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State v. Thomas and the *McDonough* Test: A Safety Net Proposal to Cure the Square Peg—Round Hole Dilemma

I. INTRODUCTION

Under the Sixth and Fourteenth Amendments to the United States Constitution, criminal defendants are guaranteed due process of law, which includes the right to trial by an impartial jury.[1] The voir dire process is one method by which our legal system attempts to empanel impartial jurors who will consider the accused innocent unless evidence presented in court proves otherwise. Any bias revealed by answers to voir dire questioning can justify excusing a potential juror for cause.[2] A party suspecting bias may exercise a peremptory challenge to excuse a juror not excused for cause.[3]

In *McDonough Power Equipment, Inc. v. Greenwood*,[4] the United States Supreme Court established a two-pronged test to determine whether allegations of juror dishonesty during voir dire are sufficient to warrant a new trial. To receive a new trial, "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."[5]

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1. U.S. CONST. amends. VI, XIV, § 1. The Sixth Amendment states that "the accused shall enjoy the right to a . . . public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI. In Duncan v. Louisiana, 391 U.S. 145, 149 (1968), the Supreme Court applied this right to state criminal proceedings under the Fourteenth Amendment's Due Process Clause. Although the right to a jury trial applies only to criminal proceedings, *see* Minnesota v. Murphy, 465 U.S. 420, 435 n.7 (1984) (dictum), petty criminal offenses have been traditionally tried without juries.

2. The requirements for challenges for cause in federal civil cases are delineated in 28 U.S.C. § 1870 (1988). Utah's equivalent requirements for challenges for cause in state civil cases are stated in UTAH R. CIV. P. 47(f) (1993); challenges for cause in criminal cases are addressed in UTAH R. CRIM. P. 18(e) (1993).

3. In Swain v. Alabama, 380 U.S. 202 (1965), the U.S. Supreme Court held that a party need not provide a reason for exercising a peremptory challenge. *Id.* at 220. Subsequent cases have since placed some restrictions on the use of peremptory challenges. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1986) (disallowing peremptory challenges showing a pattern of racial discrimination).

4. 464 U.S. 548 (1984).

5. *Id.* at 556.

In *State v. Thomas*,[6] a Utah criminal case, the *McDonough* test was applied[7] to determine whether "the failure of two jurors to disclose their prior experiences deprived [the defendant] of his constitutional right to an impartial jury and a fair trial."[8] During deliberation, other jurors learned of their fellow jurors' nondisclosures during the voir dire process. The court was forced to decide whether the jury's deliberative process should be examined in determining whether the jurors' nondisclosures had resulted in prejudice related to their misconduct at voir dire.[9] Unable to command a majority, three of the five Utah Supreme Court justices wrote separate opinions which concurred in granting a new trial, but differed in reasoning and analysis.[10]

Thomas illustrates the malleability of the *McDonough* test and the difficulty of applying it in a consistent manner to the post-trial determination of whether a juror's nondisclosure during voir dire resulted in prejudicial bias. Part II of this Note reviews *McDonough* and the two-pronged test it established. Part III examines the facts and reasoning of *Thomas*. Part IV analyzes the Utah Supreme Court's various applications of the *McDonough* test to *Thomas* and proposes a "safety net" policy which would allow courts to rule in favor of the party requesting a new trial when faced with the occasional extreme case in which the established tests cannot satisfactorily resolve questions concerning the fairness of the trial process.

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6. 830 P.2d 243 (Utah 1992).

7. Although *McDonough* was a civil case, the test has been applied to criminal trials. *See* Ian C. Wiener & Jeff E. Schwartz, Project, *Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1989-1990: Right to Jury Trial*, 79 GEO. L.J. 982, 999 n.1777 (1991). Some criminal cases applying *McDonough* include United States v. O'Neill, 767 F.2d 780 (11th Cir. 1985), and United States v. McMahan, 744 F.2d 647 (8th Cir. 1984).

The Utah Supreme Court could not abrogate any right the defendant might have to a new trial under *McDonough*; however, state rules and statutes, as well as state concerns regarding judicial economy, allow the court the freedom to establish its own rules expanding a party's right to a new trial.

8. 830 P.2d at 244.

9. *Id.* at 248-49 (opinion of Durham, J.); *id.* at 249 (Stewart, J., concurring in the result); *id.* at 252 (Howe, Assoc. C.J., dissenting).

10. *Id.* at 245-49 (opinion of Durham, J.); *id.* at 249-50 (Stewart, J., concurring in the result); *id.* at 250 (Zimmerman, J., concurring in the result); *id.* at 250-52 (Howe, Assoc. C.J., dissenting).

II. *McDONOUGH POWER EQUIPMENT, INC. v. GREENWOOD*

A. Facts and Holding

McDonough involved a products liability action arising from an accident in which a riding mower ran over a child, causing the loss of both feet.[11] During voir dire, plaintiffs' counsel asked prospective jurors whether they or any of their family members had sustained any accidental injury resulting in prolonged suffering or disability.[12] One juror did not respond to this question, even though his son had once suffered a broken leg, because the juror did not believe that his son's injury resulted in extended suffering or disability.[13] After the jury ruled in defendant's favor, the plaintiffs approached the juror with the trial court's permission and moved for a new trial.[14] The trial court denied the motion, but was never informed of the results of the interview with the juror.[15] The plaintiffs appealed the judgment, claiming that their right to invoke peremptory challenges had been prejudiced by the juror's silence.[16] The Tenth Circuit agreed and ordered a new trial.[17] The defendants appealed, and in an opinion written by Justice Rehnquist, the United States Supreme Court reversed.

After acknowledging that harmless-error rules incorporate the principle that "courts should . . . ignore errors that do not affect the essential fairness of the trial,"[18] the Court held that a new trial was not required in *McDonough* unless the juror's nondisclosure "denied respondents their right to an impartial jury."[19] The Court then set forth a two-pronged test for determining when a juror's failure to disclose information during voir dire requires a new trial.[20]

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11. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 549, 558 n.* (1984).

12. *Id.* at 549-50.

13. *Id.* at 550, 555.

14. *Id.* at 550-51.

15. *Id.* at 551.

16. *Id.*

17. Greenwood v. McDonough Power Equip., Inc., 687 F.2d 338, 342-43 (10th Cir. 1982), *rev'd*, 464 U.S. 548 (1984).

18. *McDonough*, 464 U.S. at 553 (citing Kotteakos v. United States, 328 U.S. 750, 759-60 (1946)).

19. *Id.* at 549.

20. *See infra* part II.B. In deciding the *McDonough* case, the courts treated the juror's silence as an answer to voir dire questioning. *McDonough*, 464 U.S. at 551-52. Factors for determining whether silence constitutes a response are found in McCoy v. Goldston, 652 F.2d 654, 658-59 (6th Cir. 1981). If a juror's silence dem-

B. The McDonough *Test*

The *McDonough* test replaced the more subjective standard used by the Tenth Circuit, which required a new trial whenever a juror failed to disclose information that would have provided evidence of a probable bias, if such information would have been disclosed by an average juror.[21] The Supreme Court emphasized that trial error should not automatically be grounds for a new trial,[22] and declared the standard used by the Tenth Circuit to be "contrary to the practical necessities of judicial management."[23] This statement finds support in Rule 61 of the Federal Rules of Civil Procedure[24] and 28 U.S.C. § 2111,[25] which emphasize that trial error does not require a new trial unless a party's substantial rights have been affected.

The first prong of the *McDonough* test requires proof that a juror "failed to answer honestly a material question on *voir dire*."[26] The plain language of this prong does not differentiate between a juror's intentional or knowing dishonesty and a juror's inadvertent but mistaken response or nondisclosure. However, Justice Rehnquist, writing for the Court, stated that although "[t]he motives for concealing information may vary, . . . only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial."[27] This statement implies that bias cannot be presumed from a juror's

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onstrates failure to answer honestly a material question, the nondisclosure constitutes juror misconduct which may require a new trial, depending on the extent to which the nondisclosure affected the fairness of the trial. *See McDonough*, 464 U.S. at 549, 556.

21. *Greenwood*, 687 F.2d at 343. This standard protected a party's right to exercise peremptory challenges based upon the possibility of juror bias.

22. *McDonough*, 464 U.S. at 553.

23. *Id.* at 555-56.

24. This rule requires that a party's substantial rights be affected in order to justify a new trial:

> No error . . . or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict . . . unless refusal to take such action appears to the court inconsistent with substantial justice. 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. CIV. P. 61.

25. This statute provides that, "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." 28 U.S.C. § 2111 (1988).

26. *McDonough*, 464 U.S. at 556.

27. *Id.*

nondisclosure, but that an appellant must prove that the failure to disclose rendered the juror unfit for jury service; consequently, there may be situations in which a court must probe the juror's mental state.[28]

The second prong of the *McDonough* test requires proof that an honest response would have provided grounds for a challenge for cause.[29] The Court explicitly declined to extend this prong to the possible exercise of a peremptory challenge. Justice Rehnquist stated 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."[30]

In his concurrence, joined by Justices Stevens and O'Connor, Justice Blackmun specifically stated it was his understanding that the Court's decision did 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."[31] Justice Brennan, joined by Justice Marshall, wrote an opinion concurring in the judgment only.[32] Under his analysis, "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."[33] Justice Brennan argued that a new trial should be awarded if a "juror incorrectly responded to a material question on *voir dire*, and [if], under the facts and circumstances surrounding the particular case, the juror was

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28. David Crump, *Peremptory Challenges After* McDonough Power Equipment, Inc. v. Greenwood*: A Problem of Fairness, Finality, and Falsehood*, 69 OR. L. REV. 741, 772 (1990). According to Crump, this type of inquiry into the juror's mental state could "lengthen hearings, make outcomes depend more heavily upon vague inferences from diffuse evidence, and increase juror harassment." *Id.* However, Crump believes that the *McDonough* test's requirement of dishonesty in a response to questioning, wherein a juror intends to mislead the court or knows the given response did mislead the court, should be retained in any modification of the test. Crump's reason for adhering to this requirement is that mistaken juror responses—such as those resulting from mistake, ineffective communication, or a juror's imperfect knowledge or understanding—are almost always found in "fair-but-imperfect trials." *Id.* at 772-73. Furthermore, the requirement of dishonesty provides an incentive for voir dire questioning to be brief, clear, and focused "on the most likely sources of bias." *Id.* at 773.

29. *McDonough*, 464 U.S. at 556.

30. *Id.* at 555.

31. *Id.* at 556 (Blackmun, J., concurring).

32. *Id.* at 557 (Brennan, J., concurring in the judgment).

33. *Id.*

biased against the moving litigant."[34] Brennan's standard would not limit a new trial to those situations in which the juror intentionally gives an incorrect or dishonest answer during voir dire; according to Justice Brennan, "[o]ne easily can imagine cases in which a prospective juror provides what he subjectively believes to be an honest answer, yet that same answer is objectively incorrect and therefore suggests that the individual would be a biased juror in the particular case."[35]

Taking all the opinions in *McDonough* as a whole, every Justice agreed in the result and determined that the trial court, not the court of appeals, should have decided the new trial question.[36] Furthermore, five Justices argued in concurrences that trial courts should have the discretion to infer bias from the facts and circumstances of the case despite a juror's honesty.[37] This suggests that a majority of the Court did not favor the *McDonough* test as an exclusive test of impartiality. It appears that, when challenging a decision on the basis of juror nondisclosure, the *McDonough* test is required only when bias cannot be shown.

In addressing a party's right to an impartial jury, the *McDonough* test focuses on the issue of juror bias sufficient to justify a challenge for cause. "[H]ints of bias not sufficient to warrant challenge for cause,"[38] although they might influence a litigant's decision to exercise a peremptory challenge,[39] do not automatically justify reversal.[40]

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34. *Id.* at 557-58 (Brennan, J., concurring in the judgment).

35. *Id.* at 559 (Brennan, J., concurring in the judgment).

36. *Id.* at 556, 557.

37. *Id.* at 556-57 (Blackmun, J., concurring); *id.* at 557 (Brennan, J., concurring in the judgment).

38. *Id.* at 554.

39. *Id.*

40. *Id.* at 555-56. Other courts have also used the "presumed bias" reasoning of the concurring opinions in *McDonough*. Crump, *supra* note 28, at 762 n.114, cites several cases which were decided by using the less rigid reasoning of the concurring opinions in *McDonough* rather than that of the majority opinion. *See, e.g.*, United States v. Colombo, 869 F.2d 149 (2d Cir. 1989) (remanding for hearing when affidavit charged juror with nondisclosure at voir dire because she wanted to serve on the jury); United States v. Scott, 854 F.2d 697 (5th Cir. 1988) (reversing conviction by applying presumed bias reasoning to reverse district court's finding of juror's sincerity in nondisclosure).

III. *STATE V. THOMAS*: THE UTAH SUPREME COURT'S APPLICATION AND INTERPRETATION OF THE *MCDONOUGH* TEST

A. Facts

In *State v. Thomas*,[41] defendant Thomas appealed his conviction of rape, alleging four counts of trial error. One assignment of error was "that the failure of two jurors to correctly respond to a question during voir dire denied him a fair trial by an impartial jury."[42] During voir dire, the judge asked prospective jurors whether they or any close relatives had ever been the victim of a violent crime, and whether they or any close relatives had ever been accused of any offense similar to the rape charge against Thomas.[43] Juror Salaz, who had previously been assaulted, and juror Wall, who had told police that her husband had sexually assaulted her son, remained silent and did not inform the judge of these experiences.[44]

Thomas claimed that during jury deliberation, the other jurors learned of Salaz's and Wall's undisclosed experiences,[45] and coerced Salaz and Wall into changing their votes from not guilty to guilty by threatening to reveal their misconduct during voir dire.[46] Thomas also argued that the nondisclosures had prevented him from excusing the jurors on challenges for cause or peremptory challenges, and that he had therefore been deprived of his right to an impartial jury.[47] Despite Thomas's assertions, the trial judge refused to admit post-trial evidence regarding these allegations on the ground that it would constitute "an intrusion on the deliberative process of the jury, in violation of rule 606(b) of the Utah Rules of Evidence."[48]

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41. 777 P.2d 445 (Utah 1989).

42. *Id.* at 447.

43. State v. Thomas, 830 P.2d 243, 245 (Utah 1992).

44. *Id.* at 244.

45. *Id.* at 244, 247.

46. *Id.*

47. 777 P.2d at 450. The Utah Constitution guarantees defendants the right to a speedy trial by an impartial jury. UTAH CONST. art. I, § 12.

48. 777 P.2d at 447. Rule 606(b) of the Utah Rules of Evidence states the following:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly

On Thomas's first appeal, the Utah Supreme Court remanded the case to the trial court to determine whether Thomas could prove that both prongs of the *McDonough* test had been satisfied.[49] On remand, the trial judge denied Thomas's motion for a new trial after holding an evidentiary hearing.[50] The judge found that the first prong of the *McDonough* test—that a prospective juror failed to answer honestly a material question during voir dire—was not satisfied.[51] The judge apparently believed that neither juror had intended her silence to mislead the court,[52] and again refused to admit any evidence showing jury misconduct during deliberation.[53] Thomas appealed a second time, and the Utah Supreme Court reversed and remanded for a new trial.[54]

B. Reasoning

1. The court's application of the McDonough *test's first prong*

Although the court found juror Wall had not intended to deceive the court by failing to disclose that she had charged her husband with sexually assaulting her son,[55] it determined that Wall's nondisclosure satisfied the first prong of the *McDonough* test because "she nonetheless failed to answer a material question accurately."[56] Justice Durham considered the possibility that Wall may not have perceived any similarity between her husband's alleged sexual assault on her son and the crime of rape.[57] In Durham's view, this was one of those

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> brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

UTAH R. EVID. 606(b).

49. 777 P.2d at 451.

50. 830 P.2d at 244.

51. *Id.*

52. *Id.* at 245.

53. *Id.* at 244.

54. *Id.*

55. *Id.* at 245-46.

56. *Id.* at 246. The dissent in *Thomas*, written by Associate Chief Justice Howe and joined by Chief Justice Hall, maintained that the first prong of the *McDonough* test had not been met for juror Wall since no evidence was submitted to prove that the charge against Wall's husband of sexually assaulting her son was a crime of violence rather than "a nonconsensual touching or fondling unaccompanied by violence." *Id.* at 251 (Howe, Assoc. C.J., dissenting).

57. *Id.* at 246.

"easily imagine[d]" cases where subjective belief was unreasonable. Relying upon the objective perspective proposed by Brennan,[58] Justice Durham stated "there are obvious similarities between a sexual assault and a rape,"[59] and argued that Wall's intent or lack of intent to deceive the court was irrelevant; her failure to accurately answer a material question during voir dire was sufficient to satisfy the first prong of the *McDonough* test.[60]

As to juror Salaz, her testimony during the evidentiary hearing showed that "[s]he knew that she had been a victim of a violent crime and, substituting her judgment for that of court and counsel, decided that she could be impartial and did not need to disclose the information."[61] Justice Durham held that, in accordance with the court's past decisions, "the trial court, not the juror, must determine a juror's qualifications."[62] The court found that Salaz's nondisclosure also satisfied the first prong of the *McDonough* test since "Salaz's subjective impression that she could be fair and impartial [did] not overcome the fact that she had been a victim of a violent crime and failed to disclose that fact during voir dire."[63] For these reasons, the court held that the trial judge had been clearly erroneous in ruling that the first prong of the *McDonough* test had not been met.[64]

2. McDonough*'s second prong: Four different views*

The Utah Supreme Court justices were significantly divided over the application of the second prong of the *McDonough* test and their understanding of its effect on the facts of *Thomas*. Justice Durham modified the second prong of the test in order to justify a new trial.[65] Justices Stewart and Zimmerman concurred in remanding the case for a new trial, but disagreed with Justice Durham's extension of the *McDonough* test's second prong; each gave different reasons for

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58. *See supra* notes 32-35 and accompanying text.
59. 830 P.2d at 246.
60. *Id.*
61. *Id.* at 246-47.
62. *Id.* at 247.
63. *Id.*
64. *Id.* at 245. In the dissent, Associate Chief Justice Howe and Chief Justice Hall favored a subjective analysis for determining juror dishonesty. *Id.* at 251 (Howe, Assoc. C.J., dissenting).
65. *Id.* at 247-49 (opinion of Durham, J.).

determining that a new trial was required.[66] The dissent argued that application of the unaltered *McDonough* test did not justify a new trial.[67]

a. Justice Durham's opinion. Under the second prong of the *McDonough* test, Thomas could not have been granted a new trial unless he proved that the jurors' honest answers to the voir dire questions would have been grounds for challenges for cause.[68] Justice Durham believed that Thomas could not do so because "there [was] no record establishing a basis for this challenge, nor [was] there any way to show that proper disclosure by the jurors would have created such a basis."[69]

In accordance with the "outside influence" exception to rule 606(b),[70] Thomas had also tried to show he had been prejudiced by the jury's use of Wall's and Salaz's nondisclosures.[71] Since the alleged prejudice did not originate from any bias of the two jurors who failed to answer honestly the questions at voir dire, Thomas sought to prove that prejudice resulted from the reactions of Wall and Salaz to the coercive behavior of their fellow jurors, who "threat[ened] to reveal their misconduct."[72] Justice Durham argued that the trial judge's refusal to admit evidence of the jury's "prejudicial use of the voir dire-related information during jury deliberations" prevented Thomas from proving the existence of this prejudice.[73]

For these reasons, Justice Durham concluded that the second prong of the *McDonough* test could not be satisfied for either Wall or Salaz.[74] In order to address the situation presented by Thomas's case, Justice Durham modified the second prong of the test "to require a showing that a correct response would have provided *either* a valid basis for a challenge for cause *or* that the nondisclosure itself prevented the juror from serving as a fair, impartial factfinder."[75] To satisfy this modi-

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66. *Id.* at 249-50 (Stewart, J., & Zimmerman, J., concurring in the result).
67. *Id.* at 250-52 (Howe, Assoc. C.J., dissenting).
68. *Id.* at 245 (opinion of Durham, J.).
69. *Id.* at 247 (opinion of Durham, J.).
70. *See supra* note 48.
71. 830 P.2d at 247.
72. *Id.*
73. *Id.* at 248-49 (opinion of Durham, J.).
74. *Id.* at 247-49 (opinion of Durham, J.).
75. *Id.* at 248 (opinion of Durham, J.). Modification of the Supreme Court's *McDonough* test is not unprecedented. In United States v. Perkins, 748 F.2d 1519 (11th Cir. 1984), a defendant convicted of both obstruction of justice and conspiracy to obstruct justice was granted a new trial based upon a juror's dishonest answers

fied prong of the test, Thomas could introduce evidence that jury misconduct relating to the nondisclosures at voir dire occurred during jury deliberation.[76] Even though the trial judge had refused to admit such evidence, Justice Durham thought "[e]vidence that the undisclosed information was used during deliberations should be admissible under the provision of rule 606(b) allowing testimony on the question 'whether any outside influence was improperly brought to bear upon any juror.' "[77]

Justice Durham apparently felt justified in departing from the policy favoring secrecy in jury deliberations when juror misconduct during voir dire results in misconduct by other jurors during deliberations. Although she acknowledged that "harassment, pressure, or intimidation from other jurors is not a basis for impeaching a verdict,"[78] she then argued that this traditional rule should be different "[w]here the pressure is based on the other jurors' improper use of a juror's misconduct during voir dire" because such a situation implicates "the fairness of the trial process."[79] Justice Durham would have remanded for trial court proceedings under her new test, but since no other justice joined her proposed modification, she concurred in remanding the case for a new trial.[80]

b. Justice Stewart's opinion. Although Justice Stewart agreed that a new trial was required, he did not believe that "a jury verdict should be impeachable on the basis of what was said during the jury's deliberations."[81] He supported the reversal of Thomas's conviction because, if Wall and Salaz had responded honestly to the voir dire questioning, their answers would have been grounds for peremptory challenges and possibly challenges for cause.[82]

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to voir dire. The Eleventh Circuit resolved the *McDonough* test's second prong requirement—that an honest response would have provided a basis for a challenge for cause—by quoting Justice Blackmun's concurring opinion in *McDonough*, not the plurality opinion. Justice Blackmun's concurrence stated 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." *Id.* at 1532 (quoting McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984) (Blackmun, J., concurring)). Note, however, that while *McDonough* is wholly binding authority on the Eleventh Circuit, only its constitutional requirements are binding on the Utah Supreme Court.

76. 830 P.2d at 248 (opinion of Durham, J.).

77. *Id.* at 249 (opinion of Durham, J.) (quoting UTAH R. EVID. 606(b)).

78. *Id.* at 247 n.2 (opinion of Durham, J.) (citations omitted).

79. *Id.*

80. *Id.* at 249 (opinion of Durham, J.).

81. *Id.* at 249 (Stewart, J., concurring in the result).

82. *Id.*

c. Justice Zimmerman's opinion. Justice Zimmerman agreed with Justice Stewart's criticism of the modification proposed by Justice Durham, but felt that the original *McDonough* test was sufficient to determine whether a new trial should be granted.[83] Justice Zimmerman argued that a basis for a challenge for cause would have been found had Wall and Salaz given honest responses to the voir dire questions, because another potential juror in *Thomas* had been excused for cause after disclosing an experience involving assault.[84] Justice Zimmerman interpreted "basis" to mean creating "a prima facie case for a motion to disqualify for cause,"[85] or taking the undisclosed answer alone, without regard to what the trial court might have learned from follow-up questions.[86] Justice Zimmerman recognized that, "after the fact, the jurors may state that they still could have judged the case impartially," but felt that "such retrospective second-guessing" was inappropriate and not required by *McDonough*.[87]

d. The dissent. Associate Chief Justice Howe, joined by Chief Justice Hall, disagreed with the analyses of Justices Durham, Stewart, and Zimmerman. In rejecting Justice Durham's extension of the second prong of the *McDonough* test, Justice Howe maintained that admitting affidavits of jurors relating details of the jury's deliberations would violate rule 606(b) of the Utah Rules of Evidence.[88] He claimed that the test in its original form was "eminently fair to both the prosecution and the defendant."[89]

In his dissent, Justice Howe argued that Thomas's conviction should have been affirmed and that no new trial was warranted.[90] He felt that Wall's nondisclosure did not satisfy the first prong of the *McDonough* test because the sexual assault Wall had accused her husband of perpetrating on her son may

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83. *Id.* at 250 (Zimmerman, J., concurring in the result).

84. *Id.* The potential juror told the court that she had been the victim of a sexual assault, and indicated that she might have difficulty remaining impartial. Brief for Appellant at 15, State v. Thomas, 830 P.2d 243 (Utah 1992) (No. 890503); *cf. infra* note 96 and accompanying text (explaining that a juror whose brother had been the victim of a violent assault had not, after follow-up questioning, been challenged for cause, and was allowed to serve on the jury).

85. 830 P.2d at 250 (Zimmerman, J., concurring in the result).

86. *Id.*

87. *Id.*

88. *Id.* at 252 (Howe, Assoc. C.J., dissenting).

89. *Id.*

90. *Id.*

not have been a violent crime.[91] As Justice Howe argued, "[a]n assault can be a nonconsensual touching or fondling unaccompanied by violence."[92] For this reason, Justice Howe did not find clearly erroneous the trial judge's determination that Wall had responded honestly.[93]

Although Justice Howe agreed that the first prong of the *McDonough* test had been met in regard to Salaz, he maintained that "a challenge for cause against Salaz would not have been sustained."[94] In support of this position, he stated that,

> We have held in many cases that a prospective juror is not subject to a challenge for cause because he or she may harbor preconceived notions, feelings, or ideas which will fairly yield to the evidence to be presented. Particularly is that true when the juror, without being "pushed" by the court, indicates his or her willingness to do so.[95]

Supporting this argument is the fact that another juror, who had disclosed the facts of his brother's murder by an unknown assailant but who nonetheless asserted his ability to serve impartially, was not challenged for cause.[96]

3. *Reconciling the opinions in* Thomas

The confusion in *Thomas* may be attributed to a result-oriented approach. However, the opinions can be substantially reconciled. First, a majority of the court agreed to apply the unaltered version of the *McDonough* test's second prong.[97] Second, a majority consisting of a different grouping of justices found that the facts of *Thomas* satisfied some variant of the second prong.[98] Third, a majority of the justices apparently

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91. *Id.* at 251 (Howe, Assoc. C.J., dissenting).
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 251-52 (Howe, Assoc. C.J., dissenting); *see also* Brief for Appellee at 2, State v. Thomas, 830 P.2d 243 (Utah 1992) (No. 890503) (giving a more detailed account of this juror's history and the decision to allow him to serve on the jury); *supra* note 84 and accompanying text (discussing the fact that another potential juror had been excused for cause after telling the court that she had been the victim of a crime of violence).
97. 830 P.2d at 250 (Zimmerman, J., concurring in the result); *id.* at 250-51 (Howe, Assoc. C.J., joined by Hall, C.J., dissenting).
98. *Id.* at 249 (opinion of Durham, J.); *id.* at 249-50 (Stewart, J., concurring in the result); *id.* at 250 (Zimmerman, J., concurring in the result).

felt that the facts of *Thomas* did not satisfy the second prong if the phrase "valid basis" considers more than just the omitted response.[99] Taken together, the opinions limit the unaltered second prong to consideration of whether the omitted response, if unrebutted, would justify a juror's disqualification for cause. While only Justice Zimmerman took this position,[100] his approach provides the narrowest possible grounds on which the court's opinions could rest.[101]

IV. ANALYSIS AND PROPOSAL

The *Thomas* decision involves two separate issues. The first issue, which *McDonough* adequately addresses, asks when juror dishonesty or nondisclosure during voir dire requires a new trial. The second issue, which *McDonough* did not address, asks when—if ever—jury misconduct during deliberation, when prompted by juror misconduct during voir dire, requires a new trial.

The *McDonough* test deals with juror misconduct during voir dire that prejudices a party's ability to wisely exercise a challenge for cause or a peremptory challenge. Under the *McDonough* test, juror dishonesty at voir dire requires a new trial only when it affects a party's substantial rights and would have provided sufficient grounds for a challenge for cause.

In *Thomas*, a question arose as to whether Wall's and Salaz's nondisclosures at voir dire concealed juror bias which would have justified a challenge for cause. However, apparently neither juror was actually biased against Thomas because both initially voted to find him not guilty.[102] Any prejudice arising

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99. *Id.* at 247 (opinion of Durham, J.) (arguably implying by her "no record" discussion that the test might not be satisfied if more than the omitted response were considered); *id.* at 251-52 (Howe, Assoc. C.J., joined by Hall, C.J., dissenting) (discussing other jurors not excused after follow-up questioning).

100. *Id.* at 250 (Zimmerman, J., concurring in the result). Note that Justice Durham's "no record" discussion might also suggest a reluctance to second-guess what might have followed disclosure, had it been made. *Id.* at 247 (opinion of Durham, J.). Note also that Justice Stewart, in stating that "the answers, if truly given, *may not* have been a ground for a challenge for cause," did not foreclose the possibility that the nondisclosures justified a challenge for cause. *Id.* at 249 (Stewart, J., concurring in the result) (emphasis added).

101. *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .' ") (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

102. 830 P.2d at 247, 248.

from their misconduct during voir dire did not manifest itself in any predetermined verdict on their part; instead, it resulted when other jurors used their knowledge of the nondisclosures to influence Wall's and Salaz's votes.[103]

Because the pressure applied to Wall and Salaz was based on the other jurors' knowledge of Wall's and Salaz's misconduct during voir dire, the *McDonough* test might appear relevant to, although not dispositive of, the situation. However, a juror's testimony concerning events that occur during the deliberative process falls under rule 606(b) of the Utah Rules of Evidence.[104] The conflicting opinions in *Thomas* are the result of the Utah Supreme Court's attempt to apply both the *McDonough* test and rule 606(b) to this situation.

A. The Square Peg—Round Hole Dilemma

Does juror misconduct at voir dire constitute "an outside influence" or "extraneous prejudicial information" affecting jury deliberation? If so, evidence that such information was used during deliberation should be admissible under the exception to rule 606(b).[105] If not, the evidence is inadmissible because it "would constitute an impermissible intrusion into the deliberative process of the jury."[106] The *Thomas* court struggled to determine just how relevant the *McDonough* test was—or should be—in resolving this question.

B. Justice Durham's Extension of McDonough

Adopting Justice Durham's modification of the *McDonough* test could result in a multitude of problems and uncertainties. Determining whether "the nondisclosure itself prevented the juror from serving as a fair, impartial factfinder"[107] would necessitate inquiry into the juror's performance of jury duties. The search for juror bias would extend beyond pre-trial procedures to the trial itself, intrude upon the jury's deliberative process, and continue long after the trial's conclusion. While Justice Durham sought to protect "the fairness of the trial process,"[108] allowing a party to inquire into a juror's impartiality

103. *Id.*
104. *See supra* note 48.
105. *See supra* note 48.
106. 830 P.2d at 248 (opinion of Durham, J.).
107. *Id.*
108. *Id.* at 247 n.2 (opinion of Durham, J.).

to such an extent would also affect the fairness of the trial process.

A delicate balance exists between the need for finality of verdicts and the interest in providing a fair trial. While the parties, and society, must be able to rely on the finality of a verdict, finality also relates to the concept of a fair trial. One commentator has persuasively argued that,

> If a verdict is impeached and the judgment set aside, it may be years before the case is retried . . . . As time passes, memories fade, witnesses become unavailable, and evidence is often lost . . . . Due to these problems, it is uncertain whether a later retrial is likely to result in a just verdict.[109]

On the other hand, "if a verdict is the result of threats against jurors, outside or erroneous information provided to jurors, or other improper influences, the parties have not received the just and impartial verdict to which they are entitled."[110]

Although the *McDonough* test was properly applied in *Thomas* to discover whether Wall or Salaz acted improperly during voir dire, the test was not intended to resolve the question of whether a new trial should be granted based upon jury misconduct during deliberation. In seeking to ensure the fairness of one aspect of the trial process, courts should be wary of compromising the fairness of the trial process in other aspects.

C. Justice Stewart's Extension of McDonough

Rather than undermining the "long-established policy of the law to keep jury deliberations both secret and sacrosanct,"[111] Justice Stewart chose to modify the test in a manner which granted a new trial because the jurors' nondisclosures deprived Thomas of his right to exercise pe-

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109. James W. Diehm, *Impeachment of Jury Verdicts:* Tanner v. United States *and Beyond*, 65 ST. JOHN'S L. REV. 389, 402-03 (1991).

The need for finality is a generally recognized principle. "[T]he setting aside of jury verdicts on any but the most egregious grounds would cost more in terms of stability and finality than it could possibly gain." Susan Crump, *Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?*, 66 N.C. L. REV. 509, 534 (1988). However, Crump concedes that "an exclusionary rule preventing proof of serious misconduct, or a rule preventing the investigation that would discover it, would be dysfunctional." *Id.* at 535.

110. Diehm, *supra* note 109, at 403-04.

111. *Thomas*, 830 P.2d at 249 (Stewart, J., concurring in the result).

remptory challenges.[112] Justice Stewart's modification of the *McDonough* test grants a new trial if a nondisclosing juror's honest response to voir dire questioning would have been grounds for a challenge for cause or a peremptory challenge. This would create a standard similar to that used by the Tenth Circuit,[113] prior to the establishment of the *McDonough* test, in which the unrevealed information is so significant that counsel is "entitled to know of it in deciding how to use . . . peremptory challenges."[114] In *Thomas*, Justice Stewart argued that,

> The questions put to the jurors which were incorrectly answered were clearly material and potentially of great importance to an attorney's making a rational decision as to how to exercise peremptory challenges. Although it is true that the answers, if truly given, may not have been a ground for a challenge for cause, peremptory challenges are nonetheless an essential and important part of choosing a jury.[115]

Had Wall and Salaz responded honestly to the voir dire questions, Thomas's attorney would probably have questioned them further concerning their past experiences. Depending upon their answers to more extensive questioning, it is certainly possible that the defense would have attempted to excuse both jurors by exercising either challenges for cause or peremptory challenges. The defense should have had that opportunity.

Justice Stewart's proposed modification of the test is similar to that suggested by Professor David Crump. According to Crump, the *McDonough* test "fails to recognize how a juror's frustration of the peremptory challenge process can lead to unfairness in the trial."[116] Crump's proposal retains the first

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112. *Id.*

113. "If an average prospective juror would have disclosed the information, and that 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), *rev'd*, 464 U.S. 548 (1984).

114. *Id.* at 342.

115. *Thomas*, 830 P.2d at 249 (Stewart, J., concurring in the result) (citing State v. Worthen, 765 P.2d 839 (Utah 1988)). The two types of challenges are discussed in McCoy v. Goldston, 652 F.2d 654, 657-58 (6th Cir. 1981). "While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable." *Id.* at 657-58 (quoting Swain v. Alabama, 380 U.S. 202, 220 (1965) (citing Hayes v. Missouri, 120 U.S. 68, 70 (1887))).

116. Crump, *supra* note 28, at 764. Crump claims that Justice Rehnquist's

prong of the original test—that "a party must . . . demonstrate that a juror failed to answer *honestly* a material question on *voir dire*"[117]—but modifies the second prong so that a new trial may be granted if "the average attorney of reasonable skill would have been particularly likely to exercise a peremptory challenge if provided with correct answers."[118] This proposal is more generous than the *McDonough* test in recognizing the role of the peremptory challenge in selecting an impartial jury, but is still sufficiently vague enough to cause inconsistent results.

D. The Combined Effect of the Opinions in Thomas

Justice Zimmerman's prima facie case analysis requires a new trial if the unrebutted nondisclosure would have justified disqualification for cause. Since, absent rebuttal, the jurors would have been dismissed had they answered honestly, this analysis requires a new trial. If this rule properly reconciles the Justices' opinions, *Thomas* protects parties from jurors' after-the-fact assurances of impartiality—assurances sought by judges anxious to avoid repeating a trial. The prohibition on using impartiality declared after the fact to deny a new trial is similar to the prohibition on using hints of bias to justify granting a new trial.

E. The Safety Net

In effect, the *McDonough* test states that, when the lack of an honest response to voir dire questioning results from a juror's nondisclosure or inadvertent mistake, a party's substantial rights are not affected by the deprivation of any opportuni-

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second prong of the *McDonough* test, requiring a finding that "a correct response would have provided a valid basis for a challenge for cause," McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984), would often "preserve some verdicts that many would find too glaringly unfair to tolerate." Crump, *supra* note 28, at 774. Crump finds that the concurring opinions in *McDonough*

> propose too diffuse a standard in focusing merely on the bias of the juror and the resulting prejudice to the litigant. By grounding this standard upon multiple unspecified factors, these Justices would encourage hearings in marginal cases, cause an undue number of unproductive retrials, lengthen hearings, produce unpredictable results, and increase juror harassment.

Id. at 774-75.

117. *McDonough*, 464 U.S. at 556 (emphasis added).

118. Crump, *supra* note 28, at 775.

ty to exercise a peremptory challenge. This seems unjust, since the inability to exercise a peremptory challenge in such a situation might well compromise the essential fairness of a trial. The *McDonough* test seeks to provide fairness in the trial process without creating judicial inefficiency. Had a less rigid standard been applied to *Thomas*, a new trial could have been ordered without intruding upon the jury's deliberative process to impeach the verdict or interpreting and manipulating the *McDonough* test in order to resolve the issue before the court.

The conflicting analyses and results of the Utah Supreme Court justices in *Thomas* illustrate that the *McDonough* test was not designed to address a situation involving such unusual circumstances. Confusion and inconsistency will necessarily occur when the courts attempt to force a square peg into a round hole. Efforts to resolve the occasional extreme case by applying tests and standards which cannot encompass the facts of the case are more likely to frustrate rather than administer justice. Although a defendant is "not entitled to perfection in the trial process,"[119] the courts should provide a "safety net" for the occasional extreme case in which questions concerning the fairness of the trial process cannot be satisfactorily resolved by established tests. When a court's reasonable efforts are insufficient to conclusively establish that a party's substantial rights have not been affected by trial error, the courts should adopt a policy of ruling in favor of the moving party.[120]

Tests and standards are created to address issues which arise with some regularity. Most cases can be adequately resolved by the application of an established test. For these reasons, the safety net policy will not need to be used often. However, when a case presents facts which cannot be clearly resolved by a test or standard which would otherwise apply, the safety net policy would allow the judicial system to decide a case without risking the possibility of compromising the fairness of the trial process at some other stage of the proceedings. This approach protects the integrity of the trial process and,

119. Commonwealth v. Amirault, 506 N.E.2d 129, 134 (Mass. 1987) (citing Brown v. United States, 411 U.S. 223, 231-32 (1973)); *see also McDonough*, 464 U.S. at 553.

120. *Accord* United States v. Scott, 854 F.2d 697, 700 (5th Cir. 1988) (stating that "in criminal cases '[d]oubts about the existence of actual bias should be resolved against permitting the juror to serve' ") (quoting United States v. Nell, 526 F.2d 1223, 1230 (5th Cir. 1976)).

when necessary, gives the benefit of the doubt to the moving party.

V. CONCLUSION

The *McDonough* test was designed to provide a new trial if a juror who responded dishonestly to voir dire questioning could have been challenged for cause had an honest response been given. The various opinions in *Thomas* demonstrate the difficulties courts have had in attempting to apply this test to cases involving juror nondisclosure at voir dire, and in deciding whether the "honesty" of a response should be determined from a subjective or an objective standard. The *Thomas* case further complicated the successful application of the *McDonough* test by questioning the proper extent of any examination into juror bias: should information affecting jury deliberations be scrutinized in order to determine juror prejudice related to misconduct at voir dire?

Unusual cases such as *Thomas* are the exception rather than the rule; however, they cannot be adequately resolved by tests established to resolve less problematic situations. In trying to force a test to fit the facts of the occasional extreme case, the courts are seldom able to achieve consistent and predictable results, the integrity of the trial process is often compromised, and justice is frequently not satisfied. These problems could be reduced if the courts would adopt a safety net policy when they are unable to satisfactorily resolve questions concerning the fairness of the trial process by using an established test or standard. The safety net policy would cause courts to rule in favor of the party moving for a new trial when it cannot be conclusively established that a party's substantial rights have not been affected by trial error.

The trial process is at the very heart of our country's judicial system. In order to minimize the amount of trial error, courts must sometimes take action which, while it may not always be the correct result in a given case, will preserve the procedures by which we attempt to provide due process of law to the accused. The safety net policy proposed in this Note would help insure a fair trial even in situations for which established tests are inadequate.

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