JUROR BIAS UNDISCOVERED DURING VOIR DIRE: LEGAL STANDARDS FOR REVIEWING CLAIMS OF A DENIAL OF THE CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY

TABLE OF CONTENTS

I. INTRODUCTION

In both civil and criminal suits the parties are guaranteed the right to trial by an impartial jury.[1] An impartial jury is one "capable and willing to decide the case solely on the evidence before it."[2] This note focuses on the legal effect which is given under a sixth amendment analysis[3] to information about a juror that was undiscovered during the jury selection process.[4]

The right to an impartial jury is protected by the voir dire process, in which jurors are questioned either by counsel or by the court about various matters, such as: their knowledge of the facts of a case; whether they know any of the parties, attorneys, or witnesses; whether publicity has affected their views of the defendant's guilt or innocence; and attitudes which they hold about individuals in the defendant's position, such as racial or ethnic attitudes, beliefs about those previously convicted of a crime, and so forth. Jurors' responses to certain questions may result in their being struck from the panel for cause, and certain responses to other questions may result in jurors being peremptorily struck, often after being unsuccessfully challenged for cause.

If the voir dire process is to truly serve its purpose of obtaining a fair and impartial jury, then the operating components of that process—the court, the attorneys, and the prospective jurors—must function with certain expectations and within certain limitations. The voir dire process in its ideal form is a collaborative effort between the court, the prospective jurors, and the attorney for the party then conducting voir dire. The burden on the court is to rule on challenges for cause, to recognize appropriate peremptory challenges, to regulate the attorneys' questioning within the court's sound discretion, or in some jurisdictions, to ask the questions of the prospective jurors that are posed by the attorneys and required under the circumstances. The prospective jurors have the obligation to give full and complete answers to questions that are posed and to provide any other information that they feel the attorneys or the court would want to know, but have not directly sought. The attorneys have the obligation to ask questions of the

---

1. In civil cases the right to an impartial jury is derived from state constitutions and from the seventh amendment to the United States Constitution. There seems to be little doubt that although the seventh amendment does not specifically provide for trial by an *impartial* jury, it is either derived therefrom or comes within the fundamental meaning of due process. The right to an impartial jury in criminal cases derives from the sixth amendment, where it is expressly provided that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury." U.S. CONST. amend. VI. While the author indicates that both parties in criminal cases have the right to trial by an impartial jury, the right of the government to an impartial jury does not exist in the sixth amendment's plain language.

2. Smith v. Phillips, 455 U.S. 209, 217 (1982).

3. The reader should note that courts have applied basically the same analysis regardless of whether the alleged violation is in a civil or criminal matter.

4. This note does not focus on other matters which touch on the impartiality of the jury such as jury composition, outside influence, or jury misconduct.

prospective jurors designed to elicit both specific and general information about the jurors that might relate to the issues in the case and that relates to more general issues common to most criminal cases. The attorney has the obligation to act with due diligence during voir dire in both questioning the jurors and in removing those jurors who have a demonstrated bias, an apparent bias, or an inability to be impartial. If the attorneys, the court, or the prospective jurors fail to fulfill their respective obligations during the voir dire process, a denial of the defendant's right to a fair trial may occur. This note does not focus on the effect that is given to a court's failure to grant a challenge for cause, or upon the legal standard applicable to defense counsel's ineffectiveness during voir dire. Rather, this note addresses the failure of a juror to fulfill his or her obligation during voir dire.

The situations discussed in this note typically arise after the verdict is rendered and it is discovered that a juror apparently engaged in some form of concealment or deception during voir dire. Often jurors make statements that are directly inconsistent with their voir dire testimony, and in some cases they even admit to a lack of candor. The sources by which this information is discovered are as diverse as one might imagine, but the most common sources are statements made to other jurors by the suspect juror, knowledge that friends and family possess about the suspect juror, and searches of court records to determine a juror's prior involvement in litigation. After reading this note, attorneys may find it advisable to modify their post-verdict practices in particular cases to include an investigation of jurors in addition to preparing the typical post-trial motions. Of course, before such an investigation is undertaken, the attorney should consult the local rules of professional responsibility to ensure that the investigation is conducted within permissible bounds.

II. Two Legal Standards

A. *General Discussion*

The United States Supreme Court has recognized that "[t]he bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law."[5] The definitional truism that a juror who is actually biased is not impartial has met with no judicial opposition. Several courts, however, have applied legal standards which require a showing of precise questioning on the alleged source of bias during voir dire, and direct rather than circumstantial proof of the juror's alleged bias. Under an actual bias standard the juror's bias must be established in a post-trial hearing as a matter of demonstrated fact, not by presumption or inference. However, bias is a state of mind which is extremely difficult to prove by direct and demonstrable evidence.

---

5. United States v. Wood, 299 U.S. 123, 133 (1936).

Under an implied bias[6] standard a defendant is entitled to a presumption[7] that a juror was actually biased without showing it as a demonstrable reality on the record. In cases in which the implied bias standard is applicable, some fact about a juror from which bias can be implied must be established.

The reluctance of courts to apply an implied bias theory derives from the unwillingness to disturb the finality of a judgment and the lack of clarity with which the United States Supreme Court has applied the bias standard. The courts that have applied an implied bias standard to alleged juror concealment during voir dire have based their decisions on whether the juror's answers to material voir dire questions were intentionally or purposefully deceptive.[8] Because of the differences in the means of proof between the implied and actual bias standards, the determination of the appropriate standard to be applied to the alleged bias is critical, and most often dispositive, of the effort to obtain a new trial.

The United States Supreme Court has applied a presumed bias standard in a number of cases discussing the ability of a trier of fact to be impartial. While these cases do not discuss the specific issues relating to nondiscovery during voir dire, they have some applicability to such issues because these cases interpret the meaning of the term "impartial." In *Tumey v. Ohio*[9] the Court recognized that a judge's financial interest in the outcome of a case would disqualify a judge from sitting on the case even though the judge might not have actually been affected by that interest. In *In re Murchison*[10] the Court held that a judge may not preside over both a defendant's grand jury proceedings and the defendant's trial because the judge's impartiality might reasonably be questioned. The Court held in *Leonard v. United States*[11] that because five members of the jury in defendant's second trial had heard the jury in defendant's first trial announce its guilty verdict on similar charges, those members of the second jury should have been automatically disqualified. In *United States v. Wood*[12] the Court refused to hold that bias could be imputed to potential jurors merely because they were federal government employees; rather, defendant was required to show that they were somehow actually biased, unless the special circumstances of the particular case dictated otherwise. A plurality of the Court in *Dennis v. United States*[13] held that the defendant, who was

---

6. Throughout this note the terms "implied bias" and "presumed bias" are used interchangeably. The Court in *Wood* defined "implied bias" as "a bias attributable in law to a prospective juror regardless of actual partiality." *Id.* at 134.

7. The Court in *Wood* considered this to be a conclusive presumption. *Id.* at 133.

8. *See infra* notes 38-84 and accompanying text.

9. Tumey v. Ohio, 273 U.S. 510, 532 (1927).

10. *In re* Murchison, 349 U.S. 133, 138 (1955).

11. Leonard v. United States, 378 U.S. 544, 544 (1964).

12. United States v. Wood, 299 U.S. 123, 149 (1936).

13. Dennis v. United States, 339 U.S. 162, 171 (1950).

charged with contempt for failing to appear before the House Un-American Activities Committee, was not entitled to challenge jurors for cause solely on the basis of their relationship to the government even though a Presidential Loyalty Oath was alleged to be a special circumstance warranting a presumption of bias. In *Smith v. Phillips*[14] the Court held that the habeas petitioner was not entitled to a presumption of partiality only because a juror applied for employment with the prosecutor's office mid-trial.

In cases in which the Court has interpreted the term "impartial," it has been faced with the task of determining whether a trier of fact should have been allowed to sit on a case in light of their individual characteristics, such as a financial interest in the outcome of the case, knowledge of the facts, or knowledge of inadmissible evidence. In analyzing cases involving juror bias, the Court has recognized that there are two separate and distinct standards for assessing the alleged bias of prospective triers of fact during voir dire: the actual bias standard and the implied bias standard. The bias standards are applicable to post-verdict challenges to jurors because the claim for relief after trial is that the defendant was denied the constitutional right to an impartial jury.

Bias claims may be based upon concealment of information by a juror or upon the juror's characteristics, either of which were previously unknown to the defense and which illustrate that the juror was actually or presumptively biased against the defendant. While in some respects the post-verdict grounds for relief from a denial of the right to an impartial jury are identical to the grounds for striking a juror for cause during voir dire, additional considerations arise when the alleged bias was undiscovered during voir dire due to the culpability of the juror.

The Supreme Court has addressed the effect of a juror's culpability for the nondiscovery of information during voir dire twice. In *Clark v. United States*[15] the Supreme Court reviewed the conviction of a juror who was found guilty of criminal contempt for deliberately concealing information during voir dire that the juror knew would have led to her being struck for cause.[16] The Court held that

> [b]ias is to be gathered from the disingenuous concealment which kept her in the box . . . .
>
> The judge who examines on the voir dire is engaged in the process of organizing the court. If the answers to the questions are willfully evasive

14. Smith v. Phillips, 455 U.S. 209 (1982). Significantly, the juror did not conceal his interest in pursuing a law enforcement career during voir dire. *Id.* at 212 n.4. As will be discussed later, some courts have apparently read *Smith v. Phillips* as holding that presumed bias is no longer a viable legal standard. *See, e.g.*, United States v. Billups, 692 F.2d 320, 325 (4th Cir. 1982).

15. Clark v. United States, 289 U.S. 1 (1933).

16. *Id.* at 7, 10. The juror was a former employee of the defendant and the juror's husband was friendly with the defendant. *Id.* at 7-8.

> or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham. What was sought to be obtained was the choice of an impartial arbiter. What happened was the intrusion of a partisan defender. If a kinsman of one of the litigants had gone into the jury room disguised as the complaisant juror, the effect would have been no different. The doom of mere sterility was on the trial from the beginning.[17]

The *Clark* opinion constitutes mere dicta. However, it does set forth a standard for relief from concealment during voir dire by indicating that relief should be granted when the juror's answers are "willfully evasive or knowingly untrue."[18] Until recently, *Clark* appeared to be the only significant statement by the Court regarding the effect of juror concealment during voir dire.

B. *McDonough Power Equipment, Inc. v. Greenwood*

In *McDonough Power Equipment, Inc. v. Greenwood*[19] the Supreme Court faced the issue of juror concealment in the context of a personal injury case.[20] In *McDonough* one juror failed to respond to a question posed by the plaintiff's attorney concerning accidents in which any member of the juror's family had been involved, even though the juror's son's leg was broken when a tire exploded.[21] The four justice plurality opinion[22] set forth a standard for assessing claims of juror concealment despite the fact that the issue had been poorly preserved and recorded for the court.[23] The only issue necessary for the Court to decide was whether prejudice to the right to exercise a peremptory challenge is sufficient to obtain a new trial, without any showing that the juror was actually or presumptively biased.[24] All justices

---

17. *Id.* at 10-11.

18. *Id.* at 11.

19. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984).

20. *Id. McDonough*, a civil case, was decided under the seventh amendment. However, it has been applied to sixth amendment cases by numerous courts.

21. *Id.* at 550-51. The question asked of the suspect juror was:

> Now, how many of you have yourself or any members of your immediate family sustained any severe injury, not necessarily as severe as Billy, but sustained any injuries whether it was an accident at home, or on the farm or at work that resulted in any disability or prolonged pain and suffering, that is you or any members of your immediate family?

Id. at 550. Apparently, the juror did not feel his son's injury was "severe" within the meaning of the question. *Id.* at 552 n.3.

22. Justice Rehnquist wrote for the plurality. *Id.* at 549.

23. *Id.* at 549-52. Justice Rehnquist reached the issue "in order to correct the legal standard the District Court should apply upon remand." *Id.* at 551 n.3. There was apparently no record made of the alleged concealment, other than an affidavit of a telephone conversation. *Id.*

24. *Id.* at 549, 551. The Tenth Circuit held that "[g]ood faith, however, is irrelevant to our inquiry. If an average prospective juror would have disclosed the information, and that

agreed that a mere deprivation of the right to exercise a peremptory challenge, without some showing that the nondisclosure was indicative of a lack of impartiality, was insufficient to warrant granting a new trial.[25] The plurality stated:

> We hold 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 challenge for cause. 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.[26]

Justice Blackmun concurred, but stated that while "in most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial," he did not read the plurality opinion to foreclose what he termed the "normal avenue of relief."[27] Justice Blackmun went on to say that

> 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.[28]

Justice Brennan wrote a concurring opinion in which he expressed the view that the propriety of applying the implied bias standard was not even

---

information would have been significant and cogent evidence of the juror's probable bias, a new trial is required to rectify the failure to disclose it." Greenwood v. McDonough Power Equip., Inc., 687 F.2d 338, 343 (10th Cir. 1982).

25. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. at 555-56; *id.* at 556 (Blackmun, J., concurring); *id.* at 557 (Brennan, J., concurring in the judgment). The Court was in essence holding that unless the nondisclosure was somehow indicative of unfairness in the trial, no new trial could be granted as the error would be considered harmless. *Id.* at 553.

26. *Id.* at 556.

27. *Id.* (Blackmun, J., concurring). Justice Blackmun was joined by Justices Stevens and O'Connor. *Id.* (Blackmun, J., concurring). The "normal avenue of relief" is the opportunity to establish actual bias in a post-trial evidentiary hearing. *Id.* (Blackmun, J., concurring).

28. *Id.* at 556-57 (Blackmun, J., concurring). The concurring opinion of Justice Blackmun adopted by reference the concurrence that Justice O'Connor had written in *Smith v. Phillips*. *Id.* at 557. *See* Smith v. Phillips, 455 U.S. at 221-24 (O'Connor, J., concurring). In *Smith v. Phillips*, Justice O'Connor argued that the majority opinion should not be read to "foreclose the use of implied bias in appropriate circumstances." *Id.* at 221 (O'Connor, J., concurring). Justice O'Connor indicated that appropriate circumstances "might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." *Id.* at 222 (O'Connor, J., concurring). In Justice O'Connor's view, the implied bias doctrine should apply to conclusively presume partiality where a hearing would be inadequate to uncover actual bias. *Id.* at 222 n.* (O'Connor, J., concurring).

raised in the case.[29] Justice Brennan stated that "to 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."[30] Justice Brennan went on to point out that bias may be either actual or implied.[31] Bias should be conclusively presumed if warranted by the facts of the particular case.[32] Brennan further indicated that a juror's honesty or dishonesty should only be a factor in the determination of actual bias.[33] Thus, five justices in *McDonough* specifically indicated that they were not setting forth a new rule in their decision or backing away from the long recognized principle that there are two separate standards for evaluating claims of lack of impartiality: the actual bias standard and the implied bias standard.

III. The Implied or Presumed Bias Standard

A. *Sufficient Questioning*

Courts that have applied an implied bias standard have expressed their reluctance to consider post-trial claims of bias when the alleged source of bias was not the subject of any questioning during voir dire.[34] Another way for courts to approach the sufficient questioning requirement of the implied bias standard is to consider it as an error preservation requirement, rather than as part of the legal standard itself. Under such an approach, the alleged error is still recognized as plain error even though the alleged bias was not the subject of questioning. This is in accord with the Supreme Court's view that some errors are so fundamental that they can not possibly be harmless because they go to the heart of the meaning of fair trial.

1. *Subjective Test Versus Objective Test*

There are two different standards that can be applied to judge the sufficiency of the voir dire questioning: an objective standard and a subjective

---

29. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. at 559 (Brennan, J., concurring). Justice Brennan was joined by Justice Marshall. *Id.* at 557 (Brennan, J., concurring).

30. *Id.* at 557-58 (Brennan, J., concurring).

31. *Id.* at 558 (Brennan, J., concurring) (citing United States v. Wood, 299 U.S. 123, 133 (1936)).

32. *Id.* (Brennan, J., concurring). However, Justice Brennan did not speculate as to what those facts might be.

33. *Id.* at 558-59 (Brennan, J., concurring). Justice Brennan's view of the actual bias standard appears to be a totality of the circumstances approach. *Id.* (Brennan, J., concurring). Justice Brennan also indicated that a preponderance of the evidence is required to establish actual bias. *Id.* at 558. (Brennan, J., concurring).

34. *See, e.g.*, United States v. Kerr, 778 F.2d 690, 694 (11th Cir. 1985) (defendant was not entitled to an evidentiary hearing on alleged potential bias that was not the subject of questioning during voir dire).

standard.[35] The objective standard for judging the sufficiency of questioning asks whether the "average juror" would have understood the voir dire questioning to have called for the answer that counsel later claims was not given. If an average juror would have answered the voir dire question(s) as counsel argues the question(s) should have been answered, then the questioning is deemed sufficient. The subjective standard asks whether the juror subjectively understood the voir dire questioning to call for the response that counsel later claims was not given. If the juror did in fact understand that the question called for the response which counsel claims was not given, the questioning is deemed sufficient under a subjective standard. It should be apparent that odd results may occur if a purely objective standard is applied. In some cases an "average juror" may not believe that an answer is required. In other cases the suspect juror subjectively may believe that he or she should have responded to a question that was objectively insufficient, or should have responded differently.

2. *The Test When the Juror Lacks Culpability*

Under this aspect of the implied bias standard it is established as given that the questioning was subjectively insufficient to call the juror's attention to the matter that was not discovered during *voir dire*. A plurality of the Court in *McDonough* apparently requires that the questioning during *voir dire* be sufficient under a subjective test by requiring that the juror's answer be dishonest.[36] Justice Blackmun, in his concurrence, agreed with the plurality that "in most cases, the honesty or dishonesty of a juror's response is the best initial indicator of whether the juror in fact was impartial," however, he went on to indicate that an implied bias standard could be applied "in exceptional circumstances" even though the juror was not dishonest.[37] The standard articulated by Justice Brennan in his concurring opinion requires that the juror provide an incorrect response during voir dire.[38] Thus, five Justices have apparently expressed the view that an objective standard should be applied to test the sufficiency of questioning during voir dire.

This analysis of the *McDonough* Court's discussion on questioning may mean little under an implied bias standard since only actual bias was argued.[39] Under a presumed bias standard no good reason[40] exists for requir-

---

35. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. at 555.

36. *Id.* at 555-56. The applicability of *McDonough* to implied bias cases is arguably inappropriate, although the Court itself did address the implied bias standard in the concurring opinions. *See Id.* at 556-57 (Blackmun, J., concurring); *id.* at 557-59 (Brennan, J., concurring).

37. *Id.* (Blackmun, J., concurring). Blackmun used the word "inferred" rather than "implied" or "presumed." *Id.* at 557 (Blackmun, J., concurring).

38. *Id.* at 557 (Brennan, J., concurring).

39. *Id.* at 559 (Brennan, J., concurring) ("no claim is raised in this case that bias should be conclusively presumed").

40. Not all constitutional rights are absolute, and it may be argued that failure of ade-

ing *any* questioning during voir dire on the alleged source of bias where the standard is sought to be applied solely on the ground that certain unknown facts exist that warrant a presumption that a particular juror was biased. This is true because the presumption of bias arises not from deception or conduct during *voir dire*, but rather from the existence of some characteristic about the juror that was simply previously unknown. Under a presumed bias standard, it may be appropriate for the courts to remove the requirement of sufficient questioning and grant relief.

3. *The Test When the Juror Knowingly or Intentionally Misleads or Conceals*

The majority of the Court in *McDonough* appears to have applied an objective test for judging the sufficiency of questioning during *voir dire*.[41] The entire Court also appears to recognize that an answer to a question that is dishonest can serve as the basis for further inquiry into bias, thereby adopting a subjective prong to the sufficient questioning requirement. Although the Court did not expressly indicate this, it seems apparent that under a "dishonesty" test, objectively insufficient questioning would not bar a party from raising a claim of juror partiality so long as the juror was dishonest.

B. *Materiality to an Issue of Bias*

Clearly, not all information about a juror that is undiscovered during voir dire but becomes known later should serve as the basis for a new trial, let alone an evidentiary hearing. The Court in *McDonough* generally agreed that the undiscovered information must have been "material" to the alleged bias.[42] However, no test for materiality was set forth by the Court, perhaps because it felt that this is a matter more properly left to the trial court to decide under the facts and circumstances of each particular case.[43] Additionally, the degree of materiality required appears to depend in part upon the reason for the nondisclosure. When the nondisclosure is due to no fault of the juror, courts require a stronger showing of materiality to bias than when the juror knowingly or intentionally withheld information. The materiality standard for each situation is discussed below.

---

quate questioning constitutes waiver. *See, e.g.*, United States v. Kerr, 778 F.2d 690, 693-94 (11th Cir. 1985). The failure of counsel to adequately question leaves criminal defendants with an ineffectiveness of counsel argument which requires a substantially more difficult legal standard for relief. The respect for finality of judgments also weighs in favor of requiring questioning as a predicate to relief for undiscovered juror bias.

41. McDonough Power Equip. Inc. v. Greenwood, 464 U.S. at 549-52.

42. *Id.* at 556, 559 (Brennan, J., concurring).

43. *Id.* at 556.

1. *Focusing on the Nature of the Undiscovered Information*

This section discusses the situations in which judicial attention is focused on the nature of the information that was not known to the parties or the court during voir dire, but the nondiscovery was due to no fault of the juror from which an adverse inference could be drawn. This category of situations has been separated from cases in which the nondiscovery was due to some act chargeable to the juror's state of mind, because the absence of that factor changes the balance of the analysis. This category of the implied bias standard appears to be a close relative of the actual bias standard, however, it differs in the degree to which inferences may be drawn from the facts established about a juror.[44] Because courts that attempt to apply bias standards continue to use the language of voir dire practice and because voir dire challenge cases are closely related to this type of post-verdict challenge for bias, it is useful to break the cases down into two separate categories: those in which the undiscovered information would have lead to a successful challenge for cause, and those in which it can only be established that the juror would have been stricken peremptorily if counsel had known about the juror's characteristics.

a. *Information That Would Have Led to a Successful Challenge for Cause.* Justice O'Connor wrote in *Smith v. Phillips* that the implied bias standard ought to be applied in "appropriate circumstances," which "might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction."[45] While the subjects that are undiscovered seem to be strong candidates for a finding of deliberate concealment, one can imagine situations in which either the questioning does not raise the issue sufficiently for the juror's memory to be triggered or where the juror simply does not remember until the trial commences.[46] Additionally, in these situations it is unnecessary to establish that the juror knowingly misled or deliberately concealed information during voir dire, although that would certainly make the case stronger.[47]

b. *Information That Would Have Led to a Peremptory Challenge.* The Supreme Court has held that the right to exercise a peremptory challenge,

---

44. Some courts have apparently not even recognized this category of implied bias to exist. United States v. Howard, 752 F.2d 220, 225 (6th Cir. 1985).

45. Smith v. Phillips, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring).

46. This is precisely what happened in United States v. Howard, 752 F.2d 220, 225 (6th Cir. 1985), where the juror did not realize that she knew a witness who was the defendant's daughter until that witness testified.

47. United States v. Scott, 854 F.2d 697, 698 (5th Cir. 1988) (The juror withheld the fact that his brother was a police officer and had conducted some of the investigation on defendant's case. The court found that this relationship provided grounds for granting a challenge for cause.).

although "one of the most important rights secured to the accused," is a statutory rather than a constitutional right.[48] Thus, no constitutional violation occurs merely because a juror fails to respond to questioning during voir dire. All nine justices of the Court in *McDonough* held that an impairment of the statutory right to peremptorily strike a juror is not *alone* sufficient to warrant granting a new trial.[49] The plurality indicated that "it 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.[50] Justice Brennan agreed with this position, stating that "a finding that less than complete information was available to counsel conducting voir dire does not by itself require a new trial."[51] Therefore, it is settled that at least in those cases where there is no indication of juror culpability for the nondiscovery, failure by a juror to disclose information that would have led to a peremptory strike is not sufficient to warrant granting a new trial in federal court.[52]

2. *Focusing on the Culpability of the Juror for the Non-Discovery*

This category of implied bias cases focuses on the mental culpability of the juror for the nondisclosure during voir dire, rather than upon the nature of the information not disclosed. However, the materiality of the information to the alleged source of bias still remains an important element of the analysis. These cases indicate that bias is to be presumed from the juror's deceptive or dishonest conduct during voir dire. Simplistically, these opinions reason that if a juror feels that a piece of requested information is important enough to conceal, then it can only be presumed that it is an important part of that juror's psyche—one which the juror is incapable of setting aside during deliberations. In another sense these cases appear to provide a remedy to defendants for the deliberate interference with the administration of justice by what amounts to criminal conduct, and in this respect, only grant relief under the veil of a denial of the right to an impartial jury.[53]

a. *Dishonest Answers and Knowing, Intentional, or Deliberate Concealment.* The Supreme Court in *Clark v. United States* recognized that disingenuous concealment by a juror or "willfully evasive or knowingly untrue" answers furnish the basis for a finding of bias and for declaring the

48. Swain v. Alabama, 380 U.S. 202, 219 (1965).

49. Six of the justices made express statements on the peremptory challenge issue, while Justice Blackmun implicity agreed in his concurrence.

50. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. at 555.

51. *Id.* at 557 (Brennan, J., concurring).

52. A state court may reach a different result when interpreting its own constitution or statutes.

53. United States v. Columbo, 869 F.2d 149 (2d Cir. 1989).

trial a "mere sterility."[54] In *McDonough* the Court focused on the honesty or dishonesty of the juror as an important factor in determining bias.[55] Numerous circuit courts have applied tests of purposefulness, deliberateness, or knowing deception or concealment to find that the juror's conduct during voir dire warranted a new trial.[56]

Juror concealment cases do not require any bad motivation for the concealment in order for the presumption to attach, only that the juror knowingly or purposefully give incorrect answers. The circuit courts have not elaborated much on the underlying basis for their imputation of bias from the deliberate concealment or knowingly untrue answers of the juror during voir dire. The Fourth Circuit Court of Appeals has indicated that "[c]ertainly . . . the result is deprivation of the defendant's rights to a fair trial."[57] In *United States v. Colombo* the Second Circuit Court of Appeals touched on two distinct aspects of the basis for the judicially created presumption.[58] The Second Circuit held, "[T]he point is not that [the juror's] relationship with her brother-in-law tainted the proceedings but that her willingness to lie about it exhibited an interest strongly suggesting partiality."[59] The court went on to indicate that

> courts cannot administer justice in circumstances in which a juror can commit a federal crime in order to serve as a juror in a criminal case and do so with no fear of sanction so long as a conviction results. . . . We need not reduce [the government's] incentives to take such conduct seriously, however, by giving the government cause to believe that overlooking juror misconduct will preserve tainted convictions.[60]

The difficulty with the decisions that imply bias from knowing or deliberate concealment is that the link between the reasons for concealment and bias are inadequately discussed and established. While it might be true that jurors who intentionally disregard their oath to tell the truth, the whole truth, and nothing but the truth are less likely to undertake jury service as impartial jurors, no such connection has been established specifically in these cases or as a general proposition.[61] Until this link can be established,

---

54. Clark v. United States, 289 U.S. 1, 1-11 (1933).

55. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. at 556.

56. *See* United States v. Scott, 854 F.2d 697, 699-700 (5th Cir. 1988) (deliberate concealment); United States v. Perkins, 748 F.2d 1519, 1533 (11th Cir. 1984) (deliberate untruthfulness); McCoy v. Goldston, 652 F.2d 654, 659 (6th Cir. 1981) ("deliberately concealed information or gave a purposefully incorrect answer"); United States v. Bynum, 634 F.2d 768, 771 (4th Cir. 1980) ("deliberate untruthfulness").

57. United States v. Bynum, 634 F.2d at 771.

58. United States v. Columbo, 869 F.2d at 152.

59. *Id.*

60. *Id.*

61. The rules of evidence permit such an inference against defendants and other witnesses with criminal histories. It would be interesting to obtain the testimony of a psychiatrist or psychologist as to the reasons that a person would conceal certain types of information and

the implication of bias from concealment will continue to be mandated more by the quest for the appearance of justice than logic and analytical rationale.

A related problem is the effect to be given a juror's later-given innocent explanation of his conduct during voir dire. Under a traditional view of the implied bias rule, once a characteristic about a juror from which an implication of bias is established, the inquiry ends, because it is the existence of the characteristics that gives rise to a *conclusive* presumption.[62] Denials by a juror in the related context of juror misconduct are admissible, but insufficient to reject a claim of misconduct.[63] Clearly, such testimony is suspect due to the juror's stake in the verdict and the attachment of potential criminal liability. However, at least the Sixth Circuit Court of Appeals has held that such evidence could be controlling.[64]

The Sixth Circuit in *United States v. Howard* held that the juror's failure to tell of her brother-in-law's police employment established a prima facie case of deliberate concealment.[65] However, the court found that the juror's later explanation—that she didn't tell of her brother-in-law's employment because she didn't feel it would make a difference—made the application of an implied bias standard unwarranted.[66] In *Howard* the other jurors who did have relatives connected to law enforcement were not stricken when they indicated that they could be fair.[67] Further, the question asked was interpreted by the juror as not necessarily calling for her response because her brother-in-law was with law enforcement in another state.[68] The court characterized this as an "honest mistake."[69]

The Fifth Circuit Court of Appeals took a different approach in *United States v. Scott*[70] and overturned a conviction because a juror knowingly failed to disclose during voir dire questioning that his brother was a deputy sheriff in the department that conducted some of the investigation in defendant's case. During the new trial hearing at the district court, the juror said that he did not answer the question because he did not believe it would affect his impartiality.[71] The juror knew that he should have answered and that if he had, he would have been stricken as two other panel members were.[72] The court held that "[a] juror may not conceal material facts dis-

---

the related ability of such a person to be an impartial juror.

62. United States v. Wood, 299 U.S. 123, 133 (1936).
63. United States v. Brantley, 733 F.2d 1429, 1440 (11th Cir. 1984).
64. United States v. Howard, 752 F.2d 220 (6th Cir. 1985).
65. *Id.* at 224.
66. *Id.* at 225.
67. *Id.* at 224.
68. *Id.*
69. *Id.* at 225.
70. United States v. Scott, 854 F.2d 697 (5th Cir. 1988).
71. *Id.* at 698.
72. *Id.*

qualifying him simply because he *sincerely* believes that he can be fair in spite of them."[73] The court found that there was "sufficient implication of [the juror's] bias to require a new trial."[74] On the whole, courts seem to favor automatic presumption of bias upon finding knowing or deliberate concealment, rather than the application of a standard such as the one in *Howard*, which requires a case-by-case balancing of culpability, materiality, and any other relevant factors.[75]

b. *Inadvertent or Unconscious Nondisclosure.* In cases where there has been no culpability of the juror in regard to the nondiscovery of information, no inference of bias is drawn.[76] These cases must therefore fall into the categories of cases in which either the nature of the information that was not disclosed implies bias to the juror[77] or where bias must be established as an actual demonstrable reality.

c. *Materiality of the Undiscovered Information to an Issue of Bias.* In the cases that have found knowing or deliberate concealment, it has not been required that the information concealed be sufficient to warrant a successful challenge for cause.[78] Under the standard applicable where a juror deliberately conceals information, circuit courts have granted reversals when the information was probative of bias, but not by an unduly tenuous series

---

73. *Id.* at 699. The court followed the reasoning articulated by Justice O'Connor in her concurring opinion in *Smith v. Phillips*. *See supra* note 28.

74. United States v. Scott, 854 F.2d at 700.

75. *See, e.g.*, United States v. Colombo, 869 F.2d 149, 152 (2d Cir. 1989) ("Inquiry into the juror's state of mind by way of partial denial, explanation or protestations of impartiality would not reveal evidence that was under these circumstances either trustworthy or sufficient to offset the deliberate violation of the oath."); United States v. Bynum, 634 F.2d 768, 770 (4th Cir. 1980) (juror expressed that he didn't consider brother, sister-in-law, or nephew, who were all convicted felons, to be "close" to him, and further that he didn't respond out of embarrassment at his relatives' criminal histories, but court presumed bias from concealment and viewed juror's testimony with suspicion).

76. United States v. Cassamayor, 837 F.2d 1509, 1515 (11th Cir. 1988) (nondisclosure due to "inattentiveness"); United States v. Howard, 752 F.2d 220, 225 (6th Cir. 1985) (nondisclosure due to lack of knowledge at time of voir dire; juror became aware during testimony of witness who had conflict with juror's daughter).

77. For a discussion of the standard in these cases see section III(A)(1) above. Some cases indicate that if there is no deliberate concealment then actual bias must be proved. *See, e.g.*, United States v. Howard, 752 F.2d 220, 225 (6th Cir. 1985). However, these cases do not involve situations in which the juror would have been struck for cause if the information been known during voir dire. Therefore, they do not exclude the application of an implied bias rule in such a case.

78. United States v. Colombo, 869 F.2d 149 (2d Cir. 1989) (possible bias); United States v. St. Clair, 855 F.2d 518, 523 (8th Cir. 1988) (finding that the court should proceed with caution, indicated that there was no showing that the juror could have been struck for cause); United States v. Perkins, 748 F.2d 1519, 1533 (11th Cir. 1984) (quoting United States v. Bynum, 634 F.2d 768 (4th Cir. 1980); United States v. Bynum, 634 F.2d 768, 771 (4th Cir. 1980) (concealment of "possible non-objectivity"). *See also* United States v. Scott, 854 F.2d 697, 698 (5th Cir. 1988) (finding grounds for a challenge for cause in addition to deliberate concealment, but not indicating that this was a required finding).

of inferences. This differs from the unanimous holding by the Supreme Court in *McDonough* that impairment of the right to exercise a peremptory challenge is not alone sufficient to warrant granting a new trial.[79] The Supreme Court has not itself decided whether impairment of the statutory right to peremptory challenge when coupled with knowing or deliberate concealment by a juror, is sufficient to warrant a new trial, but a reading of the three opinions leads to the conclusion that in marginal cases, the Court will have little difficulty with the standard applied in these circuit cases.

C. *The Burden of Proof and Strength of the Presumption*

No cases appear to apply a burden of proof higher than a preponderance of the evidence, yet no cases discuss the issue beyond stating that the characteristic about the juror must be shown or established. The typical statement of the implied bias rule is that it creates a *conclusive* presumption of the juror's bias,[80] however, there are indications that courts may be moving away from such an inflexible rule.[81]

D. *Application of the Implied Bias Standard*

In *United States v. Bynum*[82] the Fourth Circuit Court of Appeals overturned convictions in two cases that were combined for purposes of appeal. In *Bynum* an individual was selected to sit as juror in two different criminal cases, both of which resulted in guilty verdicts.[83] One involved alleged violations of narcotics laws, while the other involved allegations that a false statement was made to the government.[84] During the voir dire in the first case, the juror was asked whether a person to whom the juror felt close was ever a defendant or victim of a crime.[85] The juror did not respond affirmatively.[86] In the voir dire for the second trial, the juror was asked whether he had any close family members or relatives who had ever been involved in any criminal investigation or prosecution.[87] Again, the juror did not respond.[88] In fact, the juror had a brother who was convicted of bank robbery,

---

79. *See* McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984).

80. United States v. Wood, 299 U.S. 123, 133 (1936).

81. *See* McDonough Power Equip., Inc. v. Greenwood, 464 U.S. at 556-57 (Blackmun, J., concurring) (using the term "inferred" rather than "conclusively presumed"). Additionally, a number of cases have gone into detailed analysis of juror testimony given after trial in an effort to measure culpability. While these cases often do not result in giving much weight to juror testimony, such inquiry should be unnecessary once it is established that the juror knew the incorrectness or incompleteness of the answer during voir dire.

82. United States v. Bynum, 634 F.2d 768 (4th Cir. 1980).

83. *Id.* at 769.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 769-70.

88. *Id.* at 770.

a sister-in-law convicted of narcotics violations, and a nephew convicted of bank robbery.[89]

The juror testified in a post-trial hearing that he did not consider these relatives to be close and that he tried to put them out of his mind because he was a proud man and thought his relatives' criminal history was embarrassing.[90] In reversing both convictions, the fourth circuit held that in light of the record from both cases, none of the convictions could stand.[91] In holding as it did, the court indicated

> Certainly when possible non-objectivity is secreted and compounded by the deliberate untruthfulness (footnote omitted) of a potential juror's answer on *voir dire*, the result is deprivation of the defendant's rights to a fair trial. [The juror] by his concealment impaired the right of [defendants] to exercise intelligently a peremptory challenge to remove a juror who was suspected of being partial. (footnote omitted)[92]

The Sixth Circuit Court of Appeals in *McCoy v. Goldston*[93] addressed the issue of juror bias in the context of a civil rights action against the Detroit Police Department and two police officers. In *McCoy* the juror who ultimately became the foreman did not respond to a question that unambiguously requested disclosure of relatives affiliated with any law enforcement agency or police department, despite the fact that the juror's son was about to complete a training program as a parole officer.[94] The district court

---

89. *Id.* The attorneys for the defendants indicated by affidavit that they would have attempted to strike the juror for cause, and if unsuccessful, would have peremptorily stricken him. *Id.*

90. *Id.*

91. *Id.* at 771. The court did indicate that without the record of the second trial's voir dire and post-trial hearing, reversal of the lower court would not be warranted because the record indicated that the juror was truthful during voir dire as he did not feel particularly close to his family members. *Id.* at 770-71.

92. *Id.* at 771. In *United States v. Billups* the Fourth Circuit seemed hesitant to apply the *Bynum* implied bias standard in light of the Supreme Court opinion in *Smith v. Phillips* which the Fourth Circuit apparently interpreted as eliminating the implied bias standard. United States v. Billups, 692 F.2d 320, 325 (4th Cir. 1982) (citing Smith v. Phillips, 455 U.S. 209, 216 (1982)). The defendant in *Billups* was the international vice-president to the International Longshoremen's Association and was charged with various abuses of office. *Id.* at 322. One juror failed to indicate that her son was a member of the same union even though the questioning called for a response. *Id.* at 324-25. The juror admitted in a post-trial hearing that "she thought her son was a *former* member of the ILA, but later discovered he was in fact an inactive member, not in good standing." *Id.* Apparently, the record also established that there was animosity between the local union to which the juror's son belonged and the defendant. *Id.* at 325. Additionally, there was evidence in the record that the juror's son had said that "Billups was getting what was coming to him." *Id.* The court held that the trial court did not err when it found the juror's omission "inadvertent," and that the juror's mind was not "poisoned" by her son's feelings toward Billups. *Id.* (citing United States v. Bynum, 634 F.2d 768 (4th Cir. 1980)). Of course, in *Bynum* the poison was implied from concealment for fear of embarrassment.

93. McCoy v. Goldston, 652 F.2d 654 (6th Cir. 1981).

94. *Id.* at 656.

denied plaintiff's motion for a new trial[95] and for an evidentiary hearing.[96]

The court reversed the denial of the motion for evidentiary hearing on the ground that the plaintiffs had established a prima facie case of grounds for a new trial, which required a hearing.[97] The court went on to indicate the standards that should be utilized by the lower court on remand.[98] The court held that "a district judge shall presume bias, and grant a new trial, when a juror deliberately concealed information or gave a purposefully incorrect answer."[99] The court indicated that

> a district court should consider the following factors to determine if a juror has intentionally concealed or purposefully given incorrect answers:
>
> A. Whether the question asked sufficiently inquired into the subject matter to be disclosed by the juror. (footnote omitted)
>
> B. Whether the response of other jurors to the question asked would put a reasonable person on notice that an answer was required. (footnote omitted)
>
> C. Whether at any time during the trial the juror became aware of his false or misleading answer and failed to notify the district court.[100]

In *United States v. Perkins*[101] the Eleventh Circuit Court of Appeals found that a juror was dishonest when he failed to disclose that he was involved in prior litigation, both as a witness and defendant, and when he did not indicate that he knew the defendant. The court held that the nondisclosure warranted a new trial as it could only be presumed that such a juror was actually biased.[102] The court in *Perkins* believed that it was applying the Supreme Court's opinion in *McDonough Power Equipment.*[103] The court in *Perkins*, however, utilized only the plurality opinion in *McDonough* to determine the appropriate legal standard.[104] Interestingly, the court in *Perkins* interpreted the second prong of the *McDonough* plurality opinion as permitting the use of a presumed bias standard.[105] The court interpreted the second prong of the *McDonough* plurality test as requiring a showing of actual bias, which it said "may be shown in two ways: 'by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed.' "[106]

---

95. *Id.* at 657. The new trial motion apparently sought relief because the plaintiff's right to peremptorily challenge the juror was abrogated by the juror's failure to answer. *Id.* at 656.

96. *Id.* at 657.

97. *Id.* at 658-59.

98. *Id.* at 659.

99. *Id.*

100. *Id.* at 658-59.

101. United States v. Perkins, 748 F.2d 1519 (11th Cir. 1984).

102. *Id.* at 1532-33.

103. *Id.* at 1531-32.

104. *Id.* at 1531.

105. *Id.* at 1532.

106. *Id.* (quoting United States v. Nell, 526 F.2d 1223, 1229 (5th Cir. 1976)). While this

The Eighth Circuit Court of Appeals in *United States v. St. Clair*[107] cited to the *McDonough* plurality standard, but reversed without finding the second prong—that the juror would have been successfully challenged for cause—was satisfied. In *St. Clair* the defendant was charged with making a destructive device.[108] One juror did not disclose during voir dire that he had seven years experience with explosives.[109] This juror raised the issue of his expert knowledge in the jury room and proffered his interpretation of crucial testimony to the defense.[110]

The court held that the defendant had clearly satisfied the dishonesty prong of the *McDonough* plurality test, but because the suspect juror was not called to testify at the post-trial hearing, the record was insufficient to determine whether the juror could have been struck for cause.[111] Rather than remanding the case for further proceedings, the court ordered a new trial because it felt "compelled to proceed with caution in this area."[112] The court never set forth a legal standard for its decision.

In *United States v. Colombo*[113] the Second Circuit applied a presumed bias standard to require a new trial if it could be shown on remand that the juror incorrectly answered a voir dire question about relatives who were attorneys or were involved in law enforcement. The suspect juror told another juror that she did not reveal that her brother-in-law was a government at-

---

might be a permissible way for the *McDonough* plurality opinion to be read, it should be pointed out that five justices in two concurring opinions in *McDonough* did not read the plurality opinion that way. *See* McDonough Power Equip., Inc. v. Greenwood, 464 U.S. at 556-57 (Blackmun, J., concurring); *id.* at 557-59 (Brennan, J., concurring). The court in *Perkins* cited and agreed with the Fourth Circuit's holding in *United States v. Bynum* previously quoted. United States v. Perkins, 748 F.2d at 1533.

107. United States v. St. Clair, 855 F.2d 518 (8th Cir. 1988).

108. *Id.* at 519.

109. *Id.* at 522.

110. *Id.* at 520. Defendant failed to show sufficient prejudice from the introduction of this extraneous information to warrant a new trial, particularly since the juror's opinion was not voiced until after the verdict on the key count had been reached. *Id.* at 521.

111. *Id.* at 523.

112. *Id.* It seems that this opinion is not very useful law for several reasons. First, the court lacked an adequate record to determine whether the juror was honest or dishonest during voir dire since the juror was never called to testify in the post-trial hearing. All that was apparent from the record was that he did not respond to questions about explosives. He may not have heard the questions or may have interpreted them as not calling for his response even though counsel told all panel members that they had a duty to respond to questions posed to individual panel members. *Id.* at 522. It further appears that the sole basis for determining that the juror was dishonest during voir dire was his own hearsay statement made during deliberations. *Id.* at 520. It is unclear from the opinion whether there was any corroboration of the juror's statement. Id. Finally, if the court was indeed applying the McDonough plurality test, defendant was not entitled to the relief granted as it was never shown that the juror could have been struck for cause. Id. at 522-23. For all these reasons this opinion can only be read as setting forth a poorly delineated standard of implied or presumed bias.

113. United States v. Colombo, 869 F.2d 149 (2d Cir. 1989).

torney because she wanted to sit on the case.[114] The court found that the *McDonough* case was not controlling as it involved a "mistaken, though honest, response to a question."[115] The court instead relied on *Bynum*, *Perkins*, and *McCoy* for the appropriate legal analysis for cases in which the record discloses that a juror deliberately concealed material information.[116] The court expressly held that "[t]he point is not that her relationship with her brother-in-law tainted the proceedings but that her willingness to lie about it exhibited an interest strongly suggesting partiality."[117] In fact the court pointed out that this juror's interest in sitting on the case "was so powerful as to cause the juror to commit a serious crime."[118] The court recognized that the juror possibly subjected herself to perjury or criminal contempt charges as well as to possible restitution by the government.[119]

IV. The Supreme Court's View of Actual Bias

In *McDonough* and *Smith v. Phillips* the Supreme Court set forth its view that in the majority of cases, the defendant's right to test the impartiality of a juror is satisfied by a post-trial hearing in which the defendant has the opportunity to demonstrate actual bias.[120] A juror is considered actually biased if the evidence adduced at the hearing demonstrates that the juror was not "capable and willing to decide the case solely on the evidence" brought forth at trial.[121] The appropriate legal standard for reviewing claims of actual bias due to undisclosed information during voir dire can be derived from the three opinions in *McDonough*. The actual bias test from *McDonough* requires a factually incorrect response or failure to respond to objectively sufficient questioning and a showing that the juror is actually biased.

A. *Sufficient Questioning*

McDonough makes clear that counsel must ask questions during voir dire sufficient to call for the claimed correct response as a predicate to at-

---

114. *Id.* at 150.

115. *Id.* at 152 (citing McDonough Power Equip., Inc. v. Greenwood, 464 U.S. at 555).

116. *Id.* at 151-52.

117. *Id.* at 152.

118. *Id.* at 151.

119. *Id.* There are a few reported cases in which jurors have been prosecuted for their untruthful testimony during voir dire. *See* Clark v. United States, 289 U.S. 1 (1933) (juror prosecuted for criminal contempt); United States v. Hand, 863 F.2d 1100 (3d Cir. 1988); *In re* Brogdon, 625 F. Supp. 422 (W.D. Ark. 1985) (juror prosecuted for criminal contempt).

120. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984); Smith v. Phillips, 455 U.S. 209 (1982).

121. Smith v. Phillips, 455 U.S. at 217. It has also been defined as "the actual existence of such an opinion in the mind of the juror as will raise a presumption of partiality." Murphy v. Florida, 421 U.S. 794, 800 (1975). This definition, however, clouds the distinction between actual and presumed bias.

tributing a specific undisclosed bias to a juror.[122] Courts have had some difficulty interpreting and applying *McDonough*. This difficulty stems primarily from the dishonesty prong of the plurality test. A number of courts have simply restated the plurality test and mechanically applied it as if it were *the test* of the Court in *McDonough*.[123] The five concurring justices indicated that establishing a juror's dishonesty is not a predicate to relief under the actual bias standard; rather, the juror's honesty or dishonesty is merely a factor to be considered in assessing claims of partiality. The five concurring justices appear to require at least a factually *incorrect* response, rather than a dishonest one.[124] This is the objective test previously discussed at greater length.[125] Application of this sufficient questioning requirement has the disadvantage of denying relief when an actually biased juror rendered verdict in the case.[126]

B. *Actual Bias*

The actual bias standard enunciated in *McDonough* requires a showing that the juror incorrectly responded to a material voir dire question and that the juror was actually biased.[127] The actual bias requirement demands

---

122. Throughout the *McDonough* decision is a recognition that the claimed source of bias must have been the subject of questioning during voir dire. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548 (1984). Even the test that Justice Brennan proposed required both an inaccurate or incorrect answer as well as a showing of actual prejudice. *Id.* at 557-59 (Brennan, J., concurring). *See also* Cunningham v. Sears, Roebuck & Co., 854 F.2d 914, 916 (6th Cir. 1988) (plaintiff was prevented from obtaining reversal on ground of juror bias where he became aware in mid trial that juror knew his key witness); United States v. Bolinger, 837 F.2d 436, 439 (11th Cir. 1988) (misconduct discovered by defendant during deliberations, but not brought to court's attention constitutes waiver); United States v. Kerr, 788 F.2d 690, 694 (11th Cir. 1985) (holding that defendant was not entitled to an evidentiary hearing on alleged potential bias which was not the subject of questioning during voir dire); United States v. Diaz-Albertini, 772 F.2d 654 (10th Cir. 1985) (defendant waived right to object to juror's alleged partiality when his attorney became aware of juror's false answer prior to trial but took no action); United States v. Dean, 667 F.2d 729, 732-34 (8th Cir. 1982) (even if actual prejudice can be shown, untimely notification of misconduct constitutes waiver).

123. *See* United States v. St. Clair, 855 F.2d 518, 522 (8th Cir. 1988) (holding that "[t]he Supreme Court has defined the test" in the *McDonough* plurality, but reversing without finding that the juror was subject to challenge for cause); United States v. Casamayor, 837 F.2d 1509, 1515 (11th Cir. 1988) (holding that in *McDonough* the Supreme Court established the required review, and then mechanically applying the plurality test); United States v. Kerr, 778 F.2d 690, 693-94 (11th Cir. 1985); United States v. O'Neill, 767 F.2d 780, 785 (11th Cir. 1985); United States v. Perkins, 748 F.2d 1519, 1531-32 (11th Cir. 1984) (applying the *McDonough* plurality holding, but implying "actual" bias from the dishonest answers during voir dire).

124. *See supra* notes 19-33 and accompanying text.

125. *See supra* note 35 and accompanying text.

126. The author suggests that until the actual bias standard is further refined and delineated by the Supreme Court, counsel for the defense should contend that there is no questioning requirement under an actual bias standard.

127. This is essentially the test as stated by Justice Brennan, although he would allow an incorrect answer, regardless of the reason for the incorrectness, to be at least a partial basis for

that proof of bias be made as a demonstrable reality rather than by inferential presumption or implication. While certain inferences must always be made to prove a fact such as state of mind, under an actual bias standard the court must be convinced based on all the evidence that the juror was actually biased before it can order a new trial.

C. *Application of the Actual Bias Standard*

Due to both the standard of appellate review and the confusion over the *McDonough* holding, appellate cases are in disarray as to how to review claims of actual juror bias. The settled standard of review is for abuse of discretion.[128] In *habeas corpus* cases the standard is one that gives a presumption of correctness to state findings of fact on a juror's actual bias making relief extremely difficult to obtain.[129] A brief review of a few of these cases may be helpful in understanding the heavy burden that a defendant must carry when attacking his conviction under an actual bias theory. In *United States v. Kerr*[130] the Eleventh Circuit Court of Appeals distinguished between the tenses of the verb "to be" in holding that the defendant was not even entitled to an evidentiary hearing to determine actual bias. Defense counsel inquired as to whether any jury members had members of their immediate family affiliated with law enforcement.[131] It was later discovered that one juror was married to a former police officer, but did not disclose this during voir dire.[132] The court held that the district court was

---

the application of the implied bias rule. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. at 558 (Brennan, J., concurring). As discussed previously, the application of the implied bias rule to incorrect answers that were not knowingly and deliberately incorrect would draw an inference of bias from conduct that is only possibly probative on a potential source of bias.

128. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. at 556; United States v. Aguon, 851 F.2d 1158, 1170 (9th Cir. 1988); United States v. O'Neill, 767 F.2d 780, 785 (11th Cir. 1985); United States v. Howard, 752 F.2d 220, 225 (6th Cir. 1985); United States v. Vargas, 606 F.2d 341, 345 (1st Cir. 1979). The author has located no published opinion in which an appellate court has overturned a lower court's ruling on actual bias.

The trial court's decision whether to apply an implied bias rule may also be subject to review for abuse of discretion. United States v. Perkins, 748 F.2d 1519, 1533 (11th Cir. 1984). However, most courts have simply reversed upon a finding that the implied bias rule should have been applied, without indicating that this is a discretionary decision. *See* United States v. St. Clair, 855 F.2d 518, 523 (8th Cir. 1988); United States v. Scott, 854 F.2d 697, 700 (5th Cir. 1988); United States v. Bynum, 634 F.2d 768, 771 (4th Cir. 1980). This latter standard of review is more in keeping with the general rule of appellate practice that the propriety of applying one legal standard as opposed to another is a question of law reviewable for error.

129. 28 U.S.C. § 2254(d) (1984); Cannon v. Lockhart, 850 F.2d 437, 440 (8th Cir. 1988); Baca v. Sullivan, 821 F.2d 1480, 1483 (10th Cir. 1987). However, as Justice O'Connor has pointed out, "[i]n those extraordinary situations involving implied bias, state-court proceedings resulting in a finding of 'no bias' are by definition inadequate to uncover the bias that the law conclusively presumes." Smith v. Phillips, 455 U.S. at 223 n.7 (O'Connor, J., concurring).

130. United States v. Kerr, 778 F.2d 690, 693-94 (11th Cir. 1985).

131. *Id.* at 693.

132. *Id.*

correct in not ordering an evidentiary hearing because the question did not inquire into relations with former police officers, therefore the juror could not have been expected to respond to the question.[133] Other courts have simply indicated that the record does not support a finding that the trial court abused its discretion in finding that the juror was honest and not actually biased.[134]

V. Conclusion

This note has examined the legal standards for reviewing claims of juror bias that are not discovered during voir dire. There are two standards for reviewing these claims, both of which are still in their judicial infancy awaiting clarification from the United States Supreme Court. The Court's attempt to set forth a standard for reviewing claims of actual bias in *McDonough* has served to muddy an already murky area of the law. Some courts have viewed *McDonough* as declaring an implied bias standard invalid, while still others have read it as requiring a showing of dishonesty as a predicate to relief on the ground of actual bias. As this note illustrates, the opinions in *McDonough* have done neither; rather, the Court has recognized the validity of two separate standards for judicial review of these undiscovered information claims.

The implied or presumed bias standard operates as a rule of law to conclusively impute bias to a juror because of the nature of the information that was undiscovered during voir dire or because the juror's conduct during voir dire warrants such a presumption. The Supreme Court has held that this rule applies in "appropriate" or "exceptional" cases, but has not yet indicated which cases are appropriate for application of the doctrine.

Numerous circuit courts of appeals have applied the doctrine to cases in which the juror deliberately concealed information or gave a purposefully incorrect answer to a material voir dire question. These cases do not require that the moving party establish that the juror could have been struck for cause, only that he would have been peremptorily challenged had he answered correctly. When the juror acts in such a fashion, it is conclusively presumed as a matter of law that the juror lacks impartiality.

The actual bias standard is a recreation of the voir dire process, requiring sufficient questioning as its predicate, and a showing that the juror did not sit and was incapable of sitting as an impartial juror as its fundamental basis. This standard is one uniquely reserved for the trial court's discretion with reversal on appeal almost unthinkable.

Dean A. Stowers

---

133. *Id.* at 694.

134. *See* United States v. Howard, 752 F.2d 220, 225 (6th Cir. 1985); United States v. O'Neill, 767 F.2d 780, 785 (11th Cir. 1985).