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Criminal Law - The Peremptory Challenge Suffers a Severe Blow - Summers v. State

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CRIMINAL LAW—The Peremptory Challenge Suffers a Severe Blow. ***Summers v. State,*** **725 P.2d 1033 (Wyo. 1986).**

In March of 1985, Henry J. Summers was prosecuted for one count of first degree murder and one count of attempted first degree murder. Summers pled not guilty to both counts. The jury found Summers guilty of second degree murder and attempted second degree murder. Summers was sentenced to the Wyoming State Penitentiary for two concurrent terms of 35 years to life. Summers appealed.[1]

On appeal Summers focused, inter alia, on a narrow aspect of voir dire, saying it "should not only be conducted to discover grounds for challenge for cause but also for the purpose of acquiring information to enable the party to intelligently exercise peremptory challenges."[2] The Wyoming Supreme Court ruled that the only purpose of voir dire is to discover grounds for challenge for cause.[3]

The following colloquy is an attempt by Summers' attorney to persuade the trial court that in-depth questioning was required during voir dire before he could intelligently exercise his peremptory challenges:

> THE COURT: You're going into such detail with each one of these people, who they know, what they know. It's unbelievable to me. You've already asked — they've already said that they didn't know enough of these people to influence them in any way. I mentioned that to you about four times already.
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> . . . .
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> [SUMMERS' COUNSEL]: Your Honor, during the State's voir dire, the State asked if any of these jurors knew any of these witnesses and almost every hand was raised and almost everybody knew more than one. And as of this time, we don't have any idea of who they know or who they don't know and what the nature of the relationships are.
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> . . . .
>
> THE COURT: I'm going to sustain the objection. Ladies and gentlemen, [the prosecuting attorney] read to you the list of witnesses; do you recall that? All right. [He] asked you if your knowledge of any of those witnesses would influence you in your determination of this case. Would it?
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> (Entire jury panel responded "no.")

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1. Brief for Appellant at 2, Summers v. State, 725 P.2d 1033 (Wyo. 1986) (No. 85-148). The State of Wyoming accepted Appellant's presentation of the Nature of the Case, Course of Proceedings, and Disposition of the Court Below. *See* Brief for Appellee at 2, Summers v. State, 725 P.2d 1033 (Wyo. 1986) (No. 85-148).

2. Summers v. State, 725 P.2d 1033, 1038 (Wyo. 1986), *aff'd on rehearing,* 731 P.2d 558 (1987). The statute authorizing the number of peremptory challenges allowed the State, and the Defense, is WYO. STAT. § 7-11-103 (1977, Rev. 1987).

3. *Summers,* 725 P.2d at 1037 (quoting from Jahnke v. State, 682 P.2d 991, 1003 (Wyo. 1984)).

All right. That's it as far as that line of questioning is concerned.

. . . .

(WHEREUPON, the following bench conference was held out of the hearing of the jury:)

[SUMMERS' COUNSEL]: Your Honor, I want to object to the Court's not allowing the Defense to question individual jurors individually about the prospective witnesses that they know or that they had the opportunity to know. And I think that the information that we have that — the Court's question, general question, did not make it possible for any of the jurors to respond individually. . . . And when there are important witnesses in a case that some of the jurors know and when that information cannot be disclosed to the attorneys, it becomes impossible for the attorneys to intelligently exercise peremptory challenges.

. . . .

THE COURT: I'm going to let you do this. I'm going to let you ask each juror individually whether or not their knowledge of any of the witnesses would affect their ability to make a — or render a fair verdict, without going into any more detail than that. You ask each one of them individually that question.

[SUMMERS' COUNSEL]: Your Honor, may I ask them individually about if knowing the people is going to affect their view of the credibility of those witnesses on the stand?

THE COURT: Well, that's in essence what I'm saying.

. . . .

THE COURT: The only thing you're going to ask them is one question individually; do you understand me?

[SUMMERS' COUNSEL]: I think I do, Your Honor, but it would be helpful, Your Honor, to know what they know because — *not only because of the credibility issue, but because of the association issue.* [emphasis added]

THE COURT: If they say they could be fair, what difference does it make?

[SUMMERS' COUNSEL]: If I know that they know people that are witnesses from one side or the other, it might influence me on how I exercise my peremptory challenge on that juror.

THE COURT: I'm going to let you ask that question individually of each juror. If they say no, then what's the use of going into it?

(WHEREUPON, voir dire was continued by [Summers' counsel.])[4]

4. Brief for Appellant, *supra* note 1, at App. I-A at 72-73, 78-81.

Summers' counsel was concerned with some of the veniremen's ability to render a fair verdict without being adversely influenced by what he termed the "association issue," i.e., the prior associations among the veniremen and the witnesses.

When the trial court, in this instance, restricted the questioning of the suspect veniremen, it created a dilemma for Summers' attorney: he could either waste a peremptory on an individual whom further questioning might have revealed as a fair juror, or fail to dismiss an individual whom further questioning might have revealed as an unfair juror. The result is that counsel is forced to rely almost entirely upon guesswork in exercising his peremptories.

In order to appreciate why a different style of questioning is required before peremptories can be used effectively, it is essential to recognize the fundamental distinction between dismissing a juror peremptorily and dismissing a juror for cause. Counsel need not disclose his reason(s) for peremptorily dismissing a juror;[5] however, the same is not true when counsel attempts to dismiss a juror for cause. For a dismissal for cause, the attorney must convince the court that a particular juror fails to satisfy the statutory requirements for a fair and impartial juror, which entails disclosing the reasons for the request.[6] This distinction dictates why somewhat different questions are required for a dismissal for cause as opposed to a peremptory dismissal.

Challenge for cause questioning lends itself more readily to a repetitive format due to its statutory underpinnings. Because the attorney attempts to pigeonhole a juror in one of the statutorily created categories for dismissal, somewhat similar questions are capable of continued use in successive cases.

Peremptories, however, are intended to be a more refined and sophisticated technique for impanelling the constitutionally envisioned jury.[7] The peremptory questions, therefore, explore those areas which are not capable of being statutorily defined, such as the "association issue" which was of concern to Summers' counsel.

Thus, the challenge for cause examination allows the attorney to wield a meat cleaver in statutorily striking veniremen. However, the attorney

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5. It is recognized that bias and partiality may exist that do not meet the statutory requirements of a challenge for cause. The peremptory challenge then covers an area that is not encompassed by the challenge for cause, is exercised for reasons known only to counsel and his client, and is not under control of the court.

Jahnke, 682 P.2d at 1047 (Cardine, J., dissenting). This position was also advocated by the United States Supreme Court: "[W]hile challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable." Swain v. Alabama, 380 U.S. 202, 220 (1965) (citing Hayes v. Missouri, 120 U.S. 68, 70 (1887)).

6. WYO. STAT. § 7-11-105 (1977, Rev. 1987).

7. For two well reasoned analyses concerning the peremptory's raison d'etre, see Babcock, *Voir Dire: Preserving "Its Wonderful Power,"* 27 STAN. L. REV. 545 (1974-75) and Note, *Voir Dire: Establishing Minimum Standards to Facilitate the Exercise of Peremptory Challenges*, 27 STAN. L. REV. 1493 (1974-75).

also needs the peremptory, which he uses as a scalpel, to eliminate those veniremen who evade the meat cleaver's broad statutory strokes.

This casenote concerns the peremptory challenge rule in Wyoming as articulated by the Wyoming Supreme Court in *Summers*. Specifically, it will examine whether the Wyoming Supreme Court is correct in excluding questions from voir dire which are designed to examine an area beyond the statutory requirements for challenge for cause. Such questions allow counsel to determine a prospective juror's background, attitudes, and opinions and thereby facilitate the informed use of the defendant's peremptory challenges. The informed use of the peremptory challenge is intended to provide an additional means of securing the accused's constitutional right to a fair trial[8] through the selection of a fair and impartial jury.[9]

BACKGROUND

United States Supreme Court

The United States Supreme Court, in *Lewis v. United States*[10] and *Pointer v. United States*,[11] formulated its early view on the role of peremptory challenges in jury selection. Both cases involved criminal defendants who appealed the district court's alleged restriction on their use of peremptory challenges.[12] In *Lewis*, the Court held that the peremptory challenge is "essential to the fairness of trial by jury."[13] The Court in *Pointer* stated that during the selection of the jurors it provides "one of the most important of the rights secured to the accused,"[14] and that the unrestricted use of peremptory challenges is essential for the inspection and examination of the juror as required for the "due administration of justice."[15] Thus, these two early decisions indicate that the peremptory plays an important role in securing an impartial jury.[16]

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8. *Summers*, 725 P.2d at 1056 (Cardine, J., dissenting).

9. See Collins v. State, 589 P.2d 1283 (Wyo. 1979) where the court ruled that "the constitutional standard for fairness requires that the defendant have a panel of impartial jurors." *Id.* at 1289. The court referred to WYO. CONST. art. I, § 10 and U.S. CONST. amend. IV to support this fundamental requirement. *Id.* at 1289 n.5. The Supreme Court endorsed the impartial juror requirement in Irvin v. Dowd, 366 U.S. 717 (1961).

10. 146 U.S. 370 (1892).

11. 151 U.S. 396 (1894).

12. *Lewis*, 146 U.S. at 376; *Pointer*, 151 U.S. at 406.

13. *Lewis*, 146 U.S. at 376.

14. *Pointer*, 151 U.S. at 408.

15. *Id.* at 409.

16. State and federal courts, in addressing the relationship between peremptory challenges and the sixth amendment right to a fair trial, frequently rely on the Court's statement in Stilson v. United States, 250 U.S. 583, 586 (1919) that the peremptory is not constitutionally guaranteed. However, as one commentator pointed out: "*Swain's* approach to the importance of the peremptory challenge is so radically different from *Stilson's*—not only in its reading of history but generally—that it could be read as a virtual overruling of *Stilson*." Babcock, *supra* note 7, at 555-56. Furthermore, the Court's previous and subsequent decisions make it clear that, even though the Court has declined to find Constitutional protection for the peremptory challenge, it has endorsed its non-discriminatory use in the selection of a fair and impartial jury. *See* Swain v. Alabama, 380 U.S. 202 (1965), *overruled*, Batson v. Kentucky, 106 S.Ct. 1712 (1986).

Swain v. Alabama[17] presented the Court with the opportunity to further define the role of the peremptory. A black defendant, charged with raping a white woman, accused the prosecution of invidious discrimination in violation of the Equal Protection Clause of the fourteenth amendment.[18] The prosecutor used his peremptory challenges to exclude all the blacks from the jury.[19] An all-white jury found the defendant guilty and sentenced him to death.[20] Even though this particular fact situation presented the Court with compelling reasons to reconsider its prior favorable view on peremptory challenges, the Court nonetheless upheld the prosecutor's use of his peremptory challenges.[21]

The Court, initially, focused on the peremptory challenge's "old credentials" found in its common law history.[22] The Court then addressed the peremptory challenge's purpose: "The function of the [peremptory] challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."[23] The peremptory challenge reinforces the parties' belief that the procedure for jury selection is being conducted according to the mandates of justice.[24] "Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the *voir dire* and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause."[25]

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17. 380 U.S. 202 (1965). The Court devoted a significant portion of the opinion to developing its "considerations" for not examining the prosecutor's use of his peremptory challenges in search of discrimination. *Id.* at 211-21. The Court reasoned that the "nature and operation of the [peremptory] challenge" would suffer "a radical change" if the prosecutor's judgment for exercising his challenge was judicially examined. *Id.* at 221-22. Instead, the prosecutor is presumed to be using his peremptories to secure fair and impartial jurors. "The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes." *Id.* at 222. This presumption, and the resulting burden of proof it entailed for the defendant, was subsequently overruled in *Batson*, 106 S.Ct. 1712. The *Batson* Court based its holding on equal protection grounds forbidding racially motivated peremptory challenges. *Id.* at 1722-24. Notwithstanding *Batson*, the "considerations" supporting the peremptory's proper, non-discriminatory use (the intelligent use of peremptories by the defense counsel to select fair and impartial jurors) still hold true. In fact, the *Batson* opinion stated that it expressed "no views on whether the Constitution imposes any limit on the exercise of peremptory challenge by the defense counsel." *Id.* at 1718 n.12. For a more thorough analysis of the *Batson* ruling and its effect on *Swain*, see Note, CONSTITUTIONAL LAW— *Racially-Motivated Peremptory Challenges: Batson v. Kentucky*, 22 LAND & WATER L. REV. 575 (1987). For the Wyoming Supreme Court's interpretation of *Batson*, see Bueno-Hernandez v. State, 724 P.2d 1132 (Wyo. 1986).

18. *Swain*, 380 U.S. at 203.

19. *Id.* at 205.

20. *Id.* at 231 (Goldberg, J., dissenting).

21. *Id.* at 222.

22. *Id.* at 212-13. Peremptories were well established in England at the time of the American Revolution. Consequently, the common law is largely responsible for the origin and development of the peremptory in America. *Id.*

23. *Id.* at 219.

24. *Id.*

25. *Id.* at 219-20.

Under the Court's analysis in *Swain*, the peremptory challenge can be interpreted to serve both independent and ancillary roles. Some peremptory challenge questions are designed by the attorney to expose juror bias which would otherwise elude the typical statutory challenge for cause categories. Peremptories also perform an ancillary role. If an attorney angers a particular juror during a vigorous challenge for cause examination, he can then use a peremptory to dismiss him. The dicta in *Swain* supports "the long and widely held belief that peremptory challenge is a necessary part of trial by jury."[26] The Wyoming Supreme Court has only recently articulated its view on the peremptory's proper role.

Wyoming

Jahnke v. State[27] is the seminal Wyoming case concerning the specific issue of whether a right to make intelligent use of peremptory challenges exists. Jahnke argued, inter alia, that the trial court's limitations upon his questioning prevented him from intelligently using his peremptory challenges.[28] The Wyoming Supreme Court disagreed. The court said that Rule 17 of the Uniform Rules for the District Courts of the State of Wyoming provides the trial court with the appropriate means for maintaining an orderly voir dire.[29] An overriding policy concern to maintain an orderly voir dire led the court to conclude that:

> Even though the availability of a peremptory challenge facilitates the process of the selection of an impartial jury by encouraging full, free, and comprehensive voir dire examination of prospective jurors with regard to bias, prejudice or any other grounds for challenge for cause while at the same time affording the party protection from antagonism that may be developed by such voir dire, still the purpose of the voir dire is not to explore for a reason for the exercise of the peremptory challenge.[30]

The court held that the object of voir dire is to establish grounds for challenges for cause.[31]

To bolster its position, the court looked to the United States Supreme Court. Based upon its narrow interpretation of Supreme Court decisions, in particular *Swain*, the court concluded that the peremptory challenge performs only an ancillary function to challenges for cause by allowing counsel to strike jurors whom he might have angered during his challenge for cause questioning.[32] The court also seized upon a portion of the *Swain*

26. *Id.* at 219.
27. *Jahnke*, 682 P.2d 991.
28. *Id.* at 1002.
29. *Id.* at 1003. WYO. UNIF. R. D. CT. 17 is the predecessor to WYO. UNIF. R. D. CT. 701. It is interesting to note that due to language contained in old Rule 17, which restricts voir dire to challenge for cause examination, the court's decision in *Jahnke* finds support. However, under new Rule 701, which the court relied upon in *Summers*, this restrictive language is deleted. Thus, the court's continued reliance on Rule 701 to support only challenge for cause examinations is undercut.
30. *Jahnke*, 682 P.2d at 1003.
31. *Id.* at 999.
32. *Id.* at 1003.

opinion for the proposition that no additional inquiry is required for the peremptory's use.[33] Consequently, counsel should determine who to strike peremptorily based only upon the challenge for cause examination.

Justice Cardine argued, in dissent, that counsel should be allowed to make intelligent use of peremptories.[34] He pointed out that experienced and competent counsel, if allowed, could gain sufficient knowledge of individual juror's attitudes and opinions, and thereby intelligently use their peremptories without abusing voir dire.[35] In light of the *Jahnke* majority's hard-line position against the peremptory, Summers' task was clear: he had to persuade the court to adopt Justice Cardine's dissent.

THE PRINCIPAL CASE

Even though potentially suspect associations existed among some of the veniremen and the witnesses — three of the veniremen were co-employees of the victim[36] — Summers failed to sway the court.[37] Instead, the court summarily dismissed Summers' argument that juror examination should enable the parties to intelligently exercise peremptories saying that, "[c]ertainly voir dire may have this serendipitous effect, but '[t]he entitlement is to a fair and impartial jury, not one sympathetic to the defendant.' "[38]

The court also made a familiar return to its concern for preventing protracted voir dire. It sanctioned the "sound" limitations imposed upon voir dire by Rule 701 of the Uniform Rules for the District Courts.[39] In

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33. *Id.*
34. *Id.* at 1048 (Cardine, J., dissenting).
35. *Id.*
36. *Summers*, 725 P.2d at 1052 (Cardine, J., dissenting).
37. *Id.* at 1038.
38. *Id.* (quoting *Jahnke*, 682 P.2d at 999).
39. Voir dire examination is under the supervision of the trial court according to WYO. R. CRIM. P. 25. Consequently, the court defers to the trial court's judgment in establishing the "permissible bounds" of voir dire. The trial court, however, is not given a blank check. In Aldridge v. United States, 283 U.S. 308 (1931), the United States Supreme Court said that the trial court's discretion is subject to the essential demands of fairness. *Id.* at 310. Rule 25 serves to supplement WYO. UNIF. R. D. CT. 701 in defining the scope of voir dire. Rule 701 provides:

> (a) The only purpose of voir dire is to select a panel of jurors who will fairly and impartially hear the evidence and render a just verdict.
> (b) The court shall not permit counsel to attempt to precondition prospective jurors to a particular result, comment on the personal lives and families of the parties or their attorneys, nor question jurors concerning the pleadings, the law, the meaning of words, or the comfort of jurors.
> (c) The court may inquire of the prospective jurors.
> (d) In voir dire examination counsel shall not:
> (1) Ask questions of an individual juror that can be asked collectively;
> (2) Ask questions answered in a juror questionnaire except to explore some answer in greater depth;
> (3) Repeat a question asked and answered;
> (4) Instruct the jury on the law or argue the case;
> (5) Ask a juror what his verdict might be under any hypothetical.
> (e) The court may assume voir dire if counsel fails to follow this rule. If the court assumes the voir dire, it may permit counsel to submit questions in writing.

Id.

short, the majority opinion reiterated its earlier holding in *Jahnke* that the only object of voir dire is to establish grounds for challenges for cause.[40]

The basis for the court's holding rests on two beliefs. First, peremptory challenges are not intended to function independently of challenges for cause; they are ancillary in nature. Second, if counsel is allowed to intelligently use peremptories, he might improperly select a sympathetic jury by trying his case during voir dire. The court's position is that the defendant is only entitled to a fair and impartial jury, which the current structure of voir dire permits.

In his dissent, Justice Cardine, once again, took the majority to task for "clinging to the illogical rule that the only purpose of voir dire is to discover grounds for challenges for cause."[41] He relied on a portion of his dissent from *Jahnke* to refute the holding in *Summers*:

> Common sense tells us that peremptory challenges were intended to provide an additional safeguard to the required fair trial. They cannot be exercised in a vacuum or by guess and conjecture, and accomplish this purpose. The litigants, therefore, should have as full knowledge as possible of prospective jurors to permit an intelligent decision in the selection process.[42]

The court, however, declined the opportunity *Summers* presented to apply the "common sense" approach advocated by Justice Cardine, and instead clung to its earlier restrictive view.

ANALYSIS

The Wyoming Supreme Court's concern is that it is faced with mutually exclusive interests: the defendant's right to secure fair and impartial jurors through effective use of his peremptories versus the court's effort to maintain integrity in the structure of voir dire. The court apparently believes that the current structure of voir dire is adequate because the trial court is able to maintain appropriate control over voir dire; whereas if counsel is allowed to expand voir dire beyond challenge for cause examination, then the orderly and controlled structure of voir dire will cease. Potentially unlimited questioning might occur before an attorney determines how to effectively use his peremptories. The result, in the court's opinion, would be attorneys attempting to select sympathetic jurors by trying their case during voir dire. Given this worst-case scenario, one can understand why the court is reluctant to expand voir dire beyond the current challenge for cause examination.

The court is correct in seeking to preserve the integrity of voir dire, but its fears are misplaced. The court could continue to provide for an orderly voir dire and still permit peremptories to function as intended. The trial court can provide the proper limitations on voir dire through

40. *Summers*, 725 P.2d at 1037.
41. *Id.* at 1056 (Cardine, J., dissenting).
42. *Id.* at 1056-57.

Rule 701.[43] Because the rule places reasonable limitations on the type of questions counsel may ask when examining veniremen, it can be applied pragmatically by the trial court to eliminate improper, as opposed to proper, peremptory questioning.

The trial court, through the guidelines provided in Rule 701, could determine if counsel is attempting to go beyond legitimate peremptory challenge questions. The court could use its discretion (as it has always done) to eliminate those peremptory questions not deserving of the court's time. These sound limitations would still enable the attorneys to use their peremptories effectively and give effect to voir dire's primary purpose of selecting a panel of fair and impartial jurors.

The typical challenge for cause examination fails to detect certain biases due to its statutory origin. The generic design of the for cause questions glosses over the various nuances of a particular case. Consequently, a blind spot is created for the attorney. The result is an attorney who allows biased jurors to slip undetected through the statutory cracks.

An additional filtering device is needed in order to further screen out unfair or biased jurors. The peremptory challenge fulfills this need. Because it is unrealistic to include all the possible reasons for disqualifying a juror into the applicable challenge for cause categories, the peremptory challenge is needed to explore and develop those areas outside of the statutorily created grounds for dismissal. For example, the peremptory ferrets out a potential juror's unconscious biases by inquiry into "particular matters which may be the subject of biased or prejudiced views in order to determine whether the juror in fact, even without his own knowledge, may have a demonstrable bias or prejudice"[44] that would render him unfit as a juror.

It is difficult to reconcile the Wyoming Supreme Court's view of peremptory challenge with the United States Supreme Court's view. The *Swain* opinion extols the virtues of the peremptory as an additional, and occasionally independent, means to secure fair and impartial jurors. The *Summers* opinion, however, discounts the peremptory challenge's independent role in securing fair and impartial jurors. Consequently, the majority's attempt to support its position with *Swain* is misplaced.

The court's response to Summers' argument that the intelligent use of peremptories should be permitted was terse and predictable in light of its *Jahnke* analysis. The court assumes that if the attorney is allowed to exercise his peremptories effectively, the inevitable result is that he will select sympathetic jurors. This assumes too much. The proper analysis would focus on whether the attorney is permissibly rejecting venire-

43. WYO. UNIF. R. D. CT. 701 (Rule 701 is reproduced *supra* note 39).

44. State v. Pendry, 227 S.E.2d 210, 217 (W. Va. 1976). Even though the attorney's reasons for using his peremptories may be entirely subjective, "he should be given access to the information to exercise the judgments meaningfully." Babcock, *supra* note 7, at 557 n.46. As another commentator pointed out, "the more litigants know of the jurors' backgrounds, the more accurately they may identify biases apt to color the jurors' judgment and use their limited number of peremptories where the need appears greatest." Note, *supra* note 7, at 1507.

men with his peremptories who, although they do not qualify for dismissal for cause, nonetheless, are unfair and biased jurors.

The court rightly stresses its concern that criminal defendants not be deprived of their right to a fair and impartial jury. It is unfortunate, however, that the court missed an opportunity in *Summers* to provide additional means for the accused to secure this right. Voir dire should allow examination for both challenge for cause and for the effective use of peremptory challenge. Voir dire functions at maximum efficiency when the accused is allowed to develop an adequate independent informational basis in order to effectively use his peremptory challenge, instead of relying solely on hunches.

It is regrettable that the court chose to eviscerate the accused's ability to use his peremptories effectively — especially in light of Justice Cardine's compelling dissents in both *Jahnke* and *Summers* on why the majority's approach is "illogical."[45] Instead of directing the trial court to include the intelligent use of peremptories in its discretion when defining the proper scope of voir dire,[46] the court ritualistically states that "the purpose of the voir dire is not to explore for a reason for the exercise of the peremptory challenge."[47]

CONCLUSION

The majority's analysis is not persuasive. It refuses to acknowledge that legitimate reasons support the peremptory's intelligent use. Instead the majority adheres to a restrictive view of the peremptory: if voir dire is expanded so that the attorney can use his peremptories intelligently, he will attempt to select a sympathetic jury. This view is short sighted

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45. *Jahnke*, 682 P.2d at 1044-49 (Cardine, J., dissenting); *Summers*, 725 P.2d at 1051-57 (Cardine, J., dissenting). *See also* Patterson v. State, 691 P.2d 253, 260-71 (Wyo. 1984) (Rose, J., specially concurring).

46. Allowing attorneys the opportunity to effectively utilize their peremptory challenge is not a novel idea. Missouri and West Virginia have both held that voir dire is to establish grounds for the challenge for cause and for the effective use of the peremptory challenge. *See* State v. Peacher, 167 W. Va. 540, 280 S.E.2d 559 (1981); State v. Brown, 547 S.W.2d 797 (Mo. 1977).

47. *Summers*, 725 P.2d at 1037 (quoting from *Jahnke*, 682 P.2d at 1003). Perhaps the court should consider Williams v. Florida, 399 U.S. 78 (1970). The issue before the Court was whether exactly 12-person juries are necessary to fulfill the constitutional right to a trial by jury. In deciding that 12-person juries are not constitutionally required, the Court formulated a test: "The relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial." *Id.* at 99-100. The Court decided that the performance of a 6-person jury does not hamper its function, i.e., the jury's reliability "as a factfinder hardly seems likely to be a function of its size." *Id.* at 101. The Court's test could also be adapted to an argument advocating that extensive questioning is required for the effective use of peremptories. First, the peremptory challenge's function is to reassure the parties that they have selected a fair and impartial jury. *Swain*, 380 U.S. at 219. Secondly, the peremptory challenge's relation to the purpose of the jury trial is "to provide an additional safeguard to the required fair trial." *Jahnke*, 682 P.2d at 1047 (Cardine, J., dissenting). Thus, given the peremptory challenge's function in relation to the purposes of the jury trial, a compelling argument exists for the peremptory's intelligent use as an additional means to secure the constitutionally envisioned jury of fair and impartial jurors.

in that it fails to recognize that for peremptories to function properly, a more sophisticated and creative style of questioning is required.

To include the intelligent use of peremptories in voir dire's structure would promote the accused's constitutional and due process rights. When the court agrees that counsel ought to have the opportunity to so structure voir dire, it will have taken an important step toward enabling the accused to reject biased jurors who might otherwise pass unnoticed through the challenge for cause examination. Adherence to the current narrow examination will continue to unduly restrict the accused's efforts to obtain a fair and impartial jury. The majority missed the opportunity *Summers* offered to implement a more enlightened approach which recognizes the peremptory's intended role.

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