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Criminal Law - Retroactivity - Jury Instructions - Consequences of a Verdict of Non Guilty by Reason of Insanity

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CRIMINAL LAW—RETROACTIVITY—JURY INSTRUCTIONS—CONSEQUENCES OF A VERDICT OF NOT GUILTY BY REASON OF INSANITY—The Pennsylvania Supreme Court has held that its determination that a jury be informed of the consequences of a verdict of not guilty by reason of insanity not be applied retroactively and, more specifically, not to a case on direct appeal at the time of that decision.

Commonwealth of Pennsylvania v. Geschwendt, 500 Pa. 120, 454 A.2d 991 (1982).

On March 12, 1976, at approximately 8:30 a.m., George Geschwendt broke into the residence of the Abt family.[1] Geschwendt lived across the street from the Abts with his mother, who had gone to work that morning.[2] He carried with him into the Abt home a .22 caliber gun and ammunition which he had purchased and falsely reported stolen on the day of purchase.[3] No one was present in the Abt home at the time Geschwendt illegally entered the residence.[4] In entering, Geschwendt broke a kitchen window but subsequently cleaned up the glass and then positioned himself such that he was able simultaneously to view both the kitchen and front door entrances.[5] Geschwendt lay in wait for approximately six hours, and then as the members of the Abt family arrived home, he successively shot and killed five of them, as well as the boyfriend of one of the Abts.[6]

Geschwendt dragged the bodies to the basement.[7] He also cleaned up the blood after each shooting.[8] One of the Abts had the opportunity to complete a phone call before Geschwendt shot and killed her.[9] Geschwendt left the Abt residence and returned home by a circuitous route after the Abt telephone began to ring repeatedly, arousing Geschwendt's fear of being discovered.[10]

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1. Commonwealth v. Geschwendt, 500 Pa. 120, 123, 454 A.2d 991, 992-93 (1982).
2. *Id.* at 123, 454 A.2d at 99 3. Geschwendt also had a brother who resided with his mother and him. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* Geschwendt also killed and obscured from sight the family dog. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* Two members of the Abt family had not arrived home at that point and sur-

Geschwendt concealed the gun and his bloody clothing in the saddlebags of his motorcycle which he kept locked in his garage.[11] The next day Geschwendt drove a considerable distance to the Delaware River where he discarded the shoes and rubber gloves he had worn the previous day.[12] Geschwendt washed his clothing to remove any bloodstains and gave it to the Goodwill Industries.[13] On March 16, Geschwendt disposed of the gun, spent shell casings, and remainder of the live ammunition into a nearby creek from which police later recovered the gun.[14]

Approximately one week after the Abt killings, Geschwendt was asked by the local police to come to police headquarters to be questioned about the alleged theft of his gun.[15] A polygraph test given to Geschwendt on March 22 indicated he was giving deceptive answers.[16] That evening, when told of the polygraph test results, Geschwendt confessed and gave a full and detailed account of the killings, as well as his activities prior and subsequent to the killings.[17]

Geschwendt was convicted at jury trial of murder in the first degree.[18] The Pennsylvania Superior Court affirmed, holding that, inter alia, the trial judge properly charged the jury that it could bring in verdicts of guilty of murder in the first degree, or not guilty by reason of insanity.[19] Adhering to the law prevailing at that time, the trial judge had refused Geschwendt's request that the jury be instructed as to the consequences of a verdict of not

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vived as a result of Geschwendt's early departure. *Id.*

11. *Id.* at 124, 454 A.2d at 993.

12. *Id.* Geschwendt had worn rubber gloves and ear protectors during the incident. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* Geschwendt gave a stenographically recorded confession after his arraignment that evening. He stated to police that he was sorry he was unable to remain in the house long enough to kill all the members of the Abt family as he had intended. *Id.*

18. *Id.* at 122, 454 A.2d at 991. *See* Commonwealth v. Geschwendt, Nos. 939-944 (Court of Common Pleas, Bucks County 1976).

19. 271 Pa. Super. at 102-05, 412 A.2d at 595-96. The superior court also held that: (1) the trial court adequately instructed on the definition of insanity; (2) the exclusion of attorneys and physicians from the array of jurors did not prevent defendant from receiving a fair trial; (3) the trial judge did not unduly and erroneously restrict defendant's voir dire examination of prospective jurors; (4) defendant was not entitled to a change of venue; (5) it was not error to admit photographs depicting bloodstained rugs, clothing and the body of one of the victims; and (6) the record established that the stenographically transcribed confession was not involuntarily induced. *Id.* at 105-08, 412 A.2d at 597-98.

guilty by reason of insanity.[20] Subsequently, in the case of *Commonwealth v. Mulgrew*,[21] the Pennsylvania Supreme Court determined that a trial judge should charge the jury as to the consequences of a verdict of not guilty by reason of insanity.[22] The superior court declined Geschwendt's request to apply *Mulgrew* to his circumstance, stating that new decisions are not to be applied retroactively unless constitutional issues are involved.[23] The superior court saw no constitutional issue present in *Mulgrew* and, therefore, refused to apply that decision retroactively to Geschwendt.[24]

Judge Manderino filed a dissenting opinion stating his belief that Geschwendt was entitled to relief under the tenets of *Mulgrew*.[25] He opined that the jury should have had the benefit of the requested charge so as to assure a fully informed decision.[26] Contrary to the majority's rationale regarding retroactively, Judge Manderino stated that whether an issue is constitutional or not is not a fair way to determine whether relief is indicated.[27] Geschwendt appealed to the Supreme Court of Pennsylvania requesting a new trial based on numerous allegations of error.[28]

Justice Nix, writing for the plurality,[29] focused on the applicability of the holding in *Mulgrew* to Geschwendt's circumstances and the trial court's refusal to charge the jury upon the defense's request as to the consequences of a verdict of not guilty by reason of

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20. *Id.* at 105, 412 A.2d at 597.

21. 475 Pa. 271, 380 A.2d 349 (1977).

22. *Id.* at 275, 380 A.2d at 351.

23. 271 Pa. Super. at 105, 412 A.2d at 597 (citing Commonwealth v. Ernst, 476 Pa. 102, 381 A.2d 1245 (1977)).

24. 271 Pa. Super. at 105, 412 A.2d at 597.

25. *Id.* at 108, 412 A.2d at 598 (Manderino, J., dissenting).

26. *Id.*

27. *Id.*

28. 500 Pa. at 122 n.2, 454 A.2d at 992 n.2. Geschwendt, in addition to the alleged error regarding the court's failure to give the requested instruction, alleged five additional instances of error: (1) failure to suppress his confession; (2) refusal of requests for a charge of alternative tests of insanity; (3) admission of color photographs of the crime scene; (4) allowing the testimony of a prosecution psychiatrist; and (5) denial of a request for a change of venue. Geschwendt also challenged the constitutionality of 17 PA. CONS. STAT. § 1333 (1982) which exempts attorneys and physicians from jury duty, and claimed a denial of due process in the restriction of voir dire. The superior court considered and denied the aforementioned allegations of error at Commonwealth v. Geschwendt, 271 Pa. Super. 102, 412 A.2d 595 (1979).

29. 500 Pa. at 124, 454 A.2d at 993. Justices Larsen, McDermott and Hutchinson concurred in result. *Id.* at 135, 454 A.2d at 998. Chief Justice O'Brien and Justices Roberts and Flaherty dissented. *Id.*

insanity.[30] Justice Nix noted that the court had originally rejected the approach taken in *Mulgrew* and that the law of Pennsylvania had been embodied in *Commonwealth v. Gable*, which held that the jury had nothing to do with the trial judge's duty to send the defendant to a state institution, and thus it was not error to refuse to so inform them.[31] He further explained that a unanimous decision in *Mulgrew* rejected as simplistic the *Gable* view that punishment was not the concern of the jury and that no explanation was required to be given to them.[32] Justice Nix noted that Geschwendt's trial was concluded on July 19, 1976, and the opinion in *Mulgrew* was not filed until December 1, 1977; therefore, absent a determination that *Mulgrew* be applied retroactively, Geschwendt was not entitled to the requested point of charge.[33]

Faced with the question of whether a change in law should be applied to those cases still on direct review at the time of a new pronouncement, the court noted that neither the federal nor state constitution dictated a certain result.[34] The deliberations of the United States Supreme Court and views expressed by its members were considered by the plurality to be informative but not controlling since the court perceived the matter to be one of purely state law. Thus, it was not necessary that the state court anticipate the Supreme Court's view as to the appropriate effect to be given the new pronouncement.[35]

Justice Nix noted that the application of a new rule to cases such as Geschwendt's which are on direct review at the time of the decision found support early in our national history. Chief Justice Marshall, in the seminal case of *United States v. Schooner Peggy*,[36] articulated the view that a law, passed subsequent to judgment but before decision by an appellate court, must be given effect, even it if it necessary to set the judgment aside.[37] Justice

30. *Id.* at 124, 454 A.2d at 993.

31. *Id.* (citing Commonwealth v. Gable, 323 Pa. 449, 453, 187 A. 393, 395 (1936)).

32. *Id.* at 125, 454 A.2d at 994. *See* Commonwealth v. Mulgrew, 475 Pa. 271, 275, 380 A.2d 349, 351 (1977), where it was held that when insanity is raised as a possible defense to criminal charges, a jury must be instructed concerning the possible psychiatric treatment and commitment of the defendant after the return of a verdict of not guilty be reason of insanity. *Id.*

33. 500 Pa. at 125, 454 A.2d at 994.

34. *Id.* at 127, 454 A.2d at 995. "[T]he Constitution neither prohibits nor requires retrospective effect." (citing United States v. Johnson, 457 U.S. 537, 542 (1982)).

35. 500 Pa. at 128, 454 A.2d at 995.

36. 5 U.S. (1 Cranch) 103 (1801).

37. *Id.* at 110.

Nix explained that Justice Harlan, in *Mackey v. United States*,[38] had articulated the rule of limited retrospectivity, firmly stating that the law must be applied as it is at the time and not as it once was.[39]

Justice Nix also noted that the recent 5-4 United States Supreme Court decision in *United States v. Johnson*[40] reaffirmed the viability of limited retrospectivity with respect to convictions not yet final at the time the decision was rendered.[41] Justice Nix additionally stated, however, that *Johnson* had limited applicability to the instant circumstances.[42]

The *Geschwendt* plurality indicated that the retroactive application to matters on direct appeal mandated by *Johnson* related to decisions that were constitutionally compelled.[43] Conversely, the court did not recognize any constitutional overtones in its decision to set aside the long-standing *Gable* view in favor of the pronouncement in *Mulgrew*.[44] The court viewed its decision in *Mulgrew* as an exercise of its supervisory authority, and it further opined that where a change in state practice was the only concern, the decision-making consistency required in the application of constitutionally-compelled decisions was not necessary.[45] The *Geschwendt* plurality further noted that even where the change was constitutionally compelled the *Johnson* court required non-retroactivity where the new rule represented a clear break with the past.[46]

Justice Nix observed that the United States Supreme Court also has required non-retroactive application of newly articulated rules of criminal procedure declared to be a clear break with the past.[47] Justice Nix, while identifying this second type of case, noted that

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38. 401 U.S. 667 (1971).

39. 500 Pa. at 129, 454 A.2d 996. In Mackey v. United States, Justice Harlan stated, "a proper perception of our duties as a court of law, charged with applying the Constitution to resolve every legal dispute within our jurisdiction on direct review, mandates that we apply the law as it is at the time, not as it once was." 401 U.S. at 681.

40. 457 U.S. 537 (1982).

41. 500 Pa. at 130, 454 A.2d at 996.

42. *Id.*

43. *Id. Johnson* specifically considered fourth amendment violations.

44. *Id.*

45. *Id.*

46. *Id.* at 130, 454 A.2d at 996-97.

47. *Id.* at 131, 454 A.2d at 997. *See* United States v. Peltier, 422 U.S. 531, 547 n.5 (1975) (considerations of judicial integrity and deterrence of unlawful police conduct required non-retroactive application); Desist v. United States, 394 U.S. 244, 248 (1969) (decisions of retroactive application of new law determined by three *Stovall* factors).

the determinative aspect calling for non-retrospectivity was the clear break with the past more so than the particular traits of the new rule.[48] Further, once it is established that the new rule is unanticipated, he observed, two of the three factors identified in *Stovall v. Denno*,[49] reliance by law enforcement authorities on the old standards and the effect on the administration of justice, virtually compel a finding of non-retroactivity. Justice Nix concluded that a finding of prospectivity was indicated even if *Mulgrew* had been constitutionally compelled because the change at issue was an unequivocal example of a "clear break with the past" as characterized in *Desist v. United States*.[50] He explained that a decision of prospectivity would also be consistent with the dissent in *Johnson*.[51]

The four member dissent in *Johnson* had espoused retroactive application only where the rule change affected an aspect of the criminal trial that so impaired the truth finding process that the accuracy of a guilty verdict was in doubt.[52] Finding this support in the *Johnson* dissent, *Mulgrew* was viewed by the plurality as representing a refinement in practice and not a correction of a serious flaw in the fact finding process.[53] The plurality asserted that an appropriate indication of retroactivity was based on an examination of the history, purpose and effect of the new rule, as well as any inequity or disruption that would result from retroactive application.[54]

It was, however, recognized by the court that there is strong support for the view that even-handed justice requires application of the new rule to litigants similarly situated.[55] Nevertheless, the

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48. 500 Pa. at 131, 454 A.2d at 997 (citing Williams v. United States, 401 U.S. 646, 659 (1971), a plurality opinion in which the Court stated that the "new constitutional interpretations . . . so change the law that prospectivity is arguably the proper course").

49. 500 Pa. at 131, 454 A.2d at 997. Stovall v. Denno, 388 U.S. 293 (1967) articulated the considerations pertinent to the retrospectivity issue: "(a) the purpose to be served by the new standards (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Id.* at 297. *See infra* notes 105-107 and accompanying text.

50. 500 Pa. at 131, 454 A.2d at 997. *See Desist*, 394 U.S. at 248.

51. 500 Pa. at 131, 454 A.2d at 997.

52. *Id.* (citing *Johnson*, 457 U.S. at 564 (Justice White, with whom Justices Rehnquist and O'Connor joined, dissented)).

53. 500 Pa. at 132-33, 454 A.2d at 997-98 (citing Chevron Oil Co. v. Huson, 404 U.S. 97 (1971)). The plurality also considered unsound the Blackstonian theory that the court's role is not to "pronounce a new law but to maintain and expand the old one." 500 Pa. at 132 n.6, 454 A.2d at 997 n.6 (citing 1 W. BLACKSTONE COMMENTARIES 69 (15th ed. 1809)).

54. 500 Pa. at 132-33, 454 A.2d at 997-98.

55. *Id.* at 133-34, 454 A.2d at 998. The court quoted from *Desist*, 394 U.S. 244, 258-59

court considered the even-handed justice argument to be one-sided in favor of the disappointed litigant, while being of the opinion that this same viewpoint ignored the court's responsibility to provide a fair system of justice for society.[56] So as to ensure fairness to both the litigant and to society as a whole, the court settled on a balancing approach which weighs the litigant's interest in securing the benefit of the change against the purposes intended to be accomplished by the change, as well as the impact of a retrospective application upon the system.[57]

Justice Nix noted that in *Commonwealth v. Brown*[58] the language of the opinion of Justice Roberts was phrased in terms of a retrospective application of *Mulgrew*, thus affording relief to Mr. Brown, whose case was on direct review at the time of the *Mulgrew* decision. According to Justice Nix, the prosecution in *Brown* intentionally misled the jury by suggesting during closing argument that a finding of not guilty by reason of insanity would result in the immediate release of the defendant.[59] Justice Nix viewed the facts of *Brown* as justifying the result reached without applying *Mulgrew* retroactively. Further, he explicitly disavowed that part of *Brown* which called for per se retroactivity of a new rule to cases on direct review at the time of the new pronouncement.[60]

The fact that Geschwendt's trial occurred after the trial in *Mulgrew* was of no moment to the court, since the operative fact was considered to be the time when the new rule was announced and not when the trial occurred.[61] The trial court in both *Geschwendt* and *Mulgrew* labored under the then valid rule of *Gable* and were thus controlled by the same.[62]

In conclusion, the plurality saw *Mulgrew* as a clear break with

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(1969) which stated:

> when another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a "new" rule of constitutional law.

500 Pa. at 134, 454 A.2d at 998.

56. 500 Pa. at 134, 454 A.2d at 999.

57. *Id.*

58. 494 Pa. 380, 431 A.2d 905 (1981). The *Brown* court extended the benefit of the *Mulgrew* decision to appellant Brown as his conviction was not yet final at the time of the *Mulgrew* pronouncement. *Id.* at 386, 431 A.2d at 908.

59. 500 Pa. at 134, 454 A.2d at 999.

60. *Id.*

61. *Id.* at 135, 454 A.2d at 999.

62. *Id.*

the former law and, when balanced against the impact of a retrospective application upon the system, the plurality determined that *Mulgrew* would be applied only to those cases where the trial ruling occurred after the filing of the *Mulgrew* decision.[63] The prospective application of *Mulgrew* thus denied Geschwendt relief, and the trial court's refusal to give the requested instructions was left undisturbed.[64]

In a dissenting opinion, Justice Roberts joined by Chief Justice O'Brien and Justice Flaherty, asserted that the decision of the court did not depend upon the application of the *Mulgrew* or *Brown* decisions but rather rested on Pennsylvania law — the Mental Health and Mental Retardation Act of 1966[65] which essentially reenacted a statute well over a century old.[66] Justice Roberts observed that the plurality focused exclusively on the trial court's refusal to explain the consequences of a verdict of not guilty by reason of insanity.[67] Justice Roberts contended that the plurality ignored what he viewed as the critical fact of the simultaneous trial court refusal to honor the fundamental request of Geschwendt that the jury be instructed regarding the possibility of a verdict of not guilty by reason of insanity.[68] In Justice Roberts' opinion, substantial evidence of Geschwendt's sanity was offered by both sides at trial, and Geschwendt's sanity was a central issue which statutorily entitled Geschwendt to the instruction to the jury that it could return a verdict of not guilty by reason of insanity.[69] Justice Rob-

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63. *Id.*

64. *Id.*

65. 500 Pa. at 135-36, 454 A.2d at 999-1000 (Roberts, J., dissenting).

66. 50 PA. CONS. STAT § 4413(a) (1966) provides: "Whenever any person charged with any crime is acquitted on the ground of insanity or having been insane at the time he committed the crime, the jury or the court as the case may be, shall state such . . . ." *Id.*

67. 500 Pa. at 136, 454 A.2d at 1000 (Roberts, J., dissenting).

68. *Id.* The plurality responded to Justice Roberts' dissent by stating that Geschwendt's appeal did not question the court's failure to fully set forth for the jury the alternative verdicts. The plurality noted that Geschwendt's complaint was specifically challenging the trial court's refusal to explain the consequences of a verdict of not guilty by reason of insanity and did not raise the issue that the jury was not fully aware of the alternative verdict. Thus, the plurality stated that the issue was not before the supreme court, nor was it supported by the record when the charge was read as a whole. *Id.* at 135 n.8, 454 A.2d at 999 n.8.

69. *Id.* at 138-39, 454 A.2d at 1001 (Roberts, J., dissenting) (citing Act of March 31, 1860, P.L. 427, § 66, as amended, 19 P.S. § 1351 (repealed 1978). Section 1351 provides:

> In every case in which it shall be given in evidence upon the trial of any person charged with any crime or misdemeanor, that such person was insane at the time of the commission of such offence, and he shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether he was acquitted by them on the ground of such

erts' examination of the record indicated that the trial court denied Geschwendt's request for that specific charge in violation of the Mental Health and Retardation Act of 1966.[70]

Justice Roberts believed that there was a serious prejudicial effect on the truth determining process because the jury did not possess the capability to render a full and fair decision.[71] Thus, he argued, the decision of the superior court should have been reversed and a new trial granted.[72]

Additionally, Justice Roberts argued that the plurality was propounding a theory of retroactivity that lacked a sound basis for application and one that was unresponsive to the proper determination of the case.[73] He contended that the plurality's viewpoint was an example of the court picking and choosing among similarly situated persons which was recently rejected in *United States v. Johnson*.[74] Noting that Geschwendt's post-verdict motions were pending at the time of the decision in *Mulgrew* and that included in those motions was a request for the jury instruction explaining the consequences of a verdict of not guilty by reason of insanity, Justice Roberts deemed the plurality's action to be little more than a summary conclusion that, based on a limited analysis of *Mulgrew*, Geschwendt should be denied relief.[75] The plurality's rationale that the court should be guided by the history, purpose, and possible disruption imposed by retroactivity of a new rule, as well as the court's interest in devising an efficacious scheme of deter-

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insanity; and if they shall so find and declare, the court before whom the trial is had shall order the cost of prosecution to be paid by the county, and shall have the power to order him to be kept in strict custody, in such place and in such manner as to said court shall seem fit, at the expense of the county in which the trial is had, so long as such person shall continue to be of unsound mind.

Id.

70. 500 Pa. at 138, 454 A.2d at 1001 (Roberts, J., dissenting). The Mental Health and Mental Retardation Act of 1966, 50 PA. CONS. STAT § 4413(a) (1966) provides: "Whenever any person charged with any crime is acquitted by reason of insanity or having been insane at the time he committed the crime, the jury or the court as the case may be, shall state such reason for acquittal in its verdict." *Id.* This provision essentially reenacted P.L. 427 § 66 (1860), as amended 19 PA. CONST. STAT. § 1351 (repealed 1978).

71. 500 Pa. at 139, 454 A.2d at 1001 (Roberts, J., dissenting).

72. *Id.* Justice Roberts opined that the jury only had the choice of returning a verdict of guilty or not guilty because consideration was not fully given to the verdict of not guilty by reason of insanity. *Id.*

73. *Id.* at 139, 454 A.2d at 1001-02.

74. *Id.* at 139-40, 454 A.2d at 1002 (Roberts, J., dissenting). *Johnson* held that decisional policy of the Supreme Court construing the fourth amendment prospectively is subject to certain stated exceptions demanding retroactive application to all convictions that were not yet final at the time the decision was rendered. *See* 457 U.S. at 557-58.

75. 500 Pa. at 140, 454 A.2d at 1002 (Roberts, J., dissenting).

mining matters of purely state law, was criticized by Justice Roberts as being exactly that type of ambulatory retroactivily rejected by the United States Supreme Court in *Johnson*.[76] According to Justice Roberts, the determination of lawsuits of similarly situated persons should not depend upon which litigation happened to be filed first.[77]

Justice Roberts also found the court's decision contradictory in that none of the considerations deemed relevant by the plurality in announcing its decision, purportedly based on fairness, actually supported the result reached by the court.[78] Justice Roberts opined that if even-handed justice concerned the court, then Geschwendt deserved the benefit of the same law that the justice stated was applied on direct appeal to at least three other similarly situated defendants.[79] Additionally, Justice Roberts was of the opinion that the purposes intended to be accomplished by the *Mulgrew* change would be better accomplished by application, to Geschwendt, of the law existing (*Mulgrew*) at the time of his appeal.[80] Justice Roberts criticized the plurality's characterization of the decision in *Mulgrew* as a refinement of the court's practice. He opined that the decision was actually one designed to overcome an aspect of the criminal trial that impaired its truth finding function and raised questions about the accuracy of past guilty verdicts.[81] He

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76. *Id.* The *Johnson* Court, in regard to the notion of ambulatory retrospectivity stated:

> [T]he problem is not merely the *appearance* of inequity, but the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary of a retrospectively applied rule. As the persistently voiced dissatisfaction with the Court's "ambulatory retroactivity doctrine" has revealed . . ., until now this Court has not "resolved" this problem so much as it has chosen to tolerate it. The time for toleration has come to an end.

457 U.S. at 555 n.16 (emphasis supplied).

77. 500 Pa. at 141, 454 A.2d at 1002 (Roberts, J., dissenting). Justice Roberts cited Justice Nix's opinion in Commonwealth v. Hernandez, 498 Pa. 405, 411, 446 A.2d 1268, 1271 (1982) which stated: "In such an instance it is fair to conclude that all of those litigants were in the same situation and the outcome of their lawsuit should not depend on a race to the courthouse." *Id.*

78. 500 Pa. at 141, 454 A.2d at 1002 (Roberts, J., dissenting).

79. *Id.* Justice Roberts indicated three other cases in which defendants were similarly situated to Geschwendt: Commonwealth v. Brown, 494 Pa. 380, 431 A.2d 905 (1981); Commonwealth v. Mulgrew, 475 Pa. 271, 380 A.2d 349 (1977); Commonwealth v. Hastings, 301 Pa. Super. 65, 446 A.2d 1337 (1982), *allocatur denied*, Oct. 8, 1982.

80. 500 Pa. at 141, 454 A.2d at 1002-03 (Roberts, J., dissenting).

81. *Id.* at 141-42, 454 A.2d at 1003 (Roberts, J., dissenting) (citing Williams v. United States, 401 U.S. 646, 653 (1971)). Justice Roberts also relied upon *Mulgrew* to support his contentions: "[E]xplaining the consequences of acquittal by reason of insanity to a jury will assist the jury in properly determining the guilt or innocence of a defendant. By such an

additionally observed that where a change in law has been designed to overcome an aspect of the criminal trial that substantially impairs its truth finding function, the Supreme Court of the United States has consistently applied the new rule to all convictions that are not final at the time of the change.[82]

Responding again to the plurality opinion, Justice Roberts denied that retrospective application of *Mulgrew* to convictions not yet final would have an adverse impact upon the system.[83] The justice contended that the number of cases in which the defense of insanity is used is small, and that the number of cases on direct review at the time of the *Mulgrew* decision was negligible.[84] Most important to Justice Roberts, however, was the fact that the decision in *Mulgrew* governs conduct at trial which, unlike pre-trial conduct of law enforcement authorities, could be corrected by remanding for a new trial without disturbing reliance in a pre-existing standard.[85] Justice Roberts pointed out that the trial court was not compelled by *Gable* to deny Geschwendt's request for an appropriate instruction on the consequences of a verdict of not guilty by reason of insanity since *Gable* did not preclude a court from giving such an instruction.[86] Thus, Justice Roberts concluded that the plurality's assertion that the trial court had no alternative but to follow *Gable* was erroneous.[87] He criticized the ad hoc balancing approach suggested by the plurality as only inviting uncertainty and litigation concerning retrospective decisions of the court.[88] Justice Roberts concluded that, contrary to the plurality's decision that fairness to society militated against retroactivity, fairness to the defendant and society could be achieved only by a uniform application of existing law to all convictions not yet final

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instruction we reduce the possibility of compromise verdicts of guilty occasioned by a jury's misapprehension of 'acquitting' a defendant by reason of insanity." 500 Pa. at 142, 454 A.2d at 1003 (citing *Mulgrew*, 475 Pa. at 276, 380 A.2d at 352).

82. 500 Pa. at 142, 454 A.2d at 1003 (citing Hankerson v. North Carolina, 432 U.S. 233 (1977); Ivan V. v. City of New York, 407 U.S. 203 (1972); Williams v. United States, 401 U.S. 646 (1971)).

83. 500 Pa. at 142, 454 A.2d at 1003.

84. *Id.*

85. *Id.*

86. *Id.* at 143 n.8, 454 A.2d at 1003 n.8.

87. *Id.* Justice Roberts also noted that the plurality's characterization of *Mulgrew* as the clearest possible example of a clear break with the past was at odds with its view that *Mulgrew* was merely a refinement in practice. *Id.*

88. *Id.* at 143, 454 A.2d at 1003. Justice Roberts noted that he agreed with the expression in *Johnson* that such an ad hoc approach does not advance but only impedes the fair administration of justice. *Id.* (citing 457 U.S. at 547-49).

at the time of the change,[89] and by a grant of a new trial to Geschwendt as was done in *Mulgrew, Brown*, and *Commonwealth v. Hastings*.[90]

The question of whether a new rule adopted by a court in overruling one or more of its earlier decisions should be given merely prospective effect, or should be given retroactive effect as well, has been a problematic one for our courts and has provided fertile ground for judicial and scholarly criticism.[91] Four general approaches have evolved in the courts' attempts to properly apply new rules of law. The first, complete prospectivity, denies the benefit of the new pronouncement to the parties at bar and limits its applicability to future cases.[92] The second approach allows the new rule to benefit the parties at bar but otherwise limits applicability to future cases.[93] A third approach calls for the application of the

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89. *See Brown*, 494 Pa. at 385-86, 431 A.2d at 908, where the court stated:
> Certainly fairness demands that relief be granted not only in the first case which successfully contests a rule of law but also in all other cases pending on direct appeal which suffer from the same infirmity. To do otherwise in criminal proceedings is to impose an unwarranted hardship on defendants which affects their most fundamental rights of life and liberty, while serving no legitimate societal interest in applying an offensive law no longer valid.

Id. (citations omitted).

90. 500 Pa. at 144, 454 A.2d at 1004 (Roberts, J., dissenting). *See* Commonwealth v. Hastings, 301 Pa. Super. 65, 446 A.2d 1337 (1982), *allocatur denied*, Oct. 8, 1982).

91. *See, e.g.*, Desist v. United States, 394 U.S. 244 (1969); Stovall v. Denno, 388 U.S. 293 (1967); Johnson v. New Jersey, 384 U.S. 719 (1966); Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966); Kuhn v. Fairmont Coal Co., 215 U.S. 349 (1910); R. ALDISERT, THE JUDICIAL PROCESS, 877-938 (1976); 1 W. BLACKSTONE, COMMENTARIES 69-70 (15th ed. 1809); Johnson, *Retroactivity in Retrospect*, 56 CALIF., L. REV. 1612 (1968); Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Miskin*, 33 U. CHI. L. REV. 719 (1966); Currier, *Time and Change in Judge-Made Laws: Prospective Overruling*, 51 VA. L. REV. 201 (1965); Meader, *Habeas Corpus and the "Retroactivity" Illusion*, 50 VA. L. REV. 1115 (1964); Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio*, 110 U. PA. L. REV. 650 (1962); Note, *The Effect of Overruled and Overruling Decisions on Intervening Transactions*, 47 HARV. L. REV. 1403 (1934); Note, *Linkletter, Shott and the Retroactivity Problem in Escobedo*, 64 MICH. L. REV. 832 (1966); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962).

92. 500 Pa. at 126, 454 A.2d at 994 (citing Morrissey v. Brewer, 408 U.S. 471, 490 (1972); Commonwealth v. Minarik, 493 Pa. 573, 427 A.2d 623 (1981); Commonwealth v. Gravely, 486 Pa. 194, 404 A.2d 1296 (1979) (plurality opinion); Commonwealth v. Tarver, 467 Pa. 401, 357 A.2d 539 (1976) (opinion announcing decision of the court); Commonwealth v. Jones, 457 Pa. 563, 319 A.2d 142 (1974) (opinion in support of affirmance); Commonwealth v. Fowler, 451 Pa. 505, 304 A.2d 124 (1973); Commonwealth v. Milliken, 450 Pa. 310, 300 A.2d 78 (1973); Commonwealth v. Scoleri, 399 Pa. 110, 160 A.2d 215 (1960) (opinion in support of affirmance)).

93. 500 Pa. at 126, 454 A.2d at 994 (citing Michigan v. Payne, 412 U.S. 47 (1973); Adams v. Illinois, 405 U.S. 278, 284-85 (1972) (plurality opinion); DeStefano v. Woods, 392 U.S. 631, 633 (1968); Stovall v. Denno, 388 U.S. 293, 301 (1967); Johnson v. New Jersey, 394

new rule to cases already final at the time the new rule is announced.[94]

The last general approach, and the one at issue in *Geschwendt*, allows for application of the new pronouncement to all future cases, and to all cases still on direct review when the new rule is articulated.[95] This view, often termed limited retrospectivily, found support early in our history as expressed by Chief Justice Marshall in *United States v. Schooner Peggy*,[96] where he set forth the proposition that the appellate courts must decide cases according to

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U.S. 719 (1966)).

94. 500 Pa. at 126-27, 454 A.2d at 994-95 (citing August v. Stasak, 492 Pa. 550, 424 A.2d 1328 (1981); Gibson v. Commonwealth, 490 Pa. 156, 415 A.2d 80 (1980); Mayle v. Pennsylvania Dep't of Highways, 479 Pa. 384, 388 A.2d 709 (1978) (applied in Steinberg v. Commonwealth, Dep't of Public Welfare, 480 Pa. 321, 389 A.2d 1086 (1978)); Grieser v. Commonwealth, Dep't of Transp., 480 Pa. 447, 390 A.2d 1263 (1978); Tokar v. Commonwealth, Dep't of Transp., 480 Pa. 598, 391 A.2d 1046 (1978); Dubree v. Commonwealth, 481 Pa. 540, 393 A.2d 293 (1978); Kenno v. Commonwealth, Dep't of State Police, 481 Pa. 562, 393 A.2d 304 (1978); Azzarello v. Black Bros. Co., 480 Pa. 547, 391 A.2d 1020 (1978); Commonwealth v. Riggins, 474 Pa. 115, 377 A.2d 140 (1977) (applied in Commonwealth v. Green, 480 Pa. 446, 390 A.2d 1263 (1978); Kuchinic v. McCrory, 422 Pa. 620, 222 A.2d 897 (1966)).

95. *See, e.g.*, Brown v. Louisiana, 447 U.S. 323, 337 (1980) (Powell, J., with whom Stevens, J., joined, concurring); Harlin v. Missouri, 439 U.S. 459, 460 (1979) (Powell, J., concurring); Hankerson v. North Carolina, 432 U.S. 233, 245 (1977) (Marshall, J., concurring); *Id*, at 246 (Powell, J., concurring); United States v. Peltier, 422 U.S. 531, 543 (1975) (Douglas, J., dissenting); Daniel v. Louisiana, 420 U.S. 31, 33 n.* (1974) (Douglas, J., dissenting); Michigan v. Tucker, 417 U.S. 433, 461 (1974) (Douglas, J., dissenting); Michigan v. Payne, 412 U.S. 47, 58 (1973) (Douglas, J., dissenting); *id.* at 59 (Marshall J., dissenting); Adams v. Illinois, 405 U.S. 278, 288 (1972) (Douglas, J., with whom Marshall, J., concurred, dissenting); Mackey v. United States, 401 U.S. 667, 675 (1971) (separate opinion of Harlan, J.); *id.* at 713 (Douglas, J., with whom Black, J., concurred, dissenting); Williams v. United States, 401 U.S. 646, 665 (1971) (Marshall, J., concurring in part and dissenting in part); Coleman v. Alabama, 399 U.S. 1, 19 (1970) (Harlan J., concurring in part and dissenting in part); Von Cleef v. New Jersey, 395 U.S. 814, 817 (1969) (Harlan, J., concurring in the result); Jenkins v. Delaware, 395 U.S. 213, 222 (1969) (Harlan, J., dissenting); Desist v. United States, 394 U.S. 244, 255 (1969) (Douglas, J., dissenting); *id.* at 269 (Fortas, J., dissenting); Fuller v. Alaska, 393 U.S. 80, 82 (1968) (Douglas, J., with whom Black, J., joined, dissenting); Stovall v. Denno, 388 U.S. 293, 302 (1967) (Douglas, J., dissenting); *id.* at 303 (Black, J., dissenting); Whisman v. Georgia, 384 U.S. 895 (1966) (Douglas, J., dissenting); Tehan v. United Stated *ex rel.* Shott, 382 U.S. 406, 419 (1966) (Black, J., with whom Douglas, J., joined, dissenting); Linkletter v. Walker, 381 U.S. 618, 640 (1965) (Black, J., with whom Douglas, J., joined, dissenting).

96. United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) wherein Chief Justice Marshall stated:

> But if, subsequent to the judgement, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied . . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgement, rightful when rendered, but which cannot be affirmed but in violation of law, the judgement must be set aside.

Id.

existing law even if that approach meant setting aside an earlier decision. The first major United States Supreme Court case in recent years to confront the issue was *Linkletter v. Walker*.[97] The *Linkletter* Court refused to apply *Mapp v. Ohio*[98] to state convictions which had become final prior to the overruling of *Wolf v. Colorado*.[99] The *Linkletter* decision was the first time a majority of the Supreme Court recognized its power to give constitutional rules prospective operation.[100] *Linkletter* was not a purely prospective decision, however, because it was applied to the litigants at bar.[101] The Court denied relief on collateral attack but upheld the application of *Mapp* to all cases pending when *Mapp* was decided.[102] Subsequently, it was established that the *Linkletter* view of weighing the merits of each case by looking at the history, purpose, and effect on the future operation of the rule, was to be applied to cases still pending on direct review when a new rule was announced.[103]

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97. 381 U.S. 618 (1965).

98. 367 U.S. 643 (1961) (exclusionary rule of the fourth amendment applies to the states). The *Linkletter* Court stated: "In short, we must look to the purpose of the *Mapp* rule; the reliance place upon the *Wolf* doctrine; and the effect on the administration of justice of a retroactive application of *Mapp*." 381 U.S. at 636.

99. 338 U.S. 25 (1949) (exclusionary rule which applied to federal government also applied to the states).

100. Although *Linkletter* was the first case in which a majority articulated a general power of prospective overruling, individual Justices had suggested that specific decisions be given limited retroactive effect. Mishkin, *The High Court, The Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 79 (1962). Mishkin also notes that the determination whether a "new" rule is applied to cases on direct appeal is a substantially different question than that raised by a collateral attack. *Id.*

101. Commonwealth v. Cain, 471 Pa. 140, 189, n.31, 369 A.2d 1234, 1260 n.31 (1977) (Roberts, J., opinion in support of reversal). Justice Roberts observed:

> Prior to the 1964 Supreme Court Term, decisions promulgating new constitutional rules were applied retroactively as a matter of course to final convictions. While dissents occasionally criticized the Court's failure to discuss the retroactive impact of a new constitutional rule, the potential effect upon final convictions of any single rule was not sufficiently acute to justify a departure from the normal grant of retroactivity.

Id. (quoting Note, *Linkletter, Shott, and The Retroactivity Problem in Escobedo*, 64 MICH. L. REV. 832 (1966)). *See also* Mishkin, *supra* note 100, at 79.

102. 381 U.S. at 626. In approving the application of *Mapp* to cases not yet final, the Court simply applied the principle of *Schooner Peggy*: "Under our cases it appears . . . that a change in law will be given effect while a case is on direct review." 381 U.S. at 627. The Court also noted that no distinction was made in *Schooner Peggy* between criminal and civil litigation. *Id.*

103. *See, e.g.*, Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966) (applying Griffin v. California, 380 U.S. 609 (1965) to all cases not yet final). *See also* In re Gaines, 63 Cal. 2d 234, 404 P.2d 473, 45 Cal. Rptr. 865 (1965) where the California Supreme Court adopted the final judgment rule in determining whether *Griffin* should be applied to cases

In subsequent decisions, however, the Supreme Court failed to apply the *Linkletter* analysis uniformly. In *Johnson v. New Jersey*[104] and *Stovall v. Denno*[105] the Supreme Court maintained that in the interest of justice the Court could balance three factors to determine whether a new constitutional rule should be retroactively applied: (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.[106] The *Stovall* Court concluded that no distinction was justified between final convictions, or convictions at various stages of trial and direct review, because the outcome of the balancing process which *Stovall* espoused might call for different degrees of retroactivity in different cases.[107] Following that decision, the Court's application of the balancing process resulted in a series of cases that was perhaps best described by Justice Harlan in his separate opinion in *Mackey v. United States*,[108] where he commented that the retroactivity doctrine was the product of the Court's disquietude with rapid changes in the criminal constitutional law area.[109] Justice Harlan likened the task of following the post-*Linkletter* decisions to tracking "a beast of prey in search of its intended victim."[110]

At one extreme of this sometimes unintelligible line of cases, the Court has given complete retroactive effect to new constitutional rules, the major purpose of which is to overcome an aspect of the criminal trial that substantially impairs its truth finding function and so raises serious questions about the accuracy of guilty verdicts in past trials.[111] In contrast to that position, the Court has applied some standards only to future cases and denied the benefit of the new rule even to those parties at bar.[112] Subsequent to *Stovall*, the Court has viewed *Stovall* as typifying an intermediate position that applies the new rule retroactively to the parties

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pending on direct appeal. *Accord* People v. Charles, 66 Cal. 2d 330, 425 P.2d 545, 57 Cal. Rptr. 745 (1967).

104. 384 U.S. 719 (1966).

105. 388 U.S. 293 (1967)

106. *Id.* at 297. *See also* Johnson v. New Jersey, 384 U.S. at 728.

107. 388 U.S. at 300-01. *See also* Johnson v. New Jersey, 384 U.S. at 732.

108. 401 U.S. 667 (1971).

109. *Id.* at 676 (Harlan, J., concurring and dissenting).

110. *Id.*

111. Williams v. United States, 401 U.S. 646, 653 (1971) (plurality opinion). *See* United States v. Johnson, 457 U.S. at 537.

112. 457 U.S. at 544 (citing Morrissey v. Brewer, 408 U.S. 471 (1972); Johnson v. New Jersey, 384 U.S. 719 (1966); James v. United States, 366 U.S. 213 (1961)).

before the court but otherwise only to future litigants.[113]

Amidst this obvious inability of the Court to establish a uniform policy of retroactivity there was a consistent line of separate opinions that voiced disapproval with selective awards of retroactivity.[114] At a minimum, those opinions have contended that all those defendants whose cases were still pending on direct review at the time of the law change should enjoy the benefit of the new rule.[115]

Justice Harlan's separate opinion in *Mackey*, and his dissenting opinion in *Desist* are representative of the rationale underlying the aforementioned opinions disavowing selective awards of retroactivity.[116] The comprehensive analysis presented by Justice Harlan took root in the view that three norms of constitutional adjudication were transgressed by failing to apply a new rule at least to cases on direct review.[117] Justice Harlan termed the Court's policy an "ambulatory retroactivity doctrine," which conflicted with his first norm of constitutional adjudication—"principled decision making."[118] The Justice noted that initially the retroactivity doctrine was seen by some of the Justices as a way of limiting the reach of decisions that seemed to them to be fundamentally unsound, while other Justices viewed it as providing an impetus for overdue reforms which otherwise would not be implemented.[119] The result, according to Harlan, was that coalitions favoring nonretroactivity had realigned from case to case generating a welter of "incompatible rules and inconsistent principles."[120] The Court, in *Michigan v. Payne*,[121] implicitly recognized the accuracy of Harlan's statement when that Court characterized the balancing process as a "charade."

The second aspect of the adjudication process that Justice Harlan found to be offended occurred when the Court chose to ap-

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113. 457 U.S. at 545 (citing Stovall v. Denno, 388 U.S. at 301; Michigan v. Payne, 412 U.S. 47, 51 (1973); Adams v. Illinois, 405 U.S. 278, 284, 285 (1972) (plurality opinion); DeStefano v. Woods, 392 U.S. 631, 633 (1968)).

114. *See* 457 U.S. at 545 n.9 (citing cases in which Justices Black, Douglas, and Harlan either dissented or concurred in the result).

115. *Id.*

116. *See Mackey*, 401 U.S. at 675 (Harlan, J., dissenting and concurring); *Desist*, 394 U.S. at 256 (Harlan, J., dissenting).

117. *See* 457 U.S. at 546 (citing 401 U.S. at 675).

118. *See* 457 U.S. at 546 (citing 401 U.S. at 681).

119. 401 U.S. at 676 (citing Jenkins v. Delaware, 395 U.S. 213, 218 (1969)).

120. 457 U.S. at 546 (quoting *Desist*, 394 U.S. at 258).

121. 412 U.S. 47 (1973). The *Payne* Court stated: "principled adjudication requires the Court to abandon the charade of carefully balancing countervailing considerations when deciding the question of retroactivity." *Id.* at 61.

ply a new rule entirely prospectively save only with respect to the particular litigants whose case was chosen as the vehicle for establishing that rule.[122] In *Mackey*, Harlan eloquently articulated the criticism of that position, likening it to fishing one case out of a stream of cases on appeal; thus, by its very arbitrariness, it offended legitimate judicial review.[123]

Finally, Justice Harlan contended that ambulatory retroactivity compromised the principle of treating similarly situated defendants the same.[124] Justice Harlan indicated that one simple rule was needed to eliminate the confusion and vacillation of the Court, and that the most appropriate one was the proposition set forth in *Linkletter*.[125] The United States Supreme Court in *United States v. Johnson* most recently discussed Justice Harlan's views and agreed with him that retroactivity must be rethought while determining that a decision of the Court construing the fourth amendment was, subject to certain exceptions, to be applied retroactively to all convictions that were not yet final at the time the decision was rendered.[126]

It is interesting to note that the *Geschwendt* court, when confronted with the determination in *Johnson*, chose to look at *Johnson* not only as not controlling a state court's determination in this matter, but also distinguished it on more substantive grounds.[127]

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122. 457 U.S. at 546-47.

123. 401 U.S. at 678-79. Justice Harlan stated: "Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitutes an indefensible departure from this model of judicial review." *Id.*

124. 394 U.S. at 258-59 (Harlan, J., dissenting). Justice Harlan noted:

> [W]hen another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a "new" rule of constitutional law.

Id.

125. 394 U.S. at 258 (Harlan, J., dissenting). Specifically, Justice Harlan stated: "I have concluded that *Linkletter* was right in insisting that all 'new' rules of constitutional law must, at a minimum, be applied to all those cases which are still subject to direct review by this Court at the time the new decision is handed down." *Id.* Similarly, in *Mackey* Justice Harlan stated: "[A] proper perception of our duties as a court of law, charged with applying the Constitution to resolve every legal dispute within our jurisdiction on direct review, mandates that we apply the law as it is at the time, not as it once was." 401 U.S. at 681 (Harlan, J., concurring).

126. 457 U.S. at 537 (quoting Justice Harlan's dissenting opinion in *Desist*, 394 U.S. at 258).

127. 500 Pa. at 127, 130, 454 A.2d at 995, 996. The *Johnson* Court placed two limitations on its position, according to the *Geschwendt* plurality. The *Geschwendt* court noted:

Thus, the circumstances in *Geschwendt* brought the Pennsylvania Supreme Court face to face with an old nemesis—retroactivity as to cases on direct appeal when a rule change was effectuated. In this instance, the issue of a proper jury charge provided a challenging and perplexing context within which an attempt was made to resolve a most troublesome area of the law. The struggle that took place in *Geschwendt* and its antecedents merely reflects the tumultuous history of this concept in the Supreme Court and Pennsylvania courts. Recently, in *Commonwealth v. Brown*,[128] it appeared that the Pennsylvania Supreme Court had provided an unequivocal statement that fairness demanded that relief be granted not only to that litigant who successfully challenges a rule of law, but also to those cases pending on direct appeal which suffer from the same infirmity.[129]

Reviewing the lower court's determination in *Brown*, the Pennsylvania Supreme Court called for a retroactive application of *Mulgrew* for those cases still on direct review at the time of the *Mulgrew* decision.[130] The *Brown* court looked to its recent decisions in

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> First, the view of the *Johnson* majority affording retrospective application to matters then on direct appeal related to decisions that were *constitutionally compelled*, specifically in that case Fourth Amendment violations. Here we are concerned with merely a change in state practice; there was [sic] no constitutional overtones in our decision to set aside the *Gable* view, but rather our decision in *Mulgrew* represented an exercise of our supervisory authority. The argument of the necessity of decision-making consistency in the application of constitutionally compelled decisions loses its force when removed from the constitutional setting.
>
> Second, even where the decision was constitutionally mandated, the *Johnson* majority concluded that where the new rule represents "a clear break with the past," nonretroactive application is indicated.

Id. at 130, 454 A.2d at 996-97 (emphasis in original) (citations omitted).

128. 494 Pa. 380, 431 A.2d 905 (1981).

129. *Id.* at 381-82, 431 A.2d at 906. Appellant Brown was tried on charges of murder and voluntary manslaughter and found guilty by a jury of murder of the second degree. Brown raised the defense of not guilty by reason of insanity and requested that the jury be instructed as to the consequences of such a verdict. He renewed that request after the prosecution's closing argument, during which the prosecutor may have led the jury to believe that a verdict of not guilty by reason of insanity would result in release of the defendant ("If you believe that Melvin Brown didn't know what he was doing when he was up in that room, well then put him out in the street"). *Id.* at 382, 431 A.2d at 906. The court refused to grant the requested instruction. The jury in *Brown* returned a guilty verdict only nine days prior to the decision in *Mulgrew*. The trial court also denied Brown's post-trial motion urging application of the *Mulgrew* decision. The trial court opined that a new trial was not indicated since *Mulgrew* was decided after completion of Brown's trial. *Id.* at 382, 431 A.2d at 906.

130. 494 Pa. at 383-85, 434 A.2d at 906-07 (citing August v. Stasak, 492 Pa. 550, 556, 424 A.2d 1328, 1331 (1981) (since no distinction can be drawn between appellants and the injured party in Brakeman v. Potomac Ins. Co., 472 Pa. 66, 371 A.2d 193 (1977), the same relief should be available, and thus a party whose case is pending on direct appeal is entitled

several cases of both a criminal and civil nature for guidance.[131] The *Brown* court recognized that retroactivity was perhaps more important in the criminal setting where one's fundamental rights of life and liberty were at stake.[132] The court unequivocally adopted the rationale of *United States v. Schooner Peggy* which stated that a court must apply the law as it exists at the time of its decision and it does not have the power to enforce a law which is no longer valid.[133]

The *Brown* court predicated its decision to apply *Mulgrew* retroactively solely on the soundness of the *Mulgrew* decision and its importance to an accused, and not based on any sort of prosecutorial misconduct, although that issue was raised by trial counsel.[134] Demonstrative of the fact that the *Brown* court independently embraced the concept of retroactive application of *Mulgrew*, was Justice Nix's concurring opinion.[135] Justice Nix opined that the prosecutor's misleading remarks to the jury were sufficient to necessitate clarification, vis-a-vis a *Mulgrew* type instruction and that the court's discussion of retroactivity was unnecessary to vacate sentence and remand for a new trial.[136] It is also interesting to note that Justice Larsen, joined by Justice Kauffman, filed a dissenting opinion in *Brown* that foreshadowed the *Geschwendt* plurality's reliance on *Mulgrew*, and the *Geschwendt* plurality's interpretation that the *Mulgrew* pronouncement itself was a rule of criminal procedure unencumbered by constitutional overtones which might necessitate a retroactive application of *Mulgrew*.[137]

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to the benefit of changes in law which occur before the judgment becomes final); Commonwealth v. Hill, 492 Pa. 100, 111, 422 A.2d 491, 499 (1980) (opinion in support of reversal) (jurisprudential principles of judicial power and fairness to litigants mandate application on direct appeal of an intervening change in the law even where an objection has not been interposed at trial and apply equally to both criminal and civil proceedings); Gibson v. Commonwealth, 490 Pa. 156, 415 A.2d 80 (1980) (there is no principled reason to discriminate now against appellants whose causes also accrued before the overruling decision; both classes of suits affect the Commonwealth in equal measure and therefore must be treated in like fashion)).

131. 494 Pa. at 384-85, 431 A.2d at 907-08. *See supra* note 130.

132. 494 Pa. at 385, 431 A.2d at 908.

133. *Id.* at 384, 431 A.2d at 907 (citing United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801)).

134. The issue of prosecutorial misconduct was raised by appellant Brown in his brief to the Pennsylvania Supreme Court. The court chose not to address that issue, however, confining itself to the matter of retroactivity of *Mulgrew*. Brief for Appellant at 19, Commonwealth v. Brown, 494 Pa. 380, 431 A.2d 905 (1981).

135. 494 Pa. at 386-87, 431 A.2d at 908 (Nix, J., concurring).

136. *Id.*

137. *Id.* at 387, 431 A.2d at 909 (Larsen, J., dissenting). Justice Larsen noted the ma-

Whether by design or nescience, the Pennsylvania Supreme Court chose the path of least resistance in the disposition of Geschwendt's appeal, since labelling *Mulgrew* non-constitutional effectively circumvented the analysis called for by the United States Supreme Court in *Johnson* when deciding retroactive constitutional matters.[138]

The determination of the *Brown* court found unquestioned acceptance. Subsequent to *Brown*, the Pennsylvania Superior Court decided *Commonwealth v. Hastings*,[139] Relying on *Brown*, the *Hastings* court applied *Mulgrew* retroactively where the defendant had requested a *Mulgrew* type instruction and was denied that instruction at trial.[140] Fifteen days after the *Hastings* jury returned a guilty verdict, the Pennsylvania Supreme Court decided *Mulgrew*; and although the trial court granted Hastings a new trial in light of *Mulgrew*, on reargument the court *en banc* refused to apply *Mulgrew* retroactively and denied Hastings' post-trial motions.[141] The Commonwealth had argued to the *Hastings* court that *Brown* was not applicable because of the prosecutorial misconduct present in *Brown*, but absent in *Hastings*.[142] The superior court rejected this contention, explicitly noting that the *Brown* majority neither stated nor implied that the prosecutorial misconduct had a bearing on the retroactive application of *Mulgrew*.[143] The Pennsylvania Superior Court in *Hastings* clearly perceived that the Pennsylvania Supreme Court in *Brown* had unequivocally enunciated the view that when the law is changed while a case is pending on appeal, the new law must be applied.[144] Although the holding in *Brown* was apparently clear in its wording and subsequent application, the serpentine character of retroactivity continued to manifest itself.

In *Geschwendt* the Pennsylvania Supreme Court decided to change its posture and disavow the *Brown* decision. The *Geschwendt* court disapprovingly viewed *Brown* as embracing a

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jority's reliance on what he termed "a completely unrelated civil case" [August v. Stasak, 492 Pa. 550, 424 A.2d 1328 (1981)] and the majority's choice to ignore the effect its ruling would have on the Commonwealth, its witnesses, the taxpayers and society. 494 Pa. at 387, 431 A.2d at 909 (Larsen, J., dissenting).

138. *See* United States v. Johnson, 457 U.S. at 537.

139. 301 Pa. Super. 65, 446 A.2d 1337 (1982).

140. *Id.* at 66-67, 446 A.2d at 1337-38.

141. *Id.* at 67, 446 A.2d at 1338.

142. *Id.* at 67-68, 446 A.2d at 1338.

143. *Id.*

144. *Id.* at 68, 446 A.2d at 1338.

per se application of the *Schooner Peggy* doctrine.[145] Almost magically, the *Geschwendt* court also decided to change the basis of its decision in *Brown*. The *Geschwendt* court stated that the relief afforded Brown was justified without the consideration of the retroactive application of *Mulgrew*, an obvious reference to the prosecutorial misconduct which was not relied on by the court.[146] Its appears that the plurality engaged in a poorly designed attempt to state that retroactvity was not really at issue in *Brown*; this despite their unequivocal language to the contrary. Earlier, in a related line of jury instruction cases, the most notable of which was *Commonwealth v. Ernst*,[147] the Pennsylvania Supreme Court provided the foundation on which the *Geschwendt* court could apply a rule change retroactively based on a constitutional—non-constitutional dichotomy. In *Ernst*, an equally divided court affirmed a judgment of sentence which was based on the trial court's instruction that the defendant bears the burden of proving an insanity defense by a fair preponderance of the evidence.[148] Subsequent to Ernst's trial, the supreme court's decisions in *Commonwealth v. Rose*[149] and *Commonwealth v. Demmitt*[150] shifted to the prosecution the burden of proving a defendant's sanity beyond a reasonable doubt.[151] The *Ernst* court indicated that the Pennsylvania Supreme Court originally had construed *Rose* and *Demmitt* to be founded on state evidentiary law and thus retroactivity was not constitutionally mandated.[152] Based on the later United States Supreme Court decision in *Mullaney v. Wilbur*,[153] however, the Pennsylvania Supreme Court interpreted *Demmitt* and *Rose* to have constitutional underpinnings.[154] Consequently, the Pennsylvania Supreme Court retroactively applied *Demmitt* to those cases which had been tried before *Rose* and *Demmitt*, but which were still on direct review at the time of those decisions.[155]

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145. 500 Pa. at 134, 454 A.2d at 999.

146. *Id.* "It is true that the language of the opinion of Mr. Justice Roberts in that case speaks in terms of a retroactive application in *Mulgrew* in justification of affording relief to Mr. Brown. However, the facts of the case justified the result reached without requiring a retrospective application of *Mulgrew* . . . ." *Id.*

147. 476 Pa. 102, 381 A.2d 1245 (1978).

148. *Id.* at 104-05, 381 A.2d at 1246.

149. 457 Pa. 380, 321 A.2d 880 (1974).

150. 456 Pa. 475, 321 A.2d 627 (1974).

151. 476 Pa. at 105, 381 A.2d at 1246.

152. *Id.*

153. 421 U.S. 684 (1975).

154. 476 Pa. at 105, 381 A.2d at 1246.

155. 381 A.2d at 1246-47 (citing Commonwealth v. Moyer, 466 Pa. 464, 353 A.2d 447

Nevertheless, following the United States Supreme Court's decision in *Patterson v. New York*,[156] the Pennsylvania Supreme Court availed itself of the *Patterson* decision and again changed directions with regard to the retroactivity doctrine.[157] The equally divided *Ernst* court chose to adhere to its initial characterization of *Rose* and *Demmitt* as based on state evidentiary law.[158] Viewing them as non-constitutionally premised decisions, the *Ernst* court stated that *Rose* and *Demmitt* were not to be retroactively applied since the almost uniform practice of the court had been not to apply non-constitutionally premised criminal law decisions in a non-

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(1976); Commonwealth v. Williams, 463 Pa. 370,. 344 A.2d 877 (1975); Commonwealth v. Simms, 462 Pa. 26, 333 A.2d 477 (1975)).

156. 432 U.S. 197 (1977).

157. 476 Pa. at 106, 381 A.2d at 1247 (citing Patterson v. New York, 432 U.S. 197 (1977) (holding that it was not constitutionally offensive to burden the defendant with proving his insanity defense)).

158. 476 Pa. at 107, 381 A.2d at 1247 (citing Commonwealth v. Milliken, 450 Pa. 310, 300 A.2d 78 (1973) (rule mandating that sworn oral testimony be reduced to writing in some acceptable manner when offered in support of the issuance of a search warrant, is not one of constitutional proportions and thus is wholly prospective)); Commonwealth v. Tarver, 467 Pa. 401, 357 A.2d 539 (1976) (rule of compulsory consolidation for trial of all charges which are based upon the same conduct or arise from the same criminal episode or transaction is a procedural rule which is not constitutionally based and thus applied prospectively); Commonwealth v. Davis, 466 Pa. 102, 351 A.2d 642 (1976) (PA. R. CRIM. P. 2003 mandating that magistrates determine probable cause from written documents exclusive of oral testimony is not constitutionally required and is applied prospectively only); Commonwealth v. Jones, 457 Pa. 563, 319 A.2d 142 (1974) (under Pennsylvania Supreme Court's supervisory power that defendant under murder indictment is entitled upon request to have the jury advised of its power to return a verdict of voluntary manslaughter, but relief need not be given to defendant since he suffered no prejudice from a refusal of such instruction); Commonwealth v. Fowler, 451 Pa. 505, 304 A.2d 124 (1973) (ruling that if post trial proceedings in a case of first degree murder are not disposed of and that defendant is not sentenced within the stated four month period, he may then apply for bail, is not founded upon a constitutional premise and is an exercise of court's supervisory powers, thus it is to be wholly prospective); Commonwealth v. O'Neal, 441 Pa. 17, 271 A.2d 497 (1970) (decision of the Pennsylvania Supreme Court in Commonwealth *ex rel.* Johnson v. Meyers, 402 Pa. 451, 167 A.2d 295 (1961) (relating to instructions as to presumptions in homicide cases, and later disapproved in part, was not to be applied retroactively)); Commonwealth v. Scoleri, 399 Pa. 110, 160 A.2d 215 (1960) (where the court clearly and distinctly set forth that a rule regarding jury instructions on the subject of alibi was to be prospective only, there was to be no retroactive application); Commonwealth v. Jackson, 230 Pa. Super. 386, 326 A.2d 623 (1974) (in modifying the judgment of sentence, the court used its supervisory powers to limit the kinds of offenses that can be introduced for impeachment and such limitation is not retroactive); Commonwealth v. Williams, 232 Pa. Super. 339, 331 A.2d 875 (1974) (defendant's knowledge of his right to participate in the selection of jury panel was not of constitutional proportions demanding retroactive application); Commonwealth v. Saunders, 456 Pa. 406, 322 A.2d 102 (1974) (decision in Commonwealth v. Mills, 447 Pa. 163, 286 A.2d 638 (1971), with respect to convictions in state court of person convicted and sentenced in federal court for the same offense, could be relied on on direct appeal by defendant whose prosecution was initiated before the date of such decision).

retroactive manner.[159] The vacillation in this area, and the problem created by the retroactivity issue was even further illustrated by the *Ernst* court's consideration of inequality and unfairness of the retroactivity issue which was created by the court's own fence jumping.[160] Justice Pomeroy, authoring the opinion in support of affirmance, noted that several defendants had trials prior to the decisions in *Rose* and *Demmitt*, and received the benefit of those decisions while their cases were on direct appeal.[161] He stated that it would be inequitable to change courses at that time and deny relief to those persons similarly situated since those judgments were not yet final.[162] Thus, the court espoused a limited measure of retroactivity for the *Rose* and *Demmitt* decisions.[163]

The *Ernst* court went further and, speaking in what might best be described as a doctrinal waiver tone, determined that appellant Ernst was not similarly situated to those defendants who had preserved the issue for appellate review by raising it at the trial level.[164] The court based that notion on the fact that Ernst brought the instructional matter to issue for the first time on appeal.[165] Thus, the court ultimately denied Ernst retroactive application of the decisions in *Rose* and *Demmitt* because of his failure to properly raise any objection to the trial court's charge at the proper time.[166] Implicit in this reasoning is the notion that had Ernst raised the issue at trial he would have then received the benefit of a retroactive application of the *Rose* and *Demmitt* decisions. The court's discomfort with basing its decision solely on retroactivity was obvious in this defensive posture taken by the plurality in explaining the applicability of waiver rationale that rendered Ernst not to be similarly situated. The *Ernst* court recognized the well-

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159. 476 Pa. at 107, 381 A.2d at 1247.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* The court stated:

> Our rules of criminal procedure, reflecting sound jurisprudential considerations, provide that an appellant may not assign as error a portion of the charge to a jury or an omission therefrom unless specific objection is made before the jury retires to deliberate . . . . This is reflective of the elementary principle that an appellate court does not review issues raised for the first time on appeal.

Id. at 106-07, 381 A.2d at 124. Regarding the principle of waiver, *see generally* Commonwealth v. Gravely, 486 Pa. 194, 404 A.2d 1296 (1979); Commonwealth v. Blair, 460 Pa. 31, 331 A.2d 213 (1975).

165. 476 Pa. at 107, 381 A.2d at 1247.

166. *Id.* at 107-08, 381 A.2d at 1247.

established principle that the reasons supporting a limitation of appellate review to points which have been properly preserved below are absent when the unasserted proposition is not in being at the time of trial.[167] Justice Pomeroy utilized the constitutional—non-constitutional dichotomy to preclude the application of the aforementioned principle to Ernst's circumstances.[168] He opined that there were different considerations involved with a non-constitutional claim, and that in such an instance a defendant was precluded from raising on appeal a non-constitutional legal principle newly announced in an appellate decision rendered subsequent to the date of his trial.[169] Although Justice Pomeroy failed to specify what those considerations were, or at least more fully explain how they applied to Ernst, he illustrated the dichotomy and its application by referring to the pre-*Rose* decision of *Commonwealth v. Cropper*,[170] where the court based its decision on appellant's failure to preserve his claim at trial or in post-trial motions.[171] Waiver aside, however, the most important aspect of the *Ernst* decision was the court's development and explicit acknowledgement of the constitutional—non-constitutional dichotomy which was later relied on by both the Pennsylvania Superior Court and Supreme Court when appellant Geschwendt presented his claim.[172]

The reasoning of the equally divided *Ernst* court became the very foundation for the Pennsylvania Superior Court's decision in *Geschwendt*.[173] Noting that Geschwendt had requested a retroactive application of *Mulgrew*, the Pennsylvania Superior Court conveniently relied on the dichotomy espoused in *Ernst*, coupled with its contention that there was no constitutional issue involved in

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167. *Id.* at 108, 381 A.2d at 1248 (citing Commonwealth v. Simon, 446 Pa. 215, 285 A.2d 861 (1971); Commonwealth v. Richardson, 433 Pa. 195, 249 A.2d 307 (1969); Commonwealth v. Cheeks, 429 Pa. 89, 239 A.2d 793 (1968); Kuchinic v. McCrory, 422 Pa. 620, 222 A.2d 897 (1966)).

168. 476 Pa. at 108, 381 A.2d at 1248.

169. *Id.*

170. 463 Pa. 529, 345 A.2d 645 (1975).

171. 476 Pa. at 108, 381 A.2d at 1248. (citing *Cropper*, 463 Pa. at 536, 345 A.2d at 648). *Cropper* predated *Rose* and *Demmitt*. At trial, Cropper's counsel admitted that he bore the burden of proving self defense by a preponderance of the evidence and he did not object to that standard at trial or in post-trial motions. Despite its inconsistency with *Rose* and *Demmitt* (decided while Cropper was within the appellate process), the *Cropper* court based it decision on the premise that Cropper waived the claim because of his failure to properly preserve it. 463 Pa. at 536, 345 A.2d at 648.

172. 454 A.2d 991. *See* 271 Pa. Super. 102, 412 A.2d 595.

173. *See* 271 Pa. Super. at 105, 412 A.2d at 597.

Mulgrew, to dispose of Geschwendt's claim summarily.[174] Geschwendt again raised the constitutional implications of a *Mulgrew* instruction before the Pennsylvania Supreme Court, but again did not find a receptive ear.[175] The plurality in *Geschwendt* relied on *Ernst* only insofar as relying entirely on the retroactivity issue—Geschwendt's preservation of his claim apparently was not at issue. Perhaps the court felt secure enough in its position on retroactivity that it felt no obligation to look to, or rely upon, the waiver doctrine as it had done earlier in *Ernst*, and more recently in *Commonwealth v. Hernandez*.[176] The *Hernandez* court, without discussing the constitutional or non-constitutional aspects of retroactivity, recognized that fairness dictated the applicability of the newly announced principle of law to all similarly situated litigants, and application should not depend on a race to the courthouse—if the accused properly preserves his claim.[177]

Because of its past reliance and emphasis on waiver, it may have been somewhat of a surprise to both litigants that the court did not consider waiver to be of moment. The first matter that appellant Geschwendt brought to the attention of the supreme court in his brief was the assertion that he had preserved the issue of the *Mulgrew* instruction for appellate review.[178] Conversely, in its re-

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174. *Id.* The superior court stated:

> The defendant urges that we apply the *Mulgrew* decision retroactively. We hereby decline to do so because many cases have held that new decisions will not apply retroactively unless they involve constitutional issues. We see no constitutional issue involved in *Mulgrew*, and will therefore not apply that decision retroactively in this case. The trial court's charge was therefore proper.

Id. (citations omitted).

175. Brief for Appellant at 27, Commonwealth v. Geschwendt, 500 Pa. 120, 454 A.2d 991 (1983). Geschwendt brought this claim as colorable under his due process right to a fair trial. *Id.*

176. 498 Pa. 405, 446 A.2d 1268 (1982). The *Hernandez* court held that the fact that an arrest preceded the judicial decisions giving rise to the *McCutheon* doctrine (an accused under eighteen years of age may not effectively waive his constitutional rights against self-incrimination and the right to counsel without benefit of a concerned, informed adult, *see* Commonwealth v. McCutheon, 463 Pa. 90, 343 A.2d 669, *cert. denied*, 424 U.S. 934 (1975)), did not preclude application of the rule to an appellant whose direct appeal was pending at the time of those decisions. 498 Pa. at 405, 446 A.2d at 1270-71.

177. 498 Pa. at 411, 446 A.2d at 1271 (citing Commonwealth v. Hill, 492 Pa. 100, 111, 422 A.2d 491, 497 (1980) (Roberts, J., opinion in support of reversal); Commonwealth v. Cain, 471 Pa. 140, 167, 369 A.2d 1234, 1248 (1977) (Pomeroy, J., opinion in support of affirmance)).

178. Brief for Appellant at 11, Commonwealth v. Geschwendt, 500 Pa. 120, 454 A.2d 991 (1983). Geschwendt maintained that he had preserved the issue by:

> (a) specifically requesting the trial judge to instruct the jury as to the consequences of a verdict of not guilty by reason of insanity;
>
> (b) raising the issue in timely filed post verdict motions;

ply brief, the Commonwealth strongly contested Geschwendt's contention that he had preserved the issue for appellate consideration.[179] Thus, the *Geschwendt* court had an adequate framework to decide the case by application of the waiver doctrine as it had done earlier in *Ernst* and *Hernandez*.

Nevertheless, the *Geschwendt* plurality chose to ignore the waiver issue, instead choosing to engage in an extensive discussion of retroactivity and determined the case on that basis. Perhaps the mere fact that the court chose to treat the retroactivity issue is implicit acknowledgment that *Geschwendt* had properly preserved the issue for appellate review. Alternatively, it might be conjectured that the court was dissatisfied with its posture in deciding this type of case, and that *Geschwendt*, in its mind, presented the right circumstance to fully articulate the proper evaluation to be undertaken when such an issue arises. In this respect, *Geschwendt* presented an ill-conceived framework to articulate a more definitive standard based on a constitutional—non-constitutional dichotomy. This is because the *Mulgrew* instruction cannot conclusively be deemed as not possessing constitutional dimensions. The constitutional basis of the *Mulgrew* instruction, though overtly rejected by the Pennsylvania Supreme Court, possesses an undeniable vitality when the court's vacillating posture is clearly scrutinized.

Waiver not being at issue in *Geschwendt*, vis-a-vis the court's disregard of the same, it is indisputable that the *Geschwendt* plurality had to explicitly overrule *Brown* to reach a decision couched

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(c) raising the issue in the defendant's brief;

(d) filing a petition to supplement defendant's brief insofar as the Pennsylvania Supreme Court had decided Commonwealth v. Mulgrew, subsequent to the filing of defendant's brief;

(e) said supplemental brief being filed prior to the decision of the lower court on appellant's post-trial motions and affording them ample opportunity to rule on the issue.

Id.

179. Brief for the Appellee, Commonwealth v. Geschwendt, 500 Pa. 120, 454 A.2d 991 (1983). The Commonwealth maintained that Geschwendt failed to conform to the requirements of PA. R. CRIM. P. 1123(a), which provides that issues not presented in motions for a new trial will not be considered by the appellate court. The Commonwealth contended the appellant did not specifically raise the *Mulgrew*-type charge, but that it was only one of twenty-one points for charge appellant had requested. Thus where appellant stated in his post-trial motions that "it was error to refuse the defendant's points for charge at both the verdict and penalty stages of the trial" and "it was error to overrule the defendant's exceptions to the court's instructions to the jury," the Commonwealth characterized such motions as "boilerplate" and effectively waived. Brief for Appellee, Commonwealth v. Geschwendt, 500 Pa. 120, 454 A.2d 991 (1983).

in terms of retroactivity since *Brown* unequivocally required retroactive application of *Mulgrew*. The *Geschwendt* court's belated attempt to justify *Brown* in other terms—prosecutorial misconduct necessitating a *Mulgrew* instruction—may be indicative of the fact that the plurality was ultimately unconvinced of its own analysis and/or the result it reached. To reach the conceptual framework desired, the court found it necessary to characterize *Brown* both as a per se application of the *Schooner Peggy* notion of retroactivity, and also disavow *Brown* in order to adopt the constitutional—non-constitutional dichotomy.[180]

By adopting the constitutional—non-constitutional dichotomy, the Pennsylvania Supreme Court was able to categorize Geschwendt's claim as non-constitutional and allow that classification itself to determine if relief was to be granted. Similarly, that course of analysis permitted the court to circumvent arguments relating to whether Geschwendt had received a fair trial, since a *Mulgrew*-type instruction was not deemed to be a constitutional imperative. By ensconcing the retroactivity question present in *Geschwendt* in the constitutional—non-constitutional dichotomy, the *Geschwendt* plurality quickly, but perhaps short-sightedly, disposed of the case, effectively ignoring the possibility that Geschwendt had not enjoyed a fair trial.[181]

The manner in which the *Geschwendt* plurality had to construe *Mulgrew* bears this contention out. The *Geschwendt* plurality termed the determination in *Mulgrew* to be an exercise of the court's supervisory powers and thus not constitutionally compelled.[182] The *Mulgrew* court, however, did not indicate that their decision was such an exercise of supervisory powers and therefore without constitutional dimensions. In fact, a closer scrutinization of the *Mulgrew* rationale belies such a contention. The unanimous *Mulgrew* court, in assessing the import of the necessity to inform the jury of the consequences of a verdict of not guilty by reason of insanity, explicitly adopted the reasoning of *Lyles v. United States*[183] and the Supreme Court of Massachusetts in *Common-*

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180. 500 Pa. at 129-30, 134, 454 A.2d at 996, 999.

181. *Id.* at 131, 454 A.2d at 997. Referring to *Mulgrew*, the plurality stated that "*Mulgrew* was not a change fashioned to correct a serious flaw in the fact-finding process but rather represented a refinement in our practice. While the change is expected to enhance the process, its prospective application would not reflect an erosion of our committment to provide a fair trial." *Id.* at 132, 454 A.2d at 997.

182. *Id.* at 130, 454 A.2d at 996.

183. 254 F.2d 725 (D.C. Cir. 1957) (where defendant pleads not guilty by reason of insanity, jury has a right to know meaning of verdict of not guilty by reason of insanity as

wealth v. Mutina.[184] Although retroactivity was not at issue in either of those cases, both of those courts concluded that the consequences of an acquittal by reason of insanity should be presented to the jury, thus providing the *Mulgrew* court with a firm basis to change the law of Pennsylvania. The language of both *Mutina* and *Lyles* indisputably sounded in terms of the courts' concern that a defendant receive a fair trial. The *Mulgrew* court in fact quoted directly from *Mutina*[185] and *Lyles*[186] in its opinion. The *Mulgrew* court indicated that such an instruction would reduce the possibility of compromise verdicts occasioned by a jury's misapprehension that they would be acquitting a defendant by reaching a verdict of

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accurately as it knows by common knowledge the meaning of verdict of guilty and verdict of not guilty), *cert. denied*, 356 U.S. 961 (1958), *cert. denied*, 362 U.S. 943 (1960), *cert. denied*, 368 U.S. 992 (1962).

184. 366 Mass. 810, 323 N.E.2d 294 (1975) (where the defense of insanity is fairly raised the defendant upon timely request is entitled to an instruction regarding the consequences of a verdict of not guilty by reason of insanity).

185. 475 Pa. at 277, 380 A.2d at 352. The *Mulgrew* court adopted the following statement of the *Mutina* court:

> The instant case represents a classic example of the injustice which may occur when such information is withheld from the jury. The jury could have had no doubt that the defendant killed Miss Achorn. The jury also heard overwhelming persuasive evidence that the defendant was insane at the time of the killing and that, for a long time into the future, he will remain a menace to himself and to society. Foremost in their minds must have been a concern for the safety of the community.
>
> In the absence of an instruction from the trial judge as to the effect of a verdict of not guilty by reason of insanity, the jurors sought to render justice both to the defendant and to society, but theirs was not a true verdict.

Id. (quoting *Mutina*, 366 Mass. at 810, 323 N.E.2d at 301-02).

186. 475 Pa. at 275, 380 A.2d at 351 (quoting *Lyles*, 254 F.2d at 728). The language quoted by the *Mulgrew* court was as follows:

> This point arises under the doctrine, well established and sound, that the jury has no concern with the consequences of a verdict, either in the sentence, if any, or the nature or extent of it, or in probation. But we think that doctrine does not apply in the problem before us. The issue of insanity having been fairly raised, the jury may return one of three verdicts, guilty, not guilty, or not guilty by reason of insanity. Jurors, in common with people in general, are aware of the meanings of verdicts of guilty and not guilty. It is common knowledge that a verdict of not guilty means that the prisoner goes free and that a verdict of guilty means that he is subject to such punishment as the court may impose. *But a verdict of not guilty by reason of insanity has no such commonly understood meaning.* As a matter of fact, its meaning was not made clear in this jurisdiction until Congress enacted the statute of August 9, 1955. It means neither freedom nor punishment. It means the accused will be confined in a hospital for the mentally ill until the superintendent of such hospital certifies, and the court is satisfied, that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others. We think the jury has a right to know the meaning of this possible verdict as accurately as it knows by common knowledge the meaning of the other two possible verdicts.

Id. at 275-76, 380 A.2d at 351.

not guilty by reason of insanity.[187]

Despite this extensive discussion in *Mulgrew* that, at the very least, implicitly contained constitutional overtones, the Pennsylvania Supreme Court in *Geschwendt* offered little explanation for the proposition that entitlement to a *Mulgrew* charge is not a matter of constitutional dimensions.[188] After relying initially on the unsupported assertion that *Mulgrew* simply was an exercise in supervisory authority, the *Geschwendt* court alternatively contended that even if *Mulgrew* were constitutionally compelled, it was a clear break with the past calling for nonretrospective application.[189] By so doing, the *Geschwendt* court opened a Pandora's box, which unmasked the short-sightedness of its decision-making rationale. This is glaringly apparent since, even within the alternative framework, the court again avoided the merits of the claim by aborting its analysis, relying on a superficial and tenuous *Stovall* analysis.[190]

It is not as though the Pennsylvania Supreme Court had not struggled with the issue of retroactivity and jury instructions in the past. In fact the decision-making inconsistency and controversy thereto was perhaps a factor in the court's choice to avoid the more challenging issue raised but not addressed by the *Geschwendt* plurality.

In *Commonwealth v. Jones*[191] the court determined that a trial judge, upon request, must instruct the jury on its power to return a verdict of voluntary manslaughter even where the evidence presented does not provide a basis for finding passion or adequate provocation.[192] The *Jones* court did not struggle over that ultimate determination, but it was equally divided over whether the ruling should be given prospective or retroactive application.[193] The *Jones* opinion in support of reversal, authored by Justice Roberts, in which Justices Pomeroy and Manderino joined, restated the concerns voiced by those same three justices in *Commonwealth v. Davis*.[194] In *Davis*, Justice Pomeroy stated that because the choice of whether to charge voluntary manslaughter was left to the discre-

187. 475 Pa. at 276, 380 A.2d at 352.
188. 500 Pa. at 131, 454 A.2d at 997.
189. *Id.*
190. *Id. See supra* note 49 and accompanying text.
191. 457 Pa. 563, 319 A.2d 142 (1974).
192. *Id.* at 573-74, 319 A.2d at 148.
193. *Id.*
194. *Id.* at 563, 319 A.2d at 151 (citing Commonwealth v. Davis, 449 Pa. 468, 479, 297 A.2d 817, 818 (1972)).

tion of the trial judge with no objective standards to guide that decision, the practice offended due process and equal protection of the laws because similarly situated individuals were treated differently.[195] As in *Geschwendt*, retroactivity was the divisive and disputed issue in *Jones*. The opinion in support of affirmance authored by Justice Nix, in which Justices Eagen and O'Brien joined, explicitly noted that the court was acting under its supervisory power and that the rule announced in *Jones* was to be given only prospective application.[196] This prospective application was predicated upon the determination that *Jones* had not suffered any prejudice from the absence of the charge.[197] The *Jones* opinion in support of affirmance found it unnecessary to consider constitutional arguments. The court relied on the harmless error doctrine enunciated in *Chapman v. California*[198] to dispose of Jones' claim to the instruction.[199] Thus, even though Jones was the party at bar when the rule change was announced, he nevertheless did not receive the benefit of the change. The opinion in support of reversal authored by Justice Roberts criticized the result reached insofar as it failed to address constitutional aspects, but instead relied on a novel articulation of the harmless error theory to attain the desired result.[200]

Just as it might be said that the *Geschwendt* court chose the path of least resistance by hanging its decisional hat on the constitutional—non-constitutional dichotomy, so too it might be said that the *Jones* court provided the *Geschwendt* court with a perfect example of avoiding ultimate constitutional issues, as *Jones* did vis-a-vis the harmless error theory.

Jones surfaced again in *Commonwealth v. Cain*,[201] wherein retroactivity and the constitutional—non-constitutional dichotomy

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195. 457 Pa. at 563, 319 A.2d at 151.

196. *Id.* at 573-74, 319 A.2d at 142.

197. *Id.* at 574, 319 A.2d at 148. The *Jones* court stated:

> It is clear in this case that appellant did not suffer prejudice from the refusal of such an instruction in view of the jury's decision to ignore their right to return a verdict of second degree. There is not the slightest reason to believe that the jury would have returned a verdict of voluntary manslaughter out of sympathy or in recognition of factors that they may have deemed mitigating where these factors were not sufficiently compelling to cause them to elect the lesser alternative that was offered.

Id.

198. 386 U.S. 18 (1967).

199. 457 Pa. at 574 n.16, 319 A.2d at 148 n.16.

200. *Id.* at 580, 319 A.2d at 151.

201. 471 Pa. 140, 369 A.2d 1234 (1977).

produced yet another equally divided court.[202] Justice Eagen, joined by Chief Justice Jones and Justice Pomeroy, writing the opinion in support of affirmance, considered the retroactivity issue and the propriety of extending a jury instruction to one who was on direct review at the time of the change.[203]

Subsequent to *Jones*, but before *Cain*, the Third Circuit Court of Appeals in *United States ex rel. Matthews v. Johnson*[204] determined that the practice abolished in *Jones* was violative of the due process clause of the fourteenth amendment to the United States Constitution.[205] Appellant Cain complained that the trial court erred in refusing to charge the jury on voluntary manslaughter as he requested.[206] Since Cain's trial antedated both *Jones* and *Matthews*, it might have appeared to the *Cain* court that the Third Circuit had waivered sufficiently, as to the applicability of *Matthews* to those cases on direct review, to provide the *Cain* court with the leeway to take the retroactivity issue wherever the court desired. That decisional leeway seems to lead to the often times surreal, and at least arbitrary, decision-making that occurs in this area of the law. *Cain* further demonstrates the long existing turmoil in this area which seems unabated given *Hernandez, Brown* and *Geschwendt.*

Besides determining that the rule of *Jones* was constitutionally required, the *Cain* court also determined that it was not to be applied wholly retroactively but only so far as to those cases on direct review, in accordance with *United States v. Zirpolo.*[207] Subsequently, in *United States ex rel. Cannon v. Johnson,*[208] a Third Circuit panel indicated that *Matthews* did not apply to cases still on direct appeal but only to cases in which the trial commenced subsequent to *Matthews.*[209] The Third Circuit explained this change of position in terms of the intervening United States Su-

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202. *Id.* at 142, 369 A.2d at 1236.

203. *Id.*

204. 503 F.2d 339 (3d Cir. 1974).

205. *Id.* at 346. In *Matthews*, the court reasoned that a jury had the inherent power to return a voluntary manslaughter verdict on a murder indictment in Pennsylvania. Consequently, the lack of standards for the trial courts to determine whether to charge the jury on voluntary manslaughter resulted in a fundamentally unfair practice because every defendant was subject to the whim and caprice of the individual judges. *Id.*

206. 471 Pa. at 158, 369 A.2d at 243 (citing United States v. Zirpolo, 450 F.2d 424 (3d Cir. 1971) (retroactive application of rule requiring instruction for voluntary manslaughter to cases on direct appeal if instruction request was proper and timely)).

207. 450 F.2d 424 (3d Cir. 1971). *See* 471 Pa. at 158, 369 A.2d at 243.

208. United States *ex rel.* Cannon v. Johnson, 536 F.2d 1013 (3d Cir. 1976).

209. 471 Pa. at 158, 369 A.2d at 1243 (citing 536 F.2d 1013).

preme Court decision in *Daniel v. Louisiana*.[210] *Cannon* affirmed an earlier district court decision in the same case as to retroactivity in collateral attacks, and followed in dictum the district court's decision that *Matthews* was not to be applied to cases on direct appeal as was suggested by *Matthews* itself.[211] In light of the Third Circuit's waivering and seemingly unpredictable decision making process, Justice Eagen, in *Cain*, decided to give effect to the opinion in *Cannon* and not apply *Matthews* to cases on direct appeal.[212]

Justice Eagen deemed *Matthews* to be a new rule of criminal procedure which was constitutionally required.[213] But his opinion went on to consider *Matthews* in the context of the *Stovall* factors and ultimately determine that: (1) the purpose of *Matthews* was not to enhance the truth finding process; (2) there was considerable reliance by the Commonwealth; (3) a horrendous burden would be placed on the administration of justice if the court called for retroactive application; and (4) the Third Circuit had ruled that *Matthews* need not be applied to collateral attacks, and no distinction as to cases on direct review was justified.[214] Thus it was held in *Cain* that constitutional considerations did not mandate application of *Matthews* to cases on direct review.[215] The *Cain* court

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210. 471 Pa. at 159, 369 A.2d at 1243 (citing Daniel v. Louisiana, 420 U.S. 31 (1975)). *Daniel* held that Taylor v. Louisiana, 419 U.S. 522 (1975) (unconstitutional method of jury selection) was to be applied only to trials after the decision in *Taylor* was announced. 420 U.S. at 32.

211. 471 Pa. at 159, 369 A.2d at 1243 (citing United States *ex rel.* Cannon v. Johnson, 396 F. Supp. 1362 (E.D. Pa. 1975)).

212. 471 Pa. at 159-60, 369 A.2d at 1244. Justice Eagen noted the following reasons for giving *Cannon* effect:

> (1) it represents the Third Circuit Court's most recent expression on the subject;
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> (2) it represents a view which had the benefit of *Daniel* which is in conflict with *Zirpolo*;
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> (3) although it is only a panel decision, Rule 35 of the Rules of Appellate Procedure, 28 U.S.C.A. Rule 35, provides a procedure whereby a majority of the Third Circuit could have *sua sponte* caused a rehearing by the court *en banc* had a majority thought the proceeding in *Cannon* involved a "question of exceptional importance" and had "consideration by the full court [been thought] necessary to secure or maintain uniformity of its decisions." 28 U.S.C.A. Rule 35. In light of *Zirpolo* being impliedly overruled by *Cannon*, it is difficult to imagine a more appropriate case requiring uniformity. Yet no rehearing *en banc* was ordered; and,
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> (4) it presents a complete understanding of both the purpose to be served by charging the jury on voluntary manslaughter absent evidence to support such a verdict and the considerations and ramifications of applying *Matthews* to direct appeals.

Id. at 160, 369 A.2d at 1244.

213. 471 Pa. at 161, 369 A.2d at 1244.

214. *Id.* at 161-62, 369 A.2d at 1245 (citing Linkletter v. Walker, 381 U.S. 618 (1965)).

215. 471 Pa. at 161-67, 369 A.2d at 1245-47.

additionally analyzed the question of whether *Matthews* should apply to cases on direct appeal pursuant to their supervisory power.[216] The court declined such an application, noting that: (1) new rules of procedure have been applied in a wholly prospective manner in Pennsylvania;[217] (2) the rule of *Matthews*, whether constitutional or not, was still procedural and did not affect the truth finding function;[218] (3) in the exercise of its supervisory powers the rule of *Matthews* announced in *Jones* did not inure to the benefit of Jones;[219] (4) prior decisions indicated that absent an effect on the truth finding function, new rules of criminal procedure are not to be applied to cases on direct review;[220] and (5) persuasive and controlling Pennsylvania authority existed for applying *Matthews* only where the trial commenced after entry of that decision.[221]

Most important for purposes of analyzing *Geschwendt*, however, is the fact that Cain's allegation that the trial court erred in refusing to charge the jury on voluntary manslaughter was considered by the court to be one implicating the right to receive a fair trial.[222] Such was evidenced by the concluding remarks of Justice Eagen, who stated that the court was confronted with a new rule of procedure announced regarding the court's supervisory powers.[223] However, Justice Eagen, went on to state that although the rule possessed constitutional dimensions, it did not effect the truth finding process, and thus was to be given wholly prospective application.[224] But more importantly, Justice Eagen stated that consideration of the record demonstrated that Cain had received a fair trial.[225] That comment, and the *Mulgrew* court's adoption of the rationale of *Lyles* and *Mutina*, belies the assertion of the *Geschwendt* court that a lack of a *Mulgrew*-type charge can so easily be deemed a non-constitutional concern, and that the constitutional—non-con-

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216. *Id.* at 164, 369 A.2d at 1246.

217. *Id.* (citing Commonwealth v. Geiger, 455 Pa. 420, 316 A.2d 881 (1974); Commonwealth v. Hayward, 437 Pa. 215, 263 A.2d 330 (1970); Commonwealth v. Godfrey, 434 Pa. 532, 254 A.2d 923 (1969); Commonwealth v. Jordan, 407 Pa. 575, 181 A.2d 310 (1962)).

218. 471 Pa. at 165, 369 A.2d at 1247.

219. *Id.*

220. *Id.* at 164, 369 A.2d at 1246 (citing Fuller v. Alaska, 393 U.S. 80 (1968); DeStefano v. Woods, 392 U.S. 631 (1968); Stovall v. Denno, 388 U.S. at 301).

221. 471 Pa. at 166, 369 A.2d at 1247 (citing Boykin v. Alabama, 395 U.S. 238 (1974); United States *ex rel.* Hughes v. Rundle, 419 F.2d 116, 118 (3d Cir. 1969); Commonwealth *ex rel.* West v. Rundle, 428 Pa. 102, 237 A.2d 196 (1968)).

222. 471 Pa. at 166-67, 369 A.2d at 1247.

223. *Id.*

224. *Id.* at 167, 369 A.2d at 1247-48.

225. *Id.* at 167, 369 A.2d at 1248.

stitutional dichotomy is a mode of decision making possessing an unassailable sanctity. *Cain* would seem to indicate that even after apparently entertaining a determinative discussion regarding constitutional concerns, the court still can, and did, consider the issue of whether a fair trial was enjoyed by a defendant. Perhaps that is the ultimate issue to receive consideration, while the constitutional—non-constitutional dichotomy is merely a step or tool, to be used as a part of a more complete analysis, and at the very least is not as neat a package as the *Geschwendt* court would have one believe. Certainly, in view of the purpose for adopting a *Mulgrew*-type charge in Pennsylvania, a studied consideration of the record, as contemplated by *Cain*, at the very least casts doubt on whether Geschwendt actually received a fair trial. The *Geschwendt* plurality's alternative explanation, hypothetically viewing *Mulgrew* as constitutionally mandated, also seems to indicate an awareness by the court of the real issue, and at least acknowledges the self-serving and result-orientated nature of an adjudication based on a purely constitutional—non-constitutional dichotomy.

In *Cain*, Justice Roberts, joined by Justices O'Brien and Manderino, filed a dissenting opinion which foreshadowed his dissent in *Geschwendt*, strongly suggesting that Cain deserved a new trial.[226] Justice Roberts not only discussed the constitutional right to the *Jones* rule, but he initially discussed at length why the denial of that charge violated the due process provision of the state and federal constitutions.[227] Justice Roberts seemed properly to take the analysis one step back before moving forward, since he began his analysis with the simple but poignant comment that the right to a jury trial is one of the most fundamental rights afforded an accused, and that a lay group's determination of guilt or innocence depends on their being fully and correctly instructed on their powers and responsibilities.[228] Justice Roberts also noted that

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226. *Id.* at 171, 369 A.2d at 1250 (Roberts, J., dissenting).

227. *Id.* at 172-73, 369 A.2d at 1250-51 (Roberts, J., dissenting). Justice Roberts adopted the reasoning of United States *ex rel.* Matthews v. Johnson, which indicated that "[t]o deny appellee the possibility of a lesser restraint of liberty because of a practice which permits arbitrary trial court activity is offensive to those settled concepts of due process." *Id.* at 178, 369 A.2d at 1254 (quoting 503 F.2d at 345).

228. 471 Pa. at 179-82, 369 A.2d at 1254-55 (Roberts, J., dissenting) (quoting Williams v. Florida, 399 U.S. 78, 100 (1970) (citing Commonwealth v. Young, 456 Pa. 102, 317 A.2d 258 (1974) (failure to deliver a full and adequate instruction on reasonable doubt denies the accused a fair trial guaranteed by the due process clause of U.S. CONST. amend. XIV and PA. CONST art. I, § 9))). Justice Roberts also noted that "[d]ischarge of the jury's responsibility for drawing appropriate conclusions from the testimony depended upon discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of

application of the *Stovall* factors to jury instructions was somewhat tenuous insofar as those factors did not readily lend themselves to the distinct nature of that concern.[229]

Justice Manderino, although joining in Justice Roberts' dissent in *Cain*, further commented that the three *Stovall* factors could not be properly used to determine whether an accused was entitled to the benefit of a newly announced constitutional right, or to the benefit of a rule newly formulated pursuant to the court's supervisory powers.[230] Justice Manderino, in an articulation similar to that of Justice Roberts regarding a proper jury trial, stated that the ultimate function of the judicial system is not simply truth-finding, but justice.[231] Conversely, the *Geschwendt* plurality was in apparent agreement with this, stating that even-handed justice requires the application of a new rule to litigants similarly situated.[232] The *Geschwendt* plurality, however, was able to circumvent the "similarly situated" argument by opting for a position of "true fairness,"[233] or one that considered the interests of society as a whole.[234] Those interests were deemed by the *Geschwendt* plurality to be protected by providing a fair system of justice for all the citizens of the Commonwealth.[235] The *Geschwendt* plurality seems to indicate that the balancing that it calls for somehow can permit a denial of an accused's right to a fair trial, vis-a-vis a *Mulgrew* instruction, while concurrently protecting society's interest in a fair system of justice. If the history and purpose of the change from *Gable* to *Mulgrew* are reflected in the *Mulgrew* opinion, then these two interests, rather than competing interests as suggested by the *Geschwendt* court, seem to be complimentary, or in fact the same.

Perhaps the *Geschwendt* court failed to grasp the full import of the *Mulgrew* decision. At the time *Mulgrew* was decided, *Gable* was long-standing decisional authority in Pennsylvania, and it ap-

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relevant legal criteria." 471 Pa. at 179 n.17, 369 A.2d at 1254 n.17 (quoting Bollenbach v. United States, 326 U.S. 607, 612 (1946)). *See* ABA Project on Standards for Criminal Justice § 5.11(a), Commentary at 74 (Approved Draft 1972) (standards relating to the function of the trial judge).

229. 471 Pa. at 196-97, 369 A.2d at 1263-64 (Roberts, J., dissenting).

230. *Id.* at 197-98, 369 A.2d at 1264 (Manderino, J., dissenting).

231. *Id.*

232. 500 Pa. at 133, 454 A.2d at 998 (citing *Hankerson*, 432 U.S. 233 (1977); *Peltier*, 422 U.S. 531 (1975); *Mackey*, 401 U.S. 667 (1971); *Desist*, 394 U.S. 244 (1969); *Hill*, 492 Pa. 100 (1978)).

233. 500 Pa. at 134, 454 A.2d at 999.

234. *Id.*

235. *Id.*

pears that despite the fact that *Mulgrew* overruled *Gable*, the *Mulgrew* court never precisely defined its rationale for overruling *Gable*, save the adoption of the authority cited therein, *Lyles v. United States* and *Commonwealth v. Mutina*.[236]

Given the lack of a specific and articulated rationale for overruling *Gable*, the need for a more definite background against which to judge the subsequent actions and reasoning of the *Geschwendt* court becomes apparent. Appellant Mulgrew's brief to the Pennsylvania Supreme Court reveals that he attacked the viability of *Gable* on two grounds.[237] First, the contention was urged that section 1311(b) enacted after *Gable*, had been in long-standing effect and required that the jury: (1) be informed of the degree of punishment incident to the three degrees of murder so that it would be influenced by these degrees during its deliberations; and (2) be informed of the effect of acquitting a defendant on the ground of insanity.[238] Second, Mulgrew contended that the absence of a charge indicating the court's authority over a person of unsound mind was prejudicial and deprived an accused of a fair and impartial trial.[239] It would seem at some point that the *Geschwendt* plurality's characterization of the decision in *Mulgrew* as not constitutionally compelled becomes somewhat strained and possibility inaccurate, at least in terms of what was addressed in *Mulgrew* and how that analysis occurred. The *Mulgrew* court actually addressed and resolved both contentions raised by Mulgrew. Since one of those issues was that of the constitutional right to a fair trial vis-a-vis due process, it may be fairly argued that the *Geschwendt* plurality's summary characterization of *Mulgrew* as not constitutionally compelled is ill-conceived and unpersuasive.

Initially, the *Mulgrew* court stated that the applicable law at the time of Mulgrew's trial was the Mental Health and Procedures Act and not the Act of 1860 relied on by Mulgrew.[240] Despite the fact that Mulgrew's requested point for charge was erroneous, the court indicated that he had nevertheless alerted the trial judge to an important issue in the case,[241] and thus properly preserved the issue

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236. 380 A.2d at 351-52.

237. Brief for Appellant at 19, Commonwealth v. Mulgrew, 475 Pa. 271, 380 A.2d 349 (1977).

238. *Id.* at 19-20 (citing 18 PA. CONS. STAT. ANN. § 1311 (Purdon 1972)).

239. Brief for Appellant at 21, Commonwealth v. Mulgrew, 475 Pa. 271, 380 A.2d 349 (1977).

240. 475 Pa. at 274, 380 A.2d at 350.

241. *Id.* at 274-75, 380 A.2d at 351 (citing Commonwealth v. Sisak, 436 Pa. 262, 270 n.5, 259 A.2d 428, 432 n.5. (1969)).

for appellate review.[242] Although this issue of waiver was raised, and itself often seems to serve at the court's behest, the *Mulgrew* court's opinion was in response to the issue of a fair trial or lack thereof, that was raised by appellant Mulgrew. In fact, in his brief, Mulgrew cited no authority for his contention that he was denied a fair trial other than a simple assertion that he was in fact "denied a fair trial."[243] The *Mulgrew* court on its own initiative provided the authority, with extensive discussion relevant to the fair trial issue vis-a-vis *Mutina* and *Lyles*. Because of the conscious effort by the *Mulgrew* court to address that issue of a fair trial, it would seem that the *Geschwendt* court's characterization, noted above, of *Mulgrew* as non-constitutionally compelled is tenuous and self-serving to the extent that it provides a basis for not applying *Mulgrew* retroactively to *Geschwendt* based on the constitutional—non-constitutional dichotomy. The *Mulgrew* court at no point indicated that it was exercising its supervisory power in reaching its determination, and although it did not explicitly deem its ruling constitutionally compelled, the better view would seem to indicate that their concern was ultimately directed to the fairness of Mulgrew's trial and in fact can best be viewed as a direct response to Mulgrew's two-pronged brief which emphasized the fair trial issue.[244]

Perhaps the strained interpretation of *Mulgrew* as non-constitutionally compelled manifested itself to the *Geschwendt* court when it confronted the resolution of the retroactivity issue as determined in *United States v. Johnson*.[245] The constitutional—non-constitutional dichotomy was relied on by the *Geschwendt* plurality to preclude the application of *Johnson*.[246] The *Geschwendt* plurality defended its decision by reference to two of the three *Stovall*

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242. 475 Pa. at 275, 380 A.2d at 351.

243. Brief for Appellant at 21, Commonwealth v. Mulgrew, 475 Pa. 271, 380 A.2d 349 (1977). Mulgrew's counsel asserted:

> The punishment charge, in the absence of a charge of the court's authority over a person of unsound mind, is prejudicial and deprived Mulgrew a fair and impartial trial in that it prevented the jury from deliberating and considering the facts and consequences thereof in a fair and impartial manner.

Id. at 21.

244. *Id.*

245. United States v. Johnson, 457 U.S. 537 (1982).

246. 500 Pa. at 130, 454 A.2d at 996. *Johnson*, except where a case would be controlled by existing retroactivity precedents, called for retroactive application of a Supreme Court decision construing the fourth amendment to all convictions that were not yet final at the time the decision was rendered. 457 U.S. at 562.

factors,[247] which have traditionally been applied where determination of the retroactivity of a new constitutional rule is at issue. The plurality approached the question of whether Geschwendt enjoyed a fair trial through this discussion, relying on the *Johnson* dissent.[248] Initially, the plurality opined that *Mulgrew* was a clear break with the past which almost invariably called for non-retroactive application,[249] and that once it was determined that the new rule was unanticipated then the second and third *Stovall* factors —reliance, and effect on administration of justice—compelled a finding of non-retroactivity.[250]

The *Geschwendt* plurality thus initially explained away the plurality decision in *Johnson* in terms of the ever available constitutional—non-constitutional dichotomy. Perhaps sensing some discomfort with its characterization of *Mulgrew* as non-constitutionally compelled, however, the *Geschwendt* plurality went on to propound an alternative argument which implicitly acknowledged that the ultimate issue in *Geschwendt* was that of a fair trial.[251] Looking to the *Johnson* dissent, the plurality acknowledged that retroactive application was required where the rule change was directed at an aspect of the criminal trial that impairs its truth finding function and so raises serious questions about the accuracy of guilty verdicts in past trials.[252] How the plurality could minimize or ignore the fair trial issue, by terming *Mulgrew* a refinement in practice,[253] remains a mystery. This is especially apparent when the language of *Lyles* and *Mutina*—explicitly adopted by the *Mulgrew* court—is read and viewed with the *Geschwendt* plurality's adoption of the *Johnson* dissent's concern for the accuracy of guilty verdicts—precisely the concern voiced in *Lyles, Mutina,* and ultimately *Mulgrew.* Yet the *Geschwendt* plurality maintained that the *Johnson* dissent's demand for retroactive application of a rule designed to overcome inaccurate verdicts and impaired truth finding would be effectuated only if *Mulgrew* were given prospective application.[254] It seems more than a bit

247. 500 Pa. at 131, 454 A.2d at 997 (citing United States v. Peltier, 422 U.S. 531 (1975); Williams v. United States, 401 U.S. 646 (1971); Desist v. United States, 394 U.S. 244 (1969)).

248. 500 Pa. at 131-32, 454 A.2d at 997.

249. *Id.* at 131, 454 A.2d at 997 (citing United States v. Peltier, 422 U.S. 531 (1975)).

250. 500 Pa. at 131, 454 A.2d at 997.

251. *Id.* at 132, 454 A.2d at 997.

252. *Id.*

253. *Id.*

254. *Id.*

confusing when the *Geschwent* plurality first embraces *Mulgrew*, then denies the constitutional overtones contained in *Mulgrew* (vis-a-vis *Lyles* and *Mutina*) by deeming it a refinement in practice, but then goes on to adopt those very same constitutional concerns by invoking the *Johnson* dissent.[255]

Even as the plurality argued in the alternative, it presented an aborted *Stovall* analysis, maintaining that once it determined that the new rule was a clear break with the past and unanticipated, that the second and third *Stovall* factors—reliance by law enforcement authorities on the old standard and effect on administration of justice—a finding of prospective application necessarily followed.[256]

Exhibiting much the same weakness when purporting *Mulgrew* as a refinement in practice, as the plurality attempted to engage in a *Stovall* analysis they chose to ignore the fact that *Stovall* presents a balancing process of three factors, the first of which is the purpose to be served by the new standard.[257] It would seem that the purpose of the *Mulgrew* decision, as indicated in *Lyles* and *Mutina* was to issue a true and proper verdict—ultimately a fair trial. No balancing of the three *Stovall* factors is undertaken by the *Geschwendt* plurality. Instead, reliance is placed on authority to the effect that *Mulgrew* was unanticipated, and as such, the second and third *Stovall* factors summarily preclude retroactivity.[258] Thus, while ignoring one of the *Stovall* factors, and not fully analyzing the other two (upon which it relied to circumvent analyzing the purpose of the *Mulgrew* rule) the plurality shortsightedly asserts that it has effectively rebutted any application of *Mulgrew* even if it were constitutionally compelled. Further, the plurality, despite implicitly acknowledging otherwise, goes on to conclude that *Mulgrew* was not addressed to correct a serious flaw in the fact finding process but was only a refinement in practice. Similarly, without analysis, the plurality was able to circumvent the comment of the *Johnson* dissent, which was adopted and looked to for support by the plurality to preclude retroactivity of *Mulgrew*, that retroactive application was required where the accuracy of a guilty verdict was in doubt.[259] It is manifestly clear that

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255. *Id.*
256. *Id.* at 131, 454 A.2d at 997.
257. *Id.*
258. *Id.*
259. In the dissenting opinion, Justice Roberts noted:
Yet the opinion's limited analysis of the decision in *Commonwealth v. Mulgrew* dem-

the *Geschwendt* plurality failed to look closely at the *Mulgrew* decision. While it may be considered that the plurality was merely arguing the constitutionally compelled aspect in the alternative, it does not seem that far-fetched that the court's discomfort with the constitutional—non-constitutional aspect of retroactivity continued to manifest itself by this spontaneous, yet shallow constitutional analysis. Even when the court attempted the aforementioned analysis, it avoided a true *Stovall* analysis by making several conclusory statements that allowed the court to elude the actual balancing of *Stovall* factors. Especially apparent is its disregard for that factor demanding consideration of the purpose of the new rule.[260] The *Geschwendt* plurality's inadequate and self-serving *Stovall* analysis certainly seems to cast serious doubts upon the accuracy of the *Geschwendt* court's ultimate determination.

In his dissent, Justice Roberts noted that the number of cases in which the defense of insanity is raised is small; that those on direct review are even fewer; and that the *Mulgrew* decision governed conduct at trial, and does not effect the actions of law enforcement authorities.[261] Coupled with the rationale of *Lyles* and *Mutina* as to the purpose of the *Mulgrew* ruling, it can be readily seen that the plurality had little choice but to deem *Mulgrew* an exercise of its supervisory power, since any legitimate and full analysis engaged in by the court could have very well yielded an opposite result.

The very notions advanced hereinabove have been recently given credence by the decision in *Commonwealth v. Cabeza.*[262] The Pennsylvania Supreme Court retroactively applied *Commonwealth v. Scott*[263] in which the court abrogated the rule allowing the Commonwealth to introduce prior arrests (as opposed to convictions) where an accused had placed his character at issue.[264] The *Cabeza* majority per Justice Larsen held that where an appellate decision overrules prior law and announces a new principle, unless the decision specifically declares the rule to be prospective only, the new

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onstrates that the opinion has done little more than summarily conclude that appellant should be denied the right to the application of existing law simply because that law was established in a case other than appellant's after appellant had unsuccessfully requested similar treatment at trial.

Id. at 140, 454 A.2d at 1002 (Roberts, J., dissenting).

260. *Id.* at 142, 454 A.2d at 1003 (Roberts, J., dissenting).

261. *Id.*

262. 469 A.2d 146 (Pa. 1983).

263. 496 Pa. 188, 436 A.2d 607 (1981).

264. *Id.* at 196, 197, 436 A.2d 611, 612.

rule is to be applied retroactively to cases where the issue is properly preserved at all stages of adjudication including any direct appeal.[265] The *Cabeza* majority specifically rejected the Commonwealth's argument that the evidentiary rule established in *Scott* was not of constitutional dimensions,[266] and indicated that similarly situated persons, Scott and Cabeza, should be treated the same.[267] Interestingly enough, the majority relied on *Commonwealth v. Brown*,[268] quoting its language regarding similarly situated persons—*Brown* being the very case debunked by the *Geschwendt* plurality.[269] The *Cabeza* court noted that the only noteworthy difference between the defendants Scott and Cabeza was that Scott was argued and decided first.[270] Echoing the words of Justices Marshall and Harlan,[271] Justice Larsen stated that the question of whether to apply an enlightened rule in favor of a discredited one should not be determined by the fortuity of whose case first came before the appellate court.[272]

Perhaps *Geschwendt* is best characterized as one of those instances where the cart was placed before the horse, the plurality tried two horses (the constitutional—non-constitutional dichotomy and the alternative *Stovall* analysis), neither of which could pull the cart. Ultimately, *Geschwendt* has served no higher purpose than to further demonstrate the inconsistent, result orientated and perhaps arbitrary, nature of the decision making in this area.[273] The constitutional—non-constitutional dichotomy is a convenient concept, but it lacks the depth of analysis necessary when the concerns raised are of the weight such as those brought to face by

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265. 469 A.2d at 148.
266. *Id.* at 147.
267. *Id.* at 148.
268. 494 Pa. 380, 385, 431 A.2d 905, 907-08 (1981).
269. *See* 500 Pa. at 134, 454 A.2d at 999.
270. 469 A.2d at 148.
271. *See supra* notes 36, 116-120.
272. 469 A.2d at 148.
273. For an interesting treatment of the insanity defense in a different conceptual setting, *see* Commonwealth v. McCann, 469 A.2d 126 (Pa. 1983). The Pennsylvania Supreme Court there determined that in a prosecution for aggravated assault the trial judge did not err in failing to give sua sponte, an instruction on the consequences of a verdict of not guilty by reason of insanity. *Id.* Additionally the court stated that although there was broad language in *Mulgrew* that a jury must be instructed concerning the possible psychiatric treatment and committment of the defendant after the return of a verdict of not guilty by reason of insanity, that implicit in *Mulgrew* was the condition that the mandatory aspect is contingent upon an accused's request for that instruction. *Id.* at 128. Consequently the court denied a claim of ineffective assistance of counsel where it found a reasonable basis for trial counsel's failure to request a *Mulgrew*-type charge. *Id.*

Mulgrew and *Geschwendt*. The constitutional—non-constitutional dichotomy only tends to obfuscate the ultimate issue of whether an accused received a fair trial. Such a characterization, as *Geschwendt* aptly illustrates, only allows the court to avoid and denigrate valid constitutional claims under the guise of a cursory analysis, and a self-serving but ultimately useless label. The tragedy of a result-orientated approach lies, as *Geschwendt* aptly illustrates, with a result which should not have been reached.

Edward J. Borkowski