

Southern Methodist University

SMU Scholar

Faculty Journal Articles and Book Chapters

Faculty Scholarship

2010

No-Limit Texas Hold 'em, or, The Voir Dire in Dallas County

Jeffrey D. Kahn

Southern Methodist University, Dedman School of Law

Author ORCID Identifier:

 <https://orcid.org/0000-0002-8857-5647>

Recommended Citation

Jeffrey Kahn, No-Limit Texas Hold 'em, or, The Voir Dire in Dallas County, 13 Green Bag 2d 383 (2010)

This document is brought to you for free and open access by the Faculty Scholarship at SMU Scholar. It has been accepted for inclusion in Faculty Journal Articles and Book Chapters by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.



NO-LIMIT TEXAS HOLD ‘EM, OR, THE VOIR DIRE IN DALLAS COUNTY

Jeffrey Kahn

VOIR DIRE IS LAW FRENCH for “to speak the truth.”¹ In the United States and a few other common-law countries that still use juries, the term describes the process of selecting jurors who will hear the evidence presented at trial, render a verdict, and sometimes determine punishment. The

Jeffrey Kahn is an Assistant Professor of Law at Southern Methodist University. Copyright © 2010 Jeffrey Kahn.

¹ BLACK’S LAW DICTIONARY 1710 (9th ed. 2009). Pronunciation varies. In New York, “voir dire” rhymes with “fois gras and beer.” In Dallas, “voir dire” rhymes with “more wire.” Transcripts do not aid non-Law French speakers. The Texan who argued *Tompkins v. Texas*, 490 U.S. 754 (1989), apologized for his patois:

MR. PALMER: Mr. Chief Justice, and may it please the Court: At the outset I’d like to apologize to the Court. In Texas we pronounce some of these legal terms differently than the Court is used to, and if our pronunciations sound odd to the Court, I’m sorry for that. I would also like to first discuss the Beck issue.

UNIDENTIFIED JUSTICE: You’ve argued cases here before, haven’t you?

MR. PALMER: I beg your pardon, Your Honor?

UNIDENTIFIED JUSTICE: Have you argued cases here before?

MR. PALMER: Yes, but I’ve never had to use the word “voir dire”, for instance.

UNIDENTIFIED JUSTICE: Okay. [Laughter] So it’s not a general admonition, but just about voir dire.

A month later, he was welcomed back with gentle chiding: “Mr. Palmer, we’ll hear now from you. You don’t have to worry about pronouncing voir dire in this.” Oral Argument, *Penry v. Lynaugh*, 492 U.S. 302 (1989).

translation suggests a search for jurors who can render a fair and impartial verdict. Attorneys try to discover and remove jurors who seem unable or unlikely to speak the truth, such as those who nurture irrational prejudices or harbor private grievances.

In most federal courts, the judge is the primary conduit for interaction with the venire.² In most state courts, attorneys enjoy more direct engagement with jurors.³ Naturally enough, lawyers like to select jurors who seem to like them, like their clients, or like their point of view (the trifecta is predictably rare). This seems perfectly reasonable to most observers.⁴ Jury consultants do a brisk trade.

Texas has juries and a Texan version of voir dire. I know. I had a front row seat (actually, seat number 39 out of 77) for a two-day voir dire in the 194th District Court of Dallas County, the Honorable Ernest White presiding.⁵ I knew just enough theory to be a danger to the attorneys who questioned me. I had no knowledge of local practice. My conception of voir dire – memories from a clerkship in a federal district court in Manhattan – was jarred by the experience.⁶

This Essay dissects the transcript of that voir dire, which recorded my reactions.⁷ The transcript also recorded, I hasten to add, the reactions of the judge, district attorney and defense counsel, all

² THOMAS A. MAUET, TRIAL TECHNIQUES 34 (6th ed. 2002) (“In recent years the trend, particularly in federal courts, has been for the judge to conduct the entire voir dire examination.”).

³ *Id.* (“Traditionally the lawyers conduct the entire voir dire examination.”).

⁴ ABA AMERICAN JURY PROJECT, PRINCIPLES FOR JURIES AND JURY TRIALS Principle 11.B.2 (2005) (“Following initial questioning by the court, each party should have the opportunity, under the supervision of the court and subject to reasonable time limits, to question jurors directly, both individually and as a panel.”).

⁵ Texans elect their judges. How this affects the judge-lawyer-jury triangle is a subject best left for the day when I’ve seen more judicial elections than jury selections. As this essay suggests, I just blew into town.

⁶ This may also be because courtrooms are “venues seldom visited by those who write legal articles.” James M. Rosenbaum, *In Defense of Rule 808, Federal Rules of Evidence*, 12 GREEN BAG 2D 165, 165 (2009).

⁷ I have altered some spellings, omissions, and punctuation for clarity’s sake.

of whom exhibited great skill and agility in the courtroom. As the transcript shows, we didn't always see eye to eye on the process in which we played our different roles.⁸

BACKGROUND: *STATE V. RANDALL MCMURPHY*

The case was styled *State v. Randall McMurphy*.⁹ Mr. McMurphy appeared for trial to answer two indictments that accused him of the criminal violation of a state court's civil order that he be committed to an out-patient treatment program for sexually violent predators. The indictments alleged that he violated this order "by possessing a cellular phone and by possessing contraband," and by "being discharged from his Sex Offender Treatment Program."¹⁰

The court order was based on a provision of the Texas Health and Safety Code that establishes a process for the civil commitment of anyone whom the state designates as a "sexually violent predator".¹¹ As Mr. McMurphy was nearing the end of a prison sentence, a state committee determined that he was afflicted with a "behavioral abnormality" that predisposed him to commit a violent sexual crime.¹² A trial followed in a district court in Montgomery County

⁸ Full disclosure: This research was partially funded by the State of Texas, which paid me \$46.00 for jury service. I assert that my views were not tainted by this filthy lucre. *But see* Yes, Minister, "Doing the Honours," BBC Series 2, Episode 2 (Mar. 2, 1981) ("The surprising thing about academics is not that they have their price, but how low that price is.") (hat-tip to Professor Gerard Magliocca).

⁹ Excepting Judge White and Ms. Baraka, the excellent court reporter, all names have been changed to protect the innocent, presumed innocent, guilty, and (keeping with the western venue) the good, the bad, and the ugly.

¹⁰ True Bill Indictments F08-00831 and F08-00834 (Grand Jury of Dallas County, Texas, July 2008 Term). The latter accusation appears to mean discharge for a reason other than successful completion.

¹¹ Texas Civil Commitment of Sexually Violent Predators Act, 11 TEX. HEALTH & SAFETY CODE ANN. ch. 841 (West 2007). The Texas Supreme Court upheld the statute against due process and other challenges. *See* *In re Commitment of Fisher*, 164 S.W.3d 637 (Tex. 2005), *cert. denied*, 546 U.S. 938 (2005).

¹² TEX. HEALTH & SAFETY CODE ANN. § 841.002(2) (West 2007) ("'Behavioral abnormality' means a congenital or acquired condition that, by affecting a person's emotional or volitional capacity, predisposes the person to commit a sexu-

(where by law all such trials occur).¹³ Although the trial is deemed civil in nature, the statute requires that findings be made “beyond a reasonable doubt,”¹⁴ the burden of proof in criminal cases. McMurphy was found to be a repeat sexually violent offender whose behavioral abnormality made him “likely to engage in a predatory act of sexual violence.”¹⁵ The court therefore ordered him to successfully complete an outpatient treatment program. In order to ensure McMurphy’s compliance and to protect the community, the statute required the court to order McMurphy to reside in a residential facility approved by the state, wear tracking equipment, and comply with a long list of other restrictions.¹⁶

The indictment’s seemingly modest charges disguised very high stakes, for although McMurphy was deemed an outpatient under a civil commitment order to treat a congenital or acquired condition, we were told that he could face up to 99 years in prison if found guilty of violating the court’s order. The jurors would hold the rest of McMurphy’s life in their hands.

This jury, like all juries, possessed great power. It is hard to imagine a more direct expression of popular control over the state, which must seek a jury’s agreement to exact punishment for violation of its law. Courts are very careful, therefore, to control this potent force. Judges instruct juries on the law and order jurors to follow their instructions. Jurors take oaths. Judges sequester juries.

Judges also filter information through rules of evidence so that only relevant and admissible evidence reaches the jury. The Texas

ally violent offense, to the extent that the person becomes a menace to the health and safety of another person.”). A state-contracted expert advises the committee. § 841.023(a). Only prisoners who are repeat sexually violent offenders are eligible for review. The act for which the person is currently imprisoned need not be a sexually violent crime. The statutory definition includes acts to which a defendant has successfully pleaded *nolo contendere* or not guilty by reason of insanity. § 841.003(b)(1).

¹³ §§ 841.041(a), 841.061(a).

¹⁴ § 841.062(a).

¹⁵ *Id.* (tracking definition of “sexually violent predator” in § 841.003).

¹⁶ § 841.082.

Rules of Criminal Evidence apply to voir dire.¹⁷ And yet during this voir dire, Rule 103(c), which requires that “proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means,” seemed honored in the breach. I offer three examples: (1) polluting the pool; (2) coercive commitments; and (3) appeals to false authority.

POLLUTING THE POOL

Judge White welcomed us to his courtroom and administered our oath. He gave a concise and helpful description of the steps in a criminal trial and explained a few legal terms. Judge White also gave an important limiting instruction: “[W]e cannot go into the facts of the case during voir dire. The law prohibits us from going into the facts. Outside of the indictment, I can’t tell you nor [can] the attorneys anything regarding the facts. A lot of things you may be asked are essentially hypotheticals. But unfortunately the law does not allow us to go into the facts at this time. So you just have to bear with us in that regard because we can’t go any further than that.”

That restriction made sense to me. I understood voir dire as a mechanism to prevent the seating of a juror who already had a preconceived idea of the “facts.” That juror might decide the case based on something other than admissible evidence or, worse, pollute the deliberations of his fellow jurors. We were blank slates, empty vessels to be filled only by relevant and admissible evidence.¹⁸ Of course, this idealized view isn’t shared by many jury consultants or litigators, who have come to expect ulterior benefits from the process.¹⁹

¹⁷ *Watson v. State*, 917 S.W.2d 65, 67 (Tex.App. – Fort Worth 1996, pet. ref’d).

¹⁸ Some of us might have been chipped slates or cracked vessels, but still blank and empty where it counts.

¹⁹ “[T]he foremost goal of *voir dire* is to gather information by getting the jurors to talk. Secondary goals include building rapport, indoctrination (when permitted) and inoculation.” Cindy K. Andrews, *Voir Dire Strategies for Success*, 780 PLI/LIT 207, 209 (2008).

Thus, I expected *voir dire* to continue as before: Judge White would ask us questions that he and the attorneys had drafted in advance. That had been my experience in federal court and it made sense to me that the attorneys should be allowed to begin active advocacy only once the jury had been selected. That is not the tradition in Texas. To my surprise, when we returned from lunch, Judge White settled into his chair and prepared for a long afternoon: “I now turn it over to the attorneys. You may proceed, Ms. Fletcher.”

From that moment, I sensed that the cool, clear waters of justice in which I’d languidly been bathing all morning (expecting them to roll on like a river, or even a mighty stream, once we’d picked the jury),²⁰ were becoming increasingly muddied by debris chucked in by the attorneys. The pool wasn’t polluted so much by jurors’ answers, which were generally thoughtful and attentive, as by the attorneys’ lengthy lectures between questions.

The prosecutor, Ms. Fletcher, began by describing her objective: “I am looking for 12 fair and impartial people”. This she soon revealed had a special meaning: “Because who here like[s] sex offenders?” Ms. Fletcher explained that it was natural to have strong feelings and yet still sit on the jury. Ms. Fletcher clearly had strong feelings about sex offenders. She repeated the phrase “violent sexual predator” so frequently that I feared it would lodge in my brain like an unwanted pop song.

Ms. Fletcher next gave a detailed analysis of the civil commitment statute. Having already reassured us that our shared loathing of (undefined) sex offenders was reasonable, she explained how carefully and scientifically the law identified this group and how it protected society.²¹ She described the rules that the state required sex offenders to obey as “very black and white ... there is no gray area.” The rigidity she ascribed to this legal framework would make

²⁰ Cf. Amos 5:24 (NIV).

²¹ Ms. Fletcher: “Then they are moved into that behavioral abnormality assessment by an expert psychologist to determine whether that person had a behavioral abnormality that makes them likely to engage in a predator act of sexual violence[ce].”

girders envious. She appeared to know the law backwards and forwards and took us through it in both directions, repeatedly.

The defense attorney, Mr. Nicholson, was no better, or, I should say, just as good. He argued against this reading of the statute, and he did his job well, introducing much gray into the previously black-and-white picture. He recounted the law's history, its retroactivity ("some people use the term double jeopardy"), and its outlier status compared to laws in other states. We heard examples of arbitrariness in the making of the rules. Mr. Nicholson claimed that no one had ever successfully completed and been released from treatment.

The defense never objected to Ms. Fletcher's performance, and Mr. Nicholson seemed destined for similar courtesy, until he overstepped. Mr. Nicholson expressed his frustration that his client had been branded with such a damning phrase. He noted that we "keep hearing the word sexually violent predator. And let me tell you, when the legislation was originally passed, that language was not used —." The prosecutor objected: this legal history was irrelevant. Hollywood's finest could not have scripted a better courtroom dialogue:

PROSECUTION: Objection, relevancy.

COURT: Sustained.

PROSECUTION: Ask the jury to disregard.

JUROR: What comment?

COURT: [Smiling to juror] You did very well. You may proceed, Mr. Nicholson.

MR. NICHOLSON: Thank you, Judge.

JUROR: I'm serious, what comment am I disregarding[?]

COURT: The comment made about the language not being in the — in the statute originally[.]

JUROR: Okay, thank you.

COURT: Now disregard that.

The courtroom erupted in laughter. Mr. Nicholson's irrelevant suggestion of legislative malice had now been etched in our memories, twice.

Though humorous, the episode illustrates the problem of polluting the jury pool with information inadmissible at trial. What possible relevance could the attorneys' personal observations, their riffs on legal history, or slanted claims about the law's operation have to the issues presented in the indictments: did McMurphy, while under court-ordered treatment, possess contraband and was he discharged from his program? Even if relevant, how were their assertions admissible? Both sides wanted to portray the law a certain way with their own personal glosses on it. But if they could not do this in their cases-in-chief, why were the rules of evidence relaxed in *voir dire*? Their speeches were not needed to exercise their challenges intelligently. The attorneys were arguing their cases, not assaying the *venire*.

It was hard to see the point of dutifully filtering testimony at trial through rules of evidence after learning so much information from the lawyers in *voir dire*.

COERCIVE COMMITMENTS

A commitment question extracts a public statement that the juror will decide an issue a particular way. The question typically comes in the form of a yes-or-no hypothetical. Answered in open court, recorded by a court reporter, the answer feels like a promise, and not always one freely made.

In Texas, questions designed "to bind or commit a prospective juror to a verdict based upon a hypothetical set of facts" are prohibited when they seek to extract a commitment that the law does not require a juror to make.²² There is nothing objectionable, for example, in eliciting a juror's commitment to consider the full range of punishment for the charged crime. In fact, Ms. Fletcher asked us to commit to this very proposition. Stated more generally, jurors ought to commit to follow the law (their secret power of nullifica-

²² *Standefor v. State*, 59 S.W.3d 177, 179, 182-83 (Tex. Crim. App., 2001). These issues are controversial, and not limited to criminal cases. See *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743 (Tex. 2006). See also SUPREME COURT OF TEXAS JURY TASK FORCE FINAL REPORT 12-14, 150-67 (Sept. 1997).

No-Limit Texas Hold 'em

tion notwithstanding). But “where the law does not require the commitment, a commitment question is invariably improper.”²³

Sounds good, but the line is hard to draw. Was it an improper commitment question when Ms. Fletcher asked each juror the following?

It is very black and white what we are talking about, right[?] He either violated the rule or he didn't, there is no gray area that we are talking about. When we are talking about following rules and regulations, it is either you are pregnant or not. It is not very. So that's what we are talking about, so the verdict is guilty. So my question to you is: If the State of Texas proves to you beyond a reasonable doubt that he violated the rule, whatever the rule or regulation was, whatever we have alleged in our indictment, could you return a verdict of guilty, could you prove it to us beyond a reasonable doubt no matter what you thought about the rule itself, whether you thought the rule was stupid or silly or trivial, could you return a verdict of guilty if he violated that rule[?]

On the one hand, Ms. Fletcher appeared to ask simply whether we could follow the law. Did we understand that we were jurors, not legislators (or, God forbid, activist jurors)? The indictment charged possession of a cellphone, which was apparently prohibited, and thus our task appeared to be simple. Did he have one? Was it prohibited? Case closed.

On the other hand, her question had a lengthy predicate. It was asked only after the jury pool had been polluted by her prolix and opinionated descriptions of this law, its “scientific” basis, and its intricate sequence of hearings, rulings, and orders. Weren't we being asked to commit to Ms. Fletcher's view of how the law operated, that is, asked to “resolve ... an issue a certain way after learning a particular fact”,²⁴ the very definition of an improper commitment question? We were not just asked if we could follow a “stupid or silly or trivial” law – clearly a legitimate commitment question. We

²³ *Standefor*, 59 S.W.3d at 181.

²⁴ *Id.* at 179.

were asked to accept the prosecution's view of the law as a clear-cut series of black-and-white rules, and commit to a worldview that seemed to brook no exceptions. Did committing to follow the law require us to commit to Ms. Fletcher's version of it?

Mr. Nicholson never objected, so Judge White never ruled whether the question, asked seventy-seven times, was improper. Mr. Nicholson never objected because he wanted to impress his own views, and ask for similar commitments. Were we required to commit to either view of the law? Is it unreasonable to wonder about the effect of such coercive commitments, made in the pre-trial fog of unknowing, once the evidence is in and deliberation begins?

THE APPEAL TO FALSE AUTHORITY

The appeal to false authority is a fallacy of logic old enough to have a Latin name: *argumentum ad verecundiam*.²⁵ Anyone who watches television is familiar with it: Ed McMahon was no expert on health insurance; Bob Dole no expert on Viagra; and no one whose visage has ever graced the front of a box of Wheaties – from Mary Lou Retton to Tiger Woods – is an expert on bland breakfast cereal. But few Americans have escaped the tug of their blandishments to do (or, more often, buy) something because *they* have endorsed it. As the most entertaining book on fallacies summarizes this one:

The fallacy lies in the introduction of material that has no bearing on the matter under discussion. ... The attempt to make our own opinions yield before such spurious authority is trading on our respect for position and achievement, and trying to use this instead of argument and evidence.²⁶

Of course, a genuine expert's opinion is fine support for an argument, as rules of evidence recognize.²⁷ But you don't have to be a

²⁵ In Texas, this is better known as the "All-Hat-No-Cattle" fallacy. Pronunciation varies.

²⁶ MADSEN PIRIE, *THE BOOK OF THE FALLACY: A TRAINING MANUAL FOR INTELLECTUAL SUBVERSIVES* 177 (1985).

²⁷ FED. R. EVID. 702.

No-Limit Texas Hold 'em

brain surgeon (or is it a rocket scientist?) to recognize that expertise should not be expanded beyond its due. The lepidopterist is helpful with butterflies, not biometrics.

Both attorneys knowingly appealed to false authority to bolster their positions with confirmation by an “expert.” To my horror, I discovered that I was the false authority. When Ms. Fletcher’s Socratic dialogue about the purpose of civil commitment did not go smoothly with the first few jurors, she turned to the law professor for support:

MS. FLETCHER: No, that is different than the adult protective services. It is very different from that. Who can venture as to why we have it? Mr. Kahn –

MR. KAHN: Yes.

MS. FLETCHER: – you are a law professor, surely you know about civil commitment a little bit. Can you venture to guess why we have civil commitment in the State of Texas?

I tried to duck the question: “Well, as a law professor, my specialty is rather narrow. I don’t think anything I might say about civil commitment has any weight since it is not my specialty.” But Ms. Fletcher was persistent:

MS. FLETCHER: What do you teach?

MR. KAHN: Constitutional law.

MS. FLETCHER: One of my favorite law [school classes]. What do you think?

MR. KAHN: I think it could be a variety of different reasons for civil commitment. And that commitment in this context might be commitment in the sense commitment away from the society.

MS. FLETCHER: And why would the legislature –

MR. KAHN: Rather than a promise of a particular person in the sense of committing to do or not to do.

I had just made the mistake of trying to correct the misimpression expressed earlier by a fellow juror. Ms. Fletcher sought to turn my equivocation to her advantage:

Jeffrey Kahn

MS. FLETCHER: So you believe in this context, it is a context away from society?

MR. KAHN: That is not what I said, Ms. Fletcher.

MS. FLETCHER: Okay.

MR. KAHN: What I said was, that it could have a variety of –

MS. FLETCHER: Right, so what do you believe it is in this context?

MR. KAHN: I am not sure.

MS. FLETCHER: When we are talking about sexually violent predator[s]?

MR. KAHN: I am not quite sure because it is not my specialty and I would rather not venture to guess where I might be wrong.

Mr. Nicholson also sought support from my false authority. He asked each juror how Ms. Fletcher's repeated use of "sexually violent predator" possibly "impacts you in terms of your ability to be [a] fair and impartial juror." My turn came.

MR. KAHN: I believe I could be a fair and impartial juror.

MR. NICHOLSON: Okay. That sounds like a law professor, just a straightforward answer, this is it. Taking everything into account, I want to know the label and what impact you feel like you have. Because you obviously can see this with a dozen constitutional law issues that exist and are obviously being litigated. My question is how does the label itself impact you as you sit here right now before you heard any testimony at all?

I didn't like his suggestion that I shared his view that the statute was constitutionally infirm. So I decided to express what I had been feeling since Ms. Fletcher's examination:

MR. KAHN: Well, Mr. Nicholson, I have to say that I am very concerned at the risk of answering that question.

MR. NICHOLSON: Okay.

MR. KAHN: Because both you and Ms. Fletcher have now drawn attention to my profession.

MR. NICHOLSON: Right.

No-Limit Texas Hold 'em

MR. KAHN: Which I put on that [jury questionnaire] to answer truthful[ly].

MR. NICHOLSON: Okay.

MR. KAHN: But in the course of our two days together I have already been approached by my fellow jurors who are asking me questions about the law, and two of them are with regard to this case.

MR. NICHOLSON: Okay.

MR. KAHN: Now, you mentioned when you came in here that you [have] got quite a lot of experience in the law and that nevertheless this voir dire was something unusual to you. And I have to say it is unusual to me and I am very concerned that the label law professor has been thrown around in order for me to somehow attach my professional answer to it.

MR. NICHOLSON: Sure.

MR. KAHN: Which to me is as dangerous as asking a dentist about your kidney.

Mr. Nicholson was too good an attorney to be rattled by an unruly juror. He pushed back in defense of voir dire, Texas-style:

MR. NICHOLSON: Well, the funny thing is in terms of my question, I am asking about the label of sexually violent predator and what's your opinion of it. And I haven't gone into any legal questions and I am not asking you to give a testimony to the jury about constitutional law or what you think of this law, I am not going there with you. I don't think it is appropriate and it could prejudice and bias the jury.

But what I do want to know, first of all, is this your first time being involved in a voir dire process[?]

MR. KAHN: As a juror, that's correct.

MR. NICHOLSON: Now, part of our job is to question the jurors about their personal feelings about things. And the fact that I see some sensitivity because you are a law professor – we do that with everybody's occupation. If you are a marshal like Ms. Mancini, or if you work at the D.A.'s office like Ms. Cheswick, we take all of those things into consideration. Okay. That's part of what we do. My job as a representative of his

rights is to know what everybody does for a living and how it applies to this case. Because people's biases and beliefs and feelings are all part of their background and what they do for a living. And if you don't think that being a constitutional law professor has a significant impact on your view on the civil commitment law in this case, I mean, that's part of this process, that's why we do that.

MR. KAHN: Well, I am new to this jurisdiction. But I have to say that I find it peculiar that my profession was named by Ms. Fletcher. But when you questioned Ms. Mancini and Ms. Cheswick, you did not mention their profession[s]. So although [I] agree that you are not asking questions about the law and I agree that my profession may well have an influence on how I would come to this case. My concern is that [by] repeatedly mention[ing it,] my influence is different than that of my fellow jurors and I think my influence should be the same.

MR. NICHOLSON: And I can tell you realistically that is not reality because the truth of the matter is [lawyers sit on juries] down here all the time, Mr. Bromden is a lawyer as well, he is a civil lawyer and that has come up during the voir dire process. And the fact of the matter is, attorneys tend to have more influence in deliberations because of their profession and their expertise than lay people.

MR. KAHN: I agree. But I feel that my influence would have been lesser just as Ms. Mancini and Ms. Cheswick were not frequently referred to. I know I would not refer to it.

MR. NICHOLSON: Okay.

MR. KAHN: But to answer your question, the substantive question. I believe that I could be an impartial juror in that I would be able to approach the issues that I am asked to answer by complying with my oath to be open minded and fair and impartial.

MR. NICHOLSON: Thank you.

On one level, Mr. Nicholson's question was perfectly legitimate. He needed to probe each juror's true feelings to do his job well. But that wasn't why he engaged me that way. He saw an opportunity for support for his view that the law was impossibly

vague, maybe unconstitutionally so. But I had no wish to be anybody's expert, let alone foil.

Reader, you already have guessed that, unlike my fellow citizens seated ahead of and behind me, I was not invited to sit in the jury box.

CONCLUSION

The transcript for *State v. McMurphy* begins in all capital letters, "BE IT REMEMBERED," as if to emphasize its important recording purpose. These words capture the dilemma of the voir dire that it memorialized: just how much information should we jurors retain from it? Put another way, does a voir dire left largely in the hands of the advocates, rather than filtered by the judge, leave jurors with memories that should be forgotten, but cannot?

Like Texas Tea, voir dire soaked the venire in strange spirits, stirred us up, and then let us steep. I could not help but wonder whether such a process fortifies the jury poured from it with irrelevant information that would never have been admissible at trial. Texas Tea is strong enough without adding potency during voir dire.²⁸

GB

²⁸ 2 oz bourbon whiskey; 2 oz gin; 2 oz rum; 2 oz tequila; 2 oz triple sec; 2 oz vodka; 2 oz sweet and sour mix; Coca-Cola. Fill a pitcher with ice. Add all ingredients except Coca-Cola. Stir, add Coca-Cola, stir again. Serve with ice. Not recommended before jury duty in most jurisdictions.