

March 2009

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Repository Citation

Kristen D. Clardy, *Judicial Confusion and Inconsistency in Handling Juror Misconduct: A New Proposal*, 17 Wm. & Mary Bill Rts. J. 895 (2009), <https://scholarship.law.wm.edu/wmborj/vol17/iss3/8>

JUDICIAL CONFUSION AND INCONSISTENCY IN HANDLING JUROR MISCONDUCT: A NEW PROPOSAL

Kristen D. Clardy*

INTRODUCTION

Consider two potential jurors in a rape trial, participating in the voir dire process.¹ When Juror A is asked her occupation, she says she is a medical student. When Juror B is asked whether she or another close family member has been involved in a crime, she says no.² In reality, Juror A is a law student, and Juror B was the victim of a rape some years earlier. Both jurors have lied about an objective fact. But which juror is most likely to be negatively biased against the accused? It would be an easy argument to make that Juror B is very likely to foster a bias against the defendant; at the very least the juror should be subjected to further examination by counsel and the presiding judge, if not automatically dismissed for cause. It is a much more tenuous argument to make that Juror A harbors such a bias.³ However, the current federal standard used to determine when this type of juror misconduct should result in a new trial for the defendant comes to the reverse conclusion.⁴ This standard was set out in a two-part test in the plurality opinion of *McDonough Power Equipment, Inc. v. Greenwood*.⁵ In the years following the 1984 decision, this rule has been reinterpreted and misinterpreted in virtually all state and federal jurisdictions seeking to incorporate the Supreme

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¹ It is interesting that this Note addresses omissions or lies from prospective jurors during voir dire, a process that, literally translated from Old French, means “to speak the truth.” BLACK’S LAW DICTIONARY 1605 (8th ed. 2004).

² The inspiration for this example, as well as for this Note, comes from *Evans v. Commonwealth*, No. 0078-06-1, 2007 WL 1742457 (Va. Ct. App. June 19, 2007) (holding that a juror who had been raped thirty-seven years earlier answered honestly when she “wasn’t thinking of that situation” when asked whether she “or any member of [her] immediate family [had] been a victim or a witness to a violent crime”). This example is not meant to mirror the facts in *Evans*; however, this Note sets out a better test to use in similar situations.

³ Of course, if Juror A was a medical student, and said that she was a law student during voir dire for a medical malpractice trial, then possible bias could be found. For a discussion of materiality, see *infra* Part III.A.

⁴ See *Evans*, 2007 WL 1742457, at *3 (denying the defendant a new trial despite evidence that the juror’s omitted information played a role during deliberations).

⁵ 464 U.S. 548 (1984). Although the opinion of the Court is joined by eight Justices, only three Justices actually signed the opinion of the court. *Id.* Five Justices joined in two concurring opinions. *Id.* This issue is discussed *infra* Part II.B.1.

Court rule.⁶ Recognizing the failings of this rule, some states have even eliminated the use of the *McDonough* test and defined their own standards.⁷

This Note argues that the *McDonough* test fails to protect the constitutional rights of criminal defendants and should be replaced with a rule designed to force courts to examine a juror's potential for bias. The rule to be imposed should be: when a potential juror omits information during voir dire, a new trial will be granted if: (1) the information is material to the case; (2) the information is an objective fact; and (3) the omitted information bears directly on the juror's potential for bias such that it would have provided a valid basis for a challenge for cause. This rule will be more clearly applied and understood than the *McDonough* test, and it obviates the need to engage in extensive harmless error analysis.

Part I of this Note lays out the constitutional rights implicated by this sort of juror misconduct and the need for a rule to protect these rights. Part II identifies the current federal rule and outlines the major problems it creates. Part III proposes a new three-part rule designed to avoid the problems with the current rule. Part IV outlines the two competing rules governing juror misconduct, and compares the proposed rule to the benefits and problems of the competing rules. Part V addresses practical concerns created by the proposed rule, and this Note concludes with recommendations to courts on how to effectively protect a defendant's constitutional rights with efficiency.

Two limitations of this Note must be addressed before any meaningful analysis of this issue can take place. First, both criminal and civil suits may result in a jury trial.⁸ Indeed, *McDonough* itself is a civil opinion that has been extended to many criminal cases involving omissions of information during voir dire.⁹ However, the basis for the jury trial right is vested in different constitutional amendments for civil and criminal trials.¹⁰ While most criminal cases can result in jury trials, there is much debate about what kinds of civil trials are properly held before juries.¹¹ As such, this

⁶ See *infra* Part II.B (discussing the problems courts face in interpreting and applying the *McDonough* rule).

⁷ See, e.g., *State v. Buckom*, 485 S.E.2d 319 (N.C. Ct. App. 1997), *cert. denied*, 522 U.S. 973 (1997); *Franklin v. State*, 138 S.W.3d 351 (Tex. 2004); *State v. Briggs*, 776 P.2d 1347 (Wash. Ct. App. 1989); *State v. Wyss*, 370 N.W.2d 745 (Wis. 1985); *infra* Part II.

⁸ Christopher E. Smith, *Imagery, Politics, and Jury Reform*, 28 AKRON L. REV. 77, 80 (1994).

⁹ See, e.g., *United States v. Tucker*, 137 F.3d 1016 (8th Cir. 1998), *cert. denied*, 534 U.S. 816 (2001); *Zerka v. Green*, 49 F.3d 1181 (6th Cir. 1995); *United States v. Langford*, 990 F.2d 65 (2d Cir. 1993), *cert. denied*, 534 U.S. 1070 (2001); *Dall v. Coffin*, 970 F.2d 964 (1st Cir. 1992); *United States v. Ortiz*, 942 F.2d 903 (5th Cir. 1991), *cert. denied*, 504 U.S. 985 (1992); *Welch v. Caldwell*, 849 F.2d 607 (4th Cir. 1988) (unpublished table opinion).

¹⁰ "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ." U.S. CONST. amend. VII. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. CONST. amend. VI.

¹¹ See, e.g., *Graham C. Lilly, The Decline of the American Jury*, 72 U. COLO. L. REV. 53 (2001); *Jonathan L. Mayes, The Right to Trial by Jury in Environmental Cost-Recovery and*

Note primarily relies on criminal cases to support its proposition and analysis of *McDonough*. This does not mean that the proposed rule is applicable only to criminal trials.¹² Many of the same problems that have arisen in criminal trials exist in civil trials, and much of the reasoning herein applies to civil trials as well.¹³

Second, it is important to note that *McDonough* is a federal rule that has been adopted by many states.¹⁴ Other states have rejected *McDonough* in favor of their own rule.¹⁵ This Note proposes a new federal standard, but there is no reason why this rule cannot be adopted in all state and local jurisdictions. Indeed, in those jurisdictions that have adopted *McDonough*, this rule is strongly recommended.

I. THE CONSTITUTIONAL BASIS FOR A *McDONOUGH*-TYPE RULE

Although it may seem clear that there is something wrong with allowing a biased juror to serve on a jury, the constitutional basis for this argument is more complicated. There are a variety of ways to construct a constitutionally based argument against juror bias, but they all begin with the constitutional guarantee that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”¹⁶ Arguments regarding juror bias fall into one of two categories: those that use an ex-post view of juror bias, and those that use an ex-ante view.

A. *The Ex-Post View*

An ex-post view of juror bias focuses on whether the defendant actually suffered a detriment because of a juror’s bias.¹⁷ This is called an ex-post argument because it focuses on the result of a biased juror—the jury’s verdict is tainted by the biased

Contribution Actions: United States v. England, 10 ALBANY L. ENVTL. OUTLOOK J. 71 (2005).

¹² Although only criminal defendants are constitutionally guaranteed an impartial jury, this requirement has been implied through the Fifth Amendment guarantee to due process of law. See *Olson v. Bradrick*, 645 F. Supp. 645, 653 (D. Conn. 1986).

¹³ See, e.g., *Grundy v. Dhillon*, No. 2006-T-0007, 2007 WL 1584220 (Ohio Ct. App. June 1, 2007) (holding that a new trial was warranted in a medical malpractice suit when a juror failed to disclose that his son had received poor treatment at the same hospital).

¹⁴ E.g., *Banther v. State*, 823 A.2d 467, 484 (Del. 2003) (adopting *McDonough* but adding a materiality element); *State v. Dye*, 784 N.E.2d 469, 472 (Ind. 2003), *cert. denied*, 531 U.S. 957 (2000); *Bowling v. Commonwealth*, 168 S.W.3d 2 (Ky. 2004), *cert. denied*, 546 U.S. 1153 (2006); *State v. Mayo*, 945 A.2d 846 (Vt. 2008).

¹⁵ E.g., *State v. Briggs*, 776 P.2d 1347, 1351 (Wash. Ct. App. 1989); *State v. Wyss*, 370 N.W.2d 745, 765 (Wis. 1985).

¹⁶ U.S. CONST. amend. VI.

¹⁷ See, e.g., *Smith v. Phillips*, 455 U.S. 209, 215 (1982) (noting that before it decided *McDonough*, the Court “ha[d] long held that the remedy for allegations of juror partiality [was] a hearing in which the defendant ha[d] the opportunity to prove actual bias,” and because the evidence did not show beyond a reasonable doubt that the verdict was influenced, the defendant was not awarded a new trial).

juror, causing a violation of the defendant's Sixth Amendment rights.¹⁸ Generally, proving a constitutional violation under this view requires two things: (1) a determination of whether there was bias; and (2) whether that bias had a detrimental effect on the defendant.¹⁹

Due to the secretive nature of jury deliberations, both prongs are exceedingly difficult to prove.²⁰ Cases involving juror bias arise in a variety of ways, but bias concerns are often reported by a juror or acquaintance of a juror.²¹ In other cases, counsel finds out about potential bias through routine interactions with jury members.²² Regardless of the way in which counsel becomes aware of a juror's non-disclosure, obtaining proof of actual bias suffered by the defendant is usually prohibitively difficult.

¹⁸ See, e.g., *Conaway v. Polk*, 453 F.3d 567, 585 n.20 (4th Cir. 2006) (applying *McDonough*, but requiring an "inquiry into whether a trial's fairness was affected" as a third step, "as it must be satisfied before the juror's bias may be proven").

¹⁹ See, e.g., *Fields v. Brown*, 503 F.3d 755 (9th Cir. 2007) (applying *McDonough*, but holding that because there was no bias, there was no detrimental effect on the defendant's rights), *cert. denied*, 128 S. Ct. 1875 (2008).

²⁰ See Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 497 (1997).

A primary avoidance technique is to shield the jury's decision making process from public scrutiny by requiring jury deliberations to take place in complete secrecy. This minimizes the number of defective decisions exposed to the public. Instead of revealing misunderstandings about the evidence, instructions, or other aspects of the trial, the entire reasoning process is safeguarded. This insulates the results from many avenues of attack.

Id.

²¹ See *Commonwealth v. Amirault*, 506 N.E.2d 129 (Mass. 1987), *cert. denied*, 506 U.S. 1000 (1992). A juror misconduct claim arose after an uninterested third party called defense counsel and "informed the attorney that what he knew about the juror caused him to question whether [the defendant] received a 'fair shake.'" *Id.* at 131; see also *United States v. Ortiz*, 942 F.2d 903, 909 (5th Cir. 1991) ("A secretary employed by the United States Attorney's Office . . . approached the prosecutor and informed him that . . . she had recognized one of the jurors as . . . her cousin," and the juror had concealed this fact), *cert. denied*, 504 U.S. 985 (1992); *Evans v. Commonwealth*, No. 0078-06-1, 2007 WL 1742457, at *1 (Va. Ct. App. June 19, 2007) ("Shortly after the jury was excused from service, the jury foreperson contacted the deputy sheriff assigned to the jury and reported that Juror H had told the other jury members that 'she had been in a similar situation and [that] she c[ould] see the fear and the way that the girl felt.'").

²² See *Johnson v. Luoma*, 425 F.3d 318, 322–23 (6th Cir. 2005) ("Johnson subsequently learned that, at the time of his trial, Juror 457 was the complaining witness in a domestic violence case that was currently being prosecuted by the same prosecutor's office."), *cert. denied*, 549 U.S. 832 (2007); *United States v. Sonego*, 61 M.J. 1, 9 (C.A.A.F. 2005) (noting that juror gave conflicting answers during the voir dire processes in two different trials with the same defense attorney); *Grundy v. Dhillon*, No. 2006-T-0007, 2007 WL 1584220 (Ohio Ct. App. June 1, 2007) (noting that counsel learned of non-disclosure due to a voluntary meeting on the courthouse steps); *State v. Briggs*, 776 P.2d 1347, 1349 (Wash. Ct. App. 1989) (stating that "[a]fter the verdict, the defense learned in the course of juror interviews" that one juror had failed to answer correctly during voir dire).

Memories of the actual words used during deliberations vary, and comments that seemed important to one juror may have been ignored by another.

A rule focusing on the ex-post view of juror misconduct creates complicated legal analysis for the reviewing court. Each case involving juror misconduct has different facts, and misconduct can have varying impacts on the fairness of the defendant's trial. Factors that may have been important in one trial may turn out to be irrelevant in the next. Although it is important to provide defendants the ability to prove that they suffered actual bias, this view does not provide a bright line standard that can be applied in a wide variety of situations.

B. The Ex-Ante View

An ex-ante view of juror bias, rather than focusing on the end result of a juror's bias, alleges that the constitutional infringement happened before the partial juror was ever seated on the jury.²³ In order to ensure that an impartial jury is seated, counsel or the trial judge may pose a series of questions to potential jurors.²⁴ This process is used to examine jurors as to issues that are deemed relevant in order to discover any biases that a potential juror may hold.²⁵ Thus, "[t]he necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious."²⁶ The exact process used varies by jurisdiction,²⁷ and often by courtroom,²⁸ but every process must utilize a challenge for cause.²⁹ When a juror provides less than accurate information,

²³ See, e.g., *Briggs*, 776 P.2d at 1347.

²⁴ See generally Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179 (2003) (examining the problem of juror bias and concluding that voir dire does not adequately prevent bias).

²⁵ See *id.* (discussing the voir dire process and ways to improve it).

²⁶ *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (plurality opinion). Some would argue that voir dire is not used to select an impartial jury at all, but rather to select a jury most partial to one's side. See, e.g., HIROSHI FUKURAI ET AL., *RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE* 142 (1993) (arguing that the defense counsel's goal during voir dire is to find jurors sympathetic to the defendant's life situation, while the prosecution seeks jurors vastly different from the defendant and who will not sympathize with him).

²⁷ See Hans & Jehle, *supra* note 24, at 1183.

²⁸ See Beverly Petersen Jennison, *Trial Court Discretion in Conducting the Voir Dire Subjected to More Stringent Scrutiny: Cordero v. United States*, 33 CATH. U. L. REV. 1121, 1123 (1984) (noting the trial judge's broad ability to use discretion in conducting voir dire).

²⁹ Indeed, this notion is now taken for granted in most opinions dealing with juror bias, as courts recognize challenges for cause as the means by which to enforce a defendant's impartial jury right. See, e.g., *Uttecht v. Brown*, 127 S. Ct. 2218, 2224 (2007) ("[A] criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause."); *Morgan v. Illinois*, 504 U.S. 719 (1992) (holding that a capital defendant must be allowed to exercise challenges for cause based on jurors' feelings about the death penalty).

by way of a lie or an omission, the defendant has lost his ability to examine the juror for any hint of bias, and thus to challenge him for cause.³⁰ Indeed, "by not mentioning [material information, the juror] withdr[aws] from defense counsel and the court the decision as to whether he should nevertheless serve as a juror and ma[kes] that decision himself."³¹ More specifically, even if disclosure "would not have resulted in a . . . strike for cause . . . it would have allowed for further investigation and information bearing on that issue, specifically an inquiry into the venire person's ability to render an impartial verdict based solely on the evidence presented."³² This argument does not require any showing of actual bias on the part of the juror.³³ Instead, the ex-ante argument finds that the right to an impartial jury is violated the moment a juror fails to answer truthfully any question during voir dire.³⁴

It is important to note that the ex-ante argument focuses on the loss of the right to challenge for cause, not on the loss of a peremptory challenge.³⁵ Peremptory challenges are not constitutionally guaranteed.³⁶ Rules about the number of peremptory challenges, if any, vary by jurisdiction.³⁷ Because challenges for cause are the mechanism through which the impartial jury right is ensured, removing the defendant's ability to challenge a juror for cause directly infringes upon his Sixth Amendment rights. Thus, a defendant cannot argue for a new trial under the ex-ante view of juror bias simply because he would have used a peremptory challenge had he known the undisclosed information.³⁸ A request for a new trial based on ineffective use of peremptory challenges is another line of analysis entirely, and is outside the scope of this Note.³⁹

C. Harmless Error

As with all other procedural errors, under either view of juror misconduct, defendants must prove that the type of error alleged caused them some detriment during

³⁰ See, e.g., *United States v. Scott*, 854 F.2d 697, 698 (5th Cir. 1988).

³¹ *Id.*

³² *Williams v. State*, 904 A.2d 534, 542 (Md. 2006).

³³ See *id.* at 542–43.

³⁴ *Id.* at 544.

³⁵ *State v. Wyss*, 370 N.W.2d 745, 765 (Wis. 1985).

³⁶ *State v. Briggs*, 776 P.2d 1347, 1352 (Wash. Ct. App. 1989); William G. Childs, *The Intersection of Peremptory Challenges, Challenges for Cause, and Harmless Error*, 27 AM. J. CRIM. L. 49, 50 (1999).

³⁷ See, e.g., Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 496–97 n.8 (1978).

³⁸ *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 555 (1984) (plurality opinion) ("[I]t ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on voir dire examination.").

³⁹ For a discussion of the history of cases dealing with peremptory challenges, see *United States v. Harbin*, 250 F.3d 532, 545–49 (7th Cir. 2001).

the trial.⁴⁰ This requirement is usually referred to as the “harmless error” doctrine.⁴¹ The harmless error doctrine is found in the idea that a “‘defendant is entitled to a fair trial but not a perfect one,’ for there are no perfect trials.”⁴² In order to avoid being seen as “citadels of technicality,”⁴³ the Supreme Court and Congress adopted a rule that “embod[ies] the principle that courts should exercise judgment in preference to the automatic reversal for ‘error’ and ignore errors that do not affect the essential fairness of the trial.”⁴⁴ So, even if error occurs, new trials are not granted unless there is something so wrong about the error that the essential fairness of the trial is thwarted.⁴⁵ When errors implicate “substantial rights,” the burden of proof generally lies with the prosecution, as they are the most common beneficiaries of the errors.⁴⁶ This means the prosecution must prove that the violation did not deny the defendant a fair trial.⁴⁷ Usually the prosecution will argue, and the deciding court will hold, that the evidence against the defendant was such that even had the error not been made the verdict would be unchanged.⁴⁸ However, if the error is only “technical” in nature, the burden

⁴⁰ See, e.g., *McDonough*, 464 U.S. at 556 (plurality opinion) (arguing in dicta that “[t]he motives for concealing information may vary, but only those reasons that affect a juror’s impartiality can truly be said to affect the fairness of a trial”).

⁴¹ See, e.g., Childs, *supra* note 36, at 57–66.

⁴² *Brown v. United States*, 411 U.S. 223, 231–32 (1973) (quoting *Bruton v. United States*, 391 U.S. 123, 135 (1968)).

⁴³ *Kotteakos v. United States*, 328 U.S. 750, 759 (1946) (quoting Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 222 (1925)).

⁴⁴ *McDonough*, 464 U.S. at 553 (plurality opinion); see also 28 U.S.C. § 2111 (2008) (“On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.”); FED. R. CIV. P. 61 (“The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.”); FED. R. CRIM. P. 52(a) (“Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”).

⁴⁵ See, e.g., *United States v. Patterson*, 215 F.3d 776, 781–83 (7th Cir. 2000) (holding that a violation of FED. R. CRIM. P. 24(c)(2) is not grounds for reversal because the “substantial right” to an impartial jury was not violated), *cert. denied*, 534 U.S. 853 (2001).

⁴⁶ Childs, *supra* note 36, at 57–58.

⁴⁷ See, e.g., *United States v. Carpenter*, 494 F.3d 13 (1st Cir. 2007) (affirming the grant of a new trial when the attorney for the government did not prove that the defendant received a fair trial), *cert. denied*, 128 S. Ct. 1443 (2008).

⁴⁸ See, e.g., *United States v. Williams*, 957 F.2d 1238, 1244 (5th Cir. 1992) (noting that even excluding an improperly admitted marijuana cigarette would not change the verdict because “the evidence of Williams’s guilt [was] overwhelming”); *State v. Wyss*, 370 N.W.2d 745, 748 (Wis. 1985) (holding that in light of all of the facts properly proved at trial, “there [was] hardly a remote possibility, much less a substantial degree of probability, that a new trial would produce a different result”).

often shifts to the defendant.⁴⁹ Then, the defendant must not only offer proof of the violation, but he also must show that the trial was unfair as a result of that violation.⁵⁰ Unless the defendant can clearly implicate a substantial right, it becomes the defendant's burden to show some concrete harm as a result of that error.⁵¹ Discussion of what types of errors meet this standard—not to mention what the standard actually is—usually requires complicated analysis, and it is difficult to draw a general rule to determine what is and is not harmful error.⁵²

The harmless error doctrine is tricky to apply because it requires a distinction between “substantial” and other rights.⁵³ Courts attempt to make these distinctions when engaging in harmless error analysis, but they may really be looking at a different distinction when making the final determination of harm. Indeed, the labels of “substantial” or “harmful” can be seen as legal conclusions rather than tools of analysis. Other rules can be used to more accurately determine the level of harm—if any—suffered by the defendant as a result of a particular error.

If a defendant does not receive a fair trial, or if a criminal suspect is interrogated using coercive methods and a resulting confession is used at trial, it is almost assured that the defendant has suffered harmful and reversible error.⁵⁴ However, it is not the case that every error tending to implicate those rights automatically results in a new trial for the defendant. For example, introduction of otherwise inadmissible evidence generally is held to be harmless, though it is possible that the defendant's trial was not completely fair as a result.⁵⁵ By comparison, introduction of a confession given by a defendant who has not been informed of his *Miranda* rights will always warrant a new trial.⁵⁶ It seems then, that the distinction is not one of “substantial” rights, as both examples could possibly infringe on the defendant's Fifth and Sixth Amendment rights. The terms “substantial” and “essential fairness” can be seen as “transcendental nonsense”—terms that are actually legal conclusions instead of analytical tools—and a more functional distinction between errors that

⁴⁹ Childs, *supra* note 36, at 57–58.

⁵⁰ *Id.*

⁵¹ See, e.g., *United States v. Cherer*, 513 F.3d 1150 (9th Cir. 2008).

⁵² See Gregory Mitchell, *Against “Overwhelming” Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335 (1994) (outlining three kinds of harmless error tests used, and arguing that the choice of a test may be dispositive in the determination of whether error is harmless).

⁵³ See, e.g., *United States v. Patterson*, 215 F.3d 776, 781–83 (7th Cir. 2000) (discussing the various ways a substantial right can be implicated for the purposes of harmless error analysis), *cert. denied*, 534 U.S. 853 (2001).

⁵⁴ See, e.g., *Dickerson v. United States*, 530 U.S. 428 (2000) (holding that statements made before a suspect is properly “Mirandized” are inadmissible at trial, and the admission of these statements constitutes reversible error).

⁵⁵ See, e.g., *United States v. Gunn*, No. 06-15649, 2008 U.S. App. LEXIS 3415 (11th Cir. Feb. 12, 2008); *Estrada v. Scribner*, 512 F.3d 1227 (9th Cir. 2008).

⁵⁶ See *Dickerson*, 530 U.S. 428.

result in a new trial and those that do not can be made.⁵⁷ The *Miranda* rule provides the best example of this kind of distinction.

Before the *Miranda v. Arizona*⁵⁸ decision, courts had to engage in a case-by-case analysis of whether a confession was voluntarily given.⁵⁹ This analysis was complicated and fact intensive, and provided no clear bright line rule to determine what exactly constituted a voluntary confession.⁶⁰ So, the Court in *Miranda* created a rule to provide a more objective standard of review.⁶¹ Without certain verbal or written warnings, a confession given by a suspect is inadmissible in court.⁶² It is possible that a confession could meet the requirements of *Miranda* in every aspect, yet still be excluded if the suspect has not been sufficiently warned of his rights.⁶³ However, it is unlikely that a confession will be involuntary if the warnings are given.⁶⁴ The *Miranda* rule, then, functions as a way to determine whether a substantial right of the defendant has been violated. Any finding of a *Miranda* violation is thus harmful per se, obviating the need to engage in the complicated harmless error analysis.⁶⁵

Miranda avoided harmless error analysis because the rule functions as a tool for courts to evaluate a defendant's claim that his confession was involuntary. Instead of focusing on the intricacies of whether the individual confession is actually coerced, the rule created threshold requirements that must be met in order to come to the conclusion of voluntariness.⁶⁶ When dealing with juror misconduct, the ex-ante approach is most similar to that taken by *Miranda*. A rule following the ex-ante approach leads to the conclusion that a partial jury has been seated.⁶⁷ Even if the defendant has been given his *Miranda* warnings, he can still attempt to challenge the admission of his confession by alleging some other act of coerciveness that is not evidenced through the *Miranda* inquiry.⁶⁸ Similarly, an ex-ante rule addressing juror misconduct still leaves open the possibility that a defendant could show actual bias if he cannot sustain a challenge under that rule.⁶⁹ Thus, by using the concepts behind *Miranda*, an ex-ante rule addressing juror misconduct can effectively provide a clear, bright line rule that avoids confusing harmless error analysis.

⁵⁷ See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) (discussing how courts get bogged down in terms and concepts rather than addressing practical legal issues).

⁵⁸ 384 U.S. 436 (1966).

⁵⁹ See, e.g., *Escobedo v. Illinois*, 378 U.S. 478 (1964).

⁶⁰ See, e.g., *id.*

⁶¹ *Miranda*, 384 U.S. 436.

⁶² *Id.*

⁶³ See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443–44 (2000).

⁶⁴ See *id.* at 444.

⁶⁵ See *id.*

⁶⁶ See *id.* at 443–44.

⁶⁷ See *supra* Part I.B.

⁶⁸ See *Dickerson*, 530 U.S. at 444.

⁶⁹ See *supra* Part I.B.

II. THE *McDONOUGH* LEGACYA. *The Rehnquist Court's Reasoning*

In order to protect a defendant's right to an impartial jury, the Supreme Court developed a line of case law enforcing the guarantees of the Sixth Amendment.⁷⁰ When jurors lie or omit information during voir dire, the test from *McDonough* determines if the misconduct warrants a new trial.⁷¹ *McDonough* was a civil personal injury case that resulted in a jury trial.⁷² During voir dire, the prospective jurors were asked, "Now, how many of you have yourself or any members of your immediate family sustained any severe injury . . . that resulted in any disability or prolonged pain and suffering . . . ?"⁷³ Juror Payton's son had suffered a broken leg as a result of a tire explosion, but he failed to disclose this information when asked.⁷⁴ Juror Payton was seated on the jury, and participated in deliberations.⁷⁵ The jury found that the defendants were not liable for any percentage of the accident.⁷⁶ After the verdict, Greenwood moved for a new trial based on Juror Payton's non-disclosure during voir dire.⁷⁷ The trial court denied the motion, noting "that it was not 'overly impressed with the significance of this particular situation.'"⁷⁸ The Court of Appeals for the Tenth Circuit reversed, saying that Greenwood's right to peremptory challenge was violated.⁷⁹

On review, the United States Supreme Court reversed the Tenth Circuit, creating a new rule to be used in similar situations.⁸⁰ The opinion of the Court held that "to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause."⁸¹ A plain

⁷⁰ Early on, the United States Supreme Court affirmed the right to a jury trial in criminal matters in *Ex parte Milligan*, 71 U.S. (1 Wall.) 2 (1866), and addressed the issue of impartiality in *Reynolds v. United States*, 98 U.S. 145 (1879). Interestingly, the *McDonough* Court relied principally on *Smith v. Phillips*, 455 U.S. 209 (1981), for its analysis of the defendant's Sixth Amendment rights, a case which in turn relied on both *Remmer v. United States*, 347 U.S. 227 (1954), and *Dennis v. United States*, 339 U.S. 162 (1950). All three cases placed the prejudice sustained by the defendant at the core of their analysis. *McDonough* is thus a significant departure from its predecessors.

⁷¹ 464 U.S. 548 (1984).

⁷² *Id.* at 549.

⁷³ *Id.* at 550.

⁷⁴ *Id.* at 551-52 n.3.

⁷⁵ *Id.* at 550.

⁷⁶ *Id.* at 550 n.1.

⁷⁷ *Id.* at 551.

⁷⁸ *Id.*

⁷⁹ *Greenwood v. McDonough Power Equip., Inc.*, 687 F.2d 338 (10th Cir. 1982).

⁸⁰ *McDonough*, 464 U.S. at 556 (plurality opinion).

⁸¹ *Id.*

reading of this holding would create a two-prong test. First, the moving party must show that the juror's answer to a question posed on voir dire was dishonest.⁸² Only after a showing of dishonesty does the test move on to evaluate bias.⁸³ Though the rule seems clear, lower courts have interpreted this rule in a variety of ways, and no consistent application of this rule exists.⁸⁴

It must be noted that the opinion of the Court is a plurality opinion. Justice Blackmun, joined by Justices Stevens and O'Connor, filed a concurring opinion that presents an ex-post view of juror misconduct.⁸⁵ Justice Blackmun noted that his understanding of the Court's rule does not

foreclose the normal avenue of relief available to a party who is asserting that he did not have the benefit of an impartial jury. Thus, regardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias or, in exceptional circumstances, that the facts are such that bias is to be inferred.⁸⁶

Justice Brennan, joined by Justice Marshall, filed a separate concurring opinion, arguing that "the proper focus when ruling on a motion for new trial in this situation should be on the bias of the juror and the resulting prejudice to the litigant."⁸⁷ This argument also takes an ex-post view of juror misconduct. Both concurring opinions focus on the prejudice the defendant suffered as a result of the juror's bias. Unfortunately, neither opinion sets out a rule that avoids the evidentiary problems, as well as the general problems, with the ex-post view.

The opinion of the Court sets out an ex-ante view of juror misconduct; however, the application of this rule is less than clear cut.⁸⁸ The rule is exceedingly difficult to interpret because the Court did not actually engage in the analysis presented by the *McDonough* test. The Court stated the rule, then a few short sentences later stated that the case was remanded to the Court of Appeals to deal with other issues on appeal.⁸⁹ The Court never concluded that the information concealed by the juror in *McDonough* would be considered honest, but they implied that it would be.⁹⁰ The Court stated, shortly before announcing the new rule, that "[t]o invalidate the result of a 3-week

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See *infra* Part II.B (discussing the different ways to interpret *McDonough*).

⁸⁵ *McDonough*, 464 U.S. at 556–57 (Blackmun, J., concurring).

⁸⁶ *Id.*

⁸⁷ *Id.* at 557–58 (Brennan, J., concurring).

⁸⁸ See *infra* Part II.B.

⁸⁹ *McDonough*, 464 U.S. at 556 (plurality opinion).

⁹⁰ *Id.* at 555.

trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give."⁹¹ Then, the Court found that a new trial was not warranted in this situation.⁹² The Court did not attempt to explain which facts in *McDonough* allowed them to reach their conclusion, nor did the Court provide examples of the type of information that would warrant a reversal.⁹³

Not only has the Court declined to provide guidance in the application of the *McDonough* rule in that opinion, the Court has also declined to interpret the rule through subsequent decisions.⁹⁴ Only three subsequent Supreme Court cases mention *McDonough*, and only for propositions other than the main holding.⁹⁵ As a result, lower courts, after determining that the holding in *McDonough* controls their inquiry, have nothing to aid their application of its rule. Instead they must rely on their own interpretation of the rule and infer meaning from the opinion in its entirety. This has created a variety of different interpretations of each prong. Only the most common and egregious errors in interpreting *McDonough* are highlighted here.

B. Problems in Applying McDonough

1. Honesty Does Not Stop Courts' Analyses

The first mistake that courts make when applying the *McDonough* rule is that the analysis does not stop after the court determines that a juror's answer was honestly given.⁹⁶ A plain reading of the *McDonough* test would find that a failure to meet the first prong is fatal to a defendant's motion for a new trial.⁹⁷ The opinion clearly set out honesty as a threshold question, with bias being examined only after the court has

⁹¹ *Id.*

⁹² *Id.* at 555–56.

⁹³ *Id.*

⁹⁴ See, e.g., *Gardner v. Ozmint*, 511 F.3d 420 (4th Cir. 2007), *cert. denied*, 129 S. Ct. 125 (2008); *Tinsley v. Borg*, 895 F.2d 520 (9th Cir. 1990), *cert. denied*, 498 U.S. 1091 (1991).

⁹⁵ *O'Neal v. McAninch*, 513 U.S. 432, 441 (1995) (citing *McDonough* for the proposition that "the current harmless-error statute 'traces its lineage' to §391 [the former federal harmless error statute], and applies in both civil and criminal proceedings"); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 312 (1986) (citing *McDonough* for its mention of the harmless error doctrine); *United States v. Powell*, 469 U.S. 57, 67 (1984) (citing *McDonough* for the proposition that "with few exceptions, once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment" (internal citations omitted)).

⁹⁶ See, e.g., *United States v. Adeniyi*, No. 03 Cr. 86 (LTS), 2004 U.S. Dist. LEXIS 8490 (S.D.N.Y. May 12, 2004) (analyzing whether the juror's non-disclosure of information during voir dire would have met prong two of *McDonough* even after concluding it did not meet prong one).

⁹⁷ See, e.g., *Olson v. Bradrick*, 645 F. Supp. 645, 661 (D. Conn. 1986).

determined that a juror's answer was dishonest.⁹⁸ Instead, many courts continue their analysis and determine that no valid basis for a challenge for cause exists even after they have determined that an answer was honest.⁹⁹ This creates confusion about what the correct rule is. What is a court to do if it finds that the juror's answer was honest, but resulted in actual bias of that juror? Or, what if the fact that the juror answered the *voir dire* question honestly, but did not provide accurate information, reveals a strong bias against the defendant? In both cases the defendant's right to an impartial jury has been violated, but because the juror's answer was honest, the court may be unsure as to the correct course of action.

The reason for this confusion is that the opinion of the Court in *McDonough*, while attempting to set out a bright line rule for determining when a new trial is granted, is merely a plurality opinion.¹⁰⁰ Five members of the Court wrote that they believed bias itself was the proper focus of inquiry.¹⁰¹ The next sentence after the holding adds to the confusion, stating, "The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial."¹⁰² Some courts interpret this to mean that the rule laid out by the opinion of the Court is meant to focus on actual bias.¹⁰³ Other courts have even gone so far as to read a third prong into the *McDonough* test to require "that [the juror] was motivated by partiality."¹⁰⁴ However, that interpretation would mean that the two-prong test set out by the Court is virtually valueless. If the true focus is the

⁹⁸ *McDonough*, 464 U.S. at 558–59 (1984) (Brennan, J., concurring) ("I therefore cannot agree with the Court when it asserts that a new trial is not warranted whenever a prospective juror provides an honest answer to the question posed.").

⁹⁹ See, e.g., *Johnson v. Luoma*, 425 F.3d 318 (6th Cir. 2005), *cert. denied*, 549 U.S. 832 (2006); *Amirault v. Fair*, 968 F.2d 1404 (1st Cir. 1992), *cert. denied*, 506 U.S. 1000 (1992); *United States v. Ortiz*, 942 F.2d 903 (5th Cir. 1991), *cert. denied*, 504 U.S. 985 (1992).

¹⁰⁰ The opinion of the Court was authored by Justice Rehnquist and joined without a concurring opinion by Justices Powell and White, and Chief Justice Burger. *McDonough*, 464 U.S. at 548 (plurality opinion).

¹⁰¹ Justice Blackmun, joined by Justice Stevens and Justice O'Connor, wrote, "[R]egardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing." *Id.* at 556 (Blackmun, J., concurring). Justice Brennan, joined by Justice Marshall, wrote, "[T]o be awarded a new trial, a litigant should be required to demonstrate that the juror incorrectly responded to a material question on *voir dire*, and that, under the facts and circumstances surrounding the particular case, the juror was biased against the moving litigant." *Id.* at 557–58 (Brennan, J., concurring).

¹⁰² *Id.* at 556 (plurality opinion).

¹⁰³ See, e.g., *Lyons v. United States*, 683 A.2d 1066, 1074–75 (D.C. 1996) (construing the holding in *McDonough* to award a new trial only when actual bias is found); *Mays v. State*, 872 N.E.2d 707 (Ind. Ct. App. 2007) (unpublished table opinion) (noting that Indiana state law requires an affirmative showing of bias against the defendant in order to grant a new trial).

¹⁰⁴ *United States v. Tucker*, 137 F.3d 1016, 1026 (8th Cir. 1998), *cert. denied*, 534 U.S. 816 (2001).

bias of the juror, then the honesty of that juror's answer should not matter, and the statement following the words "we hold" is not really the holding.¹⁰⁵ Instead, a true reading of the opinion would find that the two-prong test is the holding, and the following sentence is at best an explanatory statement, or at worst, dictum.

2. Misinterpretation of "Basis"

The second major mistake courts make in applying the *McDonough* test is that they misinterpret the meaning behind "a valid basis for a challenge for cause."¹⁰⁶ This prong is exceedingly difficult to interpret because the Court did not actually engage in the analysis presented by the *McDonough* test. The Court could have used the words "would have actually been dismissed for cause," but chose instead to say that "a correct response would have provided a valid basis for a challenge for cause."¹⁰⁷ If the Court wanted the second prong to be that the trial court would have actually dismissed the juror had he answered accurately, it could have said so just as easily. It did not, and thus it seems logical that the Court meant something different. The Court, instead of wanting a challenge to actually result in the juror's dismissal, must have meant something just short of that.

It is often difficult for an appellate court to know what a trial court would do in any given situation. That difficulty becomes even more pronounced when dealing with a matter that is largely under the discretion of the trial court. The best interpretation, then, is that the phrase means counsel would have been able to articulate a valid reason for a challenge for cause, regardless of whether that challenge would have actually been granted. There are a variety of reasons why challenges for cause are not granted, even when there may be a valid basis for so doing.¹⁰⁸ It would be unwise to speculate as to what a particular judge would have thought had he known information he did not. However, courts applying the *McDonough* rule seem unable, or unwilling, to take this approach. Thus, the second prong of the *McDonough* test is often confusing for courts, and is applied without consistency.¹⁰⁹

¹⁰⁵ *McDonough*, 464 U.S. at 556 (plurality opinion).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ The most common reason is that the trial judge believes the juror when she says she can remain impartial despite her potential for bias. This is generally referred to as a juror being "rehabilitated." See, e.g., *United States v. Sanchez-Hernandez*, 507 F.3d 826, 829 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1912 (2008); *Foley v. Parker*, 488 F.3d 377, 389–90 (6th Cir. 2007).

¹⁰⁹ Compare *United States v. Greer*, 285 F.3d 158, 171 (2d Cir. 2002) (noting that a valid basis for a challenge for cause is "generally based on actual bias, implied bias, or inferable bias"), with *Bank Atl. v. Blythe Eastman Paine Webber, Inc.*, 955 F.2d 1467, 1473 (11th Cir. 1992) ("[I]n order to satisfy the second prong of the *McDonough* test, this circuit requires a showing of actual bias.").

III. A NEW PROPOSAL

It is clear from the variety of interpretations and rejections of the *McDonough* rule that the Supreme Court should adopt a new federal standard. The new rule should be: When a potential juror omits or provides false information during voir dire, a mistrial will be granted if (1) the information is material to the case; (2) the information is an objective fact; and (3) the omitted or false information bears directly on the juror's potential for bias such that it would have provided a valid basis for a challenge for cause. This rule will be more clearly applied and understood, and it obviates the need to engage in harmless error analysis.

A. Materiality

The first prong of the proposed rule is materiality. This is designed as a threshold requirement to eliminate claims that are unlikely to infringe upon a defendant's Sixth Amendment rights. A question about a juror's experience with speech disorders would be material in a case where a key component of the defense's argument rests on the defendant's own speech impediment, whereas it would not be material without that defense argument.¹¹⁰ This is important because "only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial."¹¹¹ If the question does not bear on any material argument or point of contention, but rather was information counsel just would have liked to have known, it is unlikely to affect the defendant's rights, and thus is unlikely to be error.¹¹²

B. Objectivity

The second prong requires that the information concealed or omitted is objective in nature. Subjective beliefs, intents, or biases are not covered under this rule, but can still be challenged if the defendant can show actual prejudice.¹¹³ As the Court noted in *McDonough*, "[J]urors are not necessarily experts in English usage. Called as they are from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges."¹¹⁴ Federal statutory qualifications for jurors, similar to state and local qualifications, "require only a minimal

¹¹⁰ This example is drawn from *State v. Briggs*, 776 P.2d 1347 (Wash. Ct. App. 1989). The court in this case declined to apply *McDonough* in this situation, and instead created a new state rule. *Id.*

¹¹¹ *McDonough*, 464 U.S. at 556 (plurality opinion).

¹¹² As discussed earlier, the basis for this rule is that an impartial jury has been seated as a result of the juror's omission, not that the defendant would have wanted to exclude the juror based on a peremptory challenge. See *supra* Part I.B.

¹¹³ See *supra* Part I.A.

¹¹⁴ *McDonough*, 464 U.S. at 555 (plurality opinion).

competency in the English language.”¹¹⁵ Further, one prospective juror’s definitions of a common word may be far removed from the definition of any other juror in the panel.¹¹⁶ In order to avoid speculation about what a “reasonable” or “average” juror would have thought was a correct response, the omitted information should be objective in nature.¹¹⁷ The question, “Do you have a child?” is a question of objective fact. Anyone asked that question can accurately determine what information is being asked of them. However, that question alone would not give rise to an answer that not only did a juror have a daughter, but that the child had been in a serious car accident. Without a more detailed question, that further information would be objectively irrelevant to the question asked.¹¹⁸ Limiting the rule’s applicability in this manner will ensure that the focus of post-trial challenges does not stray into arguments about whether a juror knew or should have known that the inquiry was directed at the omitted information.

This prong will also preclude challenges based on answers to questions about a juror’s personal thoughts and ability to remain impartial.¹¹⁹ Suppose, for example, that after disclosing that a potential juror’s father is a police officer, a juror says her relationship with her father will not impact her ability to remain impartial. If defense counsel learns that the juror said, during an interview after the trial, “I believed the police officer because my dad was a policeman and he would never lie, and I told that to the other jurors,” the defendant will not be able to secure a new trial. The juror, though she knew what information was being asked of her, may have truthfully believed she could put aside her biases. Thus, the proposed rule does not apply, as the juror has not concealed any information.

Instead, the defendant can only resort to a challenge based on actual bias—one not precluded by the proposed rule. A motion for a new trial in this situation is

¹¹⁵ *Id.* The federal statute requires only that the prospective juror be able to “read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form.” 28 U.S.C. § 1865 (2006). Interestingly, the Commonwealth of Virginia has no statutory English proficiency requirement. *See* *Mason v. Commonwealth*, 498 S.E.2d 921 (Va. 1998) (holding that a juror was competent to serve even when her English proficiency was limited and she needed translation at various points during the trial).

¹¹⁶ *See, e.g.,* *Sterling v. Cockrell*, No. 3:01-CV-2280-D, 2003 U.S. Dist. LEXIS 6927 (N.D. Tex. April 23, 2003) (holding that a new trial was not warranted when a juror failed to disclose that her father was the victim of a crime in the traditional sense, because her father’s actions prevented her from viewing him as a “victim”), *cert. denied*, 506 U.S. 1035 (1992).

¹¹⁷ Even the learned Justices of the United States Supreme Court couldn’t define what an “average juror” looks like. *See McDonough*, 464 U.S. at 555 (plurality opinion).

¹¹⁸ *But see* *State v. Wyss*, 370 N.W.2d 745, 767–78 (Wis. 1985) (arguing in dicta that information about a child’s car accident is properly inferred from the question, “Do you have a child?”).

¹¹⁹ *But see* *United States v. Sonego*, 61 M.J. 1 (C.A.A.F. 2005) (holding that an evidentiary hearing should take place to determine whether a juror’s statements accurately reflected his views of punishment).

more suited to an ex-post argument and standard, because here the juror's potential for bias in favor of police officers was clearly illustrated to counsel. During voir dire, the defendant may have wanted to use a peremptory challenge to eliminate her from the jury, had counsel known that the juror's bias would manifest itself during deliberations, but the defendant cannot allege that the defendant's Sixth Amendment right was violated because the peremptory challenge was not used.¹²⁰ Instead, the Sixth Amendment violation does not occur until the juror makes the biased comment during deliberations, and is thus correctly challenged using an ex-post argument.¹²¹ As such, an argument alleging actual bias is more appropriate in this situation.

C. Valid Basis for a Challenge for Cause

The third prong of the proposed new rule is that the omitted information must bear directly on the juror's potential for bias such that it would have provided a valid basis for a challenge for cause during voir dire. This requirement, adopted directly from the *McDonough* rule, has been the cause of much confusion in most attempts at applying the rule.¹²² This is most likely because courts applying the *McDonough* rule adopt an ex-post view of juror misconduct, in that they are attempting to identify and rectify a violation they believe occurred during or after the trial.¹²³ But the proposed rule—and each jurisdiction adopting its own rule—takes the ex-ante view. The proper focus of an ex-ante argument is whether the defendant's rights were violated prior to the jury ever being seated to hear evidence in the trial.¹²⁴ Instead of looking at whether the juror used her bias to create an impartial verdict, the court must look at whether the juror's concealment of potential bias caused the rights violation itself. The way by which judges attempt to prevent biased jurors from tainting the verdict is through allowing challenges for cause.¹²⁵ An evaluation of whether the knowledge of the omitted information would have led the injured party to investigate a challenge for cause is the best way to re-create the voir dire process and thus rectify the rights violation.

In applying this prong, judges should attempt to be as objective as possible. Materiality is the step under which the particular facts of the case should be taken into account. Once an omission has been found to be both material and objective, it should be a relatively straightforward proposition to determine whether knowledge of this information would have led the complaining party to attempt to challenge the juror for cause. This does not mean that the judge would have dismissed the juror

¹²⁰ See *supra* Part I.B (discussing peremptory challenges versus challenges for cause).

¹²¹ See *supra* Part I.A.

¹²² See *supra* Part II.B.2.

¹²³ See *supra* Part II.B.2.

¹²⁴ See *supra* Part I.B.

¹²⁵ See *supra* Part I.B.

because of the challenge, only that the court would have investigated whether that challenge should be granted.

The easiest way this step can be proven is by showing that other jurors were subject to further questioning as a result of their disclosure of similar information. Defendants could also show that jurors were admonished not to allow their biases to influence their decision. However, these types of comparisons can lead to the problematic analysis seen in applications of the current *McDonough* rule, that because no jurors with similar disclosures were dismissed for cause, this prong was not met.¹²⁶ Even if this is the case, the ex-post view acknowledges that the juror in question did not receive the admonishment other jurors did, and thus the juror may allow his bias to influence his thinking.¹²⁷ Further, the fact that the juror omitted the information originally indicates that the juror may not recognize that he or she harbors such a bias. By providing the correct information, the juror allows counsel and the judge to identify a bias the juror may not have known existed. Without this knowledge, the juror definitely cannot prevent his unknown bias from influencing his deliberations and subsequent verdict. Thus, though looking at how other jurors were handled can be indicative of whether there existed a valid basis for a challenge for cause, it is not dispositive. The injury occurs when the particular juror omits his particular information, and thus judges should evaluate whether there is a valid basis for a challenge for cause independent of what was done with respect to other jurors.

D. Harmless Error

The three-prong test does not require extensive use of harmless error analysis. If the defendant can provide evidence of each of the three prongs, the error was not harmless. If even one partial juror is seated on the jury, the entire panel has been tainted.¹²⁸ Harmless error has been found to be generally inapplicable to violations of the impartial jury right, because “[t]he constitutional right to have an impartial jury decide the accused’s fate would be an empty promise if an appellate court could decide after the fact that, although the jury was not impartial, it would have made no difference in the ultimate decision to convict.”¹²⁹ If one juror omitted information that, had it been disclosed, would have provided a valid basis for a challenge for cause, it can easily be presumed that the juror harbored some bias against the defendant.

¹²⁶ See, e.g., *Maier v. Del. & Hudson Ry. Co.*, No. 3:CV-03-909, 2007 WL 693679, at *3 (M.D. Pa. Mar. 5, 2007).

¹²⁷ Jurors are presumed to follow instructions and admonishments, so an instruction to a juror to disregard her bias can be presumed to prevent that juror from tainting the verdict. See, e.g., *Myers v. Harter*, 459 P.2d 25, 29 (Wash. 1969) (noting the existence of “the presumption that jurors carry out their duties honestly and in accordance with the instructions given them by the trial judge”).

¹²⁸ See *supra* Part I.A.

¹²⁹ *Williams v. Netherland*, 181 F. Supp. 2d 604, 617 (E.D. Va. 2002).

The juror would have been asked whether he could keep his biases separate from his deliberations, and could have been rehabilitated to serve on the jury. Without this line of questioning and instructions, the juror can be presumed to harbor a bias against the defendant, such that if the juror is seated, the jury will be partial in violation of the defendant's Sixth Amendment rights.

IV. RULES FROM OTHER JURISDICTIONS

A. *The Washington Approach*

Other jurisdictions have created their own approaches to omission of information by jurors during voir dire. When the Court of Appeals of Washington dealt with this issue, it rejected *McDonough* in favor of its own rule.¹³⁰ In *State v. Briggs*, the defendant was charged with attempted rape, and the prosecution's case rested almost entirely on eyewitness identification of the defendant.¹³¹ The primary argument for the defense was that the defendant had a pronounced stutter, and none of the eyewitnesses mentioned this stutter in their accounts of the incident.¹³² The defense presented medical experts that the defendant could not have refrained from stuttering during the incident, and the prosecution presented their own experts to counter this testimony.¹³³ During voir dire, prospective jurors were asked whether they had any experience or contact with speech disorders.¹³⁴ Several potential jurors responded that they did have experience with speech disorders, and were admonished to set aside any preconceived notions about speech impediments, though no potential juror was dismissed for this experience.¹³⁵ Juror White, the juror in question, did not affirmatively respond to this question.¹³⁶ Defense counsel later learned that not only did Juror White suffer from a slight speech disorder, but he had referred to this disorder during deliberations.¹³⁷ Juror White informed the jury about techniques he had learned to prevent his speech impediment, and advised them about how the defendant could have avoided stuttering when committing the alleged attack.¹³⁸

The Court of Appeals of Washington acknowledged that Juror White did not have the intent to deceive or mislead the court, but simply omitted the information about his speech disorder.¹³⁹ However, the court declined to apply the *McDonough* test because

¹³⁰ *State v. Briggs*, 776 P.2d 1347 (Wash. Ct. App. 1989).

¹³¹ *Id.* at 1349.

¹³² *Id.*

¹³³ *Id.* at 1350.

¹³⁴ *Id.* at 1349.

¹³⁵ *Id.* at 1349 n.1.

¹³⁶ *Id.* at 1349.

¹³⁷ *Id.*

¹³⁸ *Id.* at 1349–50.

¹³⁹ *Id.* at 1350.

it does not focus on the underlying issue of bias.¹⁴⁰ The court identified that the defendant suffered prejudice, in that the defendant “was denied the opportunity to detect, and to prevent from being used during deliberations, juror White’s prior experience with, and opinions about, speech disorders.”¹⁴¹ The implication is that if Juror White had answered the question correctly, the defendant

could have pursued the matter to determine whether the juror should be excused for cause. Certainly he would have been asked, as were the other jurors who revealed in voir dire their prior experiences with speech disorders, if he would be able to refrain from doing precisely what he did in this case—discussing his unique personal experience in deliberations.¹⁴²

The Court of Appeals of Washington used an ex-ante argument to invalidate the verdict in *Briggs*.¹⁴³ However, the court got bogged down in an extra issue, that of the extrinsic evidence presented to the jury by Juror White.¹⁴⁴ The court spent a considerable amount of time analyzing the effect of Juror White’s discussion of his speech impediment and the measures he took to diminish its prominence, finally holding that “Juror White’s material non-disclosure, coupled with his later discussion of the undisclosed information during deliberations, was not harmless beyond a reasonable doubt and could have affected the jury’s verdict.”¹⁴⁵ Usually juror misconduct charges based on the use of extrinsic evidence involve a juror doing their own research into various aspects of the case.¹⁴⁶ In fact, jurors are often instructed to use their own personal experiences in determining the credibility of witnesses. Further, once the court decides that extrinsic evidence has been presented to the jury, they must engage in harmless error analysis to determine whether the defendant was prejudiced beyond a reasonable doubt.

The three-prong test outlined above could have been used in *Briggs*, and would have come to the same result. First, the omitted information—here the juror’s personal experience in dealing with a speech impediment—is material to the defendant’s case. Much of the testimony at trial involved expert witnesses describing the defendant’s ability or inability to disguise his speech impediment during a violent act.¹⁴⁷

¹⁴⁰ *Id.* at 1353–54.

¹⁴¹ *Id.* at 1353.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1352–57.

¹⁴⁵ *Id.* at 1356–57.

¹⁴⁶ See Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 329–31 (2005).

¹⁴⁷ *Briggs*, 776 P.2d at 1350.

Counsel asked prospective jurors whether they had experience with speech disorders, and if they answered in the affirmative, they were questioned further as to the extent of their experience.¹⁴⁸ Taking into account the specific facts of the defense, the omitted information is material to the defendant's case, and thus meets prong one.

Next, the omitted information is an objective fact. That the juror had suffered from a speech impediment is uncontroverted.¹⁴⁹ Other jurors responded with their own knowledge of speech impediments, showing that there was no ambiguity in the question that would lead the defendant to reasonably believe that counsel did not ask for the omitted information.¹⁵⁰ It takes no amount of subjective reasoning to find that the type of experience the defendant had with speech disorders was the kind of information asked for during voir dire. This is the exact type of information that counsel desired to uncover, and the type of omission this rule is designed to address.

The final prong of the test is the most difficult to prove, but is the most important prong. However, in this case counsel could easily show that the omitted information would have warranted an investigation into a challenge for cause.¹⁵¹ When other jurors disclosed similar experiences, they were asked further questions about those experiences, and also whether they could decide the case based solely on the information before them.¹⁵² Juror White did not receive any of this questioning, nor did he give an assurance that he could keep his experience separate from the trial, and there is evidence he did not do so.¹⁵³ Using all the evidence available to the court, it is clear that disclosure of the omitted information would have created a valid basis for a challenge for cause. It does not matter that no other juror was dismissed for their experience with speech disorders, as Juror White's experience may have been significantly different than that of any other potential juror. It only matters that counsel could have articulated a challenge for cause that could have been considered by the judge. Therefore, the third prong of the proposed test could have been met.

The court could easily have found that the material non-disclosure of information that would have provided a valid basis for a challenge for cause—the juror's experience with speech impediments—had directly biased the juror against the defendant. The testimony that this information had been used to the defendant's detriment during deliberations simply provides more proof that the juror's non-disclosure during voir dire prejudiced the defendant. Using the three-part test outlined above, the Court of Appeals of Washington could have used the same reasoning, reached the same result, and avoided discussion of the extrinsic evidence problem and harmless error.

¹⁴⁸ *Id.* at 1349 n.1.

¹⁴⁹ *See id.* at 1350.

¹⁵⁰ *Id.* at 1349 n.1.

¹⁵¹ *See id.* at 1350.

¹⁵² *Id.* at 1349 n.1.

¹⁵³ *See id.* at 1350.

B. The Wisconsin Approach

The Supreme Court of Wisconsin also heard an appeal involving juror misconduct soon after the *McDonough* decision.¹⁵⁴ In *State v. Wyss*, the defendant was convicted of first degree murder, and soon after the conviction, defense counsel discovered that an impaneled juror made numerous misstatements of fact on his juror questionnaire.¹⁵⁵ The juror omitted information about his marital status, parentage, and residence.¹⁵⁶ The lower court used *McDonough* and determined that while the juror's statements were clearly intentional, they did not provide a valid basis for a challenge for cause because the omitted information did not reveal any potential bias on the part of the juror.¹⁵⁷ The Supreme Court of Wisconsin rejected *McDonough*, acknowledging that with the first part of the test, inquiry into actual bias is prevented if the juror answers the questions honestly but incorrectly.¹⁵⁸ The court noted that "the first step in the *McDonough* test is that an honest answer forecloses *any* further inquiry into the area of potential juror bias."¹⁵⁹ The *Wyss* court also acknowledged that the second prong could be construed too narrowly to be effective.¹⁶⁰ The court was concerned that the correct information itself must provide the basis for a challenge for cause, rather than the bias to be implied from the information.¹⁶¹ The court adopted its own two-part rule: "[A] litigant must demonstrate: (1) that the juror incorrectly or incompletely responded to a material question on *voir dire*; and if so, (2) that it is more probable than not that under the facts and circumstances surrounding the particular case, the juror was biased against the moving party."¹⁶²

The court correctly identified the weaknesses of the *McDonough* rule, but went too far in attempting to rectify the problem of correct but incomplete answers. The court indicated that a party should reach the bias issue whenever a potential juror "has given an incorrect or incomplete answer to a material question on *voir dire*."¹⁶³ In order to demonstrate this problem, the court suggested a hypothetical personal injury case where jurors are asked whether they have a child.¹⁶⁴ A juror has a child who has been seriously injured in a car accident, but fails to respond to the question.¹⁶⁵ The court is worried that here, even a correct "yes" to the question will not uncover bias,

¹⁵⁴ *State v. Wyss*, 370 N.W.2d 745 (Wis. 1985).

¹⁵⁵ *Id.* at 749.

¹⁵⁶ *See id.* at 761.

¹⁵⁷ *Id.* at 764.

¹⁵⁸ *Id.* at 766.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 767.

¹⁶¹ *Id.*

¹⁶² *Id.* at 766.

¹⁶³ *Id.* at 767.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

as the juror's bias lies not in the fact that she has a child, but rather that the child has been injured in an accident.¹⁶⁶

This focus on completeness of jurors' answers takes the test from too narrow in *McDonough* to too broad in *Wyss*. It is unreasonable to suppose that a juror, when asked whether they have a child, would know to also disclose that their child had been injured in an accident. Instead, this hypothetical would require that the juror be asked whether a close friend or family member had been involved in an accident, and that the juror fail to respond accurately to that question. Indeed, that is exactly the case presented in *McDonough*.¹⁶⁷

Further, the court unwittingly employed an ex-post view of juror misconduct, by focusing on whether the juror was actually biased against the moving party.¹⁶⁸ By rejecting the weaknesses of *McDonough*, the *Wyss* court rejected the one strength of the *McDonough* rule.

The three-prong rule, laid out above, would solve the problems that the *Wyss* court attempted to fix from *McDonough*, while also avoiding the new problems created by the *Wyss* rule. The issue of completeness does not come into play with the proposed rule. Prong two requires the omitted information to be an objective fact, resolving the issue of completeness. If the question asked had multiple parts, and a juror did not provide a complete answer to each part, as long as that information was objective then it would meet prong two. However, this prong does not require the juror to guess what type of information counsel desires by asking the question. Only information within the scope of the question is considered by the proposed rule. With the hypothetical employed in *Wyss*, the juror who did not reveal that she had a child and that the child had been in an accident would meet prong two only if she had been asked whether a family member or friend had been in an accident. However, if jurors who revealed they had children were then immediately asked if those children had been in any accidents, then the defendant may have an argument that her omission was objective and within the scope of the question. It is unlikely, however, that counsel would fail to ask each prospective juror whether they knew anyone who had been in an accident. If this is the case, then the proper issue on appeal may well be incompetence of counsel rather than juror misconduct.

The three-prong test would allow the Wisconsin court to reach the same result and still avoid the problems their own rule creates. The analysis under the proposed test would begin with evaluating the materiality of the juror's omissions. The juror in *Wyss* stated he was single, had no children, and was not acquainted with anyone involved in law enforcement, though these statements were all untrue.¹⁶⁹ There is not

¹⁶⁶ *Id.* at 768.

¹⁶⁷ *See supra* Part II.A.

¹⁶⁸ *Wyss*, 370 N.W.2d at 768.

¹⁶⁹ *Id.* at 761.

enough evidence available on the record to determine whether the omitted information truly was material to the case, but it is unlikely that this is true. The defendant would be required to show that counsel paid particular attention to disclosures of this or similar information. The juror's marital status and parentage are unlikely to spur any additional questioning about biases related to this information. The juror's acquaintance with law enforcement personnel, however, necessitates further inquiry.¹⁷⁰ If the acquaintance is distant, it is unlikely to affect the voir dire proceedings. However, assuming, *arguendo*, it runs deeper, the next prongs would be necessary.

The second prong is that the material omitted is an objective fact. The only omitted information likely to be analyzed under this prong is the relationship with a person involved in law enforcement, which also requires more information than is available from the record to determine its objectivity. It may be the case that the acquaintance's job was not clearly related to law enforcement, such as being a secretary at a United States Attorney's office.¹⁷¹ In these cases, the objectivity of the answer may be in question, and may not meet this test. If, however, the acquaintance was a police officer, it is likely to move on to the third prong.

The third prong is most likely to be dispositive in this case. Determining whether the omitted information would provide a valid basis for a challenge for cause again requires more information than is available on the record, but barring an egregious omission, this prong is unlikely to be met. Even if the juror had an acquaintance who was a police officer, it is unlikely that this acquaintance would cause the juror to be challenged for cause by either party. Merely knowing someone who is a police officer rarely constitutes grounds for challenging the juror's placement on the jury.¹⁷² Without more information about the juror's relationship with the law enforcement officer, the defendant is unlikely to succeed on the third prong.

This is not to say that the defendant in this case would be prevented from showing a juror harbored an actual bias against the defendant.¹⁷³ However, this type of argument requires an affirmative showing of the effect of the juror's bias, and will likely be subjected to harmless error review.

¹⁷⁰ See, e.g., *United States v. Scott*, 854 F.2d 697 (5th Cir. 1988) (noting that the real inquiry is whether a juror's relationship with law enforcement indicated bias, but holding that because the juror's answer was honest, further inquiry into the relationship was barred).

¹⁷¹ See *United States v. Ortiz*, 942 F.2d 903 (5th Cir. 1991), *cert. denied*, 504 U.S. 985 (1992).

¹⁷² See, e.g., *Sudds v. Maggio*, 696 F.2d 415, 416-17 (5th Cir. 1983) (holding that a new trial was not warranted when a challenge for cause was denied even though the juror, whose nephew was a police officer, admitted she may favor the testimony of a police officer over that of other witnesses, but was subsequently rehabilitated and placed on the jury).

¹⁷³ Indeed, the *McDonough* concurrences suggest that the Court still reserves for the defendant the ability to prove actual or implied bias through an *ex-post* argument. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556-57 (1984) (Blackmun, J. concurring).

V. PRACTICAL IMPLICATIONS OF THE NEW RULE

A. *Juror Privacy*

As a result of modern technology, jurors' rights to privacy have become of great concern.¹⁷⁴ Though practitioners have used a few standard methods in the attempt to pick favorable juries since the beginning of the modern jury system, technology is beginning to raise new issues about its ethical—and legal—uses in the courtroom.¹⁷⁵ Although it may be that extensive background checks and psychological assessments are the work of fiction, such fictional works nevertheless color the expectations jurors have of what their service entails.¹⁷⁶ These issues have led to a line of jurisprudence, holding that jurors do have at least a general right to privacy during and after trials in which they serve.¹⁷⁷

It is essentially undisputed that certain information should be available to litigants before the start of voir dire, specifically names, addresses, and other information relating to eligibility to serve as a juror.¹⁷⁸ This information is necessary because a

¹⁷⁴ See, e.g., Christo Lassiter, *TV or Not TV—That is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928 (1996) (discussing the privacy and other implications of television coverage of trials); Thomas F. Liotti, *Closing the Courtroom to the Public: Whose Rights are Violated?*, 63 BROOK. L. REV. 501 (1997) (discussing Supreme Court and lower court jurisprudence on media access to criminal proceedings).

¹⁷⁵ Saby Ghoshray, *Untangling the CSI Effect in Criminal Jurisprudence: Circumstantial Evidence, Reasonable Doubt, and Jury Manipulation*, 41 NEW ENG. L. REV. 533 (2007) (discussing the effects that high-technology television crime shows may have on jury expectations and deliberations); Nancy S. Marder, *Cyberjuries: A New Role as Online Mock Juries*, 38 U. TOL. L. REV. 239 (2006) (discussing the role that online mock juries can play in trial preparation and actual jury selection); Nancy S. Marder, *Juries and Technology: Equipping Jurors For The Twenty-First Century*, 66 BROOK. L. REV. 1257 (2001) (noting that jury selection has not changed significantly since the creation of the modern jury, and arguing that jurors should have more access to now-standard technology during trials and deliberations); Kirk W. Schuler, *In the Vanguard of the American Jury: A Case Study of Jury Innovations in the Northern District of Iowa*, 28 N. ILL. U. L. REV. 453 (2008) (explaining various technologies used in one federal district courtroom).

¹⁷⁶ For example, the movie *Runaway Jury* depicts highly paid jury consultants engaging in intimidation and bribery to “buy” the verdict they desire. *RUNAWAY JURY* (New Regency Pictures 2003); see also David Ray Papke, *12 Angry Men Is Not an Archetype: Reflections on the Jury in Contemporary Popular Culture*, 82 CHI.-KENT L. REV. 735 (2007).

¹⁷⁷ See, e.g., Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739 (2006) (calling for Supreme Court action to establish a new policy on court access); Liotti, *supra* note 174 (advocating Supreme Court action to solidify jurors' privacy rights); Marc O. Litt, “Citizen-Soldiers” or Anonymous Justice: Reconciling the Sixth Amendment Right if the Accused, the First Amendment Right of the Media and the Privacy Rights of Jurors, 25 COLUM. J.L. & SOC. PROBS. 371 (1992) (addressing disparate judicial holdings on jurors' privacy rights).

¹⁷⁸ But see *United States v. Branch*, 91 F.3d 699, 723–25 (5th Cir. 1996) (upholding the sua sponte withholding of names and addresses of potential jurors in the high-profile Branch

criminal defendant is entitled to a jury of his peers,¹⁷⁹ as well as jurors who reside within the jurisdiction of the court in which the suit has been brought.¹⁸⁰ However, this basic information also allows defendants to run basic public records checks on potential jurors, to see if any have had prior run-ins with the law. It allows attorneys to check if any potential jurors have been or are related to the attorney's current or former clients. Finally, this information allows attorneys to approach former jurors after the trial, to inquire about information that could be helpful either on appeal or for the attorney's future cases.¹⁸¹

However, proponents of strong protections of juror privacy argue that attorneys, if given the chance, will abuse this information and impermissibly invade jurors' privacy.¹⁸² They argue that this type of invasion will deter citizens from wanting to become jurors because they do not want to be subjected to harassment or stress after sitting through a trial.¹⁸³ Thus, proponents argue, allowing attorneys to gain more information about potential jurors, or providing incentives to do so, will inevitably harm the modern jury system.¹⁸⁴ Because the proposed rule provides an incentive for attorneys to investigate jurors' backgrounds thoroughly, it could be argued that the proposed rule will create an increase in violations of jurors' privacy. However, upon deeper analysis of the rule and its implications, it is unlikely that the proposed rule will significantly impact jurors' expectations of privacy.

Most issues of juror misconduct arise through voluntary interactions between jurors and members of the public. In *Briggs*, the defense counsel learned of the non-disclosure during routine juror interviews.¹⁸⁵ In *Conaway v. Polk*, defense counsel learned of a juror's relationship to a co-defendant through an anonymous phone call.¹⁸⁶ Defense counsel in *United States v. Fulks* learned of a juror's non-disclosure through a newspaper article printed soon after the jury verdict.¹⁸⁷ The jury foreman in *Evans v. Commonwealth* reported a juror's non-disclosure of information to the court a few

Davidian shooting case); *United States v. Scarfo*, 850 F.2d 1015 (3d Cir. 1988) (upholding the decision of a trial judge to withhold identifying information about jurors when the defendants were allegedly involved in an organized crime family).

¹⁷⁹ See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968).

¹⁸⁰ U.S. CONST. amend. VI, cl. 3; see also *State v. Wyss*, 370 N.W.2d 745, 762 (Wis. 1985).

¹⁸¹ See, e.g., David N. Averyt, *Paying Former Jurors for Consultation on a Retrial: Suspect Tactic or Good Lawyering?*, 57 ALA. L. REV. 853 (2006); Major Holly M. Stone, *Post-Trial Contact With Court Members: A Critical Analysis*, 38 A.F. L. REV. 179, 179–80 (1994).

¹⁸² See, e.g., Stone, *supra* note 181, at 179.

¹⁸³ John D. Jackson, *Making Juries Accountable*, 50 AM. J. COMP. L. 477, 495 (2002).

¹⁸⁴ See, e.g., *id.*

¹⁸⁵ *State v. Briggs*, 776 P.2d 1347, 1349 (Wash. Ct. App. 1989).

¹⁸⁶ *Conaway v. Polk*, 453 F.3d 567, 573 (4th Cir. 2006).

¹⁸⁷ *United States v. Fulks*, 454 F.3d 410, 420 (4th Cir. 2006). The court in *Fulks* declined to order a new trial when a juror failed to disclose that her husband had been murdered three decades earlier because the trial court would not have dismissed her for cause had she disclosed this information. *Id.* at 432.

days after the verdict, without any contact on the part of either prosecution or defense counsel.¹⁸⁸ These cases, along with the majority of other cases involving juror non-disclosure, arose through contact that even proponents of strict juror privacy rules would have to concede was proper. Even though the proposed rule is more favorable to defendants than that of *McDonough*, there is no reason that defense counsel will suddenly begin to harass jurors to find out information that is usually exposed through other means.

B. Increase in New Trials

Another potential criticism of the proposed rule is that because it is more favorable to defendants, it will result in an increased number of trials, unduly burdening the criminal justice system and making an already sluggish system that much slower. Indeed, studies have shown that jurors often conceal information about voir dire—up to thirty-nine percent of surveyed jurors had done so in one jurisdiction.¹⁸⁹ However, most jurisdictions using the *McDonough* rule require an evidentiary hearing before a new trial is granted.¹⁹⁰ This allows the trial court to screen claims of juror misconduct, and ensure that only those claims with merit result in new trials.¹⁹¹ This system need not change with the proposed rule, and in fact is recommended in all jurisdictions. The only change that need be made to the current hearings is that the trial judge must view the evidence in light of the new rule and make his decision accordingly. This continued use of the evidentiary hearing will ensure that the proposed rule does not needlessly increase the amount of trials in our criminal justice system.

A stricter juror misconduct rule has the ability to actually prevent a number of mistrials. If jurors know that any omission they make, whether intentional or otherwise, could result in a mistrial for the court, jurors may be more likely to recognize the importance of truthfully answering questions during voir dire.¹⁹² With the proposed rule, and before voir dire commences, a trial judge could give an instruction to the jury that explains the impact untruthful answers can have on their jury service. This instruction, while clearly unable to ensure that all jurors respond truthfully to questions, makes it more likely that jurors will recognize the importance of truthful answers, and may reduce the number of cases of juror misconduct.

¹⁸⁸ *Evans v. Commonwealth*, No. 0078-06-1, 2007 WL 1742457, at *1 (Va. Ct. App. June 19, 2007).

¹⁸⁹ Jan Mills Spaeth, *Swearing With Crossed Fingers: Juror Honesty and Voir Dire*, ARIZ. ATT'Y, Jan. 2001, at 38, 39.

¹⁹⁰ See, e.g., *United States v. Stewart*, 433 F.3d 273, 306 (2d Cir. 2006); *United States v. Hodge*, 321 F.3d 429, 440–41 (3rd Cir. 2003); *Amirault v. Fair*, 968 F.2d 1404, 1405–06 (1st Cir. 1992), cert. denied, 506 U.S. 1000 (1992); *Evans*, 2007 WL 1742457, at *1.

¹⁹¹ None of the defendants in *Stewart*, 433 F.3d 273, *Hodge*, 321 F.3d 429, *Amirault*, 968 F.2d 1404, or *Evans*, 2007 WL 1742547, were granted new trials.

¹⁹² But see Gershman, *supra* note 146, at 322 (discussing the difficulties in identifying and remedying juror misconduct).

C. Which Party Can Challenge a Verdict?

The final problem with the proposed rule is not unique just to the proposed rule. Any attempt to codify a universally applicable rule in both civil and criminal jury trials will encounter the same problem: which party gets to use the rule to request a new trial? Fortunately, the answer to this question is surprisingly simple.

In criminal trials, there are three potential outcomes of a jury trial. First, the jury could acquit the defendant. If this happens, the prosecution cannot challenge the verdict, due to the prohibition on "double jeopardy."¹⁹³ Thus, the prosecution would be unable to request a new trial even if the prosecuting attorney could prove that a juror met all three prongs of the proposed rule.¹⁹⁴ If the jury convicts the defendant, then the prosecution has no incentive to request a new trial, and is usually procedurally barred from doing so.¹⁹⁵ Finally, if the jury is unable to reach a verdict, a new trial is usually ordered as a direct result. Thus, in criminal trials, only the defendant has the incentive and procedural right to challenge the jury for bias.

In civil trials, the answer is even less complicated. Civil trials have the same three potential outcomes as criminal trials. However, because plaintiffs in civil actions are not usually government actors, they are able to challenge a verdict where a government entity would not.¹⁹⁶ Thus, if the proposed rule is applied to all civil trials, both plaintiffs and defendants will be able to challenge a verdict based on juror non-disclosure. This will not increase the amount of new civil trials, however, because the current rule clearly applies to plaintiffs as well.

CONCLUSION

Juror misconduct in the form of untruthful answers on voir dire has had a significant impact on defendants' rights to an impartial jury. Jurors lie or conceal information while under oath much more often than trial attorneys wish to admit, and a review of the major cases of juror misconduct reveal serious concerns about juror partiality during deliberations.¹⁹⁷ Unfortunately, the current federal standard, as outlined in the *McDonough* decision, is not adequate to protect criminal defendants' rights, and does not provide for a new trial in many cases where severe bias is clearly

¹⁹³ U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.").

¹⁹⁴ See Max Kravitz, *Ohio's Administrative License Suspension: A Double Jeopardy and Due Process Analysis*, 29 AKRON L. REV. 123, 136–37 (1996).

¹⁹⁵ See *id.* at 137.

¹⁹⁶ See, e.g., *Grundy v. Dhillon*, No. 2006-T-0007, 2007 WL 1584220 (Ohio Ct. App. June 1, 2007) (granting plaintiff's request for a new trial on the basis of juror non-disclosure); *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984) (denying plaintiff's request for a new trial on the basis of juror non-disclosure).

¹⁹⁷ See *supra* note 189 and accompanying text.

evident. Thus, the rule proposed in this Note should replace the current federal standard, and is strongly recommended to be used in all jurisdictions. This rule provides as close to a bright line rule as is possible when dealing with the subjective nature of juror non-disclosure, and avoids all of the problems of *McDonough*. Although concerns have been raised about the impact of this proposed rule on the amount of new trials granted, it is unlikely that the proposed rule will create the feared increase. At most, the proposed rule will more accurately identify those instances of juror misconduct that are per se harmful to a defendant's right to an impartial jury, and will screen out frivolous claims. Providing a new trial when a juror's non-disclosure is material, objective, and would have provided a valid basis for a challenge for cause, will serve to fully protect all parties during jury trials.