Defendant. Defense counsel immediately objected and after a discussion at the bench, the panelist was held in contempt, handcuffed and escorted from the courtroom.

A different prospective juror, number 28, relayed her opinion before the rest of the panel that "if they look guilty they are guilty ... That's just it, so I don't think I would be, you know, fair for the Defendant." Once again, defense counsel objected two times, requesting a mistrial, arguing that the jury pool had been tainted based on the prospective juror's statements. The trial court overruled the objection. Defense counsel did not request an instruction.

The issue on appeal was whether these remarks were so emotionally inflammatory that the seated jurors were influenced by these comments to the prejudice of the defendant. Without answering this question, the court held that the record was simply devoid of evidence that any juror on the panel was prejudiced or that any other juror held a similar opinion as either of the prospective jurors who made the statements.

> The fact that venire member 45 was handcuffed and led away from the courtroom in contempt clearly indicated the court's displeasure with the opinion expressed by venire member 45. Even without an instruction, the other jurors could have reasonably drawn on their own experiences to know that individuals who commit child abuse do not all look alike. Another venire member responded that a child abuser

> would look "normal" immediately before venire member 45 made his comment. Furthermore, it does not seem probable that remaining members of the panel would have been so persuaded by the panelists' statements to make them incapable of drawing their own conclusions.

Martinez v. State

In *Martinez v. State*, 161 S.W.3d 697 (Tex. App.--Austin 2005, rev'd on other grounds, 225 S.W.3d 550 (Tex.Crim.App. 2007), Martinez claimed that the trial court erred when it denied his challenges of two prospective jurors for cause. He claimed that, during voir dire, it became apparent that two venirepersons, Silberkraus and Soliz, were unable to consider the full range of punishment for the offense of aggravated sexual assault. Because the trial court denied the challenges for cause, Martinez argued that he was forced to use a peremptory strike to exclude each of the two challenged venirepersons, that he was denied additional peremptory strikes, and that he identified two members of the jury as objectionable and claimed he would have struck them with a peremptory challenge. The court held that Martinez appropriately preserved the trial court's error, if any. *Id.* at 701, citing *Demouchette v. State,* 731 S.W.2d 75, 83 (Tex. Crim. App. 1986) (describing procedure for preserving error for trial court's failure to sustain challenges for cause).

During voir dire, defense counsel asked the panelists whether they could consider probation for aggravated sexual assault of a child. The following exchange took place between defense counsel and Venireman Silberkraus:

> Mr. Mange: Can you consider probation?
> Silberkraus: If the law says, yeah.
> Mr. Mange: The law says you can.
> Silberkraus: I don't know that I could.
> Mr. Mange: I have to do something that frequently irritates people about lawyers. . . . The thing I have to do is . . . pin you down. You said that I don't know that I could. Could you, could you not?
> Silberkraus: No, I don't think so.

Id.

Later, the trial judge called Silberkraus to the bench, and questioned him again about whether he could consider probation in the appropriate case. Silberkraus replied:

> Silberkraus: I am tempted to say yes because that's what the Legislature has deemed the appropriate punishment.
> Court: They have given you a wide range.
> Silberkraus: I can't think in my mind right now theoretically what that appropriate case might be.
> Court: Do you think that there could be an appropriate case?
> Silberkraus: It's a theoretical possibility that case exists. I can't think of one right now where I personally would think if I had found the person guilty beyond a reasonable doubt where I myself would think a recommendation of probation would be appropriate. But it is possible.

Id. Potential juror Soliz, similar to Silberkraus, initially responded that he would be unable to consider probation for the offense of aggravated sexual assault of a child. Toward the end of voir dire, the trial court called Soliz to the bench and explained the range of punishment associated with aggravated sexual assault of a child, and asked once again if he could consider probation. The following exhange took place:

> Soliz: I would consider but I think they should be a lot more harsh than that, especially for a child.
> Court: But you could consider it?
> Soliz: Yeah, I guess I could consider it . . . .
> Court: You wouldn't give it, maybe, but you could consider it.
> Soliz: I would not even consider it.
> Court: Now you just answered it different.
> Soliz: Well, it's just that I feel a little bit stronger than that. I don't think it's harsh enough to be honest with you. What I feel and what I think what should be done is not what you are asking me. What you are asking me is what the law is and I will have to go with the law.

Id. at 701-02.

The court held that the trial judge had not abused his discretion by denying the challenges for cause due to vacillating answers. *Id.* at 702.

Murff v. Pass

In *Murff v. Pass*, 249 S.W.3d 407 (Tex. 2008) the Texas Supreme Court reversed the Waco Court of Appeals holding that the trial court was satisfied that Ruth was sufficiently impartial without having to conduct additional individual questioning, and review of the entire examination failed to indicate that the trial court's assessment constituted an abuse of discretion. The following exchange with venireperson 5, Mr. Ruth, occurred:

> Counsel: Okay. Does anyone here disagree with Mr. McBrine about that? That they do not believe that that would be a more likely than not vote if she said I believe it more likely than not, but I have some doubts. Anyone have a problem with that? Very good. Yes, sir, Mr. Ruth?
> Ruth: Is the question more likely than not the preponderance of the evidence? Because if it is, then I disagree.
> Counsel: I'm sorry. The preponderance of the evidence is what would be [the] greater weight and degree of credible testimony. Mr. Ruth, do you see a big difference in more likely than not and greater weight?
> Ruth: Yes.
> Counsel: Okay. Could you please tell me what that difference is in your opinion?
> Ruth: The greater the weight, I would expect it to be clear and convincing.
> Counsel: Clear and convincing, okay.
> Ruth: I have doubts then.
> Counsel: Well, you would hold me to clear and convincing?
> Ruth: Yes.
> Counsel: Okay. And I appreciate that because, you know, a lot of people-okay. (Clarification by reporter.)
> Counsel: The Court Reporter would like you to repeat that, sir.
> Ruth: I just said that for me the clear and convincing would be that closer to the greater weight measure that he mentioned before.
> Counsel: Okay. And the question then was whether or not you would hold me to a clear and convincing degree in this case?
> Ruth: Yes, I would.
> Counsel: Okay. And who agrees with Mr. Ruth about that?
>
> Counsel then listed the venirepersons who responded affirmatively, including venirepersons 10, 29, and 31. Shortly thereafter, another panel member had the following exchange with Pass's counsel:
> Cantu: Now, in preponderance of the evidence, are you saying that clear and convincing is an option, or is more likely than not a preponderance of the evidence?
> Counsel: Okay. It means the greater weight and degree of credible testimony. The greater weight, okay?
> Cantu: But what is considered the greater weight than that? Does it have to be clear and convincing or does it have to be more likely than not?
> Counsel: Well, I guess that's up to the juror to decide because when the Judge gives the instructions-

At this point in the questioning Murff's counsel objected, and the trial court agreed that the jury was becoming confused. The trial court clarified that the standard of proof in this case was preponderance of the evidence, and that the jury charge would contain appropriate instructions related to the standard of proof and its definition.

Following the objection by Murff's counsel, Pass's counsel continued to attempt to explain the differences between the various standards of proof, as did the defense attorneys. Comments made by several of the panel members indicated that they continued to be confused. One of the defense attorneys asked the panel whether they would apply a standard of proof other than the one outlined by the judge in the jury charge. None answered affirmatively.

Pass made timely and proper objections to venirepersons 5 (Ruth), 10, 29, and 31, arguing that they should be disqualified for cause. The trial court overruled all of Pass's challenges. Pass used peremptory challenges to eliminate venirepersons 5, 29, and 31, and venireperson 10 served on the jury. After a two-week trial, the jury found in Murff's favor and the trial court

entered a take-nothing judgment. Pass appealed, contending the challenged venirepersons should have been disqualified for their endorsement of an improper standard of proof.

The Waco Court of Appeals, No. 10-06-00162-CV, 2007 Tex. App. LEXIS 1481 (Tex. App.–Waco 2007, reversed)(not designated for publication) found that a general question on proximate causation was insufficient to establish the disqualification of several venirepersons under Tex. Gov't Code Ann. §§ 62.105; instead, further questioning on the apparent initial bias was required. As to questions relating to the required burden of proof, the court found that a challenge for cause should have been granted for several venirepersons when they indicated they would hold the next friend to a clear and convincing standard of proof. Specifically, the court noted there was a general inability to follow the trial court's instructions regarding the law and disagreed that these venirepersons were rehabilitated by defense counsel's later questioning and the trial court's instruction that the burden of proof was the preponderance of the evidence. In reversing and remanding for a new trial, the Waco Court held harm was presumed when an objectionable juror was seated because a strike was used on a disqualified venireperson.

The supreme court held that Mr. Ruth's statement that he would hold plaintiff to a clear and convincing standard of proof, rather than the proper preponderance of the evidence standard, was not grounds for disqualifying for cause, as Ruth was confused about the definitions and nothing indicated that he harbored bias or prejudice in favor of or against a party or claim, or that he would be unable or unwilling to follow the court's instructions once the definitions were properly stated. 249 S.W.3d at 411.

Standefer v. State

In *Standefer v. State*, No. 08-97-00641-CR , 2003 Tex. App. LEXIS 8773 (Tex. App.–El Paso 2003, pet. dism'd)(mem. op., not designated for publication), the court examined the exchanges with three jurors on voir dire. Rogers, Sale, and several other Veniremembers indicated a willingness to trust "our peace officers" out on the road that have had years of experience identifying the intoxicated driver to determine when somebody has had too much to drink. Rogers said, when asked if he presumed the defendant to be "just a little bit guilty" because he had been charged, stated that he did not "figure the police officer is going to waste my time or yours, so there must be something for me to hear. But I'm not making any presumptions." Sale, when asked if he presumed Standefer to be "just a little bit guilty" because he had been charged, replied, "I think if the police picked him up and wrote him a ticket for this, he may have been guilty. But I certainly wouldn't think that until I hear what is going on." Sale indicated that either he or his spouse had contributed to the organization Stop DWI, formerly Mothers Against Drunk Drivers. All three of these challenged voir dire members testified that he or she would keep an open mind until hearing all of the evidence and closing arguments of both sides.

The court of appeals noted that a Veniremember who indicates a tendency to give certain classes of witnesses a slight edge in terms of credibility, but otherwise appears open-minded and persuadable, with no extreme or absolute position regarding the credibility of any witness, is not challengeable for cause. *Id.* at *4-5 (citing *Ladd v. State*, 3 S.W.3d 547, 560 (Tex. Crim. App. 1999)). The court observed that Rogers, Sale, and Hawk appeared open-minded and persuadable, and had no extreme or absolute position regarding the credibility of any witness. Therefore it held that the trial court did not abuse its discretion in overruling Standefer's challenges for cause as to them.

Williamson v. State

In *Williamson v. State*, No. 05-03-00111-CR 2004 Tex. App. LEXIS 959 (Tex. App.–Dallas 2004, no pet.) (not designated for publication), the court noted that if a venireperson testifies unequivocally that they can follow the law despite personal prejudices, the trial court must deny a challenge for cause. *Id.* at *5 (citing *Brown v. State*, 913 S.W.2d 577, 580 (Tex. Crim. App. 1996)). However, the court observed that if a venireperson vacillates or equivocates on their ability to follow the law, deference must be given to the trial court's judgment on whether or not to grant the challenge. At voir dire, the trial court questioned venireperson 31 about her ability to be fair with respect to punishment. Specifically, whether she could keep an open mind on the range of punishment. She responded both that she thought she could be fair and that she did not know if she could be fair. On further questioning, she said if the defendant was found guilty and if he used a gun, it would be very "difficult" to give him just five years, the minimum prison sentence available. However, she would not rule out a five-year sentence. The court of appeals found that venireperson number 31 was, at most, a vacillating or equivocal venireperson. Therefore, it defered to the trial court's decision to deny the challenge for cause.

Primrose Operating Co., Inc. v. Jones

In *Primrose Operating Co., Inc. v. Jones,* 102 S.W.3d 188 (Tex. App.–Amarillo 2003, pet. denied), the court addressed whether a pretrial "focus group" conducted by Jones probably caused any injury. The case was pending in King County which has a population of just over 300. Anticipating some difficulty in obtaining a jury, the district court had the clerk summon 130 veniremen. The jury summons were mailed on Monday, September 12, 2000. At some time prior to September 14, 2000, one of Jones' attorneys contacted Dr. Blodgett, a veterinarian at the 6666 Ranch in King County. He was seeking use of a conference room for a meeting in preparation for the trial; however, he did not explain the nature of the meeting. Another of Jones' attorneys, the lead counsel at trial, spoke to a secretary at the ranch, telling her that they wanted to conduct a "focus group" to help them decide how to best present their case at the upcoming trial. The Jones parties called this meeting a "focus group" while appellants referred to it as a "mock trial."

Jones' attorney asked the secretary to assemble a group who was representative of the county population, but had not been called for jury duty. The secretary assembled a group of approximately seven adults, including a high school teacher and five students from the teacher's seniors government class. On Thursday, September 14, 2000, the group met at the ranch. Some time before the mock trial, the first attorney obtained a list of those summoned for jury duty in the case; however, he did not recall if he provided the list to Jones' trial attorney beforehand.

Jones' trial attorney presided over the mock trial and was unaware who would be participating before he arrived at the ranch. He asked the participants if any of them had been summoned for jury duty in the case and excluded one person who had been called. The attorney did not ask if any of the group's family members had been summoned to the trial venire. At the meeting, Jones' attorney summarized the evidence he expected would be presented by each party in the case using flip charts and a portion of a video deposition. At the conclusion of the meeting, which lasted approximately two hours, the mock jury held Primrose 80 percent responsible and opined that the Jones parties were entitled to $7,000,000 in damages. Each participant was given a $30 restaurant gift certificate for their participation in the mock trial.

The King county district judge learned of the mock trial on the same day that it was conducted. The judge went to the ranch and obtained a list of all the participants. The judge provided the list to the district clerk, who compared it to the members of the jury venire for the purpose of identifying family relationships between members of the two groups and found several relationships between the two lists. A copy of the mock trial list was also furnished to the district judge.

The case was called for trial on Monday, September 18, 2000. Primrose, Palmer, and Byrd learned of the mock trial before the jury voir dire began and jointly moved for a mistrial on the basis that the mock trial had tainted the entire venire. They also objected to Jones' failure to furnish them a list of the participants in the mock trial which, they argued, seriously impaired their ability to conduct an effective voir dire of the panel. The trial court did not rule on the motion immediately, but carried it through the voir dire examination.

Even so, the effect of the mock trial was significantly explored during the jury voir dire examination. The parties explored the relationships between Veniremembers and mock trial participants, as well as the effect of the mock trial on the community view of the dispute. One Veniremember, Mr. Pettiet, pointed out that the mock trial concluded only a few hours before a local junior high football game attended by many county residents. He was serving food at the game and, he said, the mock trial, including the $7 million damage finding, was a major topic of conversation. He averred he heard about the case "from every direction," and ultimately stated that he could not set aside what he had heard about the case, which resulted in him being struck for cause. The trial court also allowed a strike for cause in the instance of Dr. Blodgett who had questioned the ethics of the plaintiffs' attorney's actions in conducting the mock trial at the time. At the conclusion of the voir dire, the motion for mistrial was again urged, but it was overruled.

In challenging the refusal of their mistrial motion, both Primrose and Palmer initially argue the trial court erred because Jones' attorney's conduct violated Texas Disciplinary Rules of Professional Conduct 3.06 and 3.07, which address respectively, maintaining the integrity of the jury system and trial publicity. Parenthetically, the court noted that paragraph 15 of the preamble to the rules specify that they are not designed to be the standards for procedural decisions. Those rules govern disciplinary proceedings and are only applicable to other types of proceedings to the extent they might manifest public policy. *Id.* at 193 (citing *Shields v. Tex. Scottish Rite Hosp. for Crippled Children,* 11 S.W.3d 457, 459 (Tex. App.–Eastland 2000, pet. denied)).

The court applied Texas Rule of Civil Procedure 327 (jury misconduct) to the facts noting that by including communications made to the jury, it was clear that "jury misconduct" is not limited to acts of jurors. The court noted that a trial court's denial of a motion for

mistrial will not be disturbed without a showing that the court abused its discretion. *Id.* (citing *Till v. Thomas*, 10 S.W.3d 730, 734 (Tex. App.–Houston [1st Dist.] 1999, no pet.)).

The court also applied Disciplinary Rules 3.06 and 3.07 but found that even if you interpret them as explicating improper communications under Rule 327, the record did not show the trial court abused its discretion by denying the motion for mistrial. (Rule 3.06(a)(2) prohibits an attorney from seeking to influence a venireman or communicate with any member of the venire). Initially, the court noted that the record revealed only one communication between Jones' attorneys and any member of the venire (Jones' trial attorney's conversation in which he discovered that one person included in the group at the 6666 Ranch, who was a member of the jury trial venire, but wanted to serve as a member of the mock trial). The court noted that it was undisputed that his conversation with the person was limited to explaining that he could not participate in the mock trial. The court held this communication was not improper because it amounted to an effort to avoid a potential violation of Disciplinary Rule 3.06(a).

Rule 3.07 prohibits an attorney from making statements "that a reasonable person would expect to be disseminated by means of public communications" that he should know will have a substantial likelihood of prejudicing a proceeding. The court found nothing in the record that shows any of the matters discussed in the mock trial were disseminated by "means of public communications" and dismissed appellants' apparent position that word-of-mouth in a small community such as King County is sufficient to fall within the purview of dissemination by "means of public communications."

The court held that whether Jones' attorneys sought to influence members of the venire by communicating with non-members was a fact question for resolution by the trial court. It noted that it was undisputed that Jones' attorneys took steps to ensure that no members of the venire participated in the mock trial. There was not, however, any evidence that Jones' attorneys asked if family members of the mock trial participants had been summoned to serve on the jury venire in the case, nor was there any showing that the attorneys had instructed the participants not to speak about the case to others in the community before the trial.

Appellants also emphasized the evidence that the mock trial concluded just hours before the local junior high football game and that there was testimony that news of the outcome of the mock trial and the verdict of seven million dollars "spread like wildfire" in the county. This emphasis arises from the testimony of Veniremember Pettiet's statement that "Y'all got to understand ... we're a big county but we don't have many people and it just spreads like wildfire, and it goes to the school and the post office and the courthouse. That's all we've got." The court concluded that, taken in context, use of the plural "spreads" is referring to the pronoun "it" and refers to news generally, rather than the specific news about the mock trial outcome. Thus, the court held that statement was a general description of the county's culture rather than evidence establishing the extent to which information about the mock trial reached members of the venire. The court found that Pettiet gave much more specific information about his view as to the community's knowledge about the facts before the mock trial and the damages they found.

The court also found that the voir dire examination of the jury venire included rather detailed exploration of the relationships between Veniremembers and participants in the mock trial. The parties had a full opportunity to inquire into what, if any, information had been conveyed to each Veniremember and what effect it might have on them.

Out of a venire of 130 people, each of the parties sought, and were granted, four strikes for cause. Appellants did not identify any specific members of the jury they were forced to accept because they were denied additional strikes for cause. The court held that the trial court did not abuse its discretion in denying appellants' mistrial motions.

Buls v. Fuselier

In *Buls v. Fuselier*, 55 S.W.3d 204 (Tex. App.–Texarkana 2001, no pet.), the court examined two veniremen's association with an attorney and with the medical community in a medical malpractice case.

Venireman Deese was questioned regarding his relationship with defense counsel. Deese admitted that he had known Jeffery Lewis, Fuselier's attorney, in both a professional and social capacity for over twenty years. Deese consequently answered in the affirmative when asked whether his personal knowledge of Lewis could cause a problem in the case. Finally, Deese commented that in light of this potential problem, he would "certainly" like to be excused from the jury panel.

Venireman White indicated that because his daughters worked in medical administrative capacities, he "might be" influenced in the case. White then commented that he had heard of people "trying to get something for nothing." Finally, White indicated that because one of his daughters left her position at Collom and Carney Clinic, a medical facility, in some distress, he did not know whether he "could be fair in this situation."

The Court stated that the key response that supports a successful challenge for cause is that the Veniremember cannot be fair and impartial because the Veniremember's feelings are so strong in favor of or against a party or against the subject matter of the litigation that the Veniremember's verdict will be based on those feelings and not on the evidence. *Id.* at 210.

The Court held that the collective responses of both Deese and White did not conclusively establish that either of them could not fairly consider the evidence in the case before them. They concluded that Buls' attorney failed to adequately explore the issue of whether each juror could listen to the evidence and reach a verdict based on that evidence and not their feelings. The court also noted that the Texas Supreme Court has held that even if a juror admits having a slight bias in favor of a party, as juror Deese arguably did, disqualification as a matter of law is still not established. *Id.* (citing *Goode v. Shoukfeh,* 943 S.W.2d 441, 453 (Tex. 1997)). Accordingly, the Court found that the trial court, being in a better position than it to observe the sincerity and capacity of the panelists for fairness and impartiality, properly exercised its discretion in not disqualifying the challenged jurors.

Justice Grant, dissenting, felt that the venireman in this case showed more than a slight bias. He noted that the Texas Supreme Court in *Goode* defined bias as "an inclination toward one side of an issue rather than the other, but to disqualify it must appear that the state of mind of the juror leads to the natural inference that he [or she] will not or did not act with impartiality." *Id.* at 214 (Grant, J., dissenting) (citing *Goode,* 943 S.W.2d at 453; *Compton v. Henrie,* 364 S.W.2d 179, 182 (Tex.1963)). He pointed out that the court in *Goode* goes on to say that prejudice is defined as "prejudgment, and consequently embraces bias." *Id.* (quoting *Goode,* 943 S.W.2d at 453).

He observed that venireman John Deese stated in voir dire that his personal knowledge of one of the attorneys could cause a problem in the case, that the attorney was the consulting attorney for his employer, that he had known the attorney personally for twenty years in a number of capacities, that he considered him a very close friend, that his friendship could cause a problem in the case, and that he would like to be excused. Justice Grant felt that these voir dire responses demonstrate an inclination toward one side and the venireman believed that he could not act impartially. "The juror's frank admission of this bias because of friendship was sufficient to support the challenge for cause unless he testified that he could put that matter aside and base his verdict solely on the evidence, which he did not." *Id.*

Justice Grant also scrutinized the answers of venireman Lewis White. Mr. White told the court during voir dire that he would have trouble sitting in judgment in a medical malpractice case because he had two daughters who were directors of medical records at two different hospitals, that he felt like matters he had heard from his daughters might influence him in the case, and that he had been told that people are trying to get something for nothing. He also told the court that one of his daughters had left her employment with a medical facility in distress, so that he was not sure he could be fair in this situation. He noted that Mr. White was unresponsive to the court's question of whether he could listen to the evidence in the case and be completely fair and impartial. Justice Grant disagreed with the majority and was of the opinion that the trial court improperly denied the motions to strike for cause. *Id.*

Excel Corp. v. Apodaca

In *Excel Corp. v. Apodaca*, 51 S.W.3d 686 (Tex. App–Amarillo 2001, rev'd on other grounds, 81 S.W.3d 817 (Tex. 2002)), a juror questionnaire was disseminated in a non-subscriber personal injury case and a veniremember answered "I would be biased in favor of the employee." During voir dire, that same venireman said he would use his best efforts to try to be even-handed in looking at the evidence.

Appellant, relying on *Gum v. Schaefer,* 683 S.W.2d 803, 808 (Tex. App.–Corpus Christi 1984, no writ), argued that the juror admitted his bias in the jury questionnaire and in response to further questioning by counsel, and once the admission was made, the juror could not be rehabilitated by opposing counsel or the court. *Excel Corp. v. Apodaca*, 51 S.W.3d at 693. However, the Amarillo Court noted that they had previously held that bias is not shown by answers to general questions, which are usually insufficient to satisfy the diligence required to determine the mind set of a Veniremember with respect to disqualification for bias. *Id.* (citing *Gant v. Dumas Glass and Mirror, Inc.*, 935 S.W.2d 202, 208 (Tex. App.–Amarillo 1996, no writ)). Without reaching a determination as to whether the unsworn answers on the jury questionnaire constitute competent evidence as to the juror's bias, the Court noted that in response to more specific questions from counsel during voir dire posed as a result of the answers to the questionnaire, the juror stated, "I might tend to lean towards Plaintiff." The Court held that such a response did not establish bias as a matter of law, but merely raised a factual determination for the court. *Id.* at 693.

When the juror responded to the question as to whether he would break a tie in the evidence presented by the parties in favor of the plaintiff by stating that he

would tend to favor the plaintiff, the Court held that a juror cannot be fair and impartial because his feelings are so strong in favor of or against a party that the verdict will be based on those feelings and not the evidence. *Id.* The Court held that the juror's response did not conclusively establish that he could not fairly consider the evidence, because the hypothetical question posed by counsel was that the evidence presented was "dead even." The Court noted that no specific questions were posed to the juror by defense counsel at that point as to whether he could follow the court's instructions as to plaintiff's burden of proof. The Court noted that upon additional questioning by appellee and the court, the juror stated he could hold the plaintiff to its burden of proof and would make his best effort to be even-handed in looking at the evidence. Lastly, the Court indicated that the trial court had the opportunity to observe the juror and was better able to evaluate his capacity for fairness and impartiality. *Id.*(citing *Goode v. Shoukfeh,* 943 S.W.2d 441, 453 (Tex.1997); *Sullemon,* 734 S.W.2d at 16). The court therefore declined to find that the trial court abused its discretion in determining that the juror should not be stricken for cause. *Id.*

Additionally, the trial court held that even if there was error, such error probably did not cause the rendition of an improper judgment so as to necessitate a reversal of that judgment. *See* TEX. R. APP. P. 44.1(a)(1). The court noted that the juror that Excel was forced to accept due to its lack of sufficient peremptory strikes was juror Brown. The charge showed that ten jurors signed the verdict but Brown was not one of them. Therefore, the verdict was returned by a sufficient number of qualified jurors. *Id.* (citing *Beavers v. Northrop Worldwide Aircraft*, 821 S.W.2d 669, 681 (Tex. App.–Amarillo 1991, writ denied)); *see also Palmer Well Services, Inc. v. Mack Trucks, Inc.,* 776 S.W.2d 575, 577 (Tex.1989).

Hartfield v. State

In *Hartfield v. State*, No. 04-02-00407-CR, 2003 Tex. App. LEXIS 9388, 2003 WL 22495572 (Tex. App.–San Antonio Nov. 5, 2003, no pet.) (not designated for publication), the court found that a juror who stated he could follow the law but didn't agree with it was not improperly maintained on the panel over a challenge for cause. The court found that one venire person was unequivocal in stating that, although he believed a defendant should "tell his story," he would follow the law and not hold it against the defendant if he did not testify. *Id.* at *8-9.

Watson v. State

In *Watson v. State*, NO. 03-01-00258-CR, 2002 WL 1805378 (Tex. App.--Austin Aug. 8, 2002, pet. ref'd) (not designated for publication), the State challenged venire person Cooley for cause after she imparted that she was uncertain of her ability to be a fair and impartial juror in light of two prior experiences between her son and police officers.

She explained to the judge that her son had been beaten by police officers, that the incidents had caused her a great deal of stress, and that they were difficult to forget. When asked by the State whether she would be able to listen objectively to the police officers who would be testifying, she responded that she was unsure because the police had lied in one of her son's cases: "It's there in my mind. But I would like to serve if you don't mind, if you're not afraid to let me. I just want to be fair with you ... because I know how it feels to have someone accused in the family of something that they didn't do."

Although Cooley expressed that she might have a difficult time dismissing the incident from her mind when listening to the witnesses, the record reflects that she later indicated that she thought she could look at the case objectively. Appellant's counsel told Cooley that her prior experiences with the police did not necessarily disqualify her from serving on the jury. He then asked Cooley if she would be able to look at the evidence impartially. She responded, "Given what you are saying, yes." The State challenged Cooley for cause asserting that her past experiences made her biased against the State, and that the State would therefore be held to a higher burden of proof. The trial court sustained the challenge for cause over appellant's objection and the court affirmed.

Appellant also argued that the trial court erred in denying his challenge for cause to venire person Boyd who conveyed to the court that he had a hearing impairment. Specifically, Boyd imparted that although he wore hearing aids in both ears, he might have difficulty understanding statements made during the proceedings. The trial court responded that the courtroom maintained high quality speakers on each bench and that Boyd's impairment should not be a problem. After appellant asked Boyd if his inability to hear would affect his ability to sit on the jury and hear the evidence, Boyd replied that it might. He stated, "With a microphone, I hear fine[,] [but] when you people stand in front and talk sometimes I hear but don't distinguish some tones, especially women." The trial judge overruled appellant's challenge for cause in light of Boyd's assurance that he could hear with the aid of the courtroom's speaker system.

After the jury had been seated, appellant asked the court to grant him an additional peremptory challenge, asserting that he was forced to use his last peremptory challenge on Boyd and was thereby forced to accept an unnamed juror on the panel whom he otherwise would have struck. The trial court overruled appellant's request for an additional peremptory challenge.

The Court noted that the record reflects that appellant did not ask for an additional strike at the time the challenge was overruled; after the panel was seated but before it was sworn, he informed the court that he had exhausted all of his strikes and asked for an additional strike because he had been forced to use one on Boyd. However, although he complained generally that an objectionable juror was seated, he neglected to identify the specific venire person he considered objectionable and upon whom he would have exercised such a challenge. Appellant therefore failed to demonstrate the need for an additional peremptory strike and did not preserve error for review.

Even if appellant had preserved the error, the Court could not say that the trial court abused its discretion by refusing to disqualify Boyd. Appellant cited two cases for the proposition that a party can challenge for cause a venire person with a hearing impairment. *See Nobles v. State*, 843 S.W.2d 503, 515-16 (Tex. Crim. App. 1992); *Woolls v. State*, 665 S.W.2d 455, 465 (Tex. Crim. App. 1983). The *Watson* court distinguished those cases because neither involved the use of courtroom microphones and speakers to remedy the venire person's hearing impairment and enhance his ability to hear adequately. In this case, the record reflected that Boyd unequivocally stated, "With a microphone I hear fine." *Watson*, 2002 Tex. App. LEXIS 5737, at *6-7. Therefore, the Court found that the trial court did not abuse its discretion in refusing to strike Boyd. (Appellant asserted for the first time on appeal that Travis County district courts did not provide for the use of microphones during voir dire, implying that Boyd was unable to hear the attorneys during the examination. However, he failed to raise this argument to the trial court, and the record did not reflect Boyd's inability to hear during voir dire.)

Franco v. State

In *Franco v. State,* 2007 WL 2200468 (Tex. App. --El Paso 2007, pet. ref'd)(not designated for publication), Appellant argued that the trial court abused its discretion by denying his motion to quash the jury panel because of prejudicial remarks made by a potential juror during voir dire. Appellant argued that it could reasonably be assumed that the prospective juror's statements were prejudicial to the Appellant's case and that the entire panel of prospective jurors should have been dismissed and that failure to do so was reversible error.

Following the State, Appellant's trial counsel continued voir dire examination by asking generalized questions of the potential jurors. Following a general explanation of how the State can prove intent, Appellant's trial counsel asked whether there were any further questions. The following exchange took place between Appellant's attorney and a potential juror, in the presence of all other potential jurors:

> PROSPECTIVE JUROR: Yes. I have got a problem. I own guns. Just like everybody else, I hunt. The only time I carry a gun in the car is when I'm going to the hunting lease or going hog hunting. Why do people carry a gun in the car? Why did he have to have a gun in the car? Is he that bad of a person?
> DEFENSE: There's, you know, you are assuming by your question that the State's already proven their case.
> PROSPECTIVE JUROR: No, I'm not. All I'm asking is why did he have a gun if [sic] the car, I mean, that's just a logical question, isn't it? I mean-or did he take the gun away from an officer that was supposed to have committed attempted capital murder?
> DEFENSE: Well, I think by your question you are assuming that the State has already proven their case and that he was somehow in the car. The indictment doesn't set out either of those points.
> PROSPECTIVE JUROR: Well, I assume that he was in a car at the time resisting arrest. He might have been running, but what was he still having a pistol or gun for or why?
> DEFENSE: Well, that's not part of the voir dire. That's-I'm just saying by your question you're not putting the State to their burden of proof in regards to what they have to prove. People can carry guns in all sorts of situations to where it's legal. We have concealed handguns.
> PROSPECTIVE JUROR: I'm a former police officer, myself. I have two brothers-in-law that are retired cops, so I'm very well aware of the law.

> DEFENSE: I think the question was, why did he have a gun in a car?
> PROSPECTIVE JUROR: A car, on himself, on his person, if he was running through a field when they tried to catch him or what.
> DEFENSE: We can't go into that. Is there anybody else that has a question?

Appellant's trial counsel continued voir dire examination of the potential jurors. At the end of voir dire, the prospective juror was stricken for cause. Appellant then moved to quash the entire panel due to the prospective juror's remarks. The court denied that request.

The court noted that to prove error due to improper juror comments which precipitated a motion to quash the jury panel, a defendant must show (1) that other members of the panel heard the remark, (2) that the jurors who heard the remarks were influenced to the prejudice of the defendant, and (3) that the juror in question or some other juror who may have had a similar opinion was forced upon the defendant. *Citing Callins v. State,* 780 S.W.2d 176, 188 (Tex. Crim. App. 1986), *cert. denied,* 497 U.S. 1011, 110 S.Ct. 3256, 111 L.Ed.2d 766 (1990) (quoting *Johnson v. State,* 151 Tex.Crim. 110, 205 S.W.2d 773, 774 (1947)).

The court inferred that other members of the panel heard the exchange between Appellant's counsel and the prospective juror, because the statements were made in open court. The prospective juror was sitting with the panel and participating in the questioning conducted by Appellant's counsel during voir dire. Appellant then argued that the court should also infer that other potential jurors were influenced by the remarks and that those jurors were forced upon the Appellant, because of the trial court's refusal to quash the entire panel. The court declined to make this inference for two reasons. First, Appellant presented no evidence that there was another, similarly-prejudiced, juror on the panel. Appellant did not point to evidence that any other juror held a similar opinion as the potential juror who made the statement. Neither did the Appellant point to any evidence that a prejudiced juror was forced upon him. The potential juror who made the statement was removed for cause; thus, the Appellant presented no evidence to support the inference he proposes.

Second, the court found that such an assumption discounted the ability of potential jurors to weigh the merit of another juror's statements. The court cited *Young v. State,* where the Court of Criminal Appeals concluded that the statements of a potential juror during voir dire were not sufficient for a mistrial, even though they concerned a central issue in the case. *Young v. State,* 137 S.W.3d 65, 72 (Tex. Crim. App. 2004). In *Young,* the defendant was convicted of aggravated sexual assault of a child. *Id.* at 67. The testimony and credibility of the child were central to the case. *Id.* at 71. During voir dire, a potential juror stated that, in her twenty-five years' experience in social work, she had never had a child lie about being sexually assaulted. *Id.* at 67-68. The Court of Criminal Appeals explained that "even without an instruction from the court, it seems probable that other members of the venire, drawing on their own experiences regarding the truth-telling tendencies of young children, would question the veracity of [the potential juror's] statements that she had never known a child with whom she worked to lie." *Id.* at 71.

In the case at bar, the court found it was probable that other members of the venire would be able to independently assess whether the potential juror's statements regarding the type of person who carries a gun were meritorious. Like the Court of Criminal Appeals, it declined to assume that jurors are so easily prejudiced.

The court also affirmed the trial court's denial of Appellant's motion for a mistrial. It held that a mistrial is required only when the improper question is clearly prejudicial to the defendant and is of such character as to suggest the impossibility of withdrawing the impression produced on the minds of the jurors. *Citing Ladd v. State,* 3 S.W.3d 547, 567 (Tex. Crim. App. 1999). The court, citing *Ladd,* noted that asking an improper question will seldom call for a mistrial, because, in most cases, the harm can be cured by an instruction to disregard. *Id.* The court presumed the jury followed the trial court's prompt admonition to disregard improper evidence. *Citing Hinojosa v. State,* 4 S.W.3d 240, 253 (Tex. Crim. App. 1999). The court, in reviewing the efficacy of the curing instruction, looked at the following factors: (1) the nature of the error; (2) the persistence of the prosecution in committing the error; (3) the flagrancy of the violation; (4) the particular instruction given; (5) the weight of incriminating evidence; and (6) the harm to the accused, as measured by the severity of the sentence. *Citing Waldo v. State,* 746 S.W.2d 750, 754 (Tex. Crim. App. 1988).

Haggerty v. State

In *Haggerty v. State*, No. 05-99-01914-CR, 2001 Tex. App. LEXIS 270 (Tex. App.–Dallas 2001, no pet.) (not designated for publication), the court examined the following exchange regarding bias during voir dire of a criminal case:

THE COURT: Can you be fair and impartial as a juror in these cases?
VENIREMEMBER: I don't think so.
THE COURT: Why?
VENIREMEMBER: Well, I hate drugs. I work with teenagers everyday at school. Those--I'm not going to say convictions, the alleged incidents took place so close together. I guess I really don't think I could be impartial when it came to that. I couldn't separate the two, I do not think.
THE COURT: So you don't like drugs. What kind of criminal offenses do you like?
VENIREMEMBER: Well, I don't like any. **...**
PROSECUTOR: But if we prove it beyond a reasonable doubt, you find them guilty.
VENIREMEMBER: Right.
PROSECUTOR: If we don't prove it, then you find him not guilty.
VENIREMEMBER: Right.
PROSECUTOR: And we have different--some of the elements are the same, but some of them are different. And so you just have to go through and check them off, yes, you did, or, no, you didn't. And what we're asking is, yes, you can do that, or, no you can't do that.
VENIREMEMBER**:** Okay. Yes, I could do that.
PROSECUTOR: Okay. And each case could stand or fall on its own merit.
VENIREMEMBER: Yes, it could.
...
DEFENSE: Okay. If they proved their case beyond a reasonable doubt on one of the cases, but failed to prove their case beyond a reasonable doubt on the other case, would the fact that they actually proved one cause you to find him guilty on the other case?
VENIREMEMBER: No I don't think so. I just want to believe that I can be fair and impartial.
DEFENSE: Okay.
VENIREMEMBER: And I want to believe that I can.
DEFENSE: But you're not sure?
VENIREMEMBER: Well, I have to tell you, there's a little doubt there.
PROSECUTOR: So are you saying that you could follow the law?
VENIREMEMBER: Oh, yes, I could follow the law.
PROSECUTOR: And if one is guilty and one is not guilty, you'd vote that way?
VENIREMEMBER: Uh-huh.
PROSECUTOR: I'm sorry, you have to answer.
VENIREMEMBER: Oh, uh-huh, yes. Yes. This is just difficult. I'm sorry. I've never been brought before and talked like this. I want to believe that I could--what you're saying, yes. I've said all I can say. I'm sorry.
DEFENSE: So are you saying that you cannot presume him to be innocent because there are two cases so close together in this situation?
VENIREMEMBER: I'm saying I think that's what troubles me.
DEFENSE: Okay. I guess you need to say yes or no. Can you presume him innocent of not?
VENIREMEMBER: Why can't we have maybe?
DEFENSE: Okay. I know. Can you presume the defendant innocent with two cases pending again [sic] him?
VENIREMEMBER: I would do my very best to do that, to listen to the evidence presented and make a decision. Yes. Do I make myself--am I-
PROSECUTOR: Presuming innocent basically means you're not going to find him guilty if the State doesn't prove the case?
VENIREMEMBER: Right. That's right.
PROSECUTOR: And are you saying that you'll make the State prove its case beyond a reasonable doubt?
VENIREMEMBER: I certainly would.

The Court then explained its denial of the Defendant's challenge stating that the denial or grant of a challenge for cause is within the discretion of the trial court and will not be overturned absent an abuse of that discretion. *Citing Ladd v. State,* 3 S.W.3d 547, 559 (Tex. Crim. App. 1985). The court noted that one should examine the record as a whole to determine whether there is support for the trial court's decisions, and, in doing so, give great deference to the trial court which

was in a position to actually see and hear the Veniremember. *See id. (citing Banda v. State,* 890 S.W.2d 42, 55 (Tex. Crim. App.1994); *Satterwhite v. State,* 858 S.W.2d 412, 415 (Tex. Crim. App.1993)). The court said this was especially true when the court is faced with a vacillating or equivocating Veniremember. *Id. (citing Ladd,* 3 S.W.3d at 559; *Banda,* 890 S.W.2d at 55). The court noted that the trial court is able to consider important factors such as demeanor and tone of voice that do not come through when reviewing a cold record. *Banda,* 890 S.W.2d at 55.

The court also noted that all persons are presumed innocent, and no person may be convicted unless each element of the offense is proved by the prosecution beyond a reasonable doubt. *Id. (citing Ladd,* 3 S.W.3d at 560, *citing In re Winship,* 397 U.S. 358 (1970)). Therefore, a Veniremember who cannot presume the defendant innocent is challengeable for cause under article 35.16(c)(2) for having a bias or prejudice against the law. *See* Tex. Code Crim. Proc. Ann. art. 35.16(c)(2); *Banda,* 890 S.W.2d at 55. The court found that although the Veniremember vacillated in her responses, she agreed at various times she could follow the law, presume appellant to be innocent, and require the State to prove the offenses beyond a reasonable doubt. The court noted that in its ruling, the trial court specifically noted that he had "[l]ook[ed] into her eyes of less than three feet" and he "believe [d] that her answers were sincere, and ... she could and would for each side be a fair and impartial juror." Therefore, the court felt it could not conclude the trial court abused its discretion in denying appellant's challenge for cause. *Id.* at *11.

Farrell v. State

In *Farrell v. State*, NO. 03-03-00338-CR, 2004 Tex. App. LEXIS 2237, (Tex. App.–Austin 2004, pet. denied) (memorandum opinion) (not designated for publication), the court held that merely because a panelist was currently serving as police officer was insufficient to warrant a challenge for cause. *Id.* at *6-7.

Jones v. State

In *Jones v. State*, No. 08-02-00465-CR, 2004 Tex. App. LEXIS 1186 (Tex. App.–El Paso 2004, no pet.) (not designated for publication), the defendant argued that the trial court erroneously refused to grant his challenge for cause against a prospective juror who knew the State's only witness, a deputy sheriff, for at least 20 years and had at one time attended the same church. The juror believed the deputy to be an honest man, and said she would believe a police officer more than another witness. The court found that the issue was properly preserved for review, where the trial court denied the challenge for cause and refused a request for additional peremptory challenges. Defendant used his last peremptory challenge to strike the juror at issue, and thus another objectionable juror remained on the jury. The court held, however, that the trial court properly refused the challenge for cause. The juror had known the deputy years ago, had only seen him once in recent years, did not frequent his home, and did not know if he still attended her church. The trial court had characterized the relationship as acquaintances, and the court of appeals held that the relationship did not rise to bias as a matter of law. Further, the juror was not challengeable simply because she was predisposed to believe police officers over other witnesses. *Id.* at *4-10.

Courtney v. State

In *Courtney v. State*, 115 S.W.3d 640 (Tex. App.--Waco 2003, no pet.), the district court refused to quash the petit jury after it discovered that the husband of one of the jurors had served on the grand jury that returned defendant's indictment. The motion was upheld because the juror was not subject to a challenge for cause under Texas Code of Criminal Procedure article 35.16 and the juror was not biased or prejudiced based on her testimony that she and her husband had not discussed the case and that she would vote to acquit if the State failed to prove its case.

In re Collins

In *In the Interest of Collins*, No. 07-00-0415-CV, 2001 Tex. App. LEXIS 3260 (Tex. App.–Amarillo 2001, no pet.) (not designated for publication), the alleged juror bias revolved around the possible invocation by appellant of his fifth amendment right not to testify. Counsel for appellant's wife, Karen Collins, explained the right against self-incrimination to the Veniremembers and then asked one of the jurors how he would feel "'if someone in response to a question or in response to all questions in this case took the Fifth Amendment.'" *Id.* at *1-2. The juror responded that he "would think they were hiding something." Counsel then asked how many jurors agreed with that statement, and at least 24 other jurors responded affirmatively. Counsel next asked whether those persons "believe that a person who would take the fifth amendment is hiding something and that you would require that person to testify." The record indicates that one unidentified juror responded yes and no one else disagreed. At that point, counsel told those

Veniremembers he had been advised by appellant's counsel that appellant would repeatedly invoke the fifth amendment, and asked:

> Is there anything that I can say or do to those of you who answered yes a moment ago to the question to change your minds about the answer that you gave? ... I take it by your silence that all of you have a strong held opinion that anyone including Mr. Collins who repeatedly takes the Fifth Amendment is hiding something that you would require him to testify; is that correct?

Some jurors then proceeded to ask counsel questions about the privilege.

Counsel next posed the situation of a neighbor who pled guilty ten years ago to aggravated sexual assault of a child and inquired of the venire panel whether they would be willing to have that neighbor watch their children. Some of the jurors responded with answers such as "he wouldn't be my favorite babysitter," and "something must be wrong somewhere." One prospective juror responded: "[p]eople in their right minds would not feel really 100 percent comfortable with leaving their kids with somebody who's had a conviction. If you're basing on whether or not we're selected on the jury based on that you're never going to find 12 people." Another prospective juror replied: "[n]one of us would leave our kids with a convicted felon. You might as well dismiss us all and start over if that's what the basis is." A third juror stated: "... when you told us what you told us that this man was convicted in '88, he's going to plead the Fifth over and over and over. If you can find any person here that's going to have a bias get after it."

After counsel for Child Protective Services complained that the attorney was trying to commit the panel to a specific set of facts, the court took a short recess in chambers presumably to discuss the voir dire examination. Upon resumption of voir dire, counsel for Karen Collins did not ask additional questions regarding the fifth amendment privilege. However, the attorney ad litem for the children did present a question on the topic, which was as follows:

> If you believe that the Fifth, by claiming the Fifth you will be so predisposed, prejudged, biased, have a strong inclination or tending towards the fact that that person did what they're pleading the Fifth to that you cannot hear the evidence and listen and obey your oath and make a fair judgment, a legal judgment, based on the evidence; how many of you believe you cannot do that?

There was no response to that question.

Appellant moved for a mistrial on the basis of the answers to the questions of Karen Collins' attorney as to the fifth amendment and also requested that those who responded that they would believe appellant was hiding something be struck for cause. Appellant also named an objectionable panelist who remained after the exercise of peremptory strikes due to the trial court's failure to strike the other jurors for cause. Since no objection was made to any jurors on the specific basis that they were biased due to appellant's prior conviction, the Court addressed that issue only as it related to appellant's fifth amendment rights. The Court held:

> The general questions posed to the venire panel were whether they agreed that someone who invokes his right against self-incrimination has something to hide and should testify and whether counsel could change their minds. There was also a general question as to whether the jurors would be willing to leave their children alone with a convicted sex offender. While these questions and the subsequent responses may raise the issue whether the prospective jurors might be biased, they do not conclusively establish that fact because counsel did not follow up more specifically by asking the prospective jurors such questions as whether they could follow the instructions of the court as to the law and the burden of proof or if they had already reached a conclusion as to whether appellant's rights should be terminated. Therefore, we cannot find any of the jurors were disqualified as a matter of law.

Id. at *6-7.

People v. Al-Turki

In *People v. Al-Turki*, 06CA2104, 2009 WL 147006 (Colo. Ct. App. Jan. 22, 2009), *cert. denied*, 09SC326, 2009 WL 2916999 (Colo. 2009) and *cert. denied*, 130 S. Ct. 2342, 176 L. Ed. 2d 577 (U.S. 2010), the issue of religious bias was raised. In 2006, a

Colorado jury convicted Petitioner, a Saudi national and a Muslim, of unlawful sexual contact, extortion, false imprisonment, conspiracy to commit false imprisonment, and theft. The charges in question arose from Petitioner's purported exploitation of a live-in female housekeeper from Indonesia. Petitioner was sentenced to twenty-eight years to life in the Colorado Department of Corrections (on February 25, 2011 Al-Turki's sentence was reduced to 8 years to life, making him eligible for parole soon). This was a highly-publicized prosecution that intersected sensitive issues of ethnicity, religion, and nationality. As the trial court was preparing to swear in the petit jury, a juror felt compelled to alert the court that he held certain views about Islam, and adherents to the Muslim faith, that might impair his ability to be fair and impartial. (More specifically, the juror expressed the view that Muslims believed "the laws of God are higher than the laws of man," and even went so far as to assert that "notwithstanding the facts presented, if it came to a situation where it was a he said, she said issue, my bias may be altered based on the belief [Petitioner] would be obeying religion versus law"). The trial court refused to excuse the juror, and furthermore declined to allow additional questioning of the juror to probe his expressions of possible bias or prejudice. The court ultimately seated the juror over Petitioner's repeated objections. Presumably playing upon some of the very concerns expressed by this juror, the prosecution repeatedly injected Islamic culture and putative Muslim practices into the trial proceedings. The court of appeals affirmed the trial court's decision to seat the juror without allowing further inquiry into the juror's expression of possible bias. The court reasoned that, absent a "clear" or "unequivocal" expression of bias or prejudice on the part of the juror, the trial court retained the discretionary authority to preclude additional questioning.

Al-Turki petitioned the United States Supreme Court and several groups including the Kingdom of Saudi Arabia filed amicus briefs. On April 5, 2010, certiorari was denied. *Al-Turki v. Colorado*, 130 S. Ct. 2342, 176 L. Ed. 2d 577 (2010).

Procedure if court refuses to strike juror for cause:

If the court refuses to strike a juror for cause, the challenging party must either advise the court, before exercising any peremptory challenges, that the challenging party will exhaust its peremptory challenges and that after exercising such challenges, specific objectionable jurors will remain on the jury list, or must exercise all peremptory challenges and then identify by name the specific jurors on the panel who are objectionable. *See Landers v. State*, 110 S.W.3d 617 (Tex. App.-- Houston [14th Dist.] 2003, pet. ref'd); *Shepherd v. Ledford,* 962 S.W.2d 28, 34 (Tex.1998); *Goode v. Shoukfeh,* 943 S.W.2d 441, 452 (Tex.1997); *Hallett v. Houston Northwest Medical Center*, 689 S.W.2d 888 (Tex.1985); *Wright v. State,* 28 S.W.3d 526, 534 (Tex.Crim.App.2000), *cert. denied,* 531 U.S. 1128 (2001); *Gem Homes, Inc. v. Contreras,* 861 S.W.2d 449, 458 (Tex.App.--El Paso 1993, writ denied; *Lopez v. Southern Pacific Transp. Co.*, 847 S.W.2d 330 (Tex.App.--El Paso 1993, no writ). If the appellant demonstrates he suffered a detriment from the loss of the strike by being forced to accept a juror he would have otherwise struck, reversible error is shown. *See id; Ladd v. State,* 3 S.W.3d 547, 558 (Tex. Crim. App.1999), *cert. denied,* 529 U.S. 1070, 120 S.Ct. 1680 (2000). A party cannot wait until the trial is finished, then seek to reverse an unfavorable verdict by complaining of an error which the trial court could have corrected had it been timely informed of the error. *Hallett,* 689 S.W.2d at 890. After the challenge for cause has been made during voir dire, the record must show the party made an objection to the exhaustion of peremptory strikes before the party give its peremptory strikes to the clerk. *Beavers v. Northrop Worldwide Aircraft Services, Inc.*, 821 S.W.2d 669 (Tex. App.–Amarillo 1991, writ den'd). If the party does not make the objection before it turns in its peremptory strikes, it waives the error. *Operation Rescue v. Planned Parenthood, Inc.*, 937 S.W.2d 60 (Tex. App.–Houston [14th Dist.] 1996), *modified on other grounds*, 975 S.W.2d 546 (Tex. 1998). However, a party does not waive a challenge to trial court's refusal to allow him to ask specific questions of veniremembers, when that has been previously considered and ruled upon, by saying he had no objection to jury as seated. *Stairhime v. State*, 463 S.W.3d 902 (Tex. Crim. App. 2015), overruling *Harrison v. State*, 333 S.W.3d 810 (Tex.App.–Houston [1st Dist.] 2010, pet. ref'd). The party asserting such an objection should inform the court that because of the court's refusal to grant the calling for cause, a specific objectionable panelist will remain on the jury (identify the juror and state the reason why they are objectionable, and then request that the court reconsider its ruling on the challenge for cause or to grant an additional peremptory strike). *Hallett*, 689 S.W.2d at 890. Only after those requests are denied should the strikes be handed to the clerk.

The Texas Supreme Court has held, however, that such a showing is required only when a challenge for cause is overruled, and not when the trial court improperly apportions peremptory challenges. *See Scurlock Oil Co. v. Smithwick,* 724 S.W.2d 1, 5

(Tex.1986) (citing *Garcia v. Central Power & Light Co.,* 704 S.W.2d 734 (Tex.1986)).

Riddle v. State

In *Riddle v. State*, NO. 2-02-157-CR, 2003 Tex. App. LEXIS 2933 (Tex. App.–Fort Worth 2003, pet. ref'd) (mem. op., not designated for publication), the court analyzed a "late request" to ask certain veniremembers questions individually. The court noted that the trial judge wanted "to get everybody [else's] name that we're going to call and let the others take a break." Appellant asked to have two venirepersons brought in after the trial court had already denied his challenges for cause as to them. The trial judge refused. The lone venireperson was then questioned while the remaining veniremembers took a short break.

After this venireperson was excused for cause, Appellant asked that he be allowed to individually voir dire the same two persons he had mentioned before plus two more members. The trial court denied the requests. The court held that the trial judge did not abuse his discretion in refusing to allow individual voir dire of members about whom he had no uncertainty, nor did he abuse his discretion in denying the late requests.

Urista v. Bed, Bath, & Beyond, Inc.

In *Urista v. Bed, Bath, & Beyond, Inc.,* 245 S.W.3d 591 (Tex.App.-Houston [1st Dist.] 2007, no pet.), Urista's attorney requested the opportunity to individually question the three jurors because "they said they could not award money for mental anguish," but the court responded to the request by stating, "I don't think that's a proper characterization of what they said." The trial court also said that "after we're done," Urista's attorney would be allowed to "make a record" concerning the trial court's refusal to allow individual questioning of the jurors. After the trial court ruled on all the challenges for cause, Urista's attorney stated, "I'm sorry, Judge, I do have a couple of things I would like to put on the record. Does the Court want me to do that after the jury is let go?" The trial court responded in the affirmative. While the jury was in recess and before he began making his peremptory strikes, Urista's attorney objected to the trial court's refusal to allow individual voir dire of the three jurors because he had relied on the trial court's earlier representation that it would be allowed. Urista's attorney said that had he known the trial court would not be allowing the individual voir dire, he would have further explored biases and prejudices of these three jurors while conducting voir dire of the group.

In his objections to the trial court's refusal to allow the individual voir dire of these three jurors, Urista's attorney said that he was "not able to ask the questions that [he] needed to ask in order to present them" and that he was "denied the opportunity to go into some areas due to the Court's instructions." After confirming that Urista had made all the objections he wished to make, the trial court stated:

> The Court will note for the record that counsel has mischaracterized the instructions given to counsel, both on the record and off the record regarding voir dire. And the Court afforded the parties 30 minutes to conduct voir dire and, then, to move for grounds for disqualification. And I did inform counsel that they would be able to have [venire members] approach the Bench, so they could follow-up on specific areas, which have already been covered, not so that they could have free reign to do additional voir dire. And also mention to counsel that he spent a significant time arguing the facts of the case and arguing the law, as opposed to asking questions. Also for the record, that counsel has not suggested or put on the record, prior to me making this ruling, any specific questions which he was denied the opportunity to ask. Therefore, I'm overruling the objection.

The court noted that to preserve error from the denial of the opportunity to conduct voir dire, Urista had the burden to make a record to show the specific manner in which he intended to pursue his inquiry. *Citing Hyundai Motor Co.,* 189 S.W.3d at 758. "When group voir dire on the subject matter complained of on appeal has been allowed, error is not preserved unless counsel identifies the specific areas of inquiry he wishes to pursue during individual voir dire." The court held that the trial court allowed voir dire about mental anguish damages, and these jurors did not respond. It held that because Urista failed to plainly present an objection to the trial court that included the specific areas of inquiry he wished to pursue, he failed to preserve any error for our review.

Improper Questions and Comments (including Commitment Questions):

Examples of improper questions include discussing evidence that will be inadmissible at trial (*Traveler's Ins. Co. v. Deleon*, 456 S.W.2d 544, 545 (Tex. Civ. App.–Amarillo 1970, writ ref'd n.r.e.); *A.J. Miller Trucking Co. v. Wood,* 474 S.W.2d 763 (Tex. App.–Tyler 1971, writ ref'd n.r.e.)), advising the jury of the effect of their answers (*TEIA v. Loesch,* 538 S.W.2d 435 (Tex. App.–Waco 1976, writ ref'd n.r.e.)), getting the jury to commit to certain views or conclusions (*Campbell v. Campbell,* 215 S.W. 134, 137 (Tex. App.–Dallas 1919, writ ref'd)); *Tex.s Gen. Indem. Co. v. Mannhalter,* 290 S.W.2d 360, 365 (Tex. Civ. App.–Galveston 1956, no writ)), advising jury of monetary limits on exemplary damages (TEX. CIV. PRAC. & REM. CODE § 41.008(e)), asking a question in which the prejudicial effect outweighs the probative value (*Loesch*, 538 S.W.2d at 440), and questions in which the answers may show that the juror has been convicted of an offense which disqualifies him or her, or that the juror stands charged by some legal accusation of theft or any felony (TEX. R. CIV. P. 230).

Also improper is informing the jury that a defendant or plaintiff has insurance or that a plaintiff has no insurance is improper. *Ford v. Carpenter*, 216 S.W.2d 558 (Tex. 1949); *Atchison, Topeka and Santa Fe Railway Co. v. Acosta,* 435 S.W.2d 539, 549 (Tex. Civ. App.–Houston [1st Dist.] 1968, writ ref'd n.r.e.) (when plaintiff by "artful questions attempts to convey to the jury the information that the defendant probably is protected by indemnity insurance, a mistrial should be declared"). *But see Meyers v. Searcy,* 488 S.W.2d 509, 513-515 (Tex. Civ. App.–San Antonio 1972, no writ) (injecting the subject of insurance into the case on voir dire is not reversible error unless it is shown to probably have caused the rendition of an improper verdict).

A question that attempts to commit a potential juror to a particular outcome or a determination of the weight given the evidence is improper. *Vasquez v. Hyundai Motor Co.*, 119 S.W.3d 848, 855 (Tex. App.--San Antonio 2003 (en banc) rev'd at 2006 Tex. LEXIS 207; 49 Tex. Sup. J. 420 (March 10, 2006); *Lassiter v. Bouche*, 41 S.W.2d 88, 90 (Tex. Civ. App.--Dallas 1931, writ ref'd). A litigant may not, under the guise of bias and prejudice, ask prospective jurors to pledge or speculate about how specific evidence in the case may influence their verdict. *See Cortez* 159 S.W.3d at 94 (attempts to preview a prospective juror's likely vote not permitted). Such questions, commonly referred to as commitment questions, are improper because they seek to commit prospective jurors to a particular view based on selected facts or evidence disclosed by counsel. *See also Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001). *But see Davis v. State*, 349 S.W.3d 517 (Tex. Crim. App. 2011) (Defendant's voir dire question, asking potential jurors what factors they thought were important in assessing a sentence for aggravated robbery with a deadly weapon, was not an impermissible commitment question, since it merely sought jurors' general philosophical outlook on an aspect of the justice system)

A prompt objection and request for the court to instruct the panel to disregard the improper conduct of the opposing counsel is generally necessary to avoid waiving the objection. *Loesch,* 538 S.W.2d at 435. However, the failure to object to an attorney's statements during voir dire of the jury panel, without more, does not waive a later objection to evidence offered during trial, because statements by lawyers during the jury selection process are not evidence. *Serv. Corp. Intern. v. Guerra*, 348 S.W.3d 221, 234 (Tex. 2011).

On the other hand, if a party asks a proper question of the venire, the other party objects, and the court sustains the objection, then error is preserved. A party is not required to further develop or exhaust the subject at issue by engaging in further questioning. Samaripas v. State, No. PD-135-13, 2014 WL 5247434 (Tex. Crim. App. Oct. 15, 2014).

Vasquez v. Hyundai Motor Co.–Court of Appeals

In *Vasquez v. Hyundai Motor Co.*, 119 S.W.3d 848 (San Antonio 2004, reversed, 189 S.W.3d 743 (Tex. 2006)), a crashworthiness case brought against Hyundai by the parents of Amber Vasquez, who was killed when the passenger-side air bag of a Hyundai automobile deployed in a low-impact collision, the Vasquezes claimed the Hyundai air bag system was defectively designed because it deployed with too much force and Hyundai claimed that Amber was killed because she was not wearing a seat belt. The jury found no design defect and the Vasquezes appealed.

The San Antonio court of appeals, sitting *en banc,* reversed and remanded the case holding that the Vasquezes were entitled to determine which potential jurors could not be fair based solely on the fact that Amber was not wearing a seat belt when she was killed. "A broad latitude should be allowed to a litigant during voir dire examination. This will enable the litigant to discover any bias or prejudice by the potential jurors so that peremptory challenges may be intelligently exercised. [A] court abuses its discretion when its denial of the right to ask a proper [voir dire] question prevents determination of whether grounds exist to challenge for

cause or denies intelligent use of peremptory challenges.'" *Vasquez, 119 S.W.2d at 854-55*.

Hyundai's position on appeal was that the trial court had not abused its discretion because the questions the Vasquezes wanted to ask sought to commit the jurors. The court of appeals identified an improper "commitment" question as one designed to determine a potential juror's view of certain evidence as opposed to one seeking to expose the existence of bias; explaining that a party is not permitted to "pre-test" juror views on the weight they would give certain evidence for purposes of exercising peremptory challenges. *Id.* The court of appeals held that the specific question the Vasquezes wanted to ask about the non-use of a seatbelt by Amber was not a commitment question because it clearly focused on the ability of jurors to be fair and did not require the jurors to state what they would do with certain evidence or state what their verdict would be based on such evidence.

Hyundai Motor Co. v. Vasquez–supreme court

In *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743 (Tex. 2006), the Texas Supreme Court noted that in *Cortez, supra,* they adopted the general rule that it is improper to ask prospective jurors what their verdict would be if certain facts were proved. *Id.* at 751. It noted that voir dire inquiries to jurors should address biases and prejudices–NOT opinions about what their verdict might be given certain evidence. *Id.* at 752. The court organized their analysis into four points:

> First, an inquiry about the weight jurors will give relevant evidence should not become a proxy for inquiries into jurors' attitudes, because the former is a determination that falls within their province as jurors. Just as excluding jurors who weigh summarized facts in a particular way infringes upon the right to trial by a fair and impartial jury, so too does excluding jurors who reveal whether they would give specific evidence great or little weight. In both cases, questions that attempt to elicit such information can represent an effort to skew the jury by pretesting their opinions about relevant evidence. And, when all of the parties to the case engage in such questioning, the effort is aimed at guessing the verdict, not at seating a fair jury.

Second, inquiring whether jurors can be fair after isolating a relevant fact confuses jurors as much as an inquiry that previews all the facts. Lawyers properly instruct jurors that voir dire is *not* evidence, yet jurors must answer whether they can fairly listen to all of the evidence based only upon the facts that counsel have revealed. In responding, jurors are unable to consider other relevant facts that might alter their responses, rendering their responses unreliable. This confusion may explain in part why jurors' voir dire reactions to the evidence have not been proven to be predictors of jury verdicts: experience tells that, whatever jurors' stated opinions about particular evidence may be at the outset, they can shift upon hearing other evidence.

Third, previewing jurors' votes piecemeal is not consistent with the jurisprudence of our sister court. In *Standefer v. State*, the Court of Criminal Appeals held it improper to ask jurors whether they would presume guilt if one fact was proved and no others. Our sister court consistently has observed that questions that are not intended to discover bias against the law or prejudice for or against the defendant, but rather seek only to determine how jurors would respond to the anticipated evidence and commit them to a specific verdict based on that evidence are not proper.

As the statutory standards for bias or prejudice in civil and criminal cases are the same, voir dire standards should remain consistent.

Finally, the Court's decision in *Babcock v. Northwest Memorial Hospital* does not dictate that a trial judge must accept questions that seek to assess jurors' opinions about the weight they will place on particular evidence. In that case, we held that counsel could question jurors about bias or prejudice resulting from a societal influence outside the case - namely, tort reform.

> In contrast, a question that asks jurors to judge the weight to be given an operative fact will not reveal whether jurors have potential external biases or prejudices that improperly skew their view of case facts.
>
> Statements during voir dire are not evidence, but given its broad scope in Texas civil cases, it is not unusual for jurors to hear the salient facts of the case during the voir dire. If the voir dire includes a preview of the evidence, we hold that 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. If the trial judge permits questions about the weight jurors would give relevant case facts, then the jurors' responses to such questions are not disqualifying, because while such responses reveal a fact-specific opinion, one cannot conclude they reveal an improper subject-matter bias.

Id. at 752-53 (citing, among others, Reid Hastie, *Is Attorney-Conducted Voir Dire an Effective Procedure for the Selection of Impartial Juries?*, *40 AM. U. L. REV. 703, 720 (1991)* (publishing results of study concluding that "[a]ttorneys disagree substantially about what information to rely on and which jurors to select, and consistently produce low levels of accuracy in forecasting juror verdict preference prejudices."). The commentator further observes, "perhaps more importantly, even the heightened power of prediction of statistical models also demonstrates comparatively low levels of success in forecasting juror verdict preferences."

In affirming the trial judge's denial of the voir dire question, the court held:

> Assuming that placing an unbelted child in the front seat is relevant, admissible evidence, reasonable jurors could base their verdict on that fact alone. 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.

Id. at 756.

Standefer v. State

In *Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001), the Court of Criminal Appeals discussed at length what constituted an improper "commitment" question. In this case the trial court prohibited appellant from asking prospective jurors the following question during voir dire: "Would you presume someone guilty if he or she refused a breath test on their refusal alone?" The trial court found that "requesting them [prospective jurors] to make a commitment of that sort would be improper voir dire." The court of appeals reversed, holding that the question was a proper attempt "to discover whether any venireperson would have an automatic predisposition to find a person guilty simply because he refused to take the breath test, thereby rendering them unable or unwilling to consider all of the evidence in determining the intoxication issue." The Court of Criminal Appeals held: (1) question was a "commitment question" if one or more of the possible answers was that prospective juror would resolve or refrain from resolving an issue in case on basis of one or more facts contained in the question; *overruling Maddux v. State,* 862 S.W.2d 590 (Tex.Crim.App. 1993); and (2) proposed voir dire question seeking to discover whether any venireperson would have automatic predisposition to find person guilty simply because he refused to take breath test was improper commitment question.

The Court discussed commitment questions as follows:

> [A]n attorney cannot attempt to bind or commit a prospective juror to a verdict based on a hypothetical set of facts. The rule is easily stated but has not been so easily applied. Nevertheless, while case law has not always been clear and consistent, a few common principles are apparent. Commitment questions are those that commit a prospective juror to resolve, or to 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 the jury to resolving an issue a certain way. For example, the following question seeks to elicit a commitment

> from jurors to convict a person of a drug offense if that person is found with a residue amount of cocaine in a crack pipe: "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, and it could be measured, and it could be seen, is there anyone who could not convict a person, based on that?" A commitment question can also be a question that asks a prospective juror to *refrain* from resolving an issue on the basis of a fact that might be used to resolve the issue. For example, a question may attempt to secure a commitment to refrain from resolving the punishment issues in a capital case on the basis of victim impact evidence: "Let us assume that you are considering in the penalty phase of any capital murder case, okay? And some of the evidence that has come in shows that the victim's family was greatly impacted and terribly grieved and greatly harmed by the facts....Can you assure us that the knowledge of those facts would not prevent you or substantially impair you in considering a life sentence in such a case?"

Standefer, 59 S.W.3d at 179-80. The Court noted these were improper questions. The Court also indicated:

> [A]lthough commitment questions are generally phrased to elicit a "yes" or "no" answer, an open-ended question can be a commitment question if the question asks the prospective juror to set the hypothetical parameters for his decision-making. An example of an open-ended commitment question is: "What circumstances in your opinion warrant the imposition of the death penalty?"

Id. at 180. The Court distinguished questions which merely seek the juror's general views on mitigating factors and noted that they are permissible. For example: "Do you think there might be circumstances that would mitigate against the death penalty?" does not commit a juror to consider specific kinds of evidence in a specific manner. It does, however, raise the topic of mitigating circumstances and permits, but does not require the juror to express his view on various relevant factors. *Id.*

Then the Court observed that not all commitment questions are improper. For example, questions concerning a juror's ability to consider the full range of punishment for a particular offense meet the above definition of commitment questions but are nevertheless proper. The question, "Can you consider probation in a murder case?" commits a prospective juror to keeping the punishment options open (i.e., to refraining from resolving the punishment issues in a certain way) in a murder case. A murder conviction, even in the abstract, necessarily comprises some factual elements such as those listed in the statute (e.g. causing the death of an individual). But jurors are required to follow the law enacted by the Legislature. So a prospective juror must be able to consider the full range of punishment provided for an offense or be challengeable for cause. 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. For example, the defense could legitimately ask prospective jurors whether they could follow a law that requires them to disregard illegally obtained evidence, whether they could follow an instruction requiring corroboration of accomplice witness testimony, or whether they could follow a law that precludes them from holding against the defendant's failure to testify. These types of questions test the prospective jurors' ability to follow various legal requirements. *See* TEX.CODE OF CRIM. PROC., art. 38.23, 38.14.

In conclusion, the *Standefer* case provides that where the law does not require the commitment, a commitment question is invariably improper. *Standefer,* 59 S.W.3d at 181.

State v. Treeline Partners, Ltd.

In *State v. Treeline Partners, Ltd.*, 476 S.W.3d 572 (Tex. App.—Houston [14th Dist.] 2015, pet. denied), the court held that the State was entitled to inquire, during voir dire, whether potential jurors believed that the State "lowballs" its fair market value appraisals of condemned property, and the trial court's ruling denying State's attorney permission to so inquire denied the State the right to trial by a fair and impartial jury. The court reversed and remanded for a new trial.

Easley v. State

In *Easley v. State,* 424 S.W.3d 535 (Tex. Crim. App. 2014), the court found that the court of appeals correctly held that the judge's error in prohibiting Easley's counsel from asking proper questions of the venire was non-constitutional error. In so doing, it overruled *Plair v. State* 102 Tex. Crim. 628, 279 S.W. 267 (1925) and its progeny to the extent they hold that erroneously limiting an accused's or counsel's voir dire presentation is constitutional error because the limitation is a per se violation of the right to counsel. During voir dire, the judge presiding over Easley's family-violence assault trial prohibited Easley's counsel from discussing different legal standards of proof and contrasting those with standards with the beyond-a-reasonable-doubt standard applicable in criminal trials. The record shows that he tried on several occasions to discuss the lesser standards of probable cause and preponderance of the evidence applicable to civil trials. His attempts were cut short by the judge's admonitions that "we don't compare standards of proof" and "I don't allow you to get into the stairstep thing of probable cause and reason to believe and that sort of stuff." The jury convicted Easley, and he was sentenced to twenty years' confinement. He appealed the judge's refusal to allow him to explore the differing burdens of proof. The court agreed that the judge erred in refusing to allow Easley's counsel to question the jury panel on the differences between the criminal and civil burdens of proof. The court concluded, however, that the error was a non-constitutional error for purposes of a harm analysis and was harmless because it did not affect a substantial right. The court then analyzed the harm for error under TRAP 44.2(b) and found it harmless.

McDowell v. State

In *McDowell v. State*, 11-16-00045-CR, 2018 WL 1320416, at *5 (Tex. App.—Eastland Mar. 8, 2018, no pet. h.), the Prosecutor asked the panel: "Is there anyone who feels like they would require not only beyond a reasonable doubt that the offense occurred in a drug free zone but also that the traffic stop occurred in a drug free zone?"

The court held that the question at issue was clearly a commitment question, as it sought to elicit a commitment from a potential juror as to whether or not he would convict Appellant if the offense occurred in a drug-free zone, however, is was not an improper commitment question because it would have led to a challenge for cause and because it did not include any evidentiary facts or non-statutory manners and means. Appellant was charged with committing the offense of possession of marihuana while in a drug-free zone. If a venireperson positively answers any of the challenged questions, it would reveal that the he or she would require the State to prove an additional element not required by the statute—that the traffic stop also occurred in a drug-free zone. Requiring proof of this additional element would warrant a valid challenge for cause, and the State's question contained only the facts necessary to lead to this valid challenge for cause. Therefore, the challenged question was a proper commitment question.

Sanchez v. State

In *Sanchez v. State*, 165 S.W.3d 707 (Tex. Crim. App. 2005), Appellant was charged with driving while intoxicated. During voir dire, the State, anticipating that the evidence at trial would show that appellant suffered physical disabilities from polio, asked the jury panel the following questions:

> There may be some evidence in the case, you may hear some evidence about physical disability. And my question is: will anyone here who is sensitive or just thinks that their thinking process lends them to feel the need to be more protective of people with physical disabilities? Is there anyone here who thinks they may have a hard time reaching a verdict based on the fact that there may be evidence of a physical disability?

The Court of Criminal Appeals granted Sanchez's petition for discretionary review on the following question: "What is the appropriate test for harm when the State is allowed to improperly commit jurors to a set of facts?" The court held that for purposes of assessing potential harm of the state's improper commitment questioning during voir dire, there is no single, specific rule by which reviewing courts should assess this question of harm, but factors to consider in determining whether trial court's error in permitting state to ask improper commitment questions to entire jury panel over defendant's objection was harmful might include: (1) whether questions were unambiguously improper and attempted to commit one or more veniremen to a specific verdict or course of action, (2) how many, if any, veniremen agreed to commit themselves to a specific verdict or course of action if state produced certain evidence, (3) whether veniremen who agreed to commit themselves actually served on jury, (4) whether defendant used peremptory challenges to eliminate any

or all of those veniremen who had committed themselves, (5) whether defendant exhausted all his peremptory challenges upon those veniremen and requested additional peremptory challenges to compensate for their use on improperly committed veniremen, (6) whether defendant timely asserted that named objectionable veniremen actually served on jury because he had to waste strikes on the improperly committed jurors, and (7) whether there is a reasonable likelihood that jury's verdict or course of action in reaching a verdict or sentence was substantially affected by state's improper commitment questioning. Because the court of appeals had used an older, four part harm analysis, the court remanded to the court of appeals to apply this seven part analysis.

On remand, the court of appeals held that the subject questions were not improper commitment questions. It held that, when read in context, it is clear that the State was not asking the venire members to disregard a person's disability in considering whether that person had lost the normal use of his mental and physical faculties. *Sanchez v. State*, 04-02-00624-CR, 2006 WL 1623311 (Tex. App.—San Antonio June 14, 2006, pet. ref'd).

K.J. v. USA Water Polo, Inc.

In *K.J. v. USA Water Polo, Inc.*, 383 S.W.3d 593, 600-02 (Tex. App.--Hous. [14th Dist.] 2012, rev. denied) appellants contended they were precluded from asking the venire panel whether they would be willing to award damages to E.J. of $2 million if the law and the credible evidence justified such an award. Further, because the trial court refused to permit the question, appellants contended they were denied the opportunity to exercise challenges for cause and peremptory challenges, depriving them of their due-process right to a fair trial.

On the first day of voir dire, the trial court informed the jury that the lawsuit involved allegations of assault and sexual assault against a teenage boy by some of his water-polo teammates at a tournament he was attending in Utah. Later, as appellants' counsel questioned the panel members, he asked the following question, without objection, to the first eighty-one panel members:

> Now, do you have you a fixed figure in mind that no matter what the law is that the Judge gives you and the evidence you hear from the witness stand that you would not go, in your own words? And by that I mean that if the law as given to you by His Honor and the evidence only justified one dollar in damages, would you be willing to serve on this jury and come back with an award one dollar for [E.J.]?

Panel member 82 stated he did not understand the question, and when appellants' counsel repeated it, counsel for USAWP objected that the question was "an improper attempt to pre-commit the jurors to any amount." Appellants' counsel responded that "it was a question of whether they can follow the law." The trial court overruled the objection, but admonished appellants' counsel to "[k]eep it in general terms."

After several more jurors answered the question, appellants' counsel changed the question:

> Let's go the other direction. What if the credible evidence, all the credible evidence and the law [that] is given to you by His Honor justifies an award of $2 million for [E.J.]. Are you willing to sit on this jury and return a verdict of $2 million for [E.J.], juror number 1?

Water Polo's counsel began to object, saying, "Once again that's an improper attempt—" when the trial court asked counsel to approach the bench. An unrecorded bench conference was held. After the bench conference, no ruling was requested or announced on the record, but appellants' counsel did not continue that line of questioning. The COA presumed for the sake of argument that the trial court ruled that appellants were precluded from asking the venire panel whether they would be willing to award damages to E.J. of $2 million if the law and the credible evidence justified such an award.

Appellants contended that the question was a proper inquiry into whether the potential jurors could follow the law given to them by the court and as based on the evidence presented because "it inquired of the venire's ability to return large damages, if all of the credible evidence they heard and the law as given to them by the judge warranted large damages." Appellants argued that the question is analogous to asking venire members in a criminal case whether they can consider the entire range of punishment. *See Cardenas v. State,* 325 S.W.3d 179, 184 (Tex.Crim.App.2010) (stating that both the State and the defense may question the jury panel on the range of punishment and may commit jurors to consider the entire range of punishment for an offense); *Davis,* 313 S.W.3d at 346 ("When the law requires a certain type of commitment from jurors, such as considering the full range of punishment, an attorney

may ask prospective jurors to commit to following the law in that regard.").

The Court rejected such analogies noting that a party may ask potential jurors whether they can consider the full range of punishment because the punishment for a particular offense is prescribed by statute, and a party is entitled to determine whether potential jurors can follow the law on which the parties rely. *Citing Cardenas,* 325 S.W.3d at 184–85; *Standefer v. State,* 59 S.W.3d 177, 181 (Tex.Crim.App.2001). Thus, the Court held, 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. *Standefer,* 59 S.W.3d at 181; *see also In re Commitment of Hill,* 334 S.W.3d 226, 229 (Tex.2011) (per curiam) (commitment question not improper when the commitment potential jurors were asked to make was legislatively mandated). In civil cases, however, the Court noted that the law does not require a jury to award a statutorily specified amount of damages if liability is found. *Citing Taber v. Roush,* 316 S.W.3d 139, 164–65 (Tex.App.-Houston [14th Dist.] 2010, no pet.)(holding that venire member was not disqualified as a matter of law when he indicated that he could not award a million dollars for mental anguish because "[t]he law does not require a juror to award any specific amount of damages for mental anguish."). Thus, the Court concluded that criminal cases involving commitment questions on the range of punishment were not dispositive in a civil case.

Appellants also contended that the question was not a commitment question because it did not tell the venire members any facts and did not ask them to commit to resolve an issue a certain way after learning a particular fact. The Court held, however, that appellants' question was framed by a preview of the claims involved, and inquired whether the jury could commit to a specific amount of damages, namely $2 million, if the law and facts allowed it. The Court discussed *Vasquez,* 189 S.W.3d at 753 and *Greenman v. City of Fort Worth,* 308 S.W.2d 553, 554 (Tex.Civ.App.-Fort Worth 1957, writ ref'd n.r.e.), a case with "facts remarkably close to those in the case at hand," and held: "Whether appellants' question exactly fits the definition of a commitment question, we hold the trial court did not abuse its discretion in refusing to allow appellants' counsel to ask it."

Same Holding: *Taber v. Roush,* 316 S.W.3d 139, 164–65 (Tex.App.-Houston [14th Dist.] 2010, no pet.)(holding that venire member was not disqualified as a matter of law when he indicated that he could not award a million dollars for mental anguish because "[t]he law does not require a juror to award any specific amount of damages for mental anguish"). Note: same venire member said he could award damages for mental anguish, follow the instructions of the court, and consider the evidence in determining whether an award for mental anguish damages was appropriate. He also indicated that he could award damages for mental anguish if proven by a preponderance of the evidence.

In re Commitment of Hill

In, *In re Commitment of Hill*, 334 S.W.3d 226 (Tex. 2011), the Texas Supreme Court addressed the issue of whether the trial court erred by curtailing voir dire questioning in a proceeding to declare an inmate a violent sexual predator. During questioning, Hill's attorney inquired, without objection, whether potential jurors could be fair to a person they believed to be a homosexual. Several stated that they would not be able to give a fair trial to such a person. The court then instructed Hill's attorney to terminate that line of questioning. The supreme court, in reversing the Court of Appeals, reasoned that Hill's sexual history was part of the state's proof of his alleged behavioral abnormality. The Court held that the trial court's refusal to allow questioning that went to the potential jurors' ability to give Hill a fair trial (by preventing him from discovering the potential jurors' biases so as to strike them for cause or intelligently use peremptory challenges) was error.

In re Commitment of Kalati

In *In re Commitment of Kalati*, 370 S.W.3d 435 (Tex. App.--Beaumont 2012, pet. denied) Respondent challenged his civil commitment as a sexually violent predator. The court of appeals held that the evidence was legally sufficient to support the commitment, but also concluded that it was required to reverse the judgment and remand the case to allow another trial due to error that occurred during jury selection. The trial court had sustained the state's objection to the inquiry: "Would anybody on the first row find it hard to give someone who has been diagnosed by an expert as a pedophile a fair trial?" Appellant's sexual history was part of the state's proof that he had a behavioral abnormality that made him likely to engage in a predatory act of sexual violence, yet the trial court refused a question that went solely to the potential jurors' ability to give him a fair trial. The substance of the question posed by counsel was probative of the potential jurors' prejudices towards persons diagnosed with pedophilia, and the question that was being posed did not ask the members of the venire for their opinions about the strength of the evidence or suggest what weight they would give to the evidence of

respondent's psychiatric diagnosis, the appellate court explained.

In re Commitment of Barbee

In *In re Commitment of Barbee*, 192 S.W.3d 835 (Tex. App.–Beaumont 2006, no pet.), Barbee contended the trial court demonstrated bias in interrupting his voir dire, accusing him of trying to bust the panel, and scolding him in the presence of the potential jurors. The Beaumont court reviewed the alleged improper comments of the trial judge as a question of law, citing *Dow Chemical Co. v. Francis,* 46 S.W.3d 237, 240 (Tex. 2001). The *Francis* court held that a trial court has great discretion in the manner it conducts a trial, and possesses "the authority to express itself in exercising this broad discretion." *Id*. at 240-41. The *Barbee* court pointed out that the complaining party first must show the comments were improper, and then show that the improper comments prejudiced the complaining party. *Id., citing Metzger v. Sebek,* 892 S.W.2d 20, 39 (Tex. App. - Houston [1st Dist.] 1994, writ denied). The *Barbee* court also noted that to preserve any error on appeal, a party must object when the comment occurs and request an instruction unless proper instruction cannot render the comment harmless. *Id., citing Francis,* 46 S.W.3d at 241. Lastly, the court recognized Texas law imputing good faith to a trial judge's judicial actions in controlling a trial. *Id., citing Schroeder v. Brandon,* 141 Tex. 319, 172 S.W.2d 488, 491 (1943).

The *Barbee* court found four occasions during voir dire when the trial court interrupted Barbee's counsel. On two of those occasions, the trial court interrupted even though the State had not objected to Barbee's questions, and on two occasions the interruptions related to the State's objections to Barbee's questions. When the trial court interrupted without a prior objection by the State, the record indicated that the trial court sought clarifications to questions that it considered potentially confusing. On the occasions when the interruptions were related to objections posed by the State, the trial court sustained the State's objections in both instances. The judge's comments included the suggestion that a question was improper, because it served to preview the jurors' attitudes about how they might weigh evidence of Barbee's prior criminal convictions. When the trial court sustained the other objection by State's counsel, it did so without comment. The *Barbee* court noted that a trial court "may properly intervene . . . to expedite the trial, and to prevent what it considers to be a waste of time." *Barbee* at 847, citing *Francis,* 46 S.W.3d at 241.

However, the court found that these comments by the judge attributable to Barbee's counsel presented a more difficult issue: "[you are] trying to bust this entire panel," and "Yeah. And I want you to be honest." The court, relying on *Francis,* noted that a judge's remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.'" *Id., citing Francis,* 46 S.W.3d at 240 (quoting *Liteky v. United States,* 510 U.S. 540, 555, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994)).

The Barbee court found that the complete voir dire record demonstrated that the trial judge properly attempted to clarify several questions posed by Barbee's attorney and that the trial court sought to limit the questioning of potential jurors in a manner that would otherwise give the parties' attorneys a preview of jurors' attitudes toward facts later placed in evidence at trial. *Barbee* at 847. Lastly, the court found that the manner in which Barbee's attorney chose to voir dire the jury required the court's intervention on more than one occasion. *Id.* In summary, the court held:

> Although we believe it would be wise for trial courts to avoid speculating before the jury panel on the possible motivations behind attorneys' questions, or to make comments critical of counsel, the comments complained of here fail to demonstrate bias on the part of the trial judge.

Barbee at 848.

Fuller v. State

In *Fuller v. State*, 363 S.W.3d 583 (Tex. Crim. App. 2012), the Court held that the trial court abused its discretion in denying defendant's request, immediately before voir dire commenced at trial for capital murder, that he be permitted to ask members of venire panel whether they understood that standard of proof beyond a reasonable doubt constituted level of confidence under law that was higher than both preponderance of evidence and clear and convincing evidence standards; it was appropriate for defendant to explain contrast among various standards of proof in case, and defendant clearly proffered question that was at least relevant to, if not altogether dispositive of, legitimate defensive challenge for cause. The Court reversed and remanded for a new trial.

Same holding: *Contreras v. State*, 440 S.W.3d 85 (Tex. App.--Waco 2012, pet. ref'd)(trial court erred in

refusing to allow defense counsel to question prospective jurors about their understanding of the various standards of proof. However, error was harmless), *Wilkerson v. State*, 391 S.W.3d 190 (Tex. App.--Eastland 2012, pet. ref'd)(trial court abused its discretion by preventing defendant from putting questions during voir dire comparing reasonable doubt standard to other standards of proof., but error was harmless).

Barnett v. State

In *Barnett v. State*, 344 S.W.3d 6 (Tex. App.--Texarkana 2011, pet. ref'd), the prosecutor asked the following question in an aggravated assault case voir dire:

> Is there anyone here who cannot consider the full range of punishment? This is really important, probation is not an option in this case, we're talking about TDC time. Okay?

The court held that this statement did not inform jury that defendant was a felon, but simply discussed range of punishment. The court also found that there was no error because option of community supervision could have become unavailable under circumstances other than a prior conviction. *Id.* at 20.

Woodall v. State

In *Woodall v. State*, 350 S.W.3d 691, 695-96 (Tex. App.--Amarillo 2011, no pet.) the Amarillo Court recognized a trial judge has the inherent authority to question prospective jurors regarding their qualifications and ability to serve as fair and impartial jurors, and for the purpose of clarification and expedition. It is only when a trial court's questions or comments are reasonably calculated to benefit the State or prejudice the defendant will reversible error occur. *Id.* at 695-96.

The court also held that hypothetical question asked by trial court to jurors who stated they could not consider probation for a defendant convicted of aggravated sexual assault of a child, was not an impermissible commitment question in prosecution of defendant for aggravated sexual assault of a child. The court found that this hypothetical involved a different fact situation of aggravated sexual assault and merely clarified for the jury the broad range of potential facts that could constitute the offense charged. *Id.* at 698.

Abdygapparova v. State

In *Abdygapparova v. State,* 243 S.W.3d 191 (Tex. App.--San Antonio 2007, pet. ref'd), the prosecutor and the trial court exchanged numerous "notes" during the voir dire process. These notes discussed Abdygapparova's ability to communicate with her counsel, defense counsel's voir dire of at least two of the venire members, the hairstyle of one of the venire members, the State's presentation of the law to the venire, the prosecutor's line of questioning of one of the venire members, time limits on voir dire, and an update on unrelated proceedings in the courthouse. Appellant complained about this behavior in support of a reversal. The court found that the trial judge knew or should have known that engaging in written communications with the State regarding potential jurors, defense counsel's voir dire questions and presentation of argument, all in the presence of potential jurors, was improper, citing Tex. Code Jud. Conduct, Canon 3(B)(8), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G, app. B. *Citing also In re Davis,* 82 S.W.3d 140, 148 (Tex.Spec.Ct.Rev.2002) (holding that it is sufficient that the judge intended to engage in the conduct); *In re Barr,* 13 S.W.3d 525, 539 (Tex. Rev. Trib.1998, no appeal). The court held that the secretive nature and content of the ex parte notes showed a bias on the part of the trial court to favor the prosecution, even going so far as to make recommendations on the presentation of its case. As such, the trial judge became an advocate for the State, and an opponent of the defense, in direct conflict with her judicial requirement of absolute impartiality, precluding Abdygapparova from receiving a fair and impartial trial.

Coble v. State

In *Coble v. State*, 330 S.W.3d 253, 295 (Tex. Crim. App. 2010), *cert. denied*, 131 S. Ct. 3030, 180 L. Ed. 2d 846 (U.S. 2011) appellant claimed that the trial court erred in limiting his voir dire by refusing to allow him to question the jurors about the mitigation value of specific facts, including evidence of a troubled childhood, mental illness or extreme emotional distress, community service, age, kindness to others, work ethic, or military service. The State objected, citing Standefer v. State, *Sells v. State*, and *Wingo v. State,* and stated that these were commitment questions. The trial judge sustained the State's objections, but allowed more general mitigation questions about whether there was anything that the jurors "could consider under the circumstances of having found [appellant] a future danger to society which might merit a life penalty."

The Court noted that in *Raby v. State,* 970 S.W.2d 1, 3 (Tex. Crim. App.1998) they rejected appellant's claim that he is entitled to ask potential jurors in a death penalty case about what specific evidence that juror could or would consider as mitigating. In that case, the Court stated "[a] trial court does not abuse its discretion by refusing to allow a defendant to ask venire members questions based on facts peculiar to the case on trial (e.g. questions about particular mitigating evidence)." The Court found no error on the part of the trial court in this regard.

Lydia v. State

In *Lydia v. State,* 117 S.W.3d 902 (Tex. App.–Fort Worth 2003, pet. ref'd), in a detailed analysis of commitment questions, including a lengthy concurrence by Justice Dalphinot, the court examined a series of questions from the prosecutor the Appellant contended were commitment questions. At trial, the prosecutor asked the entire panel during voir dire, "Do each of you feel as though you could evaluate a witness and his testimony and decide if he's being truthful without automatically dismissing his testimony because of some criminal history?" Appellant objected to this question. The trial court overruled the objection, but granted appellant a running objection to the question. The prosecutor repeated the question, in various forms, to members of the panel on a group and individual basis. *Id.* at 496-97. The prosecutor further expanded on the hypothetical by asking one of the jurors if it would make a difference if the crime committed by the witness was against the defendant. *Id.* at 497. Appellant objected again, but the trial court overruled the objection and granted appellant a running objection. *Id.* The jury later found appellant guilty, and the court sentenced him to eighteen years' imprisonment.

In appellant's sole point on appeal, he complained that the prosecutor improperly attempted to bind prospective jurors to a specific factual situation during voir dire contrary to the court of criminal appeals' pronouncement in *Standefer v. State, supra.* The court of appeals held that the prosecutor's questions were not commitment questions because they did not ask the prospective jurors to resolve or refrain from resolving any issue. *Lydia,* 81 S.W.3d at 489. Because the court of appeals answered this question negatively, it did not reach the second or third prongs of the *Standefer* test for commitment questions. *Id.*

The court of criminal appeals granted appellant's petition for discretionary review to determine "whether the State improperly attempted to bind prospective jurors to specific factual situations during the voir dire examination, contrary to this court's determination in *Standefer*." *Lydia*, 109 S.W.3d at 496. That court held that the prosecutor's questions did in fact ask jurors to resolve issues concerning witness credibility on the basis of particular facts; therefore, they were commitment questions. *Id.* at 499. The court of criminal appeals then vacated and remanded the case back to Fort Worth for further analysis under the remaining prongs of the *Standefer* test for improper commitment questions. *Id.* at 500.

On remand, the court determined if one of the possible answers to the questions would give rise to a valid challenge for cause. *Lydia,* 117 S.W.3d at 905 (citing *Standefer*, 59 S.W.3d at 182). The court held that by asking the questions, the prosecution was trying to learn if any of the prospective jurors would not impartially judge the credibility of the witness or if any of them had "extreme or absolute positions regarding the credibility of any witness" based on the witness's potential criminal history. *Id.* (citing *Ladd,* 3 S.W.3d at 560). The court noted that the possible answers to these questions would lead to a challenge for cause under article 35.16(a)(9) based on a juror's bias. TEX. CODE CRIM. PROC. ANN. art. 35.16(a)(9); *Ladd*, 3 S.W.3d at 560 (holding that a prospective juror may be properly challenged for cause and removed if he cannot impartially judge the credibility of a witness); *see also Rivera v. State,* 82 S.W.3d 64, 66-67 (Tex. App.–San Antonio 2002, pet. ref'd) (stating that if a prospective juror responded to a question by stating that he would automatically disbelieve a defendant's testimony simply because he was the defendant, that person would be stricken for cause). Thus, the court held that the questions meet the second *Standefe*r prong for proper commitment questions. *Lydia,* 117 S.W.3d at 906. The court further concluded that the questions met the third *Standefer* prong because they contained only those facts necessary to test whether a prospective juror is challengeable for cause. *Id.* (citing *Standefer,* 59 S.W.2d at 182). Accordingly, the court overruled appellant's sole point.

Lee v. State

In *Lee v. State*, 206 S.W.3d 620 (Tex. Crim. App. 2006) the appellant was charged with indecency with a child. During voir dire, the State offered a hypothetical specifically to one juror, although the facts of the hypothetical were presented before the entire panel, in which a fourteen-year-old jogger was touched on either the breast or genitals as she ran near the beach. At the hypothetical assailant's trial, which occurred two years after the fictional incident, the victim was the only

witness and her testimony was the only evidence offered against the assailant to convict him. After offering this hypothetical, the State asked, "... assume for me that you do believe her testimony beyond a reasonable doubt, you do believe her, and it meets all the elements of the charge, indecency with a child by contact, assume for me that you do believe her beyond a reasonable doubt, could you convict that hypothetical defendant of that charge or would you require some other witness or some other evidence?"

After eliciting an affirmative response from the first juror, the State continued asking individual jurors a question similar to the one it asked the first juror. In some instances the State asked a variation of the following question: "One witness, if you believed her beyond a reasonable doubt could you convict at that point or would you require more?" In other cases, the State simply followed up one juror's response by asking the next juror, "... what do you think?" Several of the venire persons conceded that they would be unable to convict in this scenario and the State moved the trial court to strike them for cause. The trial court granted the State's motions to strike these venire persons, and the appellant was convicted.

On appeal, the appellant complained that the State improperly committed prospective jurors to convict based upon the question of whether they could convict if they believed the testimony of one witness beyond a reasonable doubt. The court of appeals analyzed the State's questioning in light of *Standefer v. State,* which set forth a three-prong test to determine whether a voir dire question calls for an improper commitment. The court of appeals held that the question posed by the State was indeed a commitment question, and that this prong of *Standefer* was satisfied, because "it required prospective jurors to commit to convict a defendant or to resolve issues concerning witness credibility under a particular set of facts-the testimony of only one witness."

To address the second prong of *Standefer,* which asks whether the commitment question gave rise to a valid challenge for cause, the court discussed the court of appeals' holding that "a prospective juror is properly subject to challenge for cause if he indicated that he could not convict based on the testimony of one witness, *even if* he believed that witness beyond a reasonable doubt." The court of appeals noted this "would hold the State to a higher standard than 'beyond a reasonable doubt.' "

Lee argued that this use of the "one witness rule" was prohibited by the holding in *Castillo v. State,* 913 S.W.2d 529, 533 (Tex.Crim.App.1995). In *Castillo*, the court held that commitment to such a question would not give rise to a valid challenge for cause, because "before the trial court may sustain a State's challenge for cause on the ground that the venire person will not convict on the testimony of a single eyewitness, it must be demonstrated to the trial court that the venire person's categorical refusal is predicated upon something other than his understanding of proof beyond a reasonable doubt." 913 S.W.2d at 534. "Otherwise there is no indication the [venire person] cannot follow the law, and the State has failed to carry its burden to show the [venire person] should be excused. *Id.*

The court held that the question posed by the State went beyond the abbreviated question identified in *Castillo,* because it elicited more than whether the juror could convict with the testimony of one witness alone. It went on to ask whether the juror could convict on the one witness's testimony if the juror "believed [the witness] beyond a reasonable doubt" and the witness's testimony was sufficient to convince the juror of "all the elements of the charge" of "indecency with a child." The court held that this choice of words was consistent with the language of *Castillo* that gave rise to a valid challenge for cause because a juror acknowledged in his voir dire that "even if [he] heard one eyewitness and [he] believed the witness beyond a reasonable doubt and that eyewitness' testimony proved the indictment beyond a reasonable doubt, [he] would still require additional evidence before [he] would return a verdict of guilty[.] The court affirmed the court of appeals and the conviction.

Shuler v. State

In *Shuler v. State*, 2009 WL 3078716, NO. 2-08-313-CR (Tex.App.-Fort Worth 2009)(not designated for publication) Shuler asserted that the trial court erred by allowing the State's prosecutor to ask the jury an allegedly improper commitment question during voirdire:

> If at the end of the case you've heard all the evidence and [the State has] proved to you that there was a breath test, the breath test was a 0.08 or higher, and you believe beyond a reasonable doubt that the Intoxilyzer machine was working that day, can you find the defendant guilty?

Shuler's counsel objected to the question by stating:

> [I]t is a misinstruction as to what the law in this case is. The law in the case has nothing to do with jurors contracting to believe in the reliability of an

> Intoxilyzer 5000.... [W]e're asking jurors to contract so I object because it's a misstatement of the law, in addition to being a fact specific commitment question.

The court overruled the objection. Shuler appealed following his conviction for DWI complaining of the commitment question. The State conceded that the question was a commitment question because it connected a hypothetical fact-a breath test of 0.08 or higher-to the commitment of finding Shuler guilty. But the State argued that the commitment question was proper because when it is considered in the full context of the State's voir dire, the question informed the jury that a defendant must be intoxicated while driving to be guilty of DWI. The court agreed, applying the logic in *Halprin v. State*. 170 S.W.3d 111, 118 (Tex.Crim.App.2005) finding that the trial court could have reasonably found that several earlier references by the State to the elements of a DWI offense, which connected the 0.08 blood alcohol level to the time of operating a vehicle, provided adequate context to the challenged question so that the jury could understand that the same connection was tacitly included as part of that question. Thus, the court held that in context, the question was not an improper commitment question and that the trial court did not abuse its discretion by overruling Shuler's objection to the question.

Similar holding: *Roland v. State*, 2010 WL 307894 (Tex.App.-Hous. [14 Dist.] Jan 28, 2010) (NO. 14-08-00290-CR)(not released for publication)(although commitment question, was still proper).

Thompson v. State

In *Thompson v. State*, 267 S.W.3d 514 (Tex. App.-Austin 2008, pet. ref'd), the court found that Thompson was erroneously precluded from discussing the possibility of probation during voir dire but found the error harmless.

The court noted that a trial judge's impermissible exclusion of a proper question during jury voir dire is subject to a harmless error analysis, citing *Rich v. State*, 160 S.W.3d 575, 577 (Tex. Crim. App. 2005). The court stated that even if they assigned the error "constitutional dimension" (as in *Jones v. State*, 223 S.W.3d 379, 381 (Tex. Crim. App. 2007), there was no harm from refusing to allow Thompson to discuss or ask venire panelists questions about an issue not raised by the evidence presented. The court acknowledged that one might argue that the trial court's repeated declarations that Thompson was not eligible for probation dissuaded Thompson from presenting contrary evidence at punishment. However, the issue of whether he had been convicted of a felony was squarely presented at the punishment phase in the enhancement question-with the burden of proof on the State-and yet Thompson did not present any evidence that he had not been convicted of a prior felony or even seriously challenge the State's evidence that he had.

The court also found that the absence of harm was emphasized by the jury's finding of true to the enhancement allegation and assessment of 25 years in prison, both of which rendered a probation recommendation impossible. "To find error, we would have to speculate that permitting discussion of probation at voir dire would have led to the recomposition of the jury and adjustment of trial strategy significant enough to cause the theoretical jury to reject the uncontested (and even admitted) evidence of the prior juvenile felony for enhancement purposes, to assess a sentence of no more than 10 years, and to recommend probation, or at least to assess a sentence less than 25 years." *Thompson* at 520. "On the evidence before us, we do not find such speculation reasonable." Citing *Ex parte Cash*, 178 S.W.3d 816, 817-18 (Tex. Crim. App. 2005) (contention that sentencing jury could have recommended probation absent trial counsel's deficient performance was based on "pure conjecture and speculation").

In conclusion, the court held: "We are persuaded beyond a reasonable doubt that the erroneous exclusion of a discussion of probation from the voir dire examination did not contribute to the sentence assessed." *Thompson* at 520.

Murphy v. State

In *Murphy v. State*, PD-0798-08, 2009 WL 3368693 (Tex. Crim. App. 2009) (not designated for publication), the trial court prohibited defense counsel from explaining during voir dire that a sentence of life imprisonment without parole is mandatory on conviction of the capital felony as required by section 12.31(b) of the Texas Penal Code. The court held that appellant had failed to show that she was deprived of a jury that was comprised of legally qualified jurors. "The failure to provide information to which the jury panel was entitled by statute did not affect the legal qualifications of any of the venire members. We therefore conclude that the trial court's error did not affect appellant's substantial rights, and pursuant to Rule 44.2(b), it must be disregarded." Four justices dissented.

Cardenas v. State

In *Cardenas v. State*, 325 S.W.3d 179 (Tex. Crim. App. 2010), The defendant was convicted on two counts of aggravated sexual assault of a child and one count of indecency with a child. The trial court sentenced the appellant to twenty years imprisonment. The appellate court reversed concluding that the trial court had abused its discretion by denying the appellant's challenges for cause to jurors who unequivocally stated that they could not consider the full range of punishment. The Texas Court of Criminal Appeals concluded that a juror who, after the range of punishment has been explained to him as by the trial judge, the prosecutor, and the defense counsel, unequivocally responded in the negative when asked if he could consider the minimum sentence, had stated in the most concrete terms that he could not follow that law. At that point, the counsel need ask nothing more and the trial court or the opposing party could explain the law further in the hope of having the juror reconsider his position, but, absent such rehabilitation, that juror was subject to a challenge for cause. Thus, the appellant had properly preserved for review his denied challenges for cause. Further, the defense counsel's commitment question contained no evidentiary facts and did not go beyond the statutory language of the criminal offense. Hence, the counsel did not include any facts in his hypothetical that went beyond the statutory elements and statutory manner and means of committing that offense. Therefore, the appellate court was correct in concluding that the trial court abused its discretion by denying the appellant's challenges for cause to jurors who unequivocally stated that they could not consider the minimum punishment. Accordingly, the court of appeals decision was affirmed.

King v. State

In *King v. State*, 05-10-00610-CR, 2012 WL 414801 (Tex. App.--Dallas Feb. 10, 2012, pet. ref'd)(not released for publication) both of the challenged jurors stated that they could consider the minimum punishment for intoxication manslaughter, i.e., a probated sentence. The COA held that the trial court properly disallowed questions concerning whether the jurors could consider the minimum punishment *when the case involved two deaths rather than one,* (emphasis added) as this addition attempted to commit the two jurors "to consider the minimum sentence based on specific evidentiary facts." The Court, citing *Cardenas, supra*, stated:

> A question committing a juror to consider the minimum punishment is both proper and permissible. However, counsel veers into impermissible commitment questions when he attempts to commit a veniremember to consider the minimum sentence based on specific evidentiary facts. For example, a party may ask the potential juror if he could consider the minimum of five years' imprisonment in a murder case, but he may not ask if the juror could consider five years in prison in a case in which the State alleged that the defendant "tortured, garroted, poisoned, and pickled" the victim.

King at *2.

Rushing v. State

In *Rushing v. State,* 2007 WL 2405797 (Tex. App.--El Paso 2007, pet. ref'd) (not designated for publication), Appellant complained that the prosecutor effectively informed the jury that he had a prior conviction when the prosecutor informed the panel during voir dire that probation was not an issue in the case. During voir dire, the prosecutor said that aggravated robbery is a first degree felony and the range of punishment is ordinarily imprisonment for a minimum of five years to a maximum of 99 years or life. He then mentioned that if a certain evidentiary showing is made, the minimum sentence might be fifteen years. The prosecutor then ascertained the ability of the veniremembers to consider the full range of punishment, taking into account the two potential minimum sentences. Near the close of the State's voir dire, the prosecutor informed the panel that probation was not an issue and inquired whether anyone would have a problem sitting as a juror in an aggravated robbery case where probation could not be given. The trial court overruled Appellant's objection and denied his request for a mistrial. During voir dire by the defense, a potential juror stated that "there is some kind of history" because the jury had been told that "[p]robation is not an option." In response, defense counsel countered that "nobody said there was a history." He reiterated that the attorneys could not talk about the facts of the case before the evidence was presented and that what the attorneys said was not evidence.

The court held that the prosecutor clearly stayed within the bounds of *Frausto v. State,* 642 S.W.2d 506, 509 (Tex. Crim. App. 1982) in his comments regarding the minimum range of punishment "bumping up" to fifteen years in the event an unspecified evidentiary showing was met. The prosecutor's comment that "probation is not an issue" did not violate Tex. Code

Crim. Proc. Ann. art. 36.01 or exceed what is permissible under *Frausto* because, even assuming that the potential jurors would necessarily have understood that probation was unavailable because Appellant had a prior conviction, it did not inform the jury of the specifics of the prior conviction.

Hill v. State

In *Hill v. State*, NO. 07-08-0088-CR, 2009 WL 578629 (Tex. App.-Amarillo 2009, no pet.) (not released for publication), during voirdire, the prosecutor commented:

> I guess the basis of the question is, is there a way that I can get to that level in a case proving to you all of the elements if you never hear from the Defense? Or do you say, gosh, I've got to hear from him. I want to know his side? ...why wouldn't somebody want to take the stand and talk about their case?

At that moment, defense counsel objected based on the United States Constitution and the prosecutor was asked to rephrase. He continued:

> [w]hy would somebody choose to exercise their right? You understand it's not a definite prohibition. We don't say you can't take the stand. We say you have the right to exercise. You can say, I don't want to take the stand. Right?

Defense counsel again objected, and the trial court overruled the objection.

The court observed that a prosecutor's comment that refers to an accused's failure to testify violates the accused's Fifth Amendment right against self-incrimination. *Citing Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *Bustamante v. State,* 48 S.W.3d 761, 765 (Tex.Crim.App.2001). However, the court noted, to violate that right, the offending language must be viewed from the jury's standpoint and the implication that the comment referred to the defendant's failure to testify must be clear. *Citing Bustamante,* 48 S.W.3d at 764. It is not sufficient that the language might be construed as an implied or indirect allusion. *Id.* The test is whether the language used was manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify. *Id.*

The court held that comments such as those from the prosecutor in the instant case, which occur prior to testimony in the case being closed, cannot be held to refer to a failure to testify which has not yet occurred. *Citing Reynolds v. State,* 744 S.W.2d 156, 160 (Tex. App.-Ama. 1987, pet. refused). The court concluded that because the comments by the prosecutor were made during voir dire, he could not have known whether Appellant was going to testify and therefore, the comment/question was permissable.

Vann v. State

In *Vann v. State*, 216 S.W.3d 881 (Tex. App.-Fort Worth 2007, no pet.), defendant argued that reversible error occurred because his counsel was prevented from asking a voir dire question as to whether potential jurors would automatically disbelieve a convicted felon. The Ft. Worth court held that the question was a proper commitment question, and defendant was prevented from challenging for cause, under Tex. Code Crim. Proc. Ann. art. 35.16(a)(9), any jurors harboring an automatic disbelief of testimony given by a convicted felon. Defendant's only witness was a convicted felon whose testimony contradicted the State's evidence regarding the distance and the length of time that defendant drove before stopping. The error affected defendant's rights to a fair and impartial jury and to make an intelligent decision on whether to call or not call a witness under Tex. Const. art. I, §§ 10.

Same holding: *Tijerina v. State*, 202 S.W.3d 299 (Tex. App.–Ft. Worth 2006, pet. ref'd.)

Barajas v. State

In *Barajas v. State,* 93 S.W.3d 36 (Tex. Crim. App. 2002), during voir dire in defendant's indecency with a child trial, his attorney tried to ask Veniremembers if they could be fair and impartial in a case in which the victim was nine years old. The trial court denied the question. On direct appeal, defendant claimed the trial court abused its discretion by disallowing his proffered questions. The defendant alleged that this error impaired the ability of his counsel to intelligently exercise his peremptory and for-cause challenges during jury selection. The court of appeals determined the refusal to allow defendant to ask voir dire questions regarding the victim's age was constitutional error.

The court of criminal appeals left to the trial court's discretion the propriety of a particular question on voir dire. The court noted that one way a question can be relevant is if it seeks to uncover grounds for a challenge for cause and that a Veniremember may be challenged for cause if: (1) he possesses a bias or prejudice in favor

of or against the defendant, TEX. CODE CRIM. PROC. art. 35.16 (a)(9); (2) he possesses a bias against a phase of the law upon which the State or the defendant is entitled to rely, TEX. CODE CRIM. PROC. art. 35.16 (b)(3), (c)(2); or (3) he has already decided the defendant's guilt or punishment, TEX. CODE CRIM. PROC. art. 35.16 (a)(10). The court agreed that relevant questions were permissible but could not be certain to what issue in this case the appellant's question was relevant. They conceived at least three objects of the question counsel wanted to ask: (1) whether Veniremembers use the victim's age for an improper purpose during the guilt phase, (2) whether Veniremembers use the victim's age in determining credibility of the victim-witness, and (3) whether Veniremembers will use the victim's age in assessing punishment if the appellant is found guilty. The court addressed each of these potential objects finding that the victim's age is not a fact of consequence that tends to prove or disprove the appellant's guilt, except that, in this case, the State had to prove that the victim was under the age of seventeen. With regard to punishment, the court held that if the appellant's aim was to determine whether Veniremembers would consider the victim's age in assessing punishment, it was an improper pursuit: "The appellant may not seek to commit Veniremembers to assess or refrain from assessing punishment on this basis." *Id.* (citing *Standefer*, 59 S.W.3d at 181).

The court overruled its decision in *Nunfio v. State,* 808 S.W.2d 482 (Tex. Crim. App. 1991), where it held that the question "can you be fair and impartial if the victim in this case is a nun?" was a proper question and the trial court erred to prohibit Nunfio's asking the question. The court held that the question in *Nunfio* was not narrowly tailored to an issue relevant to the case and its holding provided no reasonable limitation on the parties' ability to ask questions. The *Bajaras* court held that the question "can you be fair and impartial under a given set of facts?" can be repeated to include every fact in a given case and therefore was really a "fair and impartial" license to go fishing, without providing any concrete information for the intelligent use of peremptory or for-cause challenges. In conclusion, the court held that a trial court errs to prevent a party's asking proper questions, but the questions sought to be asked by the appellant concerning the victim's age were not proper and that a trial court is within its discretion to prevent fishing expeditions during voir dire that may extend jury selection *ad infinitum*.

Judge Meyers in a dissent argued 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*. *Barajas,* 93 S.W.3d at 45 (Meyers & Holcomb, JJ., dissenting). He pointed out that the holding in *Barajas* makes it difficult for parties to distinguish between proper and improper commitment questions, because the modified *Standefer* test, as a result of *Barajas*, requires that commitment questions lie somewhere between fact-specific and vague. Lastly, he points out that the majority in *Barajas* never states where the proper medium lies. *Id*.

Similar holding: *Rodriguez-Flores v. State*, 351 S.W.3d 612 (Tex. App.--Austin 2011, no pet.)(commitment questions about jurors' ability to consider the full range of punishment that include facts outside those contained in the indictment usually will be improper because typically these questions do not lead to a challenge for cause).

McLean v. State

In *McLean v. State*, 312 S.W.3d 912 (Tex.App.-Hous. [1st Dist.] 2010, no pet.) the defendant complained of the following explanation by the trial judge during voir dire in a prostitution case:

> Solicitation of prostitution, folks, like it or not, in this state, its illegal under State law. We have some folks that believe that it should be legal and that's your right to believe that, but it's not legal in Texas to have a prostitution service. Bottom line. Simple question: If you cannot in good faith enforce that State law making prostitution illegal, I understand that. I just need to know right now that you can't do that job on this kind of case. So if you just can't do this job on this kind of case, let me know now by a show of hands. Anybody? All right. A lot of folks think that prostitution is a victimless crime. Let me give you a hint.... We have had about 7,000 alleged prostitutions in my court in 22 years [sic]. I will tell you from this viewpoint up here, prostitution is not a victimless offense. It affects families. It affects the people involved in the prostitution itself. It has the potential of possibly deadly STD's in your life. It is not a victimless crime. In Texas, prostitution is against the law period. Can we agree by a positive nod that you can enforce the law? Anybody that cannot do that? All right. Good to see.

Because the defendant's objection did not occur until the conclusion of this discussion the court found that it had been waived. *Citing, Ross v. State,* 154 S.W.3d 804, 807 (Tex.App.-Houston [14th Dist.] 2004, pet. ref'd)("To preserve error regarding improper voir dire questions, a party must make a timely, specific objection at the earliest possible opportunity."). Then the court examined whether the discussion by the trial court constituted reversible, fundamental error such that the error could not be waived; specifically whether the comments affected the presumption of innocence or vitiated the impartiality of the jury. The court held that the facts were similar to those in *Jasper v. State,* 61 S.W.3d 413 (Tex.Crim.App. 2001) in which the Court of Criminal Appeals refused to conclude that the judge's interjections to correct the misrepresentation of previously admitted testimony, expression of irritation at the defense attorney, and comments aimed at clearing up a point of confusion rose "to such a level as to bear on the presumption of innocence or vitiate the impartiality of the jury." 61 S.W.3d at 421. The court also found the facts similar to those in *Brumit v. State*, 206 S.W.3d 639, 644 (Tex.Crim.App.2006), in which the Court of Criminal Appeals held that the judge's comments that an earlier case made him think that anybody who ever harmed a child should be put to death did not reflect bias, partiality, or the failure of the trial court to consider the full range of punishment under the circumstances of the case. The court affirmed the conviction.

Shields v. State

In *Shields v. State*, NO. 06-07-00111-CR, 2008 WL 941802 (Tex. App.-Texarkana 2008, pet. dism'd as untimely filed)(not designated for publication), the court discussed preservation of error after the Appellant complained of the prosecutor's comments during voir dire but did not object at the time. Appellant argued that no objection was necessary as the State's comments constituted fundamental error so that no objection was required to preserve the complaint for appeal, citing *Marin v. State,* 851 S.W.2d 275 (Tex. Crim. App. 1993). The court reiterated that fundamental error must be so egregious it prevents a fair and impartial trial. The court agreed that during voir dire, some comments by the trial court may be so fundamentally prejudicial that a defendant's right to a fair trial is denied and such error is not waived by failing to object. *Citing Blue v. State,* 41 S.W.3d 129, 130-31 (Tex. Crim. App. 2000) (plurality op.). The court recalled the court's holding in *Blue* that it was fundamental error for the judge to have said, among other comments, "Frankly, obviously, I prefer the defendant to plead," and to have apologized to the jury for the apparent waste of time in having to attend trial. *Id.* at 130. The court distinguished the case at bar from *Blue* by noting that there was no issue of prejudicial voir dire comment by the court; rather, Appellant complained of voir dire comments made by the State.

The court noted that several appellate courts have hinted, though not held, that fundamental error under *Blue* is not extended to comments by the State. *See, e.g., Salcido v. State,* No. 08-04-00346-CR, 2006 WL 1132865 (Tex. App.-El Paso 2006, no pet.) (not designated for publication); *Clement v. State,* No. 08-03-00463-CR, 2005 WL 1593464 (Tex. App.-El Paso 2005, no pet.) (not designated for publication); *Galvez v. State,* No. 04-04-00460-CR, 2005 WL 1458228, at *1-2 (Tex. App.-San Antonio 2005, pet. ref'd) (mem. op., not designated for publication)(declining to find fundamental error in pervasive prosecutorial misconduct attacking defendant over counsel's shoulders in voir dire, during testimony, and in closing); *Beltran v. State,* 99 S.W.3d 807, 812 (Tex. App.-Houston [14th Dist.] 2003, pet. ref'd)(addressing prosecutor's voir dire comments in addition to judge's comments).

Nevertheless, the court analyzed the State's comments during voir dire concerning presumption of innocence and the right of a criminal defendant not to testify and concluded that they did not amount to fundamental error and that therefore, the error, if any, was waived. *Shields* at *7.

Same Holding: *Zachery v. State*, NO. 14-07-01050-CR, 2009 WL 136915 (Tex. App.-Hous. [14th Dist.] 2009, no pet.); *Mitchell v. State*, NO. 01-07-00289-CR, 2008 WL 4530683 (Tex. App.-Hous. [1st Dist.] Oct 09, 2008, pet. den'd); *Randolph v. State*, NO. 01-08-00266-CR, 2008 WL 5178860 (Tex.App.-Hous. [1st Dist.] 2008, no pet.)(judge did not commit error by stating that a defendant is presumed innocent *until* proven guilty rather than *unless* he is proven guilty).

Error in Panelist's Answer:

An incorrect material answer to a question on voir dire may be grounds for a new trial. TEX. R. CIV. P. 327(a). A party must show that the answer probably affected its case. TRAP 44.1. Before a veniremember's false answer to a voir dire question entitles a party to a new trial, the concealment must be in response to a specific and direct question calling for disclosure. *In re J.G.C.G.*, 283 S.W.3d 927 (Tex.App.-Fort Worth Apr 16, 2009, rev. den.)(NO. 2-08-200-CV); *Texaco Inc. v. Pennzoil Co.,* 729 S.W.2d 768, 851 (Tex. App.–Houston [1st Dist.] 1987, writ ref'd n.r.e.). A general question to the panel, versus one directed to the juror in question, is

not sufficient to support an allegation of jury misconduct. *Wooten v. Southern Pacific Transportation Co.,* 928 S.W.2d 76 (Tex. App.–Houston [14th Dist.] 1995, no writ). If the juror does not respond to a question, there is generally no juror misconduct. *Durbin v. Dal-Briar Corp.*, 871 S.W.2d 263, 272 (Tex. App.–El Paso 1994, no writ). Evidence of a juror lying or concealing information must come from sources other than jury deliberations. *Id.*, TEX. R. CIV. P. 327(b); TEX. R. CIV. EVID. 606(b). *See infra* discussion on juror misconduct.

If a juror's statement poisons the panel, a party must move to strike the entire panel. *Reviea v. Marine Drilling Co.,* 800 S.W.2d 252 (Tex. App.–Corpus Christi 1990, writ denied). A showing that the panel was affected by the statement by questioning other panelists may be required. *See, e.g.*, *Brentwood Fin. Corp. v. Lamprecht*, 736 S.W.2d 836 (Tex. App.–San Antonio 1987, writ ref'd n.r.e.). This is done by asking the panel if they were effected by the statements after a request that the jury be instructed to disregard the statement. *Id.* at 840.

Hunter v. Ford Motor Co.

In *Hunter v. Ford Motor Co., Inc.*, 305 S.W.3d 202 (Tex. App.--Waco 2009, no pet.) the family of a driver killed in a fire that occurred following a traffic collision brought a design defect action against Ford. Following a unanimous verdict for Ford, the Hunters claimed that they were entitled to a new trial because of misconduct on the part of one juror. During voirdire, the panel was told that the case involved a 1999 Ford F-350 with a 7.3 liter diesel engine. Both sides asked the panel questions about their ownership of Ford vehicles, including specifically a Ford truck, and Roscoe Lamb, who was panel member 28, did not respond to those questions. Lamb was seated as the twelfth juror.

Tracy Johnson, the Hunters' attorney, filed an affidavit with a motion for new trial alleging that after the trial, Johnson telephoned the jurors for feedback. In his conversation with Lamb, Johnson learned that Lamb owned and drives a Ford truck with the same 7.3 liter diesel engine as the Hunter truck. Lamb would not tell Johnson why he did not disclose this in voirdire. Johnson then obtained state title and registration information for Lamb, and those documents showed that Lamb owned a 2003 Ford F-250 truck with a 7.3 liter diesel engine and the same alleged design defect as the Hunter truck. The state records also showed that Lamb's wife owned a Ford, and that too was not disclosed in voirdire.

Johnson's affidavit further stated that, during the trial testimony of James Mundo, one of the Hunters' experts, Lamb asked to see a demonstrative metal bracket (apparently the one that the Hunters' experts opined cut the battery cable) that Mundo was discussing. The bracket was passed around to the jurors. (The reporter's record reflected this occurrence, but it did not identify the juror.) According to Johnson, after Lamb examined the bracket, he "sat back, took no notes, nor asked to see any other items." Johnson's affidavit concluded: "Had I been aware of Mr. Lamb's ownership of a Ford truck with the same defect at issue in the lawsuit, I could have asked about his bias in favor of Ford and raised a cause challenge if warranted. Had the challenge not been granted, I would have used one of my remaining peremptory challenges to excuse him."

The court did not analyze whether jury misconduct had occurred because it determined that the Hunters could not show that injury probably resulted from the misconduct, if it occurred. Specifically, since the verdict was unanimous, there was no evidence that the alleged misconduct affected the outcome. The court found that If someone other than Lamb had been the twelfth juror and had voted for the Hunters' position, the same verdict, albeit 11 to 1 instead of unanimous, would have been rendered.

De Leon v. State

In *De Leon v. State,* 2007 WL 2428628 (Tex. App.--Corpus Christi 2007, pet. ref'd) (not designated for publication), after the jury retired for punishment deliberations, a witness informed the court that one of the jurors, Dora Lopez, had been formerly married to Manuel Tanguma's uncle. According to the witness, Lopez's daughter had, on occasion, baby-sat for the Tanguma family. After the jury returned its punishment verdict, the trial court held a hearing. At the hearing, Lopez testified that she had been married to Manuel Tanguma's uncle and during that time, lived across the street from Tanguma for about ten years. Lopez confirmed that her daughter had baby-sat the Tanguma children, including S.T., a "couple of times." She testified that she had no prior knowledge regarding S.T.'s allegations against appellant, had not discussed the case with anyone, and that her relationship with her ex-husband's family had not affected her deliberations in the case. Lopez did not disclose to the other jurors that she knew anyone involved in the case. Lopez testified that during voir dire, she "must not have heard" the question of whether she knew Manuel and Monica Tanguma. She did not raise her hand in response to any of the questions during voir dire because she was "nervous."

The court cited *Salazar v. State,* where the Texas Court of Criminal Appeals held that, "where a juror

withholds material information during the voir dire process, the parties are denied the opportunity to exercise their challenges, thus hampering their selection of a disinterested and impartial jury." *Salazar v. State,* 562 S.W.2d 480, 482 (Tex. Crim. App. 1978). If the juror did not intentionally withhold this information, that fact is nonetheless "largely irrelevant" in determining whether the information withheld was material. A defendant is entitled to rely upon a veniremember's response to questions by the trial judge and prosecution. Therefore, if a situation arises where material information was withheld by a juror during voir dire, and if the appellant's subsequent motion for mistrial is denied, the denial of that motion will be reviewed on appeal for constitutional error. Stated differently, in such a situation, "we must reverse the trial court's ruling on the motion for mistrial unless we are convinced beyond a reasonable doubt that a juror's withholding of material information did not contribute to the defendant's conviction or punishment."

To be material, the information withheld must be of a type suggesting potential for bias or prejudice. Material information includes information regarding a juror's relationship with any party in a criminal proceeding. If counsel discovers that a member of the venire intentionally failed to disclose material information or gave false information during the voir dire examination, counsel must request a mistrial or a new trial as soon as the matter comes to counsel's attention. Failure to object, request a mistrial or new trial, or request any other relief waives any error.

The State argued that defense counsel failed to diligently pursue voir dire questions which would have revealed the information. The court disagreed, noting that during voir dire the prosecutor told the panel that she was "going to go through the witnesses" to determine if the veniremembers knew any of them, and specifically asked, "[w]hat about Manuel and Monica Tanguma and [S.T.]?" Moreover, the appellant's counsel asked, "[i]s there anyone that is related or was related to any of these individuals that were called?" The court concluded that the withheld information did not result from the appellant's lack of due diligence in eliciting that information.

However, the court held that appellant waived the issue by failing to object or request any relief from the trial court. "The record shows that when the trial court learned Lopez had allegedly withheld information, it immediately held a hearing and allowed appellant's counsel and the State to fully question her." The trial court also questioned Lopez. At the conclusion of the questions, the trial court excused Lopez and stated that the court was "in recess." The record is silent as to any objection, request for mistrial, or motion for new trial by appellant's counsel. The court concluded that appellant's silence amounted to a waiver and lack of diligence.

Peremptory challenges:

After all counsel conclude their voir dire examination and pass the jurors for cause, the peremptory challenge procedure starts. TEX. R. CIV. P. 232, 233. The attorneys retire and exercise their peremptory challenges, and from their lists, the clerk designates the first 12 (in district court–6 in county court) who become the jury. A peremptory challenge may be used for any reason other than on improper discriminatory grounds. The reason need not be explained to the court or other counsel, except to the extent discussed below.

Number of peremptory challenges:

Each party to a civil suit is entitled to six peremptory challenges in a case tried in the district court, and to three in the county court. Each side is also entitled to one additional peremptory challenge if one or two alternate jurors are to be impaneled. Each side is entitled to two additional peremptory challenges if three or four alternate jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and none of the normal peremptory challenges may be used against an alternate. TEX. GOV'T CODE ANN. § 62.020(e). *See, e.g., Temple EasTex, Inc. v. Old Orchard Creek Partners, Ltd.,* 848 S.W.2d 724 (Tex. App.–Dallas 1992, writ den'd)(when the trial court impanels alternate jurors, the trial court committed error in refusing Temple EasTex an additional peremptory challenge).

In criminal cases, the number of peremptory challenges depends on the charge against the defendant. In a capital case where the death penalty is sought, if one defendant, fifteen strikes are available. If multiple defendants, the State receives eight strikes for each defendant and each defendant receives eight strikes. In non-capital felony cases and in capital cases in which the State does not seek the death penalty, the State and defendant are each entitled to ten peremptory challenges. If two or more defendants are tried together each defendant is entitled to six peremptory challenges and the State to six for each defendant. The State and the defendant is entitled to five peremptory challenges in a misdemeanor case tried in the district court and to three in the county court, or county court at law. If two or more defendants are tried together, each defendant is entitled to three such challenges and the State to three for

each defendant in either court. The State and the defendant are each entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impaneled and two peremptory challenges if three or four alternate jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law may not be used against an alternate juror. TEX. CODE CRIM. PROC. art. 35.15.

In multiparty cases, it is the trial court's duty, before the exercise of peremptory challenges, to decide whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issue to be submitted to the jury. TEX. R. CIV. P. 233. In addition, upon the motion of any litigant in a multiparty case, it is also the trial court's duty to "equalize" the number of peremptory challenges so that no litigant or side is given an unfair advantage as a result of the alignment of the litigants and the award of peremptory challenges. *See Frank B. Hall & Co. v. Beach, Inc.*, 733 S.W.2d 251, 256-57 (Tex. App.–Corpus Christi 1987, writ ref'd n.r.e.). Thus, when multiple litigants are involved on one side of a lawsuit, the threshold question answered in allocating peremptory challenges is whether any of those litigants are antagonistic with respect to an issue of fact that the jury will decide. *See Scurlock Oil Co. v. Smithwick,* 724 S.W.2d 1, 5 (Tex.1986); *Garcia v. Central Power & Light Co.,* 704 S.W.2d 734, 736 (Tex.1986); *Patterson Dental Co. v. Dunn,* 592 S.W.2d 914, 918 (Tex.1979). If no antagonism exists, each side must receive the same number of challenges. *See Scurlock,* 724 S.W.2d at 5; *Garcia,* 704 S.W.2d at 736-37; *Patterson,* 592 S.W.2d at 919.

The Texas Supreme Court has recognized that, when defendants have collaborated on the exercise of their peremptory challenges such that no double strikes are made, this factor supports a finding that the defendants have used their ostensibly antagonistic positions unfairly. *See Lopez,* 709 S.W.2d at 645. In *Van Allen v. Blackedge*, 35 S.W.3d 61 (Tex.App.–Houston [14th Dist.] 2000, pet. denied) the court found that when two of the defendants agreed to split the juror list before making peremptory strikes such that no double strikes were made, this constituted error because it allowed additional challenges to both of the defendants. *See id.*; *but see Vargas v. French,* 716 S.W.2d 625, 627 (Tex. App.– Corpus Christi 1986, writ ref'd n.r.e.)(noting, after a review of the entire trial record, that there was "no antagonism" between defendants who had coordinated their peremptory challenges resulting in no double strikes).

Once error in the apportionment of peremptory jury challenges has been found, a reversal is required only if the complaining party can show that the trial was materially unfair. *See Garcia,* 704 S.W.2d at 737 (citing *Patterson,* 592 S.W.2d at 920). This showing is made from an examination of the entire trial record. *See id.* If the trial is hotly contested and the evidence sharply conflicting, the error in awarding peremptory challenges results in a materially unfair trial without showing more. *See id.; see also Lopez*, 709 S.W.2d at 644. The Texas Supreme Court has expressly stated that in cases where the trial court improperly allocates peremptory challenges, a party is not required to identify the objectionable jurors that served on the jury. *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 5 (Tex.1986) (citing *Garcia v. Cent. Power & Light Co.*, 704 S.W.2d 734, 736 (Tex.1986).

Peremptory challenges based on discrimination:

Parties may not use peremptory challenges for the discriminatory purpose of removing all jurors of a race. *Batson v. Kentucky*, 476 U.S. 79 (1986). The holding in *Batson* was extended to civil proceedings in *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628-31 (1991). The *Edmonson* holding was extended to Texas cases in *Powers v. Palacios*, 813 S.W.2d 489, 490 (Tex.1991)(per curiam). *See also, Price v. Short,* 931 S.W.2d 677 (Tex. App.–Dallas 1996, no writ)). Later, courts have extended this prohibition to ethnicity (*Benavides v. American Chrome & Chems., Inc.,* 893 S.W.2d 624 (Tex. App.–Corpus Christi 1994, writ denied)) and gender (*J.E.B. v. Alabama*, 511 U.S. 127 (1994)). The Texas Court of Criminal Appeals has held that use of peremptory challenges to remove jurors based upon their religion is not prohibited. *Casarez v. State*, 913 S.W.2d 468, (Tex. Crim. App. 1994) (op. on rehearing); *Ramos v. State*, 934 S.W.2d 358 (Tex. Crim. App.1996).

Procedure for making *Batson* challenge:

To challenge an opposing party's use of peremptory challenge for a discriminatory purpose, the party must lodge an objection as to the use of peremptory challenges before the jury is sworn and the remainder of the venire discharged. *Williams v. State*, NO. 07-03-0205-CR, 2004 Tex. App. LEXIS 2201 (Tex. App.–Amarillo Mar. 5, 2004, pet. ref'd)(mem. op., not designated for publication); *Pierson v. Noon*, 814 S.W.2d 506 (Tex. App.–Houston [14th Dist.] 1991, writ denied).

Such an objection triggers a three-stage process. *Grant v. State,* 325 S.W.3d 655, 657 (Tex.Crim.App.2010); *Goode v. Shoukfeh*, 943 S.W.2d 441, 445 (Tex.1997); *Genie Indus., Inc. v. Matak*, 13-11-00050-CV, 2012 WL 6061779 (Tex. App.--Corpus Christi Dec. 6, 2012, no. pet. h.). At the first step of the process, the opponent of the peremptory challenge must establish a prima facie case of racial discrimination. *Goode v. Shoukfeh*, 943 S.W.2d 441, 445 (Tex.1997). If no prima facie case is made for discrimination in the use of the peremptory challenges, the objection to the challenge should be overruled. During the second step of the process, the burden shifts to the party who has exercised the strike to come forward with a race-neutral or non-discriminatory explanation for why the juror was stricken. *Id.* at 445. The appellate court does not consider at the second step whether the explanation is persuasive or even plausible. The issue for the trial court and the appellate court at this juncture is the facial validity of the explanation. *Id*. Unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race-neutral for purposes of the analysis at step two. *Id*. However, if no nondiscriminatory or race-neutral explanation is offered for the strike, then the objection to the use of the strike should be sustained. At the third step of the process, the trial court must determine if the party challenging the strike has proven purposeful racial discrimination, and the trial court may believe or not believe the explanation offered by the party who exercised the peremptory challenge. It is at this stage that implausible justifications for striking potential jurors "may (and probably will) be found [by the trial court] to be pretexts for purposeful discrimination." *Id.* Nevertheless, the Texas Supreme Court has emphasized that "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the [peremptory] strike." The issue of whether the race-neutral explanation should be believed is purely a question of fact for the trial court. *Id.* at 445-446.

Foster v. Chapman

In *Foster v. Chatman*, 136 S. Ct. 1737, 195 L. Ed. 2d 1 (2016), the court applied *Batson* in a *habeas* appeal. Petitioner Timothy Foster was convicted of capital murder and sentenced to death in a Georgia court thirty years ago. During jury selection at his trial, the State used peremptory challenges to strike all four black prospective jurors qualified to serve on the jury. Foster argued that the State's use of those strikes was racially motivated, in violation of *Batson.* The trial court rejected that claim, and the Georgia Supreme Court affirmed. Foster then renewed his *Batson* claim in a state habeas proceeding. While that proceeding was pending, Foster, through the Georgia Open Records Act, obtained from the State copies of the file used by the prosecution during his trial. Among other documents, the file contained (1) copies of the jury venire list on which the names of each black prospective juror were highlighted in bright green, with a legend indicating that the highlighting "represents Blacks"; (2) a draft affidavit from an investigator comparing black prospective jurors and concluding, "If it comes down to having to pick one of the black jurors, [this one] might be okay"; (3) notes identifying black prospective jurors as "B# 1," "B# 2,"* and "B# 3"; (4) notes with "N" (for "no") appearing next to the names of all black prospective jurors; (5) a list titled "[D]efinite NO's" containing six names, including the names of all of the qualified black prospective jurors; (6) a document with notes on the Church of Christ that was annotated "NO. No Black Church"; and (7) the questionnaires filled out by five prospective black jurors, on which each juror's response indicating his or her race had been circled.

The court held that Georgia's prosecutors were motivated in substantial part by race when they struck Garrett and Hood from the jury 30 years ago. "Two peremptory strikes on the basis of race are two more than the Constitution allows." *Id.* at *18-19. The supreme court reverse and remanded for further proceedings.

Davis v. Fisk Elec. Co.

In *Davis v. Fisk Elec. Co.*, 268 S.W.3d 508 (Tex. 2008), the supreme court struggles with applying *Batson* and *"Miller-El II"* in its review of Davis' allegation that Fisk Electrical based its peremptory strikes on race. Chief Justice Jefferson delivered the opinion of the Court, joined by Justices Hecht, O'Neill, Wainwright, Medina, Green, Johnson and Willett. Justice Brister delivered a concurring opinion, in which Justice Medina joined as to Part III.

Davis, an African American alleging that racial discrimination formed the basis of his termination from Fisk Electric Co., asserted *Batson* challenges when five of six African Americans were peremptorily struck from the venire. In an eighteen page majority opinion, the court concluded that its rules generally permit each party in a civil action to exercise six peremptory strikes, which are challenges "made to a juror without assigning any reason therefor." *Citing* Tex.R. Civ. P. 232, 233. But peremptories exercised for an improper reason, like race or gender, are unconstitutional. It held in this case that when the respondents used peremptory challenges at trial to exclude five of six African Americans from the venire, when viewed in conjunction with the 83% removal rate

and a comparative juror analysis, defied neutral explanation. The court concluded that at least two of the strikes were based on race and reversed in part the court of appeals' judgment and remanded the case for a new trial.

In concluding, Justice Wallace noted:

> We acknowledge that peremptory strikes, often based on instinct rather than reason, can be difficult to justify. *Miller-El II*, 545 U.S. at 252. The trial lawyer's failure to do so here does not suggest personal racial animosity on his part. *See, e.g., Antony Page, Batson's Blind Spot: Unconscious Stereotyping and the Peremptory Challenge*, 85 B.U. L.Rev. 155, 160-61, 184 (2005) (noting that "research has compellingly demonstrated the existence of unconscious race- and gender-based stereotyping"). A zealous advocate will seek jurors favorably inclined to his client's position, and race may even serve as a rough proxy for partiality. *See, e.g., Batson v. Kentucky*, 476 U.S. 79, 139 (1986) (Rehnquist, J., dissenting) (noting that factors like race are often a "proxy" for potential juror bias). But whatever the strategic advantages of that practice, the Constitution forbids it.
>
> The concurrence suggests that we ascribe sinister motives to Fisk's counsel. The question presented, however, is not whether this particular advocate harbors ill will, but whether the record explains, on neutral grounds, a statistically significant exclusion of black jurors. It is not enough, under the Supreme Court precedent we examine here, that the lawyer be pure of heart. We assume that he is. Our holding depends not on the personal sentiments of the advocate but on the state of the record. *Miller-El II* and *Snyder* emphasize that *Batson's* promise cannot be fulfilled if its requirements may be satisfied merely by ticking off a race-neutral explanation from a checklist.

Davis, at 525.

Justice Brister, in his concurring opinion, stated:

> I agree that peremptory strikes provide an opportunity for discrimination. But they also provide an opportunity to accuse an opponent of discrimination and get a new trial if the first one turns out badly. As these strikes have outlived their original purpose, it is time we did something about them. Rather than using this case as an opportunity to disparage one attorney, I would use it as an opportunity to discontinue a practice inherently based on stereotypes. As the Court misses that opportunity, I concur only in the judgment.

Id. at 526.

Miller-El v. Cockrell

In *Miller-El v. Cockrell*, 537 U.S. 322 (2003) ("*Miller-El I*") the United States Supreme Court analyzed the trial judge's denial of a Batson challenge following a Dallas County prosecutors' use of peremptory strikes to exclude 10 of the 11 African-Americans eligible to serve on the jury at petitioner's capital murder trial. In the trial court, petitioner presented extensive evidence supporting his motion at a pretrial hearing, but the trial judge denied relief, finding no evidence indicating a systematic exclusion of blacks, as was required by the then-controlling precedent, *Swain v. Alabama,* 380 U.S. 202 (1965). Subsequently, the jury found petitioner guilty, and he was sentenced to death. While his appeal was pending, the Court established in *Batson v. Kentucky,* 476 U.S. 79 (1986) the three-part process for evaluating equal protection claims such as petitioner's. Upon remand from the Texas Court of Criminal Appeals for new findings in light of Batson, the original trial court held a hearing at which it admitted all the *Swain* hearing evidence and took further evidence, but concluded that petitioner failed to satisfy step one of Batson because the evidence did not even raise an inference of racial motivation in the State's use of peremptory challenges. The Court also determined that the State would have prevailed on steps two and three because the prosecutors had proffered credible, race-neutral explanations for the African-Americans excluded, *i.e.,* their reluctance to assess, or reservations concerning, imposition of the death penalty -- such that petitioner could not prove purposeful discrimination. After petitioner's direct appeal and state habeas petitions were denied, he filed a federal habeas petition under 28 U.S.C.

§ 2254, raising a Batson claim and other issues. The Federal District Court denied relief in deference to the state courts' acceptance of the prosecutors' race-neutral justifications for striking the potential jurors, and subsequently denied petitioner's § 2253 application for a certificate of appealability (COA). The Fifth Circuit noted that a COA will issue "only if the applicant has made a substantial showing of the denial of a constitutional right," § 2253(c)(2); and reasoned that a petitioner must make such a "substantial showing" under the standard set forth in *Slack v. McDaniel,* 529 U.S. 473 (2000); declared that § 2254(d)(2) required it to presume state-court findings correct unless it determined that the findings would result in a decision which was unreasonable in light of clear and convincing evidence; and applied this framework to deny petitioner a COA.

The Supreme Court discussed petitioner's extensive evidence concerning the jury selection procedures and found that it fell into two broad categories. First, the Court noted that defendant presented, at the pretrial *Swain* hearing, testimony and other evidence relating to a pattern and practice of race discrimination in the voir dire by the Dallas County District Attorney's Office, including a 1976 policy by that office to exclude minorities from jury service that was available at least to one of petitioner's prosecutors. Second, two years later, petitioner presented, to the same state trial court, evidence that directly related to the prosecutors' conduct in his case, including a comparative analysis of the Veniremembers demonstrating that African-Americans were excluded from petitioner's jury in a ratio significantly higher than Caucasians; evidence that, during voir dire, the prosecution questioned Veniremembers in a racially disparate fashion as to their death penalty views, their willingness to serve on a capital case, and their willingness to impose the minimum sentence for murder, and that responses disclosing reluctance or hesitation to impose capital punishment or a minimum sentence were cited as a justification for striking potential jurors; and the prosecution's use of a Texas criminal procedure practice known as "jury shuffling" to assure that white Veniremembers were selected in preference to African-Americans.

The Court discussed all these areas in detail and held that the Fifth Circuit should have issued a COA to review the district court's denial of habeas relief to petitioner.

Miller-El v. Dretke

In *Miller-El v. Dretke,* 545 U.S. 231 (2005) ("*Miller-El II*"), a habeas proceeding which the Supreme Court granted, the Court held that if a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination and is to be considered at the third stage of the Batson analysis in assessing whether prosecution's proffered reason is pretextual. The Court explained that the Rule created in *Batson* provides an opportunity for the prosecutor to give reasons for exercising a challenged peremptory strike, and requires the judge to assess plausibility of that reason in light of all evidence with a bearing on it. The Court held that when illegitimate grounds like race are in issue, the prosecutor simply has to state his reasons as best he can for exercising peremptory strikes and stand or fall on the plausibility of the given reasons. It noted that a Batson challenge does not call for a mere exercise in thinking up any rational basis for the state's alleged discriminatory use of its peremptory strikes; if the prosecutor's stated reason for his use of strikes does not hold up, then its pretextual significance does not fade simply because the trial judge, or appeals court, can imagine a reason that might not have been shown up as false.

The Court also analyzed the prosecution's decision to seek a jury shuffle, when a predominant number of African-Americans were seated in the front of venire panel, along with its decision to delay formal objection to the defense's shuffle until after new racial composition is revealed, and concluded that it raised the suspicion that the state was seeking to exclude African-Americans from the jury, and held that was a factor the court could consider at the third stage of the Batson analysis in assessing whether the prosecution's proffered race-neutral explanation for the use of its peremptory strikes was pretextual.

The Court looked at the specific questions posed to black veniremen as opposed to others and found them to be appropriate subject for a Batson analysis. The Court noted that the state posed contrasting voir dire questions to black and nonblack panel members. For example, the Court found that more graphic descriptions of the death penalty were posed to black members thus increasing the likelihood of provoking disqualifying responses. Absent some neutral and extenuating explanation, the Court held this was improper.

At least one Texas case has held that *Miller-El v. Dretke* reaffirms prior case law that prohibited disparate treatment among jurors and did not announce any new elements or criteria for determining a Batson claim. *Fultz v. State,* No. 03-03-00614-CR, 2005 WL 3440736, 2005 Tex. App. LEXIS 10445, at *10 (Tex. App.--Austin Dec. 16, 2005, pet. ref'd) (not designated for publication) (mem. op.).

Reed v. Quarterman

In *Reed v. Quarterman*, 555 F.3d 364 (5th Cir. (Tex.) 2009) the court, in this three decade case, described the relevance of the comparative analysis by noting that "[i]f a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step." *Citing Miller-El v. Dretke (Miller-El II*), *supra*. The court, in a detailed analysis, applied *Batson* and *Miller-El II* to the voir dire transcripts from Reed's 1983 capital murder trial and held that the facts of *Miller-El II* and *Reed* were almost identical. In both cases, the prosecution used its peremptory challenges to strike prospective black jurors. In both cases, the State had accepted several white jurors who exhibited the exact same characteristics as these black jurors. In both cases, the comparative analysis demonstrated that the State's *post hoc* rationalizations for challenging these jurors were in reality pretexts for discrimination. And in both cases, which occurred within three years of each other and involved one of the same prosecutors, a policy of excluding African-Americans from juries pervaded the Dallas County District Attorney's Office. Given the similarities, and adhering to the lessons from *Miller-El II,* the fifth circuit concluded that Reed had established a *Batson* violation and that the state court's conclusion to the contrary was an unreasonable determination of the facts before it.

Haynes v. Union Pac. R. Co.

In *Haynes v. Union Pac. R. Co.*, 395 S.W.3d 192 (Tex. App.—Houston [1st Dist.] 2012, pet. denied), the Court held that a black juror's lack of education, his living in an apartment and his nonverbal conduct were not racially neutral explanation for railroad's peremptory strike of juror. The Court noted that because reliance upon nonverbal conduct or demeanor may mask a racially motivated strike, it must carefully examine that explanation. *Citing Davis v. Fisk Electric, Inc.*, 268 S.W.3d at 518 (merely stating that a venire member "reacted" is not sufficient to overcome a *Batson* challenge) the Court stated: "Peremptory strikes may legitimately be based on nonverbal conduct, but permitting strikes based on an assertion that nefarious conduct 'happened,' without identifying its nature and without any additional record support, would strip *Batson* of meaning." "Verification of the occurrence may come from the bench if the court observed it; it may be proved by the juror's acknowledgment; or, it may be otherwise borne out by the record as, for example, by the detailed explanations of counsel." Although the trial judge's observations of non-verbal conduct are of great importance, no rule of law mandates rejection of a demeanor-based explanation if the judge did not observe or cannot recall the juror's demeanor. Citing *Thaler v. Haynes*, 559 U.S. 43 (2010).

Similar holding: *Genie Indus., Inc. v. Matak*, 462 S.W.3d 80 (Tex. App.—Corpus Christi 2012), rev'd on other grounds, 462 S.W.3d 1 (Tex. 2015).

Nieto v. State

In *Nieto v. State*, 365 S.W.3d 673, 674-75 (Tex. Crim. App. 2012) Charles Nieto appealed the trial court's denial of his *Batson* motion, which he filed after all of the black venire members in the strike zone were struck by the State. The First Court of Appeals held that the trial court clearly erred in failing to find that the State's proffered race-neutral reasons were a pretext for racial discrimination. The Court of Criminal Appeals reversed holding that venireperson's shared same last name as known criminal family and venireperson's "glaring" during voir dire were race-neutral reasons for state to exercise peremptory strikes.

Burks v. State

In *Burks v. State*, No. 03-12-00181-CR, 2014 WL 1285731 (Tex. App.-Austin 2014)(mem. op., not designated for publication), at trial the prosecutor explained that the State struck panel member number 25 for multiple reasons, including: (1) her general opposition to the death penalty, (2) her demeanor, (3) the criminal history of a family member, (4) her recent arrest, (5) her prior employment, and (6) her familiarity with defense counsel. Appellant contended the State's proffered reasons were merely pretextual. He argued that because some of panel member number 25's answers were similar to those of juror number 2, who was accepted by the State, he has proved intentional discrimination. The court observed several distinctions between the two in affirming.

Grant v. State

In *Grant v. State*, 325 S.W.3d 655, 657 (Tex. Crim. App. 2010), venireperson Franklin was asked a total of three questions. First, he was specifically asked how he decided if he believed someone. He answered, "What they're saying [referring to other venirepersons] would have to make sense to me." Second, as the sixth person to answer a question about whether anybody could think of a reason why a victim might be scared to

testify against her abuser, Franklin answered, "Pretty much the same," which was in reference to a previous response by another member of the panel. And third, as a group, the panel was asked which theory of punishment would be the most important. As the 19th person to respond, Franklin, said, "Number three" which he had been told was rehabilitation. None of Franklin's answers were investigated further by the State. And no exchange between Franklin and the State took place regarding the reason for striking him, that being his wife worked at the same place as Grant's girlfriend. The court of appeals, applying the factors listed in *Whitsey v. State*, 796 S.W.2d 707 (Tex. Crim. App. 1989), held that there was no meaningful examination of Franklin regarding the reason the State used to strike him and therefore the State's reason for striking Franklin was not supported by the record and was, thus, a pretext for discrimination. Accordingly, the court held that the trial court's acceptance of the State's reason for striking Franklin was clearly erroneous.

The Court of Criminal Appeals concluded that the Court of Appeals misapplied the standard for reviewing the trial court's ruling. "Properly applying the standard of review, the Court should have given deference to the trial court's evaluation of the prosecutors' credibility and should not have given dispositive weight to the lack-of-questioning factor." They reversed the Court's decision and remanded for consideration of the remaining claims.

Murphy v. Dretke

In *Murphy v. Dretke,* 416 F.3d 427, 439 (5th Cir. 2005), cert. denied, 126 S. Ct. 1028, 163 L. Ed. 2d 868 (2006), the court addressed a certificate of appealability on a *Batson* equal protection claim. The inmate, an African American, was convicted and sentenced by an all-Caucasian jury. Of the six potential African-American jurors who were questioned for voir dire, five were peremptorily struck by the State. One was accepted by the State but peremptorily struck by the defense. The court could not say that the district court clearly erred in its factual findings that the State's reasons for striking the African-American venirepersons at issue were valid and not racially motivated or that the district court erred in its legal conclusion that the inmate had not proven his *Batson* claim. He did not rebut the state court's factual findings with clear and convincing evidence. Therefore, the court, like the state courts and the federal district court below it, accepted that the reasons offered by the State were valid and race neutral and found that nothing in the record indicated that the trial court's determination of the State's neutrality with respect to race was objectively unreasonable and nothing rebutted such determination with clear and convincing evidence.

Cunningham v. Hughes & Luce, L.L.P.

In *Cunningham v. Hughes & Luce, L.L.P.*, 312 S.W.3d 62 (Tex.App.-El Paso 2010, no pet.) eight of the first twenty five venire persons were African- Americans, as was Cunningham, the plaintiff. Cunningham contended that Appellees challenged all eight for cause and then exercised three of their six peremptory challenges to exclude those African-Americans who were not stricken for cause. Cunningham lodged a *Batson* challenge with regard to Eric Oliver and Richard Askew and Appellees were given an opportunity to provide race-neutral explanations for the strikes. Appellees reminded the court that both men had been challenged for cause, albeit unsuccessfully. Ms. Blue, counsel for Appellees at trial, then explained Oliver was struck because he was favoring Cunningham before hearing any of the evidence. Askew was struck because of his attitude toward attorneys, legal fees, his hostile demeanor, and his body language.

The court found that answers to Ms. Blue's questionnaire as well as answers during voir dire to questions posed by Ms. Blue supported race-neutral reasons for defendants' peremptory strikes against both Oliver and Askew. The court concluded that the trial court did not abuse its discretion in overruling Cunningham's *Batson/Edmonson* challenges and affirmed the judgment of the trial court.

Moore v. State

In *Moore v. State*, 265 S.W.3d 73 (Tex. App.-Hous. [1st Dist.] 2008, rev. dism'd as improvidently granted, 286 S.W.3d 371 (Tex.Crim.App. 2009)), the court held the following reasons for striking African American veniremen were sufficiently race-neutral to rebut a *Batson* claim: in prosecution for murder of a child, that juror expressed agreement with statement of defendant's attorney that "if we disciplined our children the way our parents disciplined us ... we would be in prison today," and another venireperson who exclaimed "Amen" when the panel was asked about the rights that a criminal defendant is guaranteed under the law.

Holman v. State

In *Holman v. State*, No. 04-05-00839-CR, 2006 Tex. App. LEXIS 8752 (Tex. App.–San Antonio 2006, no pet.) (not designated for publication) defendant was charged with sexual assault of a child and requested a

jury trial. During the voir dire proceedings, the State utilized one of its peremptory challenges to remove an African-American venire member from the potential jury. Defendant raised a *Batson* challenge. The State explained that, based on the venire person's short and curt answers, it was unable to determine whether this venire member would be a fair juror. In rebuttal, defense counsel argued that other prospective jurors also provided short answers but were empaneled. The trial court held that defendant failed to carry his burden of persuasion to show that the State's race-neutral reason for the challenge was pretextual and therefore defendant failed to demonstrate purposeful discrimination.

Guzman v. State

In *Guzman v. State*, 85 S.W.3d 242 (Tex. Crim. App. 2002), the State charged defendant with capital murder for intentionally or knowingly causing the death of a child under the age of six years. The State did not seek the death penalty, and thus the parties conducted a general voir dire of the entire jury panel rather than the individual questioning of jurors. At the close of voir dire, defendant challenged the State's use of peremptory strikes against six venirepersons, all of whom were either Hispanic or African-American. The State then gave reasons for all of its strikes. Only the strike of juror number 17 was at issue on appeal. The Court of Criminal Appeals re-examined the dual motivation defense to a Batson peremptory strike challenge. It reaffirmed its prior plurality opinion in *Hill v. State*, and held that when the motives behind a challenged peremptory strike were "mixed," i.e., both impermissible (race or gender-based) and permissible (race and gender-neutral), if the striking party showed that he would have struck the juror based solely on the neutral reasons, then the strike did not violate the juror's Fourteenth Amendment right to equal protection of the law.

Densey v. State

In *Densey v. State*, 10-04-00049-CR, 2005 WL 1581116 , 2005 Tex. App. LEXIS 5239 (Tex. App.--Waco 2005, pet. den'd) (not designated for publication), *rehearing overruled,* 191 S.W.3d 296 (Tex.App.-Waco, 2006), the court reviewed *Batson* challenges to three African-Americans among the first thirty-six members of the voir-dire panel. One sat on the jury, and the State used peremptory challenges against the other two. The State gave, as race-neutral reasons for striking the two, that both favored rehabilitation over punishment, and that: (1) one had seen crack and had gone to school with Appellant; and (2) the other knew people that used crack. Appellant argued that the State did not strike other panelists who had a poor opinion of crack users, or who valued rehabilitation. The court affirmed the trial judge's denial of the challenges.

In a concurring opinion denying a motion for rehearing, Chief Judge Gray considered *Miller-El v. Dretke,* 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) which was published after the opinion in this case. He discussed the Supreme Court's opinion at length and concluded that it did not change the analysis set out in *Batson* and therefore did not effect the original decision. He also responded to criticism from fellow justice Vance. *Densey v. State*, 191 S.W.3d 296 (Tex. App.–Waco 2006, no pet).

Crosby v. State

In *Crosby v. State*, No. 05-02-00598-CR, 2003 Tex. App. LEXIS 3840, 2003 WL 21000196 (Tex. App.–Dallas 2003, no pet.) (not designated for publication), the appellate court held that the reasons given by the State for the strikes, that one juror had a criminal record and the second thought rehabilitation was the primary goal of punishment, were race-neutral reasons, and defendant had not shown that the reasons were a sham or pretext for striking the jurors.

Puente v. State

In *Puente v. State*, No. 11-02-00331-CR, 2003 Tex. App. LEXIS 6775, 2003 WL 21804906 (Tex. App.–Eastland 2003, no pet.) (not designated for publication) defendant was convicted of the aggravated sexual assault of a child. Upon finding that he had previously been convicted of the felony of aggravated rape, the trial court assessed punishment at confinement for life as mandated by TEX. PENAL CODE ANN. §§ 12.42(c)(2). The court affirmed, stating that there was no Batson error because defendant did not show that the State's race-neutral reasons for its strikes were a pretext for discrimination. Further, the trial court did not err by denying defendant's request to review the prosecutor's notes from voir dire. Moreover, defendant's request appeared to have been untimely because he did not request such notes until after the jury had been sworn. The court held that the trial court did not err in failing to grant his motion to quash the jury panel because he failed to meet the third prong of the Duren test. Defendant did not show that the underrepresentation of Hispanics in jury pools was caused by a systematic exclusion of Hispanics in the jury-selection process.

The court noted that a prosecutor may be required to turn over notes made during voir dire if those

notes were used to refresh the prosecutor's memory before or while testifying with respect to a Batson challenge. *Id.* (citing *Pondexter v. State*, 942 S.W.2d 577, 582 (Tex. Crim. App.1996), *cert. den'd*, 522 U.S. 825 (1997); *Salazar v. State*, 795 S.W.2d 187, 193 (Tex. Crim. App.1990)). The morning after the jury had been sworn, appellant asked the trial court to reopen the Batson hearing. Appellant then moved to examine the notes that the prosecutor made during voir dire and may have relied upon to exercise her peremptory challenges. The court noted that there was no indication in the record that the prosecutor used her notes to refresh her memory before or during her testimony at the Batson hearing. Moreover, the court noted that appellant's request appeared to be untimely because appellant did not request such notes until after the jury had been sworn.

The court also addressed defendant's notion that the trial court erred in failing to grant his motion to quash the jury panel. The court noted that Appellant timely filed the motion to quash, but the hearing on the motion was postponed by agreement and was heard after trial. In the motion, appellant contended that the method of choosing and summoning jury panels in Dallas County was clearly discriminatory and that Hispanics are disproportionately underrepresented as jurors. The court cited the United States Supreme Court's standard for this analysis:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at *6 (citing *Duren v. Missouri*, 439 U.S. 357, 364 (1979)).

The court analyzed the testimony of the jury services manager for Dallas County from a similar hearing in a different case which was introduced as an exhibit at the hearing. The court noted that, according to the jury services manager, the Secretary of State creates Dallas County's jury wheel from the list of Dallas County residents that are either registered to vote or have a Texas driver's license or identification card. Names of prospective jurors are randomly pulled off the jury wheel, and those people are sent a summons. Generally, however, only about 20 percent of those summoned actually report for jury service.

Appellant also introduced into evidence a study of Dallas County juries. The study reported that about 25 percent of Dallas County residents are Hispanic. According to the study, the group of people sent a jury summons "closely resembled the adult population of Dallas County." The study showed, however, that only 7 percent of those reporting for jury service were Hispanic.

The court held that appellant failed to meet the third prong of the *Duren* test. In support, it noted that unlike the defendant in *Duren*, appellant did not show that the underrepresentation of Hispanics in jury pools "was systematic--that is, inherent in the particular jury-selection process utilized." *Duren v. Missouri* at 366. The court noted that in *Duren*, the defendant showed that women were underrepresented in jury pools in large part because of an automatic exemption that was authorized by statute. In the case at bar, however, appellant merely showed that a disproportionate number of Hispanics failed to report for jury service. The court relied on a survey of people who failed to report for jury service and noted that of the Hispanics polled, a variety of answers were given. In conclusion, the court held that appellant failed to show that the underrepresentation of Hispanics was caused by a systematic exclusion of Hispanics in the jury-selection process. *Puente*, 2003 Tex. App. LEXIS 6775, at *8 (citing *Hernandez v. State*, 24 S.W.3d 846, 849-51 (Tex.App.–El Paso 2000, pet. ref'd)).

Rayford v. Thaler

In *Rayford v. Thaler*, 3-06-CV-0978-B-BD, 2011 WL 7102282 (N.D. Tex. July 12, 2011) *report and recommendation adopted*, 3:06-CV-0978-B, 2012 WL 215321 (N.D. Tex. Jan. 25, 2012) a Dallas County jury convicted petitioner of capital murder and sentenced him to death. His conviction and sentence were affirmed on direct appeal. Rayford v. State, 125 S.W.3d 521 (Tex.Crim.App.2003), *cert. denied*, 543 U.S. 823, 125 S.Ct. 39, 160 L.Ed.2d 35 (2004). Petitioner also filed an application for state post-conviction relief. The application was denied on the findings of the trial court. *Ex parte Rayford*, WR–63,201–01, 2006 WL 1413533 (Tex.Crim.App. May 24, 2006). Petitioner then filed this habeas corpus action in federal district court complaining of, among other things, that the jury in his case was not chosen from a fair cross-section of the community because young adults 18 to 34 years old and Hispanics were not adequately represented on the venire panel. The Court noted that the Sixth Amendment requires that

a jury be selected from a representative cross-section of the community. *Citing Taylor v. Louisiana,* 419 U.S. 522, 530 (1975). Thus, jury venires must not systematically exclude distinctive groups in the community. *Citing Duren v. Missouri,* 439 U.S. 357, 363–64 (1979). In order to establish a *prima facie* Sixth Amendment violation, a defendant must show that: (1) the excluded group is a distinctive group in the community; (2) representation of the group in venires from which juries are selected is not fair and reasonable in relation to their number in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process. The Sixth Amendment does not require petit juries, as opposed to panels or venires, to reflect the composition of the community at large. *Citing Taylor,* 95 S.Ct. at 702; *Lockhart v. McCree,* 476 U.S. 162, 173, 106 S.Ct. 1758, 1765, 90 L.Ed.2d 137 (1986). All that is required is that "the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Citing Taylor,* 95 S.Ct. at 702. A process systematically excludes a group in violation of the Sixth Amendment if the underrepresentation of that particular group is "inherent in the particular jury-selection process utilized." *Citing Duren,* 99 S.Ct. at 669.

The Court held that Petitioner had not established that there was any systematic exclusion of young adults or Hispanics from venire panels in Dallas.

Partida v. State

In *Partida v. State*, No. 13-00-206-CR, 2003 Tex. App. LEXIS 9337 (Tex. App.–Corpus Christi 2003, no pet.) (not designated for publication), the court held that youth and employment (or lack thereof) are acceptable race-neutral explanations for striking a prospective juror. It also held that the appearance and criminal history of a juror was a race neutral reason for a peremptory challenge.

Gibson v. State

In *Gibson v. State*, 117 S.W.3d 567 (Tex. App.–Corpus Christi 2003, no pet.), defendant argued that the State exercised its peremptory challenges of two jurors solely on the basis of race. The court of appeals agreed. The record did not support the prosecutor's statement during voir dire that the State had more evidence than a single witness as his explanation for not striking juror 7. Moreover, after informing juror 11 during voir dire that the only witness was an eye-witness, the prosecutor did not ask any follow-up questions about the effect of that fact on her reservation about one witness. Finally, the voir dire record showed that juror 7, in response to defense counsel's question, indicated he would require a defendant to testify. However, the record also showed that juror 11 agreed with the prosecutor on an issue specifically relevant to the State's drug possession case against defendant. The record showed that the State struck a juror of one race for indicating one specific reservation and did not strike a juror of another race who expressed the same specific reservation. The court found that the record did not support the State's only explanation for treating the two panelists differently.

McQueen v. State

In *McQueen v. State*, 329 S.W.3d 255 (Tex. App.--Hous. [14th Dist.] 2010, no pet.) the appellant was convicted by jury in a municipal court for failure to maintain a safe speed and was assessed a fine of $200. The county criminal court affirmed, but the appellate court preliminarily determined that the appellant made a prima facie showing of racial discrimination in the state's exercise of its peremptory strikes and ordered the municipal court to conduct a full hearing pursuant to *Batson v. Kentucky*, (1986), 476 U.S. 79. Following the hearing, the municipal court concluded that the state did not engage in purposeful racial discrimination and denied the appellant's *Batson* motion. The appellate court found that at the *Batson* hearing, the prosecutor testified that he struck one of the black venire members because she indicated she did not drive. The prosecutor explained, "We were dealing with a case involving an automobile accident and, I felt that it was pertinent that the people have acquaintance with driving a car and being able to relate to the fact that drivers have to maintain certain distances and just what it's like about driving a car." The prosecutor also testified that he struck another black venire member because he had received a traffic ticket within the last five years and had "halfway raised his hand and kind of put it down" when asked if he believed the ticket was unjust, which showed that he could be biased against the state. Thus, the prosecutor proffered race-neutral explanations for striking two of the three black venire members. The court thereby affirmed the denial of the appellant's *Batson* motion. Further, the challenge to the prosecutor's question was not preserved for appellate review and the challenges to sufficiency of evidence and the appellant's jury argument were properly denied.

Ineffective counsel based on voir dire:

Orezine v. State

In *Orezine v. State*, 01-10-00731-CR, 2011 WL 5027039 (Tex. App.--Hous. [1st Dist.] Oct. 20, 2011, no pet.) (not designated for publication) the appellate court, confronted with an ineffective assistance of counsel allegation, reviewed the trial record with an eye towards the totality of the representation. The court noted that counsel's voir dire included a question about the reasonable doubt standard, police officer testimony and credibility, and assessment of a maximum punishment. The court also found that the legal concepts about which Orezine complained should have been formulated and asked (i.e., presumption of innocence, proof of guilt beyond a reasonable doubt, the indictment as evidence of guilt, and credibility of a criminal defendant) had been addressed generally by the trial judge. Trial counsel successfully struck venire members for cause, cross-examined State's witnesses and, in closing arguments, challenged the credibility of the State's witnesses. Finally, the court noted that trial counsel's presentation of the case was at least sufficiently successful to have engendered in the jury a modicum of mercy when it rejected the State's request for the full twenty-year prison term and sentenced Orezine to four years.

Ramirez v. State

In *Ramirez v. State*, 13-09-00073-CR, 2010 WL 3420616 (Tex. App.--Corpus Christi Aug. 31, 2010, pet. ref'd)(not designated for publication) defendants had three complaints with respect to their attorneys' performance during jury selection: (1) failure to timely present the jury questionnaire; (2) failure to properly object to the time limits imposed by the judge; and (3) failure to conduct proper voir dire on the punishment range.

Defendants proposed a jury questionnaire which had questions regarding jurors' basic background information, such as their names, addresses, employment history, hobbies, previous juror experience, and political preferences. The questionnaire also had questions regarding the topic of child abuse. For example, it inquired whether potential jurors agreed, agreed strongly, or disagreed strongly with questions such as, "[r]egardless of what the law says, a person who is charged with child abuse and murder should have to prove his innocence," and "[i]f the prosecution brings a parent to trial on charges of child abuse and murder, the parent is probably guilty." The trial judge refused submission of the questionnaire stating he saw no need for it.

The court noted that all of the potential jurors completed a juror information card, which covered many background questions asked in the questionnaire. In addition, the State and counsel for both Defendants each asked questions related to the topics covered in the questionnaire during jury selection. For instance, counsel asked whether jurors would believe children over adults in the cases of alleged child abuse, how jurors felt about parents who withheld food as punishment, and other similar issues addressed in the questionnaire.

The court cited the Court of Criminal Appeals which held that "while a questionnaire may serve as an efficient vehicle for collecting demographic data, it is not the most reliable way to collect other types of information." *Gonzales v. State,* 3 S.W.3d 915, 917 (Tex.Crim.App.1999). In the case at bar, demographic data was collected on juror information cards, and all of the attorneys asked detailed questions related to the questionnaire's topics. The court could not conclude that Defendants' trial counsel's performance regarding the jury questionnaire was deficient or prejudicial.

One of the Defendants also claimed that his counsel should have objected to the trial court's one-hour limitation of questioning during voir dire. He relied on *Montez v. State,* 824 S.W.2d 308, 310 (Tex.App.-San Antonio 1992, no writ). In *Montez,* a jury convicted the defendant of aggravated possession of cocaine and sentenced him to twenty-five years' imprisonment. *Id.* at 308. The *Montez* court noted that the trial court "abbreviated the voir dire examination after appellant's trial counsel had individually examined only twenty-two members of the jury panel." *Id.* at 310. However, the court distinguished *Montez* as the trial court allowed each attorney a full hour to question potential jurors, for a combined total of three hours for jury selection. Also, all of the attorneys were able to rely upon the juror information cards and the questioning by the other attorneys to determine which jurors would be suitable for selection. The record even reflected that one of the defendant's attorney did not use all of his allotted time-perhaps because all of his questions had already been asked, or because the attorneys had interviewed enough potential jurors to comprise the twelve-person jury. The court concluded that the attorney's failure to object to the time limit during jury selection would not have resulted in a different outcome. *Citing Thompson,* 9 S.W.3d at 812-13.

Lastly, defendants contended that their trial counsel's failure to conduct a voir dire examination on punishment prejudiced their respective cases. The court examined the record and found that the State questioned

jurors about their opinions on punishment and probation during its voir dire examination. The State asked the jury panel if they could consider the "full range of punishment in a murder case." In fact, the State's prosecutor specifically stated that "that means that each of you could consider probation if a person ... applied for probation." Defendants' counsel each had the right to rely on the State's questioning. *Citing White v. State,* 999 S.W.2d 895, 898 (Tex.App.-Amarillo 1999, pet. ref'd) ("The State addressed the venire about the full range of punishment, which included an explanation of probation ... [t]he topic having been broached and explored by others, defense counsel need not traverse those territories to be effective."); and *Alcaraz v. State,* No. 05-02-00206-CR, 2003 Tex.App. LEXIS 2277, at 6-7 (Tex.App.-Dallas Mar.17, 2003 no pet.) (mem. op., not designated for publication) (same). The court also observed that there may be other reasons why defendants' attorneys refrained from this line of questioning:

> Counsel might have been afraid that more punishment-oriented jurors could influence other jurors; [they] may have been satisfied with the composition of the panel; [they] may have refrained from asking questions about probation to avoid giving the State more information on which to exercise peremptory challenges; [they] may have believed that such questioning would be perceived as admitting there was credible evidence of guilt ... Counsel might also have believed that the facts ... were so severe that there was little or no possibility of appellant receiving probation upon conviction.

Citing Goodspeed v. State, 187 S.W.3d 390, 393-94 (Tex.Crim.App.2005). Accordingly, the court could not conclude that the failure to question the jury panel about punishment was deficient, as it could have been a part of defendants' counsels' trial strategy.

Lopez v. State

In *Lopez v. State*, NO. 01-07-00888-CR, 2008 WL 4427540 (Tex. App.-Hous. [1st Dist.] 2008, pet. ref'd)(not designated for publication) Appellant contended, among other things, that his trial counsel failed to conduct a sufficient voir dire. Specifically, appellant contended that his counsel "mentioned general issues," covered "ten topics in twelve minutes," and additionally never used the topics he presented as a means of educating the panelists or discovering their views in order to make informed use of his challenges and strikes. In making this contention, appellant attempted to compare the conduct of his counsel at his retrial with the conduct of his counsel during his first trial. The court first noted that it must evaluate counsel's performance by the totality of his representation in the second trial only (Citing *Pryor v. State*, 719 S.W.2d 628, 633 (Tex. App.-Dallas 1986, pet. ref'd), *cert. denied*, 485 U.S. 1036 (1988)).

The court cited *Jackson v. State*, where the court of criminal appeals held that a "ten minute voir dire" by defense counsel does not render assistance of counsel per se ineffective, as it can be dictated by trial strategy. *Jackson*, 491 S.W.2d 155, 155-56 (Tex. Crim. App. 1973). Additionally, the court noted that in *Leija v. State*, No. 01-06-00063-CR, 2006 WL 3751434, at *4 (Tex.App.-Houston [1st Dist.] 2006, no pet.) (mem. op., not designated for publication) it determined that defense counsel was not ineffective on the basis of the brevity of his voir dire because the record demonstrated that counsel's voir dire followed a 40-minute examination by the State, during which the State explained the burden of proof; that jurors must be fair and impartial; that jurors may choose to believe or disbelieve any portion of the testimony; and that jurors may not consider whether the defendant testifies.. In addition, the trial court fully educated and admonished the panel on several issues. *Id*. In that case the court also noted that defense counsel further questioned the venire members regarding whether any had been crime victims, their ability to consider the full range of punishment, and the weight given to police testimony. *Id*.

The court concluded that the facts at bar were similar to *Leija*: appellant's counsel's voir dire followed a thorough explanation by the trial court, which took up the first half of the day, and included thorough explanations of the process of voir dire, the presumption of innocence, and burdens of proof, and the trial court also questioned the venire members regarding their personal experiences regarding relevant issues. The State conducted a 30-minute voir dire, during which it extensively questioned the jury and reiterated the issues previously addressed by the trial court. Defense counsel's voir dire included a discussion of police officer testimony, defendant's failure to testify, and eyewitness testimony. Therefore, the court concluded that appellant did not shown that his counsel was ineffective based on the mere brevity of voir dire.

Additionally, the court noted that appellant did not specify what should have been asked or show how a failure to ask such questions prejudiced his defense. Nothing in the record showed that defense counsel's voir

dire was the result of an unreasoned strategy or that there was a reasonable probability that it led to an unreliable verdict or unjust punishment. Thus, the court held that appellant did not met his burden under *Strickland* to show that his counsel was ineffective. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Goodspeed v. State

In *Goodspeed v. State*, 187 S.W.3d 390 (Tex. Crim. App. 2005), defendant complained that his trial counsel's voir dire consisted of no meaningful questions. The State argued counsel's failure to ask repetitious questions should not constitute deficient performance. The Texarkana Court of Appeals held that counsel's waiver of defendant's right to solicit information from prospective jurors (when such information could only help assist in intelligently exercising peremptory strikes) fell well below the objective standard of reasonableness. *Goodspeed v. State*, 120 S.W.3d 408 (Tex. App.–Texarkana 2003, reversed). By failing to examine the panel, the court stated, the defense never had an opportunity to determine if any of the members of the venire should have been disqualified for not being able to consider the full range of punishment. The court noted defendant was eligible for community supervision (formerly referred to as probation) pursuant to TEX. CODE CRIM. PROC. ANN. art. 42.12, §§ 4(e) and therefore the jury had the authority to grant community supervision as a possible punishment in the event it found defendant guilty. The court held that counsel's assistance fell below reasonable standards of conduct during this critical stage of the trial and so undermined the adversarial process that the trial could not be seen as having produced a just result.

The Court of Criminal Appeals reversed. They held that despite the court of appeals' characterization of defendant's trial counsel's conduct as "no assistance," they could not conclude that the failure to ask any questions in voir dire constituted conduct so outrageous that no competent attorney would have engaged in it, and that defense counsel's articulated reason for declining to ask questions (that the prosecution's questioning adequately covered the defense's concerns) could have been a legitimate trial strategy under the appropriate circumstances. *Id.* at 393. The court further held that even if the two peremptory strikes constituted deficient performance, defendant had to show that the strikes harmed him. *Id.* at 394.

Carbajal v. State

In *Carbajal v. State*, No. 07-05-0078-CR, 07-05-0079-CR, 07-05-0080-CR, 07-05-0081-CR, 07-05-0082-CR, 2006 Tex. App. LEXIS 8777 (Tex. App.–Amarillo, 2006, no pet.) (not designated for publication), at the conclusion of voir dire, defense counsel requested to be provided with a copy of the criminal history pulled by the State on each potential juror. Counsel asserted that the information would inform him of any convictions, including those which tended to disqualify jurors. The State objected to defendant's request for the histories. The trial court denied the motion to the extent it called for matters that would not show a disqualification and granted it as to matters that would show a grounds for disqualification. The jury subsequently convicted defendant on all counts. Defendant contended the trial court's refusal to compel the State to disclose the results of the venire panel's criminal history check denied him the right to effective assistance of counsel. The court noted, however, that the trial court never prohibited defendant from questioning the venire panel regarding their criminal histories. Therefore, the trial court's ruling did not prevent the intelligent exercise of defendant's peremptory challenges.

Same or similar holding: *Harrison v. State*, 01-09-00611-CR, 2010 WL 5187428 (Tex. App.--Hous. [1st Dist.] Dec. 23, 2010, no pet.)(not yet released for publication)*; Saucedo v. State*, NO. 14-06-00939-CR, 2008 WL 2261294 (Tex. App.-Hous. [14th Dist.] 2008, pet. ref'd); *Roland v. State*, 2010 WL 307894 (Tex.App.-Hous. [14 Dist.] Jan 28, 2010) (NO. 14-08-00290-CR)(not released for publication)(not ineffective assistance of counsel to fail to object to proper commitment question); *Cardona v. State*, 2009 WL 3153207 (Tex.App.-El Paso Sep 30, 2009) (NO. 08-07-00161-CR)(not released for publication)(because question was not commitment question, no ineffective assistance of counsel due to lack of objection; *Dixon v. State,* No. 14-05-00131-CR, 2006 WL 2548175, at *6 (Tex.App.-Houston [14th Dist.] September 5, 2006, no pet.) (mem. op., not designated for publication) (holding defendant's challenges for cause waived when defendant stated no objection to composition of the jury); *Franklin v. State,* No. 01-87-00097-CR, 1988 WL 139732, at *2 (Tex.App.-Houston [1st Dist.] Dec. 22, 1988, no pet.) (not designated for publication) (same); *Beck v. State,* 976 S.W.2d 265, 267 (Tex.App.-Amarillo 1998, pet. ref'd) (stating that to hold counsel ineffective for not questioning panel of racial bias would improperly micro-manage trial counsel's actions).

Note-Taking:

A bill introduced during the 2009 legislative session and language considered by the Texas Supreme Court Advisory Committee related to the conduct of jurors. Senate Bill 445, sponsored by Senator Wentworth, and proposed Texas Rule of Civil Procedure 265.1 would have allowed jurors to submit questions to witnesses during trial. The proposed Senate Bill would have allowed jurors to take notes during trial and require the courts to provide materials to jurors on which to take those notes. In addition, it required the Texas Supreme Court to adopt a rule that would allow (1) jurors to submit questions for witnesses anonymously; (2) counsel to object to questions out of the presence of the jury; (3) witnesses to be recalled to the stand to answer a question in open court; (4) an opportunity for cross-examination in response to a juror question; and (5) limitation upon questions "for good cause."

Proposed Rule 265.1 calls for an instruction to be read by the judge to the jurors at the beginning of trial advising of the right to ask questions and a form would be provided to jurors upon which questions could be submitted. The parties would then be allowed to object and the court would have the discretion to reword the question. Under the rule, parties would be allowed to ask follow up questions and any question submitted would become part of the record.

S.B. 445 passed unanimously in the Senate but the bill never made it out of committee at the House.

A discussion of the law regarding note taking by jurors can be found in *Shelley v. State*, NO. 01-02-00127-CR, 2003 Tex. App. LEXIS 1579 (Tex. App.–Houston [1st Dist.] 2003, pet. ref'd) (not designated for publication). The court observed that the decision to permit juror note-taking is within the sound discretion of the trial court. *Id.* (citing *Price v. State,* 887 S.W.2d 949, 954 (Tex. Crim. App. 1994)*; Johnson v. State,* 887 S.W.2d 957, 958 (Tex. Crim. App. 1994)). The court noted that in order to preserve a complaint about juror note-taking, a timely objection must be made at trial. *Id.* (citing *Shannon v. State*, 942 S.W.2d 591, 596 (Tex. Crim. App. 1996)).

The court recognized four cautionary steps that would allow juries the benefits of note-taking while avoiding the inherent risks. The trial judge should (1) determine if juror note-taking would be beneficial in light of the factual and legal issues to be presented at trial, (2) inform the parties, *prior to voir dire*, if the jurors will be permitted to take notes, (3) admonish the jury, at the time it is impaneled, on note-taking, and (4) instruct the jury in the jury charge as to the proper use of its notes. *Id.*

Effective April 2011, the Texas Supreme Court revised TRCP 226a "Instructions to Jury Panel & Jury" to include the following instructions regarding note taking after the jury is selected and sworn-in:

> During the trial, if taking notes will help focus your attention on the evidence, you may take notes using the materials the court has provided. Do not use any personal electronic devices to take notes. If taking notes will distract your attention from the evidence, you should not take notes. Your notes are for your own personal use. They are not evidence. Do not show or read your notes to anyone, including other jurors.
>
> You must leave your notes in the jury room or with the bailiff. The bailiff is instructed not to read your notes and to give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone.
>
> You may take your notes back into the jury room and consult them during deliberations. But keep in mind that your notes are not evidence. When you deliberate, each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes. After you complete your deliberations, the bailiff will collect your notes.
>
> When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

And the following to be included in the jury charge:

> Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be

> influenced by the fact that another juror has or has not taken notes.
>
> You must leave your notes with the bailiff when you are not deliberating. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

Videotaping Deliberations:

State ex rel. Rosenthal v. Poe

In *State ex rel. Rosenthal v. Poe*, 98 S.W.3d 194 (Tex. Crim. App. 2003, orig. proceeding), the trial judge signed an order which permitted production companies to videotape all of the proceedings of a capital murder trial for later public broadcast. The order provided that unattended cameras and equipment would record the jury deliberations and that no broadcast would be allowed until the conclusion of all trial court matters. The judge obtained the consent of all parties, including defendant and the veniremembers, to the procedure. The district attorney filed an action seeking a writ of mandamus to bar the videotaping of the jury deliberations, which was conditionally granted by the court pursuant to the authority of Tex. Code Crim. Proc. Ann. art. 36.22. The Court found that the trial judge had no discretion to permit the videotaping of this aspect of the trial, due to art. 36.22, and that it could have a potential impact on the jurors which might compromise defendant's right to a fair trial. Although the Court found that there was no set rule against broadcasting based on the right to a fair trial, it found that such was prohibited by art. 36.22, and that taping would unlawfully pierce the jury's "veil of confidentiality." *Id.*

Irregularities after jury impaneled:

Hayes v. State

In *Hayes v. State*, 484 S.W.3d 554 (Tex. App.—Amarillo 2016, pet. ref'd), the court held the Hayes was entitled to a new trial because the court bailiff informed jurors, during trial, that the parties were discussing a plea bargain. Because a plea bargain necessarily obligates a defendant to plead guilty, the court stated, the comment allegedly impugned the presumption of innocence to which he was entitled. It also purportedly interjected other evidence into the jury's deliberation. The case was reversed for a new trial.

Miranda-Canales v. State

In *Miranda-Canales v. State*, 368 S.W.3d 870, 873-74 (Tex. App.--Hous. [14th Dist.] 2012, pet. ref'd) the Court encountered this question: what should a trial court do when, after a guilty verdict has been accepted and entered upon the minutes of the court, a juror tells the court, effectively, that she regrets her vote? This is not a case involving pre-verdict outside influence on a juror, nor does it involve an allegation of improper pressure or duress on a juror during deliberations.

The following exchange took place during the individual voir dire of Juror No. 19 in the trial court's chamber:

> [Prosecutor:] In what way did those jurors pressure you to vote the verdict that you did not believe in?
> [Juror No. 19:] They didn't see what I see. They said that they're right and I'm wrong. I saw it differently. In my opinion, it wasn't enough evidence, even though everything was presented. But nobody agrees with me, so I feel like I'm the only one thinking this way and I thought, well, I don't need a whole bunch of jurors mad at me to go alone and say not guilty. I need to say guilty, because they don't want this to go another week, two weeks, a month. And I understand that. I have a job too. I want to go back to work, go back to my life. I didn't know this was gang related. It's affecting me personally.
> [Prosecutor:] You said you felt pressured by the jurors. What did they say to pressure you other than that they disagreed with your opinion?
> [Juror No. 19:] They told me it's on the video, self admission, but there was more said than the video. And I know—in my opinion, I know that when you don't follow an order, you get whacked. It wasn't going to be easy just to step out.
> [Prosecutor:] Okay. But let me get back to what I'm asking you. All they did then was point out to you the evidence that they believed showed him to be guilty.

> Is that what you're saying? They didn't pressure you by being ugly to you, did they?
> [Juror No. 19:] I know what you're saying. There is no gun to my head. I understand that.
> [Prosecutor:] Okay. But what did they do to push you into finding a man guilty of a crime you didn't believe he committed? What did they say to you that put you in that position? That's what I'm trying to understand. 'Cause so far, you've just got them showing you why they disagreed with you through the evidence and saying that they disagreed with your opinion. What was it about that that put undue pressure on you?
> [Juror No. 19:] I can't explain that. It's just the way I feel.

The Court cited prior cases and held that because the evidence only relates to influences that came to bear inside the jury room as part of its deliberations and not an outside influence, the trial court did not abuse its discretion in denying the defendant's motion for mistrial.

Wells v. Barrow

In *Wells v. Barrow,* 153 S.W.3d 514 (Tex. App.–Amarillo 2004, no pet.), appellant challenged a judgment for appellees rendered on a jury verdict for personal injuries arising from an automobile collision. Appellant presented a single point of error challenging the composition of the jury which heard the case. The case was called for trial in June 2002. The jury venire consisted of 42 members. After voir dire, the trial court sustained ten challenges for cause. The parties exercised six peremptory strikes each. Three of those peremptory strikes overlapped, leaving 23 Veniremembers. The sixth "unstruck" Veniremember was Linda Pearson. When the court clerk called the names of panel members who would compose the jury, she mistakenly omitted Pearson's name, resulting in another panel member, Sylvia McDade, serving on the jury. Neither party brought the error to the attention of the court at that time. After a two-day trial, the jury returned a unanimous verdict for appellees.

After the verdict, but before rendition of judgment, appellant filed a motion for new trial asserting, among other grounds, that the jury was not properly selected. Appellant's motion argued in support of her challenge to the jury that she was "entitled to a new trial because the jury chosen by the parties was not the jury that was impaneled to hear the case." No contention was made that McDade was disqualified; she was not challenged for cause at trial. The trial court overruled the motion for new trial and rendered judgment for appellees. Appellant's first argument on appeal was that the exclusion of Pearson violated her constitutional right to "select a jury." The court noted that none of the authority relied on by appellant supported her asserted right to "select" the members of a jury. The court stated that the right to a jury trial encompassed a right to have the jury selected in substantial compliance with the applicable procedural statutes and rules. *Id.* at 516 (citing *Heflin v. Wilson,* 297 S.W.2d 864, 866 (Tex.Civ.App.–Beaumont 1956, writ ref'd)) (jury panel erroneously chosen by jury commission method rather than required jury wheel method)). Under those statutes and rules, the court found that the parties have a role in excluding prospective jurors who are disqualified or unfit for service as jurors, by virtue of bias or prejudice or otherwise and a limited opportunity to strike prospective jurors even when bias or prejudice cannot be shown and provide for the involvement of the parties in some decisions to excuse prospective jurors. *See, eg.* TEX. GOV'T CODE § 62.110(c) (requiring approval of parties for excuse of prospective juror for economic reason). The court held that Texas' constitution, statutes and rules cannot be said, though, to grant litigants the right to "select" jury members. Restated, the court held that the right to a jury trial is a right to have fact questions resolved by an impartial jury. *Wells*, 153 S.W.3d at 517 (citing *Babcock v. Northwest Memorial Hosp.*, 767 S.W.2d 705, 709, (Tex. 1989)). The court noted that the right at bar was distinguishable from a right to have particular persons serve on the jury.

Appellant's argument was also premised on her position that the jury in this case was not selected in substantial compliance with the Rules of Civil Procedure. Appellant cited *McDaniel v. Yarbrough,* 898 S.W.2d 251, 253 (Tex. 1995), in support of her argument that the clerk's failure to call Pearson's name when announcing the jury in accordance with "the simple, clear directive of Rule 234 is a shocking lack of compliance with that rule which resulted in fundamental, constitutional error." *Wells*, 153 S.W.3d at 517. However, the court noted that *McDaniel* did not speak to the selection of a jury. Rather, it concerned the requirement of Article V, section 13 of the Texas constitution and that Rule of Civil Procedure 292 that a district court jury consist of twelve members unless not more than three jurors die or "be disabled from sitting." *Wells*, 153 S.W.3d at 517.

The court found persuasive two cases in which procedural errors in formation of the venire or jury were the basis for appeal. In *City of San Augustine v. Johnson,*

349 S.W.2d 653 (Tex.Civ.App. –Beaumont 1961, writ ref'd n.r.e.), a county judge failed to administer a statutorily required oath to the county clerk on delivery of the jury lists. *Id.* at 654. The court found no reversible error, distinguishing *Heflin* on the basis that the error did not involve the entire system of jury selection but "only the oversight of one step or link in the chain of proceedings under the proper law." *Id.* at 654.

In *Rivas v. Liberty Mutual Ins. Co.,* 480 S.W.2d 610 (Tex. 1972), the court noted that the Texas Supreme Court considered the effect of the failure to follow a rule requiring members of a jury panel be listed in the order their names were drawn from the jury wheel. It was undisputed that names were listed in the order the summons letters were collected by the bailiff. *Id.* at 611. Relying on *Heflin*, the court of appeals held the procedure used, and the denial of a jury shuffle, raised an inference of harm and reversed. *Liberty Mutual Ins. v. Rivas,* 466 S.W.2d 823 (Tex. Civ. App.–Corpus Christi 1971, *rev'd*, 480 S.W.2d 610. The supreme court disagreed, finding the procedure employed "substantially complied" with the underlying purpose of the rule to create a random list. *Rivas*, 480 S.W.2d at 612. The *Wells* court noted that the supreme court rejected the contention that denial of the requested jury shuffle resulted in a different jury than would have heard the case had the request been granted. "While conceding the procedure followed was not the proper one, the court concluded the method used did not probably cause, and was not reasonably calculated to cause, the rendition of an improper judgment."

The Amarillo Court found *Rivas* controlling. *Wells*, 153 S.W.3d at 518. It said that a mistaken failure by court personnel to follow a procedural rule, the result of which was that different Veniremembers made up the jury, did not meet the requisite showing that any member of the jury was not qualified to serve. *Id.*

It also found that a procedural error in selecting a jury is not fundamental constitutional error and is subject to waiver or harmless error analysis. *Id.* (citing *Berner v. Southwestern Public Service Co.,* 517 S.W.2d 924, 925 (Tex. Civ. App.–Amarillo 1974, writ ref'd n.r.e.) (discussing a presentation of complaints regarding the selection of a jury in a motion for new trial are ordinarily too late); *Lopez v. State,* 437 S.W.2d 268, 269 (Tex. Crim. App. 1968) (applying rule in criminal context)). The court also did not apply the "relaxed" harmless error standard of review utilized by the Fort Worth court of appeals in *Carr v. Smith,* 22 S.W.3d 128, 135 (Tex.App.–Fort Worth 2000, pet. denied). This standard requires the complaining party to show that the trial was materially unfair, without having to demonstrate specific harm. *Wells*, 153 S.W.3d at 518. Appellant argued the existence of hotly contested issues at trial established that the error resulted in a materially unfair trial. The court found the "materially unfair" standard inapplicable and noted that the standard had been applied primarily in cases involving peremptory strikes. *Id.* (citing*, Lopez v. Foremost Paving, Inc.,* 709 S.W.2d 643 (Tex. 1986); *Garcia v. Central Power & Light Co.,* 704 S.W.2d 734 (Tex. 1986); *Patterson Dental Co. v. Dunn,* 592 S.W.2d 914 (Tex. 1979)*; Tamburello v. Welch,* 392 S.W.2d 114 (Tex. 1965); *Lorusso v. Members Mut. Ins. Co.,* 603 S.W.2d 818 (Tex. 1980); *Dunlap v. Excel Corp.,* 30 S.W.3d 427 (Tex. App.–Amarillo 2000, no pet.)). The court concluded that potentially unfair advantages that can result from the awarding of peremptory strikes were not involved, nor did the clerk's error result in the kind of adverse effect on the randomness of the jury or venire that the Fort Worth court found in *Carr*, 22 S.W.3d at 133-35, and in *Mendoza v. Ranger Ins. Co.,* 753 S.W.2d 779 (Tex. App.–Fort Worth 1988, writ denied). Nor did it involve the type of prejudicial misconduct that concerned the majority in *Mann v. Ramirez,* 905 S.W.2d 275, 283 (Tex.App.-San Antonio 1995, writ denied). The court concluded, following *Rivas*, that the record did not demonstrate reversible error. *Wells*, 153 S.W.3d at 518.

Loss of juror during trial:

In re M.G.N.

In *In re M.G.N.*, 441 S.W.3d 246 (Tex. 2014), following voir dire, the trial court empaneled twelve jurors and retained one alternate. During cross-examination of George at trial, Monica's counsel asked him a series of questions concerning his former employer, Tim Smoot. The inquiries insinuated that George was at least partly responsible for Smoot's alleged business troubles, and Smoot was said to have accused George of "running his business into the ground." At the recess following this cross-examination, Joel Turney, a juror, alerted a court deputy to the fact that he personally knew Smoot. Before continuing with trial, and outside the presence of the other jurors, the trial court questioned Juror Turney about his connection to Smoot. Juror Turney disclosed he had transacted business with Smoot for many years and believed the insinuations by Monica's counsel were misleading because the juror knew Smoot was solvent. The trial court asked Juror Turney whether, in light of this personal knowledge, he could deliberate as a fair and impartial juror. Juror Turney admitted he was inclined to share his knowledge with the other jurors "unless you tell me I can't bring up things that were not brought up between the lawyers." The trial court instructed Juror Turney to withhold this information from the other jurors.

Following this hearing, Monica's counsel requested Juror Turney be excused, and George's counsel objected. The trial court dismissed Juror Turney, replaced him with the lone alternate juror, and proceeded with the trial. The court reasoned that because there was an alternate juror available, "there [was] no reason to take the risk here of impartiality ... or of extra information going into the jury room."

A second juror issue arose on the morning of the seventh day of trial when juror George Park left a message with the clerk indicating he was ill and unable to attend the proceedings. Before resuming trial for the day, the trial court called Juror Park and, along with counsel for both parties, questioned him about the nature of his illness. Juror Park was not able to definitively state when he thought he would convalesce sufficiently to return to service. Recalling its assurance to the jurors that they would be done with trial by that day and noting that Juror Park's return date was uncertain, the court held that the trial would proceed with eleven jurors. George's counsel moved for a mistrial, which the trial court denied. The eleven-member jury returned a unanimous verdict denying both parties' requests for sole managing conservatorship.

George appealed, arguing that the trial court violated his constitutional right to a jury trial, as the eleven-person jury fell short of constitutional and statutory strictures. The court of appeals agreed, and reversed and remanded for new trial, citing the Texas Constitution's requirement that a jury must consist of twelve members unless not more than three of them die or become "disabled from sitting." Tex. Const. art. V, 13. Such disability, the court reasoned, must be in the nature of an actual physical or mental incapacity—mere inconvenience or delay does not suffice. 401 S.W.3d 677, 679. While Juror Turney concededly "posed a risk of impartiality and of extra information going into the jury room," potential contamination from a tendentious juror is not a constitutional disability requiring dismissal. When the trial court dismissed the second juror—Juror Park—due to illness, only eleven jurors remained. Therefore, the court of appeals concluded the dismissal of Juror Turney when he was not constitutionally disabled ultimately resulted in an eleven-member jury and violated George's constitutional right to a jury trial.

The parties invited the court to consider whether a juror's potential bias may render her constitutionally "disabled from sitting." But the court found it need not reach that question in resolving the matter, as the issue was considerably more straightforward. Instead, the court noted a trial court need not find a juror constitutionally disabled in order to substitute an alternate when doing so does not lead to numerical diminution of a twelve-member jury. In this case, the trial court only needed to find that Juror Turney was disqualified from fulfilling his duties and that the alternate was qualified to serve. Because the court of appeals did not perform this analysis, the case was remanded for such review.

On remand, the court of appeals found that the trial court properly dismissed juror Turney based on statutory disqualification (bias) and that the court properly seat an alternate juror as the twelfth juror as the alternate was qualified to serve. The court also found the trial court acted within its discretion in finding that Juror Park had a constitutional disability that would support his statutory disqualification, where juror relayed to trial court that he had been unable to sleep due to bouts of diarrhea the previous night, that he had vomited in the morning, that he felt better but was sleep deprived, and that he could not say for certain whether he would feel better in a few hours if trial were delayed. *In Interest of M.G.N.*, 491 S.W.3d 386 (Tex. App.—San Antonio 2016, pet. denied).

Engledow v. State

In *Engledow v. State*, 2006 Tex. App. LEXIS 1357 (Tex. App.--Austin 2006, no pet.) (not designated for publication), Defendant claimed the trial court erred by "deeming" a juror disabled due to a death in her family and by allowing the trial to continue with 11 jurors without hearing evidence that the juror was disabled. The court held that the question on appeal was limited to whether the trial court had some guiding basis for determining that the juror's circumstances met the statutory requirement of a disability under Tex. Code Crim. Proc. Ann. art. 36.29(a) (Supp. 2005). The court held that the trial court's exercise of discretion had support in the record, which revealed that the juror's husband had come to the trial court to report that the juror's sister had slipped into a coma. In a telephone call the next morning, the trial judge learned that the juror's sister had died during the night. The trial judge spoke directly to the juror and her husband to evaluate her demeanor and emotional state. The court noted that whether a juror was disabled within the context of Tex. Code Crim. Proc. Ann. art. 36.29(a) (Supp. 2005) was not limited to physical disease, but included any condition that inhibits a juror from fully and fairly performing the functions of a juror including mental condition, or emotional state.

Also the court found that defendant objected generally to the juror being excused based on disability, but that he did not object to the trial court's failure to summon the juror for a hearing or claim that the

disability was in any way a ruse. The court affirmed the trial court. Same holding: *Menelly v. State*, 02-14-00324-CR, 2015 WL 1869080, at *1 (Tex. App.—Fort Worth Apr. 23, 2015, no pet.)(trial court properly declared a juror disabled when the judge learned through a phone call that the juror's young daughter had been admitted to the hospital the night before after suffering a "life-threatening" stroke. She had required emergency surgery that night to remove a blood clot and was still in intensive care.

Hill v. State

In *Hill v. State*, 90 S.W.3d 308 (Tex. Crim. App. 2002), the court cited Article 36.29(a) which states the general rule that "not less than twelve jurors can render and return a verdict in a felony case." The court notes, however, that the rule has an exception: "[H]owever, when pending the trial of any felony case, one juror may die or be disabled from sitting at any time before the charge of the court is read to the jury, the remainder of the jury shall have the power to render the verdict." The court also noted another exception in TEX. GOV'T CODE § 62.201 which provides: "The jury in a district court is composed of 12 persons, except that the parties may agree to try a particular case with fewer than 12 jurors." The court then discussed its interplay of these two statutes in *Hatch v. State*, 958 S.W.2d 813, 816 (Tex. Crim. App. 1997) noting that it had overruled *Ex parte Hernandez*, 906 S.W.2d 931 (Tex. Crim. App. 1995) (a defendant could not waive the requirement of a 12-member jury). The court recalled that in *Hatch* it concluded, based on Code of Criminal Procedure article 1.15 and Government Code section 62.201, that a jury can proceed with eleven jurors if the defendant consents. The court also noted in *Ex parte Fierro*, 934 S.W.2d 370, 372 (Tex. Crim. App. 1996) the judge declared a mistrial. There was nothing in the *Fierro* record to demonstrate that the judge considered less drastic alternatives, one of which would have been "to determine if the parties would be willing to proceed with fewer than twelve jurors under TEX. GOVT. CODE § 62.201." The court stated:

> Both *Hatch* and *Fierro* imply that a trial cannot proceed with eleven jurors unless the defendant consents. But significantly, neither of these cases involved a disabled juror. In *Hatch*, one of the jurors was not a United States citizen. In *Fierro*, one of the jurors was erroneously excused for cause because she was the defendant's cousin. Since she was not related to the defendant within the third degree of consanguinity, the trial judge erred in excusing her. In both cases, since the juror was not disabled, the only way the court could proceed with eleven jurors was under § 62.201, which requires the parties' consent.

Hill v. State, 90 S.W.3d at 315.

The *Hill* Court was presented with a different situation. In *Hill*, the juror was disabled in that she was unable to perform her duties due to "debilitating panic attacks" which brought it within the ambit of Art. 36.29, which does not require the parties' consent. The court held that proceeding to trial with eleven jurors would not have made it impossible to arrive at a fair verdict or to continue with trial because Art. 36.29(a) required it. Likewise, it would not have presented automatic reversible error on appeal because the procedure is not just authorized but compelled by the statute.

In conclusion, the court rejected the State's request for an abatement because, since the juror was disabled, Hill's consent was not necessary to proceed to trial. The court held that even if it granted the State's request and abated this case for a hearing in the trial court, there was nothing that the State could possibly establish at that hearing which would demonstrate manifest necessity and found that the judge abused his discretion in granting the mistrial, and held that subsequent prosecution was barred by double jeopardy. *Id.*

Dempsey v. Beaumont Hosp., Inc.

In *Dempsey v. Beaumont Hosp., Inc.*, 38 S.W.3d 287 (Tex. App.–Beaumont 2001, pet. dism'd by agr.), Juror # 1, Lonnie Manuel, Jr., failed to appear on the day following the beginning of deliberations. During the search for Manuel, the trial court discovered he had a prior felony conviction. Counsel for Dempsey moved for a mistrial. Following a hearing, the trial court denied the motion and proceeded with eleven jurors. The jury returned a 10-1 verdict that neither party was negligent and a take-nothing judgment was entered.

The court noted that the Texas Constitution provides that in civil cases in district courts the parties have the right to a jury of twelve persons who have not been convicted of a felony. *See* TEX. CONST. art. I, §§ 15 (1876, amended 1935), art. V § 13, art. XVI, § 2. There was no question Manuel was constitutionally disqualified to serve as a juror. The court went on to note that the Supreme Court of Texas has held "[i]n cases involving juror disqualification the Complainant need not establish

that probable injury resulted therefrom before a new trial may be granted." *Compton v. Henrie,* 364 S.W.2d 179, 182 (Tex.1963). The Hospital in that case contended, on two grounds, that Dempsey must show harm. First, the Hospital argued Dempsey must satisfy the three-part test to obtain a new trial due to jury misconduct. *See Doucet v. Owens Corning Fiberglass Corp.,* 966 S.W.2d 161, 163 (Tex. App.–Beaumont 1998, pet. denied). However, the court found that TEX.R.CIV.P. 327 did not apply because they were not dealing with a case of jury misconduct. The court noted that Dempsey did not seek a new trial based upon Manuel's misrepresentation about his criminal history; rather, Dempsey argued a jury was never impaneled because the Texas Constitution prohibited Manuel from being seated as a juror. Accordingly, the court found the Hospital's reliance upon cases involving jury misconduct misplaced.

The *Dempsey* Court was not persuaded by *Palmer Well Servs., Inc. v. Mack Trucks, Inc.,* 776 S.W.2d 575 (Tex.1989). In *Palmer,* the verdict was 10-2 and the disqualified juror was one of the ten. The *Palmer* court found that because the disqualified juror participated in a verdict rendered by the minimum number of ten jurors a new trial was required. Instead, the *Dempsey* Court relied on *McDaniel v. Yarbrough,* 898 S.W.2d 251 (Tex.1995), where the mere fact that ten *other* jurors reached a consensus did not dispel the injury of being deprived of the constitutional right to trial by a jury of twelve. *See also Excel Corp. v. Apodaca*, 51 S.W.3d 686 (Tex. App–Amarillo 2001, rev'd on other grounds, 81 S.W.3d 817 (Tex. 2002)). In *McDaniel,* twelve jurors were selected, impaneled and sworn on March 2. On the afternoon of March 3, court was recessed and the jury instructed to reconvene at 1:00 p.m. on March 4. *McDaniel,* 898 S.W.2d at 252. Upon reassembling, the judge announced juror Seals had notified the court she would be unable to return that afternoon. *Sua sponte,* and over the objection of counsel for the McDaniels, the judge dismissed Seals and proceeded with eleven jurors. On March 5, a 10-1 verdict was returned finding Yarbrough 70% negligent but awarding zero damages to the McDaniels. *Id.* The court of appeals affirmed, holding the judge did not abuse his discretion in dismissing Seals from sitting on the jury as disabled due to the weather. *McDaniel v. Yarbrough,* 866 S.W.2d 665, 670 (Tex. App.–Houston [1st Dist.] 1993). The Texas Supreme Court disagreed, finding that Seals was not disabled within the meaning of TEX.R.CIV.P. 292 and therefore was improperly dismissed. *McDaniel,* 898 S.W.2d at 253. The court stated: "[d]enial of the constitutional right to trial by jury constitutes reversible error." *Id.*; *see Heflin v. Wilson,* 297 S.W.2d 864, 866 (Tex. Civ. App.–Beaumont 1956, writ ref'd). "Depriving the McDaniels of a full jury of twelve members, absent an exception authorized by the constitution or applicable rules, is a denial of the right to jury trial guaranteed by the Texas Constitution." *McDaniel,* 898 S.W.2d at 253.

Juror Misconduct:

This topic deals with discovery of incorrect or incomplete answers or failure to answer from the venire panel with the discovery of such after the jury is seated. Additionally, misconduct by way of violation of the Court's instructions is discussed, before and during deliberations.

TEX. R. CIV. P. 327 and TEX. R. EVID. 606(b) address juror misconduct. However, because of the limitations of juror testimony, it is difficult to prove juror misconduct. Misconduct can occur anytime between the beginning of voir dire and the jury's discharge by the court but a juror cannot testify about anything occurring during jury deliberation except an outside influence that was improperly brought to bear upon a juror. *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 368 (Tex. 2000). Before deliberations begin, however, a juror may testify about any conduct, subject only to the general rules of evidence. *Id*. at 369. Relevant matters include improper contacts with individuals outside the jury, conversations with other jurors during breaks, improper viewing of the incident scene, and information about the disqualification of a juror. *Id.* at 370. A non-juror can testify about these matters as well. *Id.* at 369.

Tex.R.Civ.P. 324(b) and 327 govern the procedure for preserving error on juror misconduct. To obtain a new trial on the basis of juror misconduct, the movant must prove that the misconduct occurred, that it was material and that it probably resulted in injury to the movant, based on the record as a whole. *In re Whataburger Restaurants LP*, 429 S.W.3d 597, 598 (Tex. 2014); *Golden Eagle Archery v. Jackson,* 24 S.W.3d 362, 372 (Tex.2000); *Redinger v. Living, Inc.*, 689 S.W.2d 415, 419 (Tex. 1985).

Golden Eagle Archery, Inc. v. Jackson

In *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 368 (Tex. 2000), *on remand on other grounds*, 29 S.W.3d 925 (Tex.App.–Beaumont 2000, pet. den'd) the court addressed the issue of whether procedural and evidentiary rules may constitutionally prohibit jurors from testifying about post-verdict statements made during deliberations, unless such statements concern outside influences. *See* TEX.R. CIV.P. 327(b); TEX.R.CIV.EVID. 606(b). In this case, Ronald Jackson obtained a verdict in a products liability

case, but moved for a new trial on several grounds, including juror misconduct, juror bias, and the adequacy of the verdict.

After a hearing, the trial court denied the motion. The court of appeals reversed and remanded for a new trial, holding that Texas Rule of Civil Procedure 327(b) denied Jackson his constitutional right to a fair and impartial jury trial because it prohibited him from proving jury misconduct during deliberations. The supreme court concluded that the rule was constitutional and reversed the court of appeals and remanded to that court to consider Jackson's other points of error that the court of appeals did not reach.

At trial, ten of the twelve jurors signed the verdict. The court asked the ten if they agreed to the entire verdict, but neither party asked to poll the individual jurors. Jackson moved for a new trial. He challenged the legal and factual sufficiency of the evidence to support several of the jury's answers, contested the trial court's exclusion of certain evidence, and alleged that juror Barbara Maxwell concealed a bias during voir dire and that she and other jurors committed misconduct before and during formal deliberations. The motion attached affidavits from one of Jackson's attorneys and three jurors. Two of the affidavits were from the jurors who did not vote for the verdict, Donald Frederick and Janet Cline. A third was from the presiding juror, Shawn Lynch. The motion asserted that even though Texas Rule of Civil Procedure 327(b) prohibits consideration of juror affidavits to impeach the verdict, to ignore the evidence of misconduct during deliberations would unconstitutionally deny Jackson his right to a fair trial. Golden Eagle responded that both Rule 327(b) and Texas Rule of Civil Evidence 606(b) prohibit the court from considering the juror's affidavits, that Jackson's attorney's affidavit primarily recounted hearsay statements about what some jurors told him, and that Jackson waived any juror-bias complaint because he did not conduct a sufficient voir dire.

At the hearing on his motion for new trial, Jackson offered the four affidavits as well as juror Frederick's testimony. The trial court admitted the testimony and affidavits without limitation "to the extent they contain appropriate evidentiary matters for consideration under Rule 327," and otherwise for the purposes of Jackson's bill of exceptions. At the hearing, Jackson's attorney read passages from the voir dire questioning of the jurors to demonstrate that Maxwell had hidden her bias against lawsuits of this kind. Jackson's attorney began voir dire with a lengthy question about whether any jurors were opposed to lawsuits, or could not be fair, or simply did not want to be on a jury. The following exchange took place during voir dire:

> Is there anybody here, by the same token, who would just say, "Look, I just can't do that. I can't--I don't believe in it. I just can't give a verdict that means that somebody is going to have to pay a lot of money"? Anybody here that--again, if you do, now is the time. You owe it to yourself and you owe it to these people and to the court to be honest about it because we--all we can do is ask you about it, but you have to tell us. Anybody here that could not do that?

No one responded. Finally, Jackson's attorney asked the panel if any of them had served on a jury. Maxwell answered that she had served on both a civil and a criminal case. She said the civil case involved a man's death in an accident. Jackson's attorney asked:

> **Q:** Did you--did you reach a verdict in that case?
> **A:** No.
> **Q:** Anything about that case that would keep you from being fair here?
> **A:** No, sir.

Juror Frederick testified in his affidavit and at the hearing about a conversation he had with Juror Maxwell during a trial recess. According to Frederick, Maxwell told him that previously she had served on a jury that awarded nothing for a wrongful death claim, which Frederick thought contradicted her voir dire statements, and further told him she did not believe in "awarding money in stuff like that," and that "we are the ones who end up paying for it."

The remaining juror testimony concerned events occurring after the jury retired to begin deliberating the evidence. Frederick, Cline, and Lynch all recalled that the jury bartered on the amounts to award for disfigurement and loss of vision, although their accounts contradict each other in the specifics. Frederick said that initially ten jurors had agreed to award $2,500 for disfigurement and nine had agreed to award $2,500 for loss of vision, but traded votes to award $1,500 for disfigurement and $2,500 for loss of vision. Lynch, however, claimed that initially ten jurors had agreed on $1,500 for loss of vision, and eight agreed on $2,500 for disfigurement, but ultimately decided to switch these amounts. Cline merely remembered that the jurors "traded off" on these answers.

Frederick also stated that during the jury's discussion of damages, Maxwell told other jurors that "there is too much of this going on," which he took to mean the filing of lawsuits. He said that she "held up a document which showed the name of Wal-Mart and said something to the effect that the plaintiff had probably already gotten a big settlement from Wal-Mart and did not need any more money out of this case." Frederick and Lynch additionally testified that during jury room deliberations Maxwell speculated whether Jackson had been drinking alcoholic beverages when the accident occurred. Finally, all three juror affidavits claim that Maxwell strongly argued against Jackson's position throughout the jury room deliberations.

The trial court overruled Jackson's motion for a new trial explaining its ruling in a letter to the parties. The court advised it would not sustain Jackson's jury misconduct arguments because the jurors' affidavits and testimony all pertained to jury deliberations and were therefore incompetent. The court also rejected Jackson's complaints about undisclosed juror bias. Acknowledging that the same evidence offered to show jury misconduct "would certainly support a conclusion that the juror in question was biased against product liability suits" the court did not resolve whether Maxwell was in fact biased. Instead, the court concluded that Jackson's attorney's voir dire questioning of Maxwell was not specific enough to show she purposefully concealed any bias. Jackson did not request the trial court to make any fact findings about any of these issues.

A divided court of appeals reversed the trial court's judgment and remanded the case for a new trial. The court expressed its concern about "the ever increasing lack of veracity of jurors on voir dire...." The court held that because Rule 327(b) denied Jackson the only evidence available to prove misconduct, it denied him his right to a fair and impartial trial. It concluded that the evidence established Maxwell's misconduct, and that the misconduct was material and caused harm.

The Texas Supreme Court focused on whether, and to what extent, the jurors' affidavits and testimony are admissible to show juror misconduct such as undisclosed bias. The court recognized several other courts and commentators that had identified several policy reasons why losing parties should not be allowed to conduct unfettered investigations into the jury's deliberations to try to prove such allegations, in essence putting the jury on trial. The court felt that jury deliberations must be kept private to encourage jurors to candidly discuss the case. The court recognized that a verdict is a collaborative effort requiring individuals from different backgrounds to reach a consensus. The court felt that a juror should feel free to raise and consider an unpopular viewpoint and that to discharge their duties effectively, jurors must be able to discuss the evidence and issues without fear that their deliberations will later be held up to public scrutiny.

Second, the court recognized the need to protect jurors from post-trial harassment or tampering:

> The losing party has every incentive to try to get jurors to testify to defects in their deliberations. The winning party would likewise want to investigate in order to protect the judgment. Jury service will be less attractive if the litigants can harass a juror after trial, call a juror to testify about jury deliberations, and make juror deliberations public.

Third, the court noted that a disgruntled juror whose view did not prevail in the jury room would have an avenue for vindication by overturning the verdict–of concern especially in civil trials in which the verdict may be less than unanimous.

Fourth the court noted the need for finality. “Litigation must end at some point if the public is to have any confidence in judgments.” *Golden Eagle Archery, Inc.,* 24 S.W.3d at 368-69

The court also examined if, and to what extent, the rules bared the evidence Jackson offered. Golden Eagle argued that Rule 327(b) precludes proof of all jury misconduct except misconduct resulting from outside influences. The court noted that both Rule 327(b) and Rule 606(b) state that jurors may not testify about statements or matters occurring during deliberations, but they may testify about outside influences. The court identified a number of cases and commentators that have concluded that the Texas rules forbid all proof of jury misconduct unless it involves outside influences. Many of these cases rely on a statement in *Weaver v. Westchester Fire Insurance Company:* “[A] motion for new trial based on jury misconduct must be supported by a juror's affidavit alleging "outside influences" were brought to bear upon the jury.” 739 S.W.2d 23, 24 (Tex.1987). The court justified its statement in *Weaver* as not overly broad “because the rules' limitations on affidavits and testimony as grounds for a new trial expressly do not apply to non-jurors.” The court then recognized that a court may admit competent evidence of juror misconduct from any other source. *See, e.g., Mayo v. State,* 708 S.W.2d 854, 856 (Tex.Crim.App.1986) (considering testimony of witness contacted by juror); *Fillinger v. Fuller,* 746 S.W.2d 506, 508 (Tex.App.--Texarkana 1988, no writ) (holding that rules do not

require that affidavits be from jurors only); *Goode*, *supra,* but found that there was no competent non-juror evidence of misconduct in the case at bar. In this regard, the court found that Jackson's attorney's affidavit related in part to statements made in open court during voir dire but that the remainder of the attorney's testimony was objected-to hearsay concerning what the jurors told him another juror said. *Citing Mitchell v. Southern Pac. Trans. Co.,* 955 S.W.2d 300, 322 (Tex.App.--San Antonio 1997, no writ) (holding non-juror's affidavit about what occurred in jury deliberations was hearsay); *Clancy v. Zale Corp.,* 705 S.W.2d 820, 828 (Tex.App.--Dallas 1986, writ ref'd n.r.e.); *Tenngasco Gas Gathering Co. v. Fischer,* 624 S.W.2d 301, 305 (Tex.App.-- Corpus Christi 1981, writ ref'd n.r.e.).

The court held that Rules 327(b) and 606(b) did not bar Frederick's testimony about his conversation with Maxwell during a trial break. However, because that evidence did not conclusively establish that Maxwell prevaricated or concealed bias during voir dire, the Court did not agree that the trial court abused its discretion in failing to grant a new trial. *Id.* at 372.

As to whether a new trial was warranted, the Court examined juror Frederick's accounts of a casual conversation with Maxwell and the notion that they established that she prevaricated on voir dire and concealed her bias. Frederick elaborated on this incident as a witness called by Jackson at the hearing on the motion:

> Q I believe [your affidavit refers] to something that took place while the case was still being tried; is that correct?
> A Yes, sir, it is.
> Q Did that take place on a break of the jury?
> A Yes, sir, right outside the courtroom.
> Q Now, this this--I believe that you told me that you and a female juror both like to drink coffee and you-all were the only coffee drinkers?
> A Yes, sir.
> Q Is that right?
> A That's correct.
> Q And during this break this female juror made some comments; is that right?
> A That's correct, yes.
> Q And what was it she said?
> A It was during or right after the witness Mulaney, right after his testimony. She made the comment about it being boring. She said, "Of course, the whole thing is boring." And she said, "I don't believe in lawsuits like this." And I said, "Well," I said, "I think you was asked that during voir dire." And she didn't make any comment after that. She didn't answer me one way or the other.
> Q Did she in the same conversation mention to you that she had served on a wrongful death jury?
> A Yes, she did. She said she had--that someone was killed in an auto accident and the family had sued and she was on the jury and she said, "We didn't award them anything because I don't believe in things like that. I don't believe in lawsuits like that."
> Q And you reminded her that she'd been asked that on voir dire?
> A Right, right, I reminded her. I said--I think Mr. Smith had asked that very question on voir dire, if anybody did not believe in it to say so; and she made no comment about that.
> Q Now, there was one other statement in this affidavit attributed to this juror and that is, "We are the ones that end up paying for it"?
> A Yes, sir, she said that.
> Q She made that comment at the same time?
> A Right.

Jackson contends that Frederick's testimony established that Maxwell prevaricated on voir dire. When Jackson's attorney asked the panel about prior jury service, Maxwell volunteered she had served on juries in a criminal matter and a civil matter involving a death. The attorney asked if the jury had reached a verdict in the civil case, and Maxwell answered "no". The attorney did not ask Maxwell any further questions.

The court concluded that Frederick's affidavit and testimony did not conclusively establish that Maxwell failed to answer Jackson's voir dire questions truthfully. The Court reasoned that the other party to the conversation, Maxwell, did not testify at the new trial hearing nor did the record indicate that anyone called her to testify. The Court found that it was at least possible that Maxwell misunderstood the voir dire question about whether the jury had reached a verdict in the wrongful death case and thought it meant whether the jury had awarded any damages in the case. The Court found no other evidence in the record about this conversation or the facts of Maxwell's prior jury service. The court held

that the evidence did not conclusively establish that Maxwell intentionally answered incorrectly. *Golden Eagle Archery, Inc.,* 24 S.W.3d at 372-373.

Jackson also contended that Frederick's testimony demonstrated that Maxwell concealed bias during voir dire. The Court found that if, as Frederick testified, Maxwell said that she did not believe in "things like that" or "lawsuits like that" or in awarding money in "stuff like that" or "things like that", all referring to the wrongful death action, or that she did not believe in "lawsuits like this", referring to the present case, did she mean lawsuits that she considered to be lacking in merit or all personal injury actions? The court found that the latter was a reasonable inference, but so was the former. The court found Frederick's testimony, if credible, was inconclusive.

> But the trial court may not have considered Frederick's testimony to have been credible. It was certainly hearsay, and while no objection was made to its admission to preclude the trial court from considering it, the trial court was nevertheless free on its own to disregard the testimony.

Id. at 373.

The Court concluded that the evidence about discussions prior to formal deliberations does not establish jury misconduct in this case, and Rules 606(b) and 327(b) prohibit considering the testimony about matters and statements occurring in the course of the jury's formal deliberations. *Id.* Lastly, the Court concluded that Rules 327(b) and 606(b) do not deprive the litigants of a fair trial under the Texas Constitution, nor do they fail to afford litigants due process. *Id.* at 375. It found that the rules were designed to balance concerns about the threat of jury misconduct with the threat from post-verdict juror investigation and impeachment of verdicts. *Id*.

In summary, the Court held that the trial court did not abuse its discretion by denying a new trial on grounds of jury misconduct because Jackson did not present competent evidence. Accordingly, the Court reversed the judgment of the court of appeals and remanded the case to that court to consider Jackson's other issues that it did not reach. Justice HECHT filed a concurring opinion, in which Justice OWEN joined. Justice ABBOTT filed a concurring opinion.

Peña-Rodriguez v. Colorado

In *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855, 197 L. Ed. 2d 107 (2017), the Supreme Court, in a 5-4 decision, chipped away at the "no-impeachment rule" of Fed.Rules Evid.Rule 606(b)(same as TRE 606(b)). This appeal followed a Colorado jury's conviction of Peña–Rodriguez of harassment and unlawful sexual contact. Following the discharge of the jury, two jurors told defense counsel that, during deliberations, Juror H.C. had expressed anti-Hispanic bias toward petitioner and petitioner's alibi witness. Counsel, with the trial court's supervision, obtained affidavits from the two jurors describing a number of biased statements by H.C. The trial court acknowledged H.C.'s apparent bias but denied petitioner's motion for a new trial on the ground that Colorado Rule of Evidence 606(b) generally prohibits a juror from testifying as to statements made during deliberations in a proceeding inquiring into the validity of the verdict. The Colorado Court of Appeals affirmed, agreeing that H.C.'s alleged statements did not fall within an exception to Rule 606(b). The Colorado Supreme Court also affirmed, relying on *Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90, and *Warger v. Shauers*, 574 U.S. ——, 135 S.Ct. 521, 190 L.Ed.2d 422, both of which rejected constitutional challenges to the federal no-impeachment rule as applied to evidence of juror misconduct or bias.

Justice Kennedy explores the history of the no-impeachment rule, and acknowledges its importance. He notes that at least 16 jurisdictions have recognized an exception for juror testimony about racial bias in deliberations and that three Federal Courts of Appeals have also held or suggested there is a constitutional exception for evidence of racial bias. He finds that this case "lies at the intersection of the Court's decisions endorsing the no-impeachment rule and those seeking to eliminate racial bias in the jury system. Those lines of precedent need not conflict. Racial bias, unlike the behavior in McDonald, Tanner, or Warger, implicates unique historical, constitutional, and institutional concerns and, if left unaddressed, would risk systemic injury to the administration of justice. It is also distinct in a pragmatic sense, for the Tanner safeguards may be less effective in rooting out racial bias. But while all forms of improper bias pose challenges to the trial process, there is a sound basis to treat racial bias with added precaution. A constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after a verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right."

The Court held that where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

The Court limits juror impeachment to those cases with a threshold showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether the threshold showing has been satisfied is committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion. ALITO, J., filed a dissenting opinion, in which ROBERTS, C.J., and THOMAS, J., joined.

Ford Motor Co. v. Castillo

In *Ford Motor Co. v. Castillo*, 279 S.W.3d 656 (Tex. 2009), Castillo brought a products liability case against Ford Motor Company in Cameron County. After the trial, the jury began deliberating on a Friday, broke for the weekend, then continued deliberating on the following Monday and, after a recess on Tuesday, resumed deliberations on Wednesday. That morning, the presiding juror sent a note to the court asking, "What is the maximum amount that can be awarded?" The parties promptly settled.

After the jurors were released, some of them, but not the presiding juror, voluntarily talked to Ford. Ford learned that the jurors had decided the first liability question in Ford's favor concerning roof strength and were deliberating the second liability question when the presiding juror sent the note. Some of the jurors were unaware of the presiding juror's note and the note was sent over the objection of some other jurors.

Ford filed a motion to delay settlement and sought discovery on the issue of outside influence in drafting the note, supported by the affidavits of four jurors. The trial court denied Ford's motion but encouraged Ford to conduct its own investigation. Castillo filed a motion to enforce the settlement agreement. Ford agreed to proceed with settlement but asked for two weeks. Before two weeks elapsed, Ford filed a motion to set aside the settlement agreement on the ground it had withdrawn its consent to settlement. Ford asked the trial court to set aside the settlement agreement, based on mutual mistake of the understanding that the note was on behalf of the entire jury, and grant a new trial or mistrial based on juror misconduct. Included in Ford's motion were transcripts of interviews with ten jurors. Castillo objected to the transcripts based on hearsay. The trial court denied Ford's motion and sustained Castillo's hearsay objections. Castillo filed a motion for summary judgment for breach of contract. Ford responded that Castillo first needed to plead breach of contract and that granting summary judgment without allowing Ford to conduct discovery would deny all of its rights as a litigant. The trial court granted summary judgment in favor of Castillo. The court of appeals affirmed, holding that Ford waived any error regarding both the trial court's denial of its motion to delay settlement and the discovery request in its response to Castillo's summary-judgment motion. The court of appeals found that even if Ford had not waived error, any error would be harmless because Ford gathered virtually all the evidence it sought to discover and failed to identify any evidence it would have uncovered through discovery procedures.

Concerning the preservation of error claim, the supreme court concluded that Ford's presentation and the trial court's response were sufficient to preserve error. The trial court understood Ford's request and refused to grant it: the court told Ford that it refused to disturb the jurors and "offered Ford nothing more than encouragement in conducting an informal investigation." Without formal discovery, Ford was unable to obtain sworn testimony of the jurors and unable to compel the deposition of the presiding juror. The court of appeals had concluded waiver also because in response to the motion for summary judgment Ford did not file an affidavit explaining the need of further discovery or a verified motion for continuance. The supreme court found cases requiring such a filing distinguishable because in those cases a party was seeking time to conduct additional discovery after discovery had already been conducted.

The supreme court concluded that Ford was entitled to conduct discovery and develop its defenses regarding Castillo's breach of contract claim as it would have been allowed to do for any breach of contract claim. Because the trial court denied discovery, Ford was unable to develop facts relevant to the presentation of its defense and therefore the trial court abused its discretion by denying Ford the right to conduct discovery on the breach of settlement agreement claim.

Castillo questioned whether Ford would be entitled to discovery of jury deliberations under Texas Rule of Civil Procedure 327(b) (new trial for jury misconduct) and Texas Rule of Evidence 606 (competency of juror as a witness). The supreme court found that although discovery involving jurors will not be appropriate in most cases, in this case there was more than just a suspicion that something suspect occurred; there was some circumstantial evidence that it did.

The supreme court concluded that the lack of direct evidence about whether the presiding juror was subjected to outside influence probably prevented Ford from properly presenting its case on appeal. Accordingly, the trial court's abuse of discretion in denying discovery was harmful. The court of appeals' judgment was reversed and the case was remanded to the trial court.

Ford Motor Co. v. Castillo

In *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014), the court considered the appeal following a jury trial on the validity of the settlement agreement following remand from the 2009 case cited above. A new jury heard testimony from, among others, Tassie (Ford's managing counsel), Cantu (Plaintiffs' counsel), Rodriguez (Ford's trial counsel), and most of the jurors from the products-liability trial, including Cortez (the foreperson that delivered the note to the court asking, "What is the maximum amount that can be awarded?" inducing the parties to promptly settle). Several of the jurors testified that Cortez kept trying to bring up the damages issue on her own, and sent the note against their specific requests that she not do so. These jurors also testified that all other notes were sent by unanimous agreement. One juror testified that on the morning the case settled—after the day-long recess caused by Cortez's absence—Cortez arrived in a "very happy, very upbeat" mood, and told the other jurors, "This will be settled today." Unlike the other jurors who testified, Cortez could not recall any of the pertinent details of the trial or the jury deliberations. Notably, Cortez could not recall why she sent the note in question, why exactly she did not show up for the second full day of deliberations, or why she had left the courtroom so quickly after the settlement was announced. Cortez also could not recall her cell phone number or carrier at the time, but signed a release permitting Ford to search for all cell-phone records registered to Cortez during the time of the products-liability trial, using her name, address, and date of birth. After denying that she spoke with any attorneys during the trial, Cortez was asked to explain a phone call on September 21, 2004 to the purported private cell phone of attorney and State Representative Jim Solis. Initially, Cortez explained that her husband probably made the call. When other evidence made that explanation unlikely, she speculated that the phone records were those of another Cynthia Cortez.

After hearing all of the evidence, the jury found the settlement agreement invalid because of fraudulent inducement and mutual mistake. The trial court rendered a take-nothing judgment and Castillo appealed. The court of appeals reversed the judgment, concluding that the evidence was legally insufficient to support a jury verdict. 444 S.W.3d at 621.

The supreme court performed an in depth analysis of the legally sufficiency of the jury's verdict (which is beyond the scope of this paper) finding the evidence was legally sufficient to support the jury's verdict. Therefore, they granted the petition for review and, without hearing oral argument, reversed the court of appeals' judgment and remanded to the court of appeals for review of Castillo's factual sufficiency challenge.

In *Castillo v. Ford Motor Co.*, 13-10-00232-CV, 2015 WL 7023804, at *5 (Tex. App.—Corpus Christi Nov. 12, 2015, no pet.), the court found the evidence was factually sufficient to support the jury's finding that Ford proved its defense of fraudulent inducement.

Merck & Co., Inc. v. Garza

In *Merck & Co., Inc. v. Garza*, 277 S.W.3d 430 (Tex. App.-San Antonio 2008, rev'd on other grounds 347 S.W.3d 256 (Tex. 2011)), a Vioxx case, following the jury's verdict in favor of Mrs. Garza, Merck discovered that one of the jurors, Jose Manuel Rios, had received loans of money from Mrs. Garza. Mrs. Garza made seven interest-free loans to Rios, totaling $12,700, over a six-year period beginning in July 2000. Voir dire in the underlying lawsuit commenced on January 24, 2006. The last loan, for $2,500, was made in July 2005, just six months before trial. Also, following the verdict, Merck discovered several calls from Rios's cell phone to Mrs. Garza's telephone: one within days of Rios's receipt of the jury summons; another the night before jury selection; and four calls on the day after Merck filed a post-trial motion to take Rios's deposition. Rios voted with the 10-2 majority in rendering a verdict against Merck.

The court found that Rios had a personal financial relationship with Mrs. Garza, but when asked in voir dire how he knew her, Rios merely replied "from school." Also, Mrs. Garza's eve of trial communications with either Rios or his wife were not revealed to Merck. The court found that this was clearly a relationship that was more than simply "from school." The court noted that litigants are entitled to an unbiased jury. *Citing*

Kennard v. Kennard, 26 S.W.2d 336, 337 (Tex. Civ. App.-Waco 1930, writ ref'd). The court held that Rios's less than forthright answer left a false impression about how he knew Mrs. Garza and the extent of their relationship. The court concluded Rios's failure to disclose his financial relationship with Mrs. Garza amounted to misconduct. It stated: "Even assuming Rios's silence regarding his financial relationship with Mrs. Garza was innocent, it is impossible to say that injury to the defendant did not result from it." *Quoting Gulf, C. & S.F. Ry. Co. v. Matthews*, 28 Tex.Civ.App. 92, 66 S.W. 588, 592 (Dallas, 1902). The court also found harm because Rios voted with the majority on the 10-2 verdict. *Citing Tex. Milk Prod. Co. v. Birtcher*, 138 Tex. 178, 157 S.W.2d 633, 635 (1941) ("[T]he mind of the juror, without intending any harm, might well have been unconsciously turned in the direction of those who had thus consistently favored him upon the three occasions in question."). The court concluded the trial court erred in denying Merck's motion for new trial and reversed.

In re Whataburger Restaurants LP

In *In re Whataburger Restaurants LP*, 429 S.W.3d 597, 598 (Tex. 2014), a premises liability suit that Jose Acuna and others filed against Whataburger for injuries sustained in a fight outside of its restaurant in El Paso, the jury selection process included a written questionnaire that inquired whether the potential jurors had "ever been a party to a lawsuit." Four of seventy-five potential jurors disclosed that they had previously been defendants in a lawsuit. Acuna's attorney did not ask any of these four jurors questions about their prior lawsuits and did not challenge or exercise peremptory strikes against them. Whataburger exercised strikes against two of them. One of the remaining two, Albert Villalva, was seated on the jury, and neither party questioned, challenged, or struck him even though he had disclosed that he had been a defendant in a prior lawsuit. The jury rendered a 10–2 verdict in favor of Whataburger, and the trial court entered a final take-nothing judgment based on the jury's verdict. After investigating the jurors, Acuna filed a motion for new trial in which he asserted that one of the ten majority jurors, Georgina Chavez, had committed misconduct by failing to disclose in her questionnaire that she had been a defendant in two prior credit card collection suits and a bankruptcy action. During the hearing on the motion for new trial, Chavez testified that she mistakenly failed to disclose the suits because she never went before a judge in those cases, that her failure to disclose the suits was "an honest mistake," and that the suits simply slipped her mind. She also testified that, if she had understood the questionnaire, she would have disclosed her involvement in those suits. The trial court found that Chavez did not complete her juror questionnaire correctly, that the mistake was material, and that it resulted in probable injury. The court granted Acuna's motion for new trial on the ground that Acuna was denied the opportunity to question or strike Chavez in light of the missing information.

The supreme court noted that to warrant a new trial for jury misconduct, the movant must establish (1) that the misconduct occurred, (2) it was material, and (3) probably caused injury. In an effort to establish harm, Acuna's attorney testified that, if Chavez had disclosed that she had been a defendant in prior lawsuits, he would have questioned her about those suits and would have struck her as a juror. The court noted that generally, such testimony about what a person "would have" done or what "would have" happened under different circumstances is speculative and conclusory in the absence of some evidentiary support. The court also observed that although four jurors disclosed that they had each been a defendant in a prior lawsuit, Acuna's attorney did not question, challenge, or strike any of them, and one of them was seated on the jury and joined in the majority verdict. Because the record contained no competent evidence that Chavez's nondisclosure resulted in probable injury, and the only competent evidence supports that it did not, the court held the trial court abused its discretion in granting a new trial.

Jefferson v. Helen Fuller & Assoc. Health, Inc.

In *Jefferson v. Helen Fuller & Associates Health, Inc.*, 01-11-00199-CV, 2012 WL 2357431 (Tex. App.--Hous. [1st Dist.] June 21, 2012, pet. denied) juror Grant listed his occupation on a questionnaire as "financial services." During voir dire, Jefferson's counsel asked Grant, "[Y]ou work for a—financial services?" Grant responded, "I'm a financial adviser." Counsel did not ask any further questions on this subject, and the voir dire record does not indicate that Grant was asked whether he was an insurance agent or involved with the insurance industry. Jefferson averred that a post-trial investigation revealed that Grant owned an insurance agency and was affiliated with several insurance companies. She argued that Grant "had a direct or indirect interest in the subject matter of this case" and concealed his true occupation

The Court noted that for false answers to voir dire questions to entitle a party to a new trial, the concealment must be in response to a specific and direct question calling for disclosure. *Id.* To establish jury misconduct on grounds that the juror concealed information during voir dire, a party must obtain proof of concealment from a source other than jury deliberations.

Citing Kiefer v. Cont 'l Airlines, Inc., 10 S.W.3d 34, 40 (Tex.App.-Houston [14th Dist.] 1999, pet. denied).

The Court agreed with Appellee that the term "financial services", according to the IRS, includes life insurance, casualty insurance, and other insurance and therefore, the juror did not conceal his occupation.

The Court also held that Jefferson waived his complaint of observing Fuller and some of her family sitting near jurors at the cafeteria during a lunch break at trial, presumably within earshot, and Juror Grant talking to another juror before deliberations, and rolling his eyes and shaking his head during testimony. The Court quoted *Alamo Carriage Serv., Inc. v. City of San Antonio*, 768 S.W.2d 937, 943 (Tex.App.-San Antonio 1989, no writ):

> [Plaintiffs] had three full days to voice their objections [to the alleged jury misconduct] before the verdict was returned. We believe that it would be wantonly unfair to allow a litigant to take his chances with the jury and later complain of misconduct when he is unhappy with the result. A party may not speculate on the result of a verdict and then for the first time complain of jury misconduct.

U.S. v. Barraza

In *U.S. v. Barraza*, 655 F.3d 375 (5th Cir. (Tex.) 2011, *cert. denied*, 132 S. Ct. 1590, 182 L. Ed. 2d 203 (U.S. 2012), Barraza appealed his conviction in the United States District Court for the Western District of Texas, of wire fraud and making false statements in connection with his use of his position as a state judge to obtain money and sexual favors in exchange for assisting a state criminal defendant. Diana Rivas Valencia was facing drug charges in El Paso state court. Rivas was arrested in September 2008, and in December, Rivas conveyed to a friend that she was unhappy with her current attorney and wished to speak with Barraza. Later that day, Barraza went to the jail to visit Rivas. At the time, Barraza had won election to the state bench but had not yet been sworn in. Rivas testified that Barraza promised to help her "get rid of the charges" once he assumed office as a state judge. In exchange, Barraza indicated he wanted money and a "buffet" of women.

By mid-January 2009, the FBI had recruited Rivas's sister, Sarait, and a friend to assist with their investigation. Sarait and an undercover FBI agent, posing as a woman who would provide sexual favors, met with Barraza on January 21. There, Barraza stated that he would try to move Rivas's case to his court and that he wished to replace Rivas's court-appointed attorney with someone he trusted. On January 23, Sarait met Barraza at the courthouse and paid him $1,300. The same day, a transfer order appeared, trying to transfer Rivas's case to Barraza's courtroom, but the court coordinator stopped the transfer after discovering that Barraza had previously represented Rivas.

Despite the failed transfer, Barraza continued seeking money and sex from Rivas's family and friends in exchange for his assistance. In February 2009, Barraza asked Sarait for the FBI undercover agent's email address and began soliciting her. On February 24, Sarait and the undercover agent met with Barraza, who detailed the failed transfer order. Barraza stated that he was trying to find other ways to remove the current judge in Rivas's case, but he would need more money. Three days later, Sarait met Barraza at the courthouse and paid him an additional $3,800.

The FBI interviewed Barraza in March 2009, and he denied speaking with Rivas's family after becoming a judge. He was arrested on April 2 and indicted on August 12, charged with two counts of wire fraud and the deprivation of honest services, one count of mail fraud, and one count of making a false statement. In February 2010, a jury found Barraza guilty of two counts of wire fraud and honest services fraud and one count of making a false statement. Barraza was sentenced to an above-guidelines sentence of 60 months imprisonment followed by three years of supervised release.

In a motion for new trial, Barraza asserted a juror made inappropriate remarks during deliberations. The morning of the second day of jury deliberations, the court security officer informed the court that Juror 3 expressed a concern to him regarding inappropriate remarks made by Juror 1. The court interviewed Juror 3 on the record who said that Juror 1 was "all for" a guilty verdict and told the other jurors that men with power always make sexual advances. Juror 1 also allegedly relayed an experience she had at her place of employment, where she was sexually harassed. These comments were very troubling to Juror 3, but the court told her to return to deliberations and continue. Following a discussion with counsel, the court decided to excuse Juror 1, bring in an alternate, and instruct the jurors to restart deliberations from the beginning. However, before this decision could be acted upon, the jury reached a verdict. Defense counsel moved for a mistrial, which was denied.

The Court noted that under Federal Rules of Evidence Rule 606(b), if Juror 1's sexual harassment stories were "extraneous prejudicial information [that] was improperly brought to the jury's attention," or an "outside influence [that] was improperly brought to bear upon any juror," the jurors could testify during an inquiry

into the verdict. If, however, the statements were "emotions influencing the juror" or a part of "the juror's mental processes" then the jurors could not testify about their deliberations. The Court found that the juror's statements fell into the latter category, stating "We cannot expunge from jury deliberations the subjective opinions of jurors, their attitudinal expositions, or their philosophies. Juror 1's statements were inappropriate, but they are not admissible to upset the verdict."

The Court cited *United States v. Duzac*, 622 F.2d 911, 913 (5th Cir.1980) where they observed: "there is no evidence that any external influence was brought to bear on members of the jury. The prejudice complained of is alleged to be the product of personal experiences unrelated to this litigation. The proper time to discover such prejudices was when the jury is being selected.... Although the jury is obligated to decide the case solely on the evidence, its verdict may not be disturbed if it is later learned that personal prejudices were not put aside during deliberations. Both here and in *Duzac*, the juror communicated a generalized prejudice, but none of the statements related specifically to the defendant or the situation at trial. Rule 606(b) would bar any testimony on the jury deliberations, and we affirm the district court's denial of the motion for new trial."

McQuarrie v. State

In *McQuarrie v. State*, 380 S.W.3d 145 (Tex. Crim. App. 2012), Appellant offered the affidavits of two jurors who affirmed that a third juror had researched the effects of date rape drugs when the jury was released for the night and that she had relayed that information to the rest of the jury the next morning. They said that the third juror informed the jury that the date rape drugs would last up to 72 hours and that the side effects would last for up to a week. One of the two jurors stated that he was still undecided when they returned for deliberations on the second day, and the information provided by the third juror changed his mind. He also stated that the information had changed the mind of the third juror. The trial court determined that the affidavits did not show an outside influence and refused to consider them pursuant to Rule 606(b). Accordingly, the trial court denied the motion for new trial.

The Court of Criminal Appeals held that the internet research constituted an "outside influence." As a result, at the hearing on the motion for new trial, Rule 606(b) would permit the court to question the jury, without delving into deliberations, and to determine whether the "outside influence" impacted the outcome of the case. This can be done by making an objective determination as to whether the outside influence likely resulted in injury to the complaining party—that is, by limiting the questions asked of the jurors to the nature of the unauthorized information or communication and then conducting an objective analysis to determine whether there is a reasonable possibility that it had a prejudicial effect on the "hypothetical average juror." The court held that the trial court abused its discretion in excluding, pursuant to Rule 606(b), the jurors' testimony and affidavits offered by Appellant at the hearing on his motion for new trial, and the court of appeals erred to hold otherwise.

Colyer v. State

In *Colyer v. State,* 428 S.W.3d 117, 127–30 (Tex. Crim. App. 2014), the court held that a radio report about a gathering storm and a telephone call from a doctor, though coming from outside the jury room and from a non-jury source, were not "outside influences" because they were not related to the trial in any manner. It did not matter that these may have caused the jury to hurry its verdict. The court noted that allowing normal personal pressures to qualify as "outside influences" would jeopardize the finality of virtually every verdict. It dismissed appellant's interpretation of outside influence by discussing the potential abuses, such as a juror who has second thoughts about his vote retroactively claiming that a personal pressure, such as his job, marriage, or children, made him apprehensive and eager to conclude the deliberations. Rule 606(b) explicitly prohibits post-verdict testimony about a juror's mental processes to impeach the verdict. Most jurors feel some type of normal internal, individual pressures throughout the entire trial.

Mata v. State

In *Mata v. State*, 517 S.W.3d 257, 267–69 (Tex. App.—Corpus Christi 2017, pet. ref'd), Mata contended that the trial court committed reversible error when, pursuant to Texas Rule of Evidence 606(b), it denied his motion for a new trial that was based on improper outside influences on the jury. See Tex. R. Evid. 606(b)(2)(A). Mata complained that he was denied his constitutional right to cross-examine a juror who "testified, essentially as an expert witness inside the jury room and without the hindrance of cross-examination or confrontation guaranteed by the Sixth Amendment to the Constitution." The State responded that Mata's claim failed because his motion for new trial challenged the internal, deliberative jury process and not outside influences on the jury.

After the trial court denied Mata's motion for new trial, Mata proceeded with an offer of proof. He called Diana Criselda Sanchez, a juror in this case, as his sole witness. Sanchez testified that although the jury reached a unanimous agreement as to punishment, "it was not completely agreed upon. It was [a] forced agreement." She explained that half of the jurors leaned toward probation and the other half considered some jail time. But, according to Sanchez, there was one juror who was "pretty adamant on a very lengthy time [in] prison." Sanchez also agreed that during jury deliberations she received personal examples from some of the jurors about how sex offenders re-offend. Sanchez testified that one juror who worked as a jail guard informed the others that "he worked with pedophiles and they keep repeating, so therefore they belong in jail." Sanchez also explained that another juror "mentioned that probation would not be an option because her husband had been [o]n probation and actually broke the law ... and therefore probation would probably not be an option for him either."

The court noted that under rule 606(b), an "outside influence" must originate from outside of the jury room and not from the jurors themselves. Coercive activity in the jury room during deliberations, such as that testified to by Sanchez, is not proof of an impermissible "outside influence" for purposes of showing jury misconduct pursuant to rule 606(b). And Sanchez's offer-of-proof testimony that some of the jurors had personal reasons, which they voiced, for determining punishment, does not constitute impermissible outside influence; so that testimony is also inadmissible. *Citing Soliz v. Saenz*, 779 S.W.2d 929, 932 (Tex. App.—Corpus Christi 1989, writ denied)(explaining that a juror's interjection of personal experience or expertise into the discussion does not constitute outside influence).

Even if the trial court fully credited the above-noted testimony from Mata's offer of proof and Sanchez's affidavits, one filed in support of Mata's motion for new trial and a second filed in support of his amended motion for new trial, the court had to then make a rule 606(b) analysis to determine if the two jurors' information about repeat offenders would qualify as "outside influences" before considering that testimony to impeach the verdict. In this case, the court concluded that neither the first juror's discussion about his work experience as a jail guard nor the second juror's information about her spouse being a felon and how the respective experiences impacted the jurors' positions on punishment qualified as an "outside influence." Therefore, under rule 606(b), the trial court was not permitted, much less required, to consider Sanchez's testimony or affidavits to impeach the verdict.

Balderas v. State

In *Balderas v. State*, 517 S.W.3d 756, 789–90 (Tex. Crim. App. 2016), reh'g dismissed (June 7, 2017), cert. denied, 137 S. Ct. 1207, 197 L. Ed. 2d 251 (2017), Balderas contended his brother's act of standing near the street and waving at a bus that carried the jurors from the courthouse to their hotel was an outside influence. He asserted that there is a reasonable probability that this incident had a prejudicial effect on the verdict because jurors who were questioned by the judge acknowledged that they were fearful as a result of this incident. He theorized that this fear motivated jurors who had doubts about his guilt to abandon their reservations in order to reach a verdict quickly "and escape the situation." In support of this theory, Balderas asserted that the jury reached a guilty verdict the morning following the incident after just two hours of deliberation, although the jury foreman had reported that the jury was deadlocked when deliberations ended the previous day.

The court held that Balderas's brother's conduct of waving and smirking at the jurors as their bus passed him on a public street did not constitute "contact ... about the matter pending before the jury" and that the conduct was not particularly threatening or intrusive, rebutting any presumption of harm. Both jurors questioned indicated that their feelings about the incident did not affect their deliberations at the guilt phase and would not affect their deliberations at the punishment phase.

Tate v. State

In *Tate v. State*, 414 S.W.3d 260 (Tex. App.—Houston [1st Dist.] 2013, no pet.), after a jury had convicted defendant and assessed punishment, the jury foreman sent the trial judge an e-mail, indicating that, prior to his selection as a juror and the trial court's admonishment not to conduct any research, he had executed a search of the Texas Department of Public Safety's Sex Offender Registry on his iPhone and discovered appellant's 1981 aggravated rape charge. The court, distinguishing *McQuarrie v. State*, 380 S.W.3d 145, 154 (Tex. Crim. App. 2012), noted the foreman was not a juror at the time he conducted the internet search—he was still a member of the venire. It observed that this was akin to a situation where a member of the venire panel had information relevant to the case—information acquired prior to being selected to serve on the jury—that was not discovered until after trial. Thus, it held, this case was more closely analogous to those dealing with the conduct of venire members and their obligation to disclose information when questioned during voir dire. However, the trial court asked if

anyone knew appellant or any of the trial attorneys. However, no one asked the venire panel if they had any prior information regarding the case or had conducted any research on appellant or the charges against him. Therefore, the foreman did not withhold this information, as he was never asked about it. Thus, the court held, appellant failed to establish that he exercised due diligence in questioning the venire and that the foreman withheld material information in spite of his due diligence, so his claim of juror misconduct failed.

Similar holding: Juror in murder prosecution did not engage in misconduct by doing research specific to case on his phone during voir dire, prior to being instructed not to do so, or in failing to inform court immediately that he had done do, where juror was not asked after conducting such research if he had any knowledge about case, and soon after being told not to conduct such searches, juror informed court he had done so. *Brooks v. State*, 420 S.W.3d 337 (Tex. App.—Texarkana 2014, no pet.).

Sypert v. State

In *Sypert v. State*, 196 S.W.3d 896 (Tex. App.–Texarkana 2006, pet. ref'd)(related proceeding at *Sypert v. State*, 2006 Tex. App. LEXIS 5931 (Tex. App.--Texarkana, 2006)(not designated for publication) a juror did not respond to a question about previous experience by family members with the criminal justice system. After the case was submitted to the jury, however, he wrote to the judge, saying that he had remembered that his brother had been robbed. The trial court denied a motion for mistrial.

The Texarkana Court found that the withheld information was material even though the temporal proximity between the crimes, 20 years, was remote, and while the juror was not himself the victim of the earlier robbery, both crimes involved aggravated robbery, and it was possible that the juror harbored a desire to inflict a greater punishment on defendant out of a need for transferred vengeance. The court held that the information was material to the chief issue, the appropriate punishment, and that the delayed revelation impacted defendant's Sixth Amendment right to an impartial jury. However, the court found that it was harmless under Tex. R. App. P. 44.2(a), given the temporal remoteness, the fact that the juror knew few details of what happened to that robber and was not the victim, the juror's testimony that the incident would not affect his fairness, defendant's waiver of further voir dire, and the absence of a claim that defendant might have exercised his peremptory strikes differently.

Barfield v. State

In *Barfield v. State*, No. 05-06-00609-CR, No. 05-06-00610-CR, 2007 Tex. App. LEXIS 1627 (Tex. App.–Dallas, 2007, no pet.)(not designated for publication) defendant argued that his motion for mistrial should have been granted because a juror was told by another prospective juror she thought defendant was registered on a sex offender website. In affirming the judgment, the court found that any presumption of harm under Tex. Code Crim. Proc. Ann. art. 36.22 (2006) was rebutted. The juror's conduct was passive, not active; she simply heard a statement made to her by another prospective juror. The court found that counsel was allowed to fully develop the facts, the juror was unambiguous in her testimony that the statement would not influence her and that she was fair and impartial. The court also noted that the complained-of event did not occur during the voir dire examination of the venire members, but rather after it had concluded; therefore, defense counsel was not prevented from exercising a challenge based on conduct that had not yet occurred. The court held that the record supported the trial court's implied finding that the juror's testimony rebutted any presumed harm.

Karr v. State

In *Karr v. State,* NO. 12-02-00247-CR, 2003 Tex. App. LEXIS 2197 (Tex. App.–Tyler 2003, pet. ref'd) (not designated for publication), the court noted that when a juror withholds material information in the voir dire process, the parties are denied the opportunity to intelligently exercise their challenges, thus hampering their selection of a disinterested and impartial jury. *Id.* (citing *Salazar v. State,* 562 S.W.2d 480, 482 (Tex. Crim. App. 1978, *overruled in part on other grounds by Sneed v. State,* 670 S.W.2d 262, 265 (Tex. Crim. App. 1984)). However, the court observed that counsel must be diligent in eliciting pertinent information from prospective jurors during voir dire in an effort to uncover potential prejudice or bias. *Id.* (citing *Gonzales v. State*, 3 S.W.3d 915, 917 (Tex. Crim. App. 1999)). The *Karr* Court noted that counsel has an obligation to ask questions calculated to bring out that information which might be said to indicate a juror's inability to be impartial, truthful, and the like. *Id.* "Unless defense counsel asks such questions, we must hold that the purportedly material information which a juror fails to disclose is not really 'withheld' so as to constitute misconduct which would warrant a reversal. Counsel must ask *specific* questions, not rely on broad ones, to satisfy this obligation." *Id.*

In *Karr*, Appellant argued that jurors withheld material information, were biased and that such circumstances affected the severity of his sentence. General questions were asked by defense counsel and the prosecutor regarding D.W.I.s but at least two jurors did not acknowledge that they had family members who had been in automobile accidents with drunken drivers. The court held that their affidavits, secured after the trial, did not indicate that either of them, as a result of such relationships, had any problem sitting on a jury for a D.W.I. case or felt that they could cause either party to be put at a disadvantage by serving on the jury. The court thus concluded that the trial court's determination as to whether these two jurors answered the voir dire questions inaccurately was, at the least, within the zone of reasonable disagreement.

The *Karr* Court also concluded that the severity of Appellant's sentence was not influenced by the fact that certain members of the jury had family members who had been in accidents with drunk drivers. To the contrary, the court relied on evidence that the statements of the two jurors in question had no effect on the outcome of the sentence imposed on Appellant. Further still, the court cited evidence that the male juror was intent on making the right decision, had prayed about the matter, and, in fact, believed the jury had made the right decision.

Lopez v. State

In *Lopez v. State*, 261 S.W.3d 103 (Tex. App.-San Antonio 2008, pet. ref'd), after the State rested and Lopez began presenting his case, a juror notified the court he was acquainted with the complaining witness. The court conducted a hearing during which both parties questioned the juror about his knowledge of the complainant and whether such knowledge would interfere with his duty as a juror. The juror stated that although the complainant's name was given during voir dire, the juror did not "know him by his name, just by face." After seeing the complainant and hearing his testimony, the juror realized the complainant was a friend of his girlfriend's stepfather. The juror said he did not immediately recognize the complainant, and it took him awhile after hearing the complainant testify to "put everything together." The juror had seen the complainant one time at a small social gathering, two or three years before trial, and the juror's girlfriend's stepfather had mentioned the complainant was his friend. Since that time, the juror has heard the stepfather mention the complainant from time to time, but not often, and the juror never heard any mention of an assault. The juror first equivocated as to whether he would give more credence to the complainant's testimony, but then stated he would "make [his] own opinion." The juror also said that while he might feel a little uncomfortable if he found the defendant not guilty, the juror said he probably would not mention anything about the trial to his girlfriend's family. The juror also equivocated about whether his girlfriend's stepfather's relationship with the complainant would influence his decision, stating, "I don't want it to," "I think it might," and "I don't know." Nevertheless, when the judge asked the juror whether the relationship between his girlfriend's family and the complainant would affect what the juror did in the case and whether he would feel pressured to find Lopez guilty, the juror answered, "No." And in response to the court's question as to whether his knowledge of the complainant would keep the juror from being fair, the juror responded: "It shouldn't. I didn't really know him. I just saw him. I mean, I-it took me a while to recognize him, ..." At the conclusion of the hearing, Lopez requested the court to "excuse" the juror "for cause" and to declare a mistrial. The trial judge denied both requests.

The San Antonio Court first discussed the law. After noting the standard of review as abuse of discretion, it noted that initially, the burden is on the parties to be diligent during voir dire and ask all pertinent questions to reveal potential bias. *Citing Gonzales v. State*, 3 S.W.3d 915, 917-18 (Tex. Crim. App. 1999). *See also McAfee v. State*, NO. 14-07-00078-CR, 2008 WL 4647376 (Tex.App.-Hous. [14th Dist.] 2008, no pet.); *Larsen v. State,* NO. 2-07-108-CR, 2-07-109-CR, 2-07-110-CR, 2008 WL 2553449 (Tex. App.-Fort Worth Jun 26, 2008, pet. ref'd); *Howard v. State*, NO. 01-07-00686-CR, 01-07-00687-CR, 01-07-00688-CR, 2008 WL 3876227 (Tex. App.-Hous. [1st Dist.] Aug 21, 2008, no pet.). "When, notwithstanding the complaining party's diligence during voir dire, a juror later discloses his knowledge of or relationship with a witness, the juror is considered to have withheld information during voir dire." *Quoting Franklin v. State*, 12 S.W.3d 473, 477 (Tex. Crim. App. 2000) ("Franklin I"). "When the withheld information is material, it is constitutional error to deny a motion for mistrial." *Quoting Franklin v. State*, 138 S.W.3d 351, 353-54, 356-57 (Tex. Crim. App. 2004) ("Franklin IV")(*See also State v. Gutierrez*, PD-0197-16, 2017 WL 4675344, at *6 (Tex. Crim. App. Oct. 18, 2017)). "When the withheld information is not material and the record does not show the appellant has been deprived of an impartial jury or denied a fair trial, the trial court's denial of a motion for mistrial is not error." *Citing Decker v. State*, 717 S.W.2d 903, 907-08 (Tex. Crim. App. 1986) (op. on reh'g).

The court noted that to determine materiality, it must evaluate whether the withheld information would likely reveal the juror harbored a bias or prejudice to

such a degree that the juror should have been excused from jury service, *citing Sypert v. State*, 196 S.W.3d 896, 900 (Tex. App.-Texarkana 2006, pet. ref'd). "[M]ere familiarity with a witness is not necessarily material information." *Franklin I*, 12 S.W.3d at 478. A potential juror's acquaintance with a witness is material only if the nature of the relationship reveals a potential for bias or prejudice on the part of the juror. *See id.; Decker*, 717 S.W.2d at 907. The fact the juror did not intentionally withhold the information "is largely irrelevant when considering the materiality of the information withheld." *Franklin II*, 138 S.W.3d at 355 (quoting *Franklin I*, 12 S.W.3d at 478).

In applying the law, the court addressed the State's contention that Lopez waived this point of error because he did not meet his burden to ask questions sufficient to uncover the juror's potential bias. During voir dire, Lopez asked whether anyone knew a person with the complainant's name and whether anyone knew a person with the complainant's name who might be associated with a robbery case. None of the panel members responded affirmatively. The State argued that because the complainant's name is a common one, Lopez was required to provide more detailed information, such as the complainant is confined to a wheelchair and sells merchandise on the street. The San Antonio court disagreed, noting that the juror who ultimately recognized the complainant testified he did not know the complainant by name and that it took "a while" after the complainant testified for him to "put it together." It found that it would be pure speculation to hold that disclosure of those additional facts during voir dire would have caused the juror to connect the complaint's name with a friend of his girlfriend's stepfather, whom the juror had seen one time several years earlier. The court held that Lopez did not fail to exercise diligence in voir dire and did not waive his complaint.

The court then addressed whether the juror withheld material information, i.e., whether the relationship between the juror and the complainant had a potential for demonstrating bias or prejudice on the part of the juror against Lopez, *citing Decker v. State*, 717 S.W.2d 903, 907-08 (Tex. Crim. App.1986) (op. on reh'g); *Santacruz v. State*, 963 S.W.2d 194, 197 (Tex. App.-Amarillo 1998, pet. ref'd). In *Decker*, the Texas Court of Criminal Appeals addressed the issue of when a juror's mere acquaintance with a witness is material information in the context of voir dire. 717 S.W.2d at 907. Decker involved a juror who did not respond when asked in voir dire whether anyone knew the complaining witness, who was identified by name. *Id*. After the jury was sworn, one of the jurors notified the court he recognized the complainant. *Id*. The juror testified he did not know the complaining witness by name, but recognized him as a co-worker. *Id*. at 906. They had worked together as welders on the same job site for about nine months before the trial. *Id*. The juror testified he met the complainant seven or eight times during that period, but they were not friends and had never socialized together. The court concluded there was no showing the relationship between the juror and complaining witness had any potential for bias or prejudice on the part of the juror, and therefore the withheld information was not material. *Id*. at 907.

The court found that the facts in the case at bar demonstrated less potential for bias than those in *Decker*. There has never been any relationship between the juror and the complainant, the juror saw the complainant only once, briefly, several years earlier, and the juror did not recognize the complainant's name and did not initially recognize him in person. The complainant was a friend of the juror's girlfriend's stepfather. The record did not demonstrate the juror's relationship with the stepfather would potentially cause the juror to be biased or prejudiced in favor of the State or against Lopez. Lastly, the court noted the juror had never heard any mention of the incident on which the charges against Lopez were based. The court held that the withheld information did not suggest any potential for bias or prejudice and was not material. Citing *Decker*, 717 S.W.2d at 903; *Brown v. State*, 183 S.W.3d 728, 739-40 (Tex. App.-Houston [1st Dist.] 2005, pet. ref'd).

Lopez then argued the trial court nevertheless erred by failing to grant a mistrial because the record established the juror was biased as a matter of law. Lopez relied primarily on *Vaughn v. State*, 833 S.W.2d 180, 184 (Tex.App.-Dallas 1992, pet. ref'd), in which a juror notified the court after the jury was sworn that she knew the defendant from high school. Although the juror stated she did not know the defendant personally, had not socialized with him, and did not know his reputation in the community, she stated unequivocally that her knowledge of the defendant would preclude her from being fair and impartial. *Id.* at 185. The juror never indicated she could set aside her feelings about the defendant and be fair. *Id*. On appeal, the court held the juror's unequivocal statement established bias as a matter of law and the trial court should have granted a mistrial. *Id*.

In the case at bar, the court observed that the juror made no unequivocal statement indicating bias or prejudice. Although he initially equivocated about whether his girlfriend's stepfather's relationship with the complainant might affect his evaluation of the complainant's credibility, he ultimately stated he would rely on his own opinion to judge the witness's credibility

and the relationship would not influence what he did in the case. The juror stated he would handle the situation by simply not discussing his service as a juror with the stepfather. The court held that the record did not demonstrate the juror was biased as a matter of law and the record supported the trial court's implicit finding that the juror was not actually biased.

See also Peters v. State, NO. 07-01-0430-CR, 2002 Tex. App. LEXIS 7860 (Tex. App.–Amarillo 2002, pet. ref'd) (not designated for publication)(after the complainant's mother testified, a juror revealed to the court that she was acquainted with the witness. Motion for mistrial as a result of the juror's knowledge of the facts of the case because of that relationship denied–affirmed by COA).

Nelson v. State

In *Nelson v. State*, 129 S.W.3d 108 (Tex. Crim. App. 2004) the court considered the following remark from a juror after jury selection:

> I was not honest in swearing in this morning. When I was 17 I was convicted of misdemeanor theft. ... I got an hour in jail and a fine. ... I'm 61 years old, I was 17 then.

The court found that appellant waived the disqualification by waiting until after the verdict was entered. It found that appellant actually did the opposite of raising the issue by telling the court that he had no objection to the disqualified juror. The Court of Criminal Appeals reversed stating: "We cannot hold, as the court of appeals did, that the defendant's failure to raise the issue was of no consequence so long as someone raised it. His failure to raise the issue means this judgment of conviction may not be reversed under Article 44.46." *Nelson*, 129 S.W.3d at 113.

Glover v. State

In *Glover v. State*, 110 S.W.3d 549, (Tex. App.–Waco 2003, pet. ref'd), the defendant claimed that, although he intentionally strangled the victim with a rope and hit him with a pipe, and knew he might thereby cause the death of the victim, he did not intend to kill the victim. Since the jury found defendant guilty of capital murder, there was an automatic sentence of life without the opportunity for a punishment phase to consider lesser punishments. In an offer of proof hearing, one of the jurors testified that, based on her mistaken belief about the necessary mental state, a belief formed during jury deliberations, she voted "guilty" when in fact she was not convinced beyond a reasonable doubt that defendant committed the murder "intentionally." On appeal, defendant asserted the application of Rule 606(b), which prevented the trial court from considering the juror's testimony, violated his constitutional due process rights under the United States Constitution. The appeals court disagreed. It held that the public policy considerations underlying Rule 606(b) formed the foundation of its decision. Some of these considerations included the protection of the jury's right to privacy and from harassment and the encouragement of free discussion in the jury room.

Chavarria v. Valley Transit Co., Inc.

In *Chavarria v. Valley Transit Co., Inc.*, 75 S.W.3d 107 (Tex. App.–San Antonio 2002, no pet.), the court addressed a juror's confessions to another juror regarding visiting the accident scene during the trial at a break from deliberations. The court found that jurors discussing the case on breaks during deliberations is the same as deliberations themselves. The court stated that while the facts of the present case are unique, the evidence of jury misconduct does require "delving into deliberations," and thus fits squarely within Texas Supreme Court's holding in *Golden Eagle Archery.*

Strauss v. Continental Airlines, Inc.

In *Strauss v. Continental Airlines, Inc.*, 67 S.W.3d 428 (Tex. App.–Houston [14th Dist.] 2002, no pet.) Strauss, the plaintiff (and also a Texas lawyer) violated the court's instructions by engaging in conversation with jurors during deliberations on matters material to the case. The trial court found that there was misconduct and it was material, but that Continental was not harmed. After the juror approached the bailiff regarding Strauss' comments to him, Strauss testified that he made a comment to the effect that it had been "a long four years." In his affidavit, the juror stated that Strauss made a remark to him about the juror being a welder like the witness, Walter Cauthen, which Strauss denied. Further, Strauss testified that this particular juror was the only juror he spoke to. Strauss denied joining in jurors' conversations in the hallway as Powell stated in her affidavit, and did not recall presiding juror Jett making any comment about a vacation, in conflict with her testimony. Strauss admitted pacing in the hallway outside the courtroom, but denied that he was attempting to influence the jurors. Because the court found the evidence to be conflicting, it did not disturb the trial

court's findings of material misconduct. The court next turned to the question of probable injury.

Citing *Texas Employers' Ins. Ass'n v. McCaslin,* 317 S.W.2d 916, 921 (1958), Continental acknowledged that it did not put forth evidence of probable injury, but asked the court to find that the misconduct at issue was so egregious that the court must presume harm. Further, Continental urged that the jurors' answers to questions regarding whether the outside influence affected their verdict could not be considered; rather, harm must be inferred from the acts themselves. *See McCaslin,* 317 S.W.2d at 919-20 (noting that it has repeatedly been held that a juror's mental processes may not be probed).

The *Strauss* court noted that Rule 327(a) places the burden on the complaining party to demonstrate material misconduct that probably caused injury. *Strauss*, 67 S.W.3d at 447. The court further noted that, to show probable injury, there must be some indication in the record that the alleged misconduct most likely caused a juror to vote differently on one or more issues vital to the judgment. *Id.* Nevertheless, Continental strenuously urged that this case falls within the exception articulated in *McCaslin,* in which the Texas Supreme Court held that, despite the requirements of Rule 327, there are some types of misconduct that are "so highly prejudicial and inimical to fairness" that the burden of proving probable injury is met, *prima facie* at least, by simply showing the improper act and nothing more. *Strauss*, 67 S.W.3d at 447; *see McCaslin,* 317 S.W.2d at 921. Additionally, Continental urged that harm must be inferred here because it is wholly inappropriate to ask jurors whether improper conduct affected them.

In *McCaslin,* the plaintiff went to the business office of one of the jurors during trial, engaged her in conversation, and then ended the conversation by saying "[b]e sure and do all you can to help me" or something similar. The court equated the plaintiff's action to jury tampering, and stated that the Texas Constitution's provision that the right of trial shall remain inviolate meant that a trial by a jury must be "unaffected by bribes, promises of reward, and improper requests to “do all you can to help me." *McCaslin,* 317 S.W.2d at 918. Consequently, the *McCaslin* court held that probable prejudice was shown as a matter of law based on the plaintiff's action. *Id.* at 921-22.

In *Strauss,* Continental contended that, like the conduct in *McCaslin,* Strauss's conduct amounted to jury tampering that could only be remedied by a new trial. In support of its contention, Continental relied heavily on the testimony and affidavit of the juror with which Strauss spoke. The court found, however, that even assuming Strauss made all of the comments the juror attributed to him, which was disputed, the juror did not vote in favor of the verdict. *Strauss*, 67 S.W.3d at 448. Therefore, no harm could have resulted to Continental from Strauss's contact with the juror. The court further found that the remaining conduct of which Continental complained--the disputed "vacation" comments and Strauss's pacing in the hallway near the jury–did not warrant overturning the trial judge's decision and ordering a new trial. *Id.* Given these facts, the court declined to find that Strauss's conduct, while deplorable for an attorney licensed in Texas, was so highly prejudicial and inimical to a fair trial that probable injury could be assumed. *Id.* Further, the court noted that it had carefully examined the record, but did not find any indication that the misconduct most likely caused a juror to vote differently on one or more issues vital to the judgment. Accordingly, the court found that the trial court did not err in denying Continental's motions for mistrial and new trial.