



1993

Constitutional Law - When Does Guilty of Third Degree Murder Equal Not Guilty by Reason of Insanity

Robert Ebby

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>



Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), and the [Law and Psychology Commons](#)

Recommended Citation

Robert Ebby, *Constitutional Law - When Does Guilty of Third Degree Murder Equal Not Guilty by Reason of Insanity*, 38 Vill. L. Rev. 1153 (1993).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol38/iss4/10>

This Issues in the Third Circuit is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

CONSTITUTIONAL LAW—WHEN DOES GUILTY OF THIRD DEGREE
MURDER EQUAL NOT GUILTY BY REASON OF INSANITY?

Geschwendt v. Ryan (1992)

I. INTRODUCTION

Although the United States Supreme Court has yet to determine whether the Constitution requires a state to recognize the special defense of insanity,¹ Pennsylvania has acknowledged the insanity defense since 1846.² The United States Court of Appeals for the Third Circuit has held that in those states that recognize the insanity defense, the Due Process Clause of the Fourteenth Amendment guarantees a defendant the right to a fair opportunity to present the defense.³ In *Geschwendt v. Ryan*,⁴ the Third Circuit, sitting en banc, addressed the issue of whether this constitutional protection requires a state to provide a special verdict of not guilty by reason of insanity for defendants who raise the insanity defense.⁵ The *Geschwendt* court held, in a five-to-four decision, that the Fourteenth Amendment offers no such protection.⁶ In reaching this conclusion, the Third Circuit adopted a new approach toward reviewing

1. See *Foucha v. Louisiana*, 112 S. Ct. 1780, 1789 (1992) (O'Connor, J., concurring) (suggesting that whether Constitution guarantees right to assert insanity defense remains open question).

2. In 1846, the Pennsylvania judiciary first instructed a jury on the insanity defense. *Commonwealth v. Reilly*, 549 A.2d 503, 507 (Pa. 1988) (discussing *Commonwealth v. Mosler*, 4 Pa. 264 (1846)). At present, only three states ban the insanity defense. See RITA J. SIMON & DAVID E. AARONSON, *THE INSANITY DEFENSE: A CRITICAL ASSESSMENT OF LAW AND POLICY IN THE POST-HINCKLEY ERA* 251-63 (1988) (noting that Idaho, Montana and Utah no longer recognize insanity defense).

3. *United States ex rel. Smith v. Baldi*, 192 F.2d 540, 545 (3d Cir. 1951) (holding that fair opportunity requires "adequate hearing" on defendant's mental capacity), *aff'd*, 344 U.S. 561 (1951).

The Fourteenth Amendment states in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Supreme Court has held that the Fourteenth Amendment incorporates the rights guaranteed by the Sixth Amendment. *Illinois v. Allen*, 397 U.S. 337, 338 (1970); see, e.g., *Washington v. Texas*, 388 U.S. 14 (1967) (compulsory process for defense witnesses); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (speedy trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (confront witnesses); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel); *In re Oliver*, 333 U.S. 257 (1948) (public trial).

4. 967 F.2d 877 (3d Cir.) (en banc), *cert. denied*, 113 S. Ct. 472 (1992).

5. *Id.*

6. *Id.* A four judge dissent maintained that the guarantees of due process rendered the failure to provide the special charge reversible error. *Id.* at 892 (Aldisert, J., dissenting).

the jury instructions of a trial court.⁷

This Casebrief discusses whether a trial court's failure to instruct the jury on the possible verdict of not guilty by reason of insanity violates the Due Process rights of a defendant asserting the insanity defense in the Third Circuit. Section II of the Casebrief provides a background of case precedent regarding the doctrine of lesser included offenses.⁸ Section III outlines the facts of the *Geschwendt* case, and section IV analyzes the *Geschwendt* court's reasoning.⁹ Finally, section V addresses the potential impact of the *Geschwendt* decision.¹⁰

II. BACKGROUND

The scope of a habeas corpus petition limits a federal court's review of alleged errors in a state trial judge's jury instructions to only those errors of constitutional magnitude.¹¹ If a reviewing court determines that an alleged error amounted to a constitutional violation, the court must subject the violation to harmless error analysis.¹²

7. For a discussion of the impact of *Geschwendt*, see *infra* notes 113-21 and accompanying text.

8. For a discussion of the lesser included offense doctrine, see *infra* notes 15-16 and accompanying text.

9. For a discussion of the *Geschwendt* case facts, see *infra* notes 42-56 and accompanying text. For a discussion of the *Geschwendt* court's reasoning, see *infra* notes 57-111 and accompanying text.

10. For a discussion of the potential impact of the *Geschwendt* decision, see *infra* notes 112-21 and accompanying text.

11. *Estelle v. McGuire*, 112 S. Ct. 475, 480 (1991). An error rises to the level of constitutional magnitude when it violates the United States Constitution. *Id.* In conducting a habeas corpus review for alleged errors in a federal district court, a review court may also grant remedies for errors that constituted violations of federal laws or treaties. *Id.*

12. *Lesko v. Owens*, 881 F.2d 44, 49 n.7 (3d Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990). Under a harmless error analysis, "it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). A reviewing court should evaluate the impact of the erroneous jury instruction in the context of the entire jury instruction. *Id.* at 146-47. In addition, the reviewing court must examine the nature of the instruction error. For example, an omission, as opposed to a misstatement of law, is less likely to be a source of reversible error. *Henderson v. Kibbe*, 431 U.S. 145, 155 (1977).

Furthermore, the Constitution guarantees the right to a fair trial, not the right to a perfect trial. *Rose v. Clark*, 478 U.S. 570, 579 (1985). When attacking a jury instruction as error, the appellant maintains the burden of proving that the alleged error "so infected the entire trial that the resulting conviction violates due process." *Cupp*, 414 U.S. at 147; *see also Kibbe*, 431 U.S. at 154 ("The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal.").

However, "even the minimal standards of due process" guarantee a defendant the opportunity to present his defense. *Irvin v. Dowd*, 366 U.S. 717, 722

A. *Supreme Court Precedent*

As early as 1895, in *Stevenson v. United States*,¹³ the United States Supreme Court recognized the doctrine of lesser included offenses.¹⁴ The lesser included offense doctrine dictates that a trial court charge the jury on the indicted charge as well as on any requested lesser included offense.¹⁵ Although the *Stevenson* Court avoided incorporating the doctrine into a due process requirement, the Court held that the failure to charge the jury on a lesser included offense that the evidence supported constituted an improper intrusion into the jury's discretion.¹⁶

Nearly one hundred years later, in *Beck v. Alabama*,¹⁷ the Supreme Court evoked the lesser included offense doctrine to invalidate an Alabama criminal statute that prohibited a jury charge on noncapital lesser included offenses in capital trials.¹⁸ The *Beck* Court concluded that the statute's exclusion of lesser included noncapital offenses tended to undermine the reliability of the jury's verdict because it presented the jury with an "all or nothing choice."¹⁹ According to the *Beck* Court, the potential for an improper verdict violated the Fourteenth Amendment's prohibition against deprivation of liberty without due process of law.²⁰

(1961) (citation omitted). "In the ultimate analysis, only the jury can strip a man of his liberty or his life." *Id.*

13. 162 U.S. 313 (1896). In *Stevenson*, defendant Stevenson was indicted and tried for first degree murder. *Id.* at 314. The trial court denied Stevenson's request for a jury charge on manslaughter, and the jury convicted Stevenson of first degree murder. *Id.*

14. *Id.* at 314.

15. *Beck v. Alabama*, 447 U.S. 625, 633 (1980). The lesser included offense doctrine developed as a common-law procedural rule. *Id.* Initially, prosecutors utilized the doctrine to increase the likelihood of conviction. *Keeble v. United States*, 412 U.S. 205, 208 (1973). Eventually, defendants employed the lesser included offense doctrine as a means of avoiding serious offense convictions. *Id.*

16. *Stevenson*, 162 U.S. at 323. The *Stevenson* Court held that the defendant, indicted for murder, was entitled to have the jury instructed on the lesser included offense of manslaughter "[i]f there were any evidence which tended to show such a state of facts as might bring the crime within the grade of manslaughter." *Id.* at 314.

17. 447 U.S. 625 (1980).

18. *Id.*

19. *Id.* Noting that a guilty verdict mandated the death penalty, the Court stressed that the jury could either release a defendant or sentence him to death. *Id.* at 642-43. The Court determined that a jury, believing a defendant guilty of a lesser included offense but lacking instructions for such offense, may convict a defendant of a higher offense simply to avoid acquitting a defendant whom they believe to be guilty of some crime. *Id.* at 637.

20. *Id.* at 629. The *Beck* Court limited its holding to capital cases in which instructions required the jury to choose between the death penalty and acquittal. *Id.* at 638 n.14. In the Third Circuit, a defendant's right to a jury instruction on a lesser included offense does not depend on whether the crime charged is a capital offense. *Vujosevic v. Rafferty*, 844 F.2d 1023 (3d Cir. 1988) (citing *Bishop v. Mazurkiewicz*, 634 F.2d 724 (3d Cir. 1980), *cert. denied*, 452 U.S. 917 (1981)). For a discussion of *Vujosevic*, see *infra* notes 37-41 and accompanying text.

Subsequently, in *Schad v. Arizona*,²¹ the Supreme Court subverted a defendant's ability to evoke the lesser included offense doctrine.²² By adopting a "ladder approach" for reviewing alleged jury instruction errors regarding the lesser included offenses, the *Schad* Court limited a defendant's ability to dictate which lesser offense will be included in the jury instructions.²³ The *Schad* Court held that a jury charge authorizing a verdict of second degree murder confirmed the reliability of the jury's actual first degree murder verdict.²⁴ Specifically, the Court noted that the availability of second degree murder and not guilty verdicts ensured the reliability of the jury's first degree murder verdict.²⁵ Thus, the Court concluded that, in a trial in which the trial judge charged the jury on the indicted offense and on a viable lesser offense, a guilty verdict for the higher offense confirmed the verdict's reliability.²⁶

In addition to considering the jury instruction's impact on the verdict, the Supreme Court has considered the instruction's impact on sentencing. In *Hicks v. Oklahoma*,²⁷ the Supreme Court held that an erroneous jury instruction that constrained the jury's discretion in its penalty deliberation violated the Fourteenth Amendment.²⁸ The

21. 111 S. Ct. 2491 (1991).

22. *Id.* at 2504-05.

23. *Id.* Under the "ladder approach," the reviewing court evaluates the reliability of the verdict by examining whether the jury bypassed a lesser offense to return a verdict for one of the higher offenses. *Id.*

24. *Id.* at 2505. In 1978, defendant *Schad* was indicted on one count of first degree murder. *Id.* at 2495. Although *Schad* requested a jury instruction on the possible verdict of theft, the trial judge instructed the jury on only three possible verdicts: first degree murder, second degree murder and not guilty. *Id.* In denying *Schad* relief, the Supreme Court distinguished *Schad*'s claim from the claim asserted in *Beck*. *Id.* at 2505. Unlike *Beck*, the *Schad* jury instructions provided the jury with the viable choice of second degree murder. *Id.* The second degree murder charge avoided the situation in *Beck* in which the jury was "faced with an all-or-nothing choice between the offense of conviction (capital murder) and innocence." *Id.* In *Schad*, the Supreme Court ignored the Arizona felony murder statute that prohibited the inclusion of a lesser included offense in the jury instructions. *Id.* at 2504-05. The Court's confidence in the reliability of the jury's verdict removed the need to address this issue. *Id.*

25. *Id.* at 2505. The *Schad* Court decided that, unlike *Beck*, it would be "irrational" to conclude that a jury convinced of both *Schad*'s innocence of murder and of his guilt of robbery would select a verdict of first degree murder rather than second degree murder to prevent *Schad*'s release into society. *Id.*

26. *Id.* The Court cautioned that ensuring verdict reliability and satisfying the *Beck* holding required evidence presented at trial to support a guilty verdict on the lesser included charge. *Id.* Otherwise, the inclusion of the lesser charge would still present the jury with an all-or-nothing choice. This issue failed to materialize in *Schad* because the "petitioner concede[d] that the evidence would have supported a second-degree murder conviction." *Id.*

27. 447 U.S. 343 (1980).

28. *Id.* In *Hicks*, the state sentencing statute provided that the jury that convicts a repeat offender also determines the offender's punishment. *Id.* at 344-45. At the conclusion of *Hicks*' trial, the judge instructed the jury members that "if they found the petitioner guilty, they 'shall assess [the] punishment at forty

Supreme Court determined that the Fourteenth Amendment protected a convicted defendant's right to have the jury determine the sentence.²⁹ The Court held that once a state established this interest, the Fourteenth Amendment protected this interest against arbitrary state deprivation.³⁰ The Supreme Court concluded that because the trial judge, rather than the jury, set the length of Hicks' sentence, the erroneous instruction violated Hicks' due process rights.³¹

B. *Third Circuit Precedent*

Although the *Stevenson* Court limited the scope of the lesser included offense doctrine to encompass only offenses supported by the evidence, in 1974 the Third Circuit expanded the doctrine to provide greater protection for defendants.³² In *United States ex rel. Matthews v. Johnson*,³³ the Third Circuit held that, where the decision whether to charge the jury on a lesser offense was solely within the trial court's discretion, due process required a trial judge to instruct the jury on a requested lesser included offense even if the facts did not support a verdict for the lesser offense.³⁴ In holding that the failure to charge the jury on the lesser included offense did not constitute harmless error, the *Matthews* court emphasized that the availability of the requested lesser included offense would have created a "reasonable possibility" of a compromise verdict.³⁵ In *Geschwendt*, however, the Third Circuit overruled

(40) years imprisonment.' " *Id.* The Supreme Court declared the 40 year sentence provision unconstitutional subsequent to Hicks' conviction. *Id.* at 345 (citing *Thigpen v. State*, 571 P.2d 467 (Okla. Crim. App. 1977)).

29. *Hicks*, 447 U.S. at 346. The *Hicks* Court concluded that the 40 year directive denied the jury the opportunity to exercise its authorized sentencing discretion. *Id.* at 346-47.

30. *Id.* at 346.

31. *Id.* at 347.

32. *United States ex rel. Matthews v. Johnson*, 503 F.2d 339 (3d Cir. 1974) (en banc), *cert. denied*, 420 U.S. 952 (1975), *overruled by* *Geschwendt v. Ryan*, 967 F.2d 877 (3d Cir.) (en banc), *cert. denied*, 113 S. Ct. 472 (1992).

33. *Id.*

34. *Id.* At the time of Matthews' trial, Pennsylvania law, in the absence of evidence of "passion or provocation," committed to the discretion of the trial judge the decision of whether to charge the jury on voluntary manslaughter. *Id.* at 341 (quoting *Commonwealth v. Matthews*, 285 A.2d 510 (Pa. 1971)). In *Matthews*, the defense requested a jury instruction on the possible verdict of voluntary manslaughter. *Id.* at 342. The trial court denied Matthews' request and instructed the jury on first and second degree murder and not guilty verdicts. *Id.* The jury returned a first degree murder verdict. *Id.* at 346. Although Matthews also raised the issue of equal protection under the Fourteenth Amendment, the *Matthews* court refrained from addressing the issue. *Id.* at 340.

35. *Id.* at 346. The *Matthews* court concluded that an instruction on the lesser included offense (voluntary manslaughter) might have encouraged the jury to return a compromise verdict of second degree murder. *Id.* The *Matthews* court rejected the state's argument that the jury's first degree murder verdict rather than second degree murder rendered any due process violation harmless error. *Id.*

Matthews.³⁶

Prior to the *Geschwendt* decision, in *Vujosevic v. Rafferty*,³⁷ the Third Circuit reaffirmed that due process incorporates the lesser included offense doctrine.³⁸ In addition, the *Vujosevic* court determined that a jury instruction on a lesser included offense other than that requested by the defendant might not render harmless the trial court's failure to provide the requested charge.³⁹ Because the evidence failed to support the lesser included offense charged (manslaughter), the *Vujosevic* court concluded that the trial court's error was not harmless beyond a reasonable doubt.⁴⁰ Thus, the Third Circuit held that a jury charge on a lesser in-

Subsequently, in 1980, the Third Circuit held that where the state legislature provides the trial court with jury instruction guidelines, due process guarantees a defendant the right to have the jury instructed on a lesser included offense where the "proposed instruction has rational support in the evidence." *Bishop v. Mazurkiewicz*, 634 F.2d 724, 725 (3d Cir. 1980), *cert. denied*, 452 U.S. 917 (1981). However, the *Geschwendt* court determined that *Matthews* had been overruled by *Schad. Geschwendt*, 967 F.2d at 884 n.13.

36. *Geschwendt*, 967 F.2d at 885 n.13.

37. 844 F.2d 1023 (3d Cir. 1988).

38. *Id.* at 1026-27. In 1982, *Vujosevic* was convicted of aggravated manslaughter. *Id.* As his defense, *Vujosevic* admitted that he had assaulted, but not killed, the victim. *Id.* The trial court denied *Vujosevic's* request for a jury instruction on the lesser included offense of aggravated assault. *Id.* Instead, the trial court instructed the jury on the possible verdicts of murder, aggravated manslaughter and manslaughter. *Id.*

Although *Vujosevic* had the burden of proving that the trial court's error rose to the level of a constitutional violation, the Third Circuit noted that *Beck v. Alabama* and *Bishop v. Mazurkiewicz* previously established that the failure to charge on a viable lesser included offense constitutes a due process violation. *Id.* at 1028 n.1. *But cf.* *Beck v. Alabama*, 447 U.S. 625, 637 (1980) (noting that Supreme Court has never held due process guarantees right to lesser included offenses). The *Vujosevic* court emphasized that the lesser included offense doctrine protected against an improper conviction. *Vujosevic*, 844 F.2d at 1028 n.1. The availability of the lesser included offense reduced the possibility that a jury doubting the defendant's guilt of the specific crime would convict a defendant only to prevent his acquittal. *Id.*

39. *Vujosevic*, 844 F.2d at 1027-28. Noting that *Vujosevic* based his defense on guilt of assault rather than murder, the Third Circuit stressed that the failure to provide the aggravated assault charge denied *Vujosevic* the opportunity to have the jury recognize his defense. *Id.* at 1028. The *Vujosevic* court concluded that the jury charge included no viable lesser offense because the evidence conclusively demonstrated that the defendant possessed a mental state inconsistent with that required for the lesser included offense charged. *Id.*

40. *Id.* at 1028. Specifically, the *Vujosevic* court determined that the manslaughter charge did not ensure the reliability of the jury's verdict because the charge did not constitute "a constitutionally adequate substitute" for a lesser included offense instruction. *Id.* *Vujosevic's* own admission that he knowingly and purposely attempted to harm the victim made the offense of manslaughter "nonsensical" because manslaughter requires a *less specific* mental state of only recklessness or heat of passion. *Id.* The trial judge's failure to "offer the jury a rational compromise between aggravated manslaughter and acquittal" precluded the *Vujosevic* court from concluding that the jury would have rendered the same verdict if given the proper instruction. *Id.*

cluded offense that was not supported by the evidence failed to satisfy the lesser included offense doctrine.⁴¹

III. CASE FACTS

On March 12, 1976 George Geschwendt, a twenty-four year old resident of Bensalem, Pennsylvania broke into the Abt family residence.⁴² Finding the house empty, Geschwendt, armed with a .22 caliber handgun, awaited the return of the Abt family.⁴³ Upon their arrival home, Geschwendt shot and killed five of the Abts and one of the Abts' friends.⁴⁴ After storing the six bodies in the Abt's basement, Geschwendt returned to his own home across the street.⁴⁵ Ten days later, during the course of police questioning about his handgun, Geschwendt confessed to the killings.⁴⁶

In July of 1976, Geschwendt stood trial on six counts of murder.⁴⁷ Throughout the trial Geschwendt did not contest the evidence that he killed the six victims but instead asserted the insanity defense.⁴⁸ As part of this defense, Geschwendt requested that the trial judge provide a jury charge on the special verdict of not guilty by reason of insanity.⁴⁹ The

41. *Id.* at 1027-28. Subsequently, in 1992, the *Geschwendt* court questioned the precedential value of *Vujosevic*. *Geschwendt*, 967 F.2d at 884 n.13. For a discussion of the impact of *Geschwendt* on the precedential value of *Vujosevic*, see *infra* note 117.

42. *Geschwendt v. Ryan*, No. CIV.A.90-4043, 1991 WL 37845, at *1 (E.D. Pa. Mar. 20, 1991).

43. *Geschwendt*, 967 F.2d at 879.

44. *Id.*

45. *Id.* In planning and executing the killings, Geschwendt sought to avoid detection. *Id.* Prior to the shootings, Geschwendt reported his .22 caliber handgun as stolen. *Id.* Following the killings, Geschwendt used a roundabout route from the Abt residence to his own house. *Commonwealth v. Geschwendt*, 454 A.2d 991, 993 (Pa. 1982). The day after the killings, Geschwendt washed his bloodstained clothes and then gave them away to charity. *Id.* Three days later, Geschwendt disposed of the handgun, the empty ammunition shells and the remaining live ammunition by throwing them into a local creek. *Id.*

46. *Geschwendt*, 454 A.2d at 993.

47. *Geschwendt*, 967 F.2d at 879.

48. *Id.*

49. *Id.* at 898. (Aldisert, J., dissenting). Geschwendt also requested an instruction on the consequences of a not guilty by reason of insanity verdict. *Id.* (Aldisert, J., dissenting). Subsequent to Geschwendt's trial, the Pennsylvania Supreme Court issued two opinions that addressed the right to such an instruction. In *Commonwealth v. Mulgrew*, 380 A.2d 349 (Pa. 1977), the Pennsylvania Supreme Court held that Pennsylvania substantive law requires a trial judge to instruct the jury on the consequences of a verdict of not guilty by reason of insanity in trials in which insanity is an issue. *Id.* at 351-52. Ten years later, in *Commonwealth v. Gass*, 523 A.2d 741 (Pa. 1987), the Pennsylvania Supreme Court held that a defense counsel's failure to request a charge on the verdict of not guilty by reason of insanity constitutes a violation of the Sixth Amendment guarantee to adequate counsel. *Gass*, 523 A.2d at 744. Geschwendt, however, failed to raise the Sixth Amendment issue in his Third Circuit appeal. *Geschwendt*, 967 F.2d at 882.

trial judge denied this request.⁵⁰ Instead, the judge instructed the jury on four possible verdicts: 1) guilty of first degree murder, 2) guilty of third degree murder, 3) guilty of voluntary manslaughter and 4) not guilty.⁵¹ The jury convicted Geschwendt of first degree murder on all six counts, and in a separate penalty phase the jury rendered six death penalty verdicts.⁵²

After appealing his conviction through the state courts,⁵³

50. Although the trial judge did not explain his refusal to instruct the jury on the requested charge, the federal district court stated:

As has been observed on several occasions, the reluctance to specifically direct the jury's attention to the option of a not guilty by reason of insanity verdict was not based on a mean-spirited intention to sabotage successful insanity defenses. It was based on concern over the effect that such an instruction might have on a jury's understanding of the burden of proof regarding insanity.

Geschwendt v. Ryan, No. CIV.A.90-4043, 1991 WL 37845, at *4 (E.D. Pa. Mar. 20, 1991).

51. *Geschwendt*, 967 F.2d at 880.

52. *Id.* Subsequently, Geschwendt's penalty was reduced to life imprisonment after the Supreme Court of Pennsylvania invalidated the death penalty in *Commonwealth v. Moody*, 382 A.2d 442 (Pa. 1977), *cert. denied*, 438 U.S. 914 (1978). *Geschwendt*, 967 F.2d at 881.

53. Geschwendt first appealed his conviction to the Superior Court of Pennsylvania. *Commonwealth v. Geschwendt*, 412 A.2d 595, 597 (Pa. Super. Ct. 1979). Geschwendt raised seven arguments of error before the superior court: 1) the trial judge failed to charge the jury on the consequences of a verdict of not guilty by reason of insanity, 2) the trial judge refused to charge the jury with the defense counsel's definition of insanity, 3) the trial judge excluded both attorneys and physicians from serving on the jury, 4) the trial judge limited the defense counsel's voir dire examination, 5) the trial judge denied defense counsel's request for change of venue, 6) the trial judge admitted photographs of the crime scene and 7) the trial judge admitted Geschwendt's confession. *Id.* at 597-98.

The superior court affirmed Geschwendt's conviction. *Id.* at 598. The superior court focused on Geschwendt's claim that the trial court's refusal to instruct the jury on the consequence of a not guilty by reason of insanity verdict constituted reversible error. *Id.* at 597. The court noted that the Pennsylvania Supreme Court, in *Commonwealth v. Mulgrew*, established that Pennsylvania law requires a trial court to instruct on the consequences of a not guilty by reason of insanity verdict. *Id.* The superior court determined, however, that prior to the *Mulgrew* decision, Pennsylvania law did not direct the trial court to provide such an instruction. *Id.* Furthermore, the superior court concluded that the *Mulgrew* decision could not be applied retroactively because *Mulgrew* did not involve a constitutional issue. *Id.* For a discussion of the retroactive application of subsequent rulings on criminal procedure in the Third Circuit, see *United States v. Zirpolo*, 450 F.2d 424, 432-33 (3d Cir. 1971) (quoting *Stovall v. Denno*, 388 U.S. 293, 297 (1967) and stating that court should consider purpose of new procedure, reliance on invalidated procedure and administrative effect of retroactive application). In addition, the superior court ruled that the trial judge had instructed the jury on the possible verdict of not guilty by reason of insanity. *Geschwendt*, 412 A.2d at 597.

The Pennsylvania Supreme Court subsequently affirmed Geschwendt's conviction. *Geschwendt*, 454 A.2d at 991. In his appeal to the Pennsylvania Supreme Court, Geschwendt raised six points of error: 1) the trial judge's refusal to honor his request for a jury charge on the possible consequences of a not guilty

Geschwendt applied to the United States District Court for the Eastern District of Pennsylvania for a writ of habeas corpus.⁵⁴ The district court denied Geschwendt relief.⁵⁵ Geschwendt subsequently appealed to the United States Court of Appeals for the Third Circuit.⁵⁶

by reason of insanity verdict, 2) the admission of his confession, 3) the trial judge's failure to honor his request for an expanded definition of insanity, 4) the admission of photographs of the crime scene, 5) the admission of testimony of one of the Commonwealth's rebuttable witnesses and 6) the trial judge's refusal to grant request for change of venue. *Id.* at 992 & n.2. Holding that *Mulgrew* should not receive retroactive application, the Pennsylvania Supreme Court affirmed Geschwendt's conviction. *Geschwendt*, 454 A.2d at 999. The court dismissed Geschwendt's other charges of error as meritless. *Id.* at 992 n.2.

Justice Roberts, joined by Chief Justice O'Brien and Justice Flaherty dissented. *Id.* at 999 (Roberts, J. dissenting). The dissent focused on the trial court's refusal to charge the jury on the possible verdict of not guilty by reason of insanity and determined this refusal to be reversible error. *Id.* at 1001 (Roberts, J., dissenting). Specifically, the dissent maintained that the plurality's discussion of the application of *Mulgrew* was misdirected. *Id.* at 999-1000 (Roberts, J., dissenting). The dissent also contested the plurality's holding that *Mulgrew* did not apply retroactively. *Id.* at 1001-02 (Roberts, J., dissenting).

54. *Geschwendt v. Ryan*, No. CIV.A.90-4043, 1991 WL 37845, at *1 (E.D. Pa. Mar. 20, 1991). Geschwendt filed the petition under 28 U.S.C. § 2254. *Geschwendt*, 1991 WL 37845, at *1. In this petition Geschwendt raised five claims of error: 1) failure to suppress Geschwendt's confession, 2) failure to instruct the jury on both the availability and consequences of an alternative verdict of not guilty by reason of insanity, 3) failure to suppress photographs of the crime scene, 4) failure to exclude the testimony of one of the Commonwealth's rebuttable witnesses and 5) failure to change venue. *Id.* at *3. United States Magistrate Judge Faith Angell first reviewed the petition and recommended granting Geschwendt's petition on the basis of his second claim. Brief for Appellant at 32A, *Geschwendt*, 967 F.2d 877 (No. 91-1244). Magistrate Angell stated:

Insanity being a defense under Pennsylvania law, due process guarantees every defendant their [sic] opportunity to present this defense. *United States ex rel. Smith v. Baldi*, 192 F.2d at 544 (3d Cir. 1951). As the omission in the instant case went directly to the central purpose of Petitioner's criminal trial, namely Petitioner's mental capacity to form the intent to commit the murders, the trial court's error so infected the entire trial that Petitioner's conviction violated due process.

Id. at 47A-48A (quoting *Geschwendt v. Ryan*, No. CIV.A.90-4043, 1991 WL 37845 (E.D. Pa. Mar. 20, 1991)).

55. *Geschwendt*, 1991 WL 37845, at *1. The district court rejected Magistrate Judge Angell's recommendation and denied Geschwendt's petition. *Id.* at *7. First, the district court concluded that Geschwendt had not exhausted the alternative verdict claim in the state courts. *Id.* at *4. The court recognized that prudential limitations prohibited the federal court from ruling on the claim. *Id.* Second, the district court concluded that even if the alternative verdict claim had properly been before the court, Pennsylvania law did not require an instruction on the alternative verdict. *Id.*

56. *Geschwendt*, 967 F.2d 877. Initially, the Third Circuit determined that Geschwendt had suffered a violation of his due process rights. *Geschwendt v. Ryan*, No. 91-1244, 1991 U.S. App. LEXIS 26568, at *1 (3d Cir. Nov. 7, 1991), *reh'g granted*, (December 11, 1991), *vacated*, 967 F.2d 877 (3d Cir. 1992). On reargument, however, the Third Circuit concluded that Geschwendt had suffered no prejudicial error. *Geschwendt*, 967 F.2d at 891. For a discussion of the

IV. DISCUSSION

A. *The Geschwendt Majority Opinion*

In reviewing Geschwendt's appeal, the Third Circuit focused on Geschwendt's assertion that the trial court's refusal to instruct the jury on the possible verdict of not guilty by reason of insanity violated his due process rights.⁵⁷ The Third Circuit employed a three pronged approach to evaluate the alleged error.⁵⁸ First, the Third Circuit examined the impact of the trial court's jury instruction.⁵⁹ Second, the *Geschwendt* court applied a harmless error analysis.⁶⁰ Finally, the *Geschwendt* court assessed the appeal under the limits of federal habeas corpus review.⁶¹ Based on this analysis, the Third Circuit rejected Geschwendt's appeal for "three independent reasons."⁶²

1. *Impact of the Verdict Form*

In evaluating Geschwendt's appeal, the Third Circuit presumed, without deciding, that Pennsylvania substantive law entitled Geschwendt to have the jury consider the special verdict of not guilty by reason of insanity.⁶³ Even under this presumption, Geschwendt's failure to contest the evidence that he had killed the victims, in addition to his reliance

Third Circuit's reasons for refusing Geschwendt relief, see *infra* notes 57-89 and accompanying text.

57. *Geschwendt*, 967 F.2d at 882. On appeal to the Third Circuit, Geschwendt also asserted as a point of error his counsel's failure to properly raise, on direct appeal, the denied instruction as error. *Id.* Although the Third Circuit noted that it need not consider this claim because Geschwendt failed to raise it in the lower courts, the Third Circuit concluded that Geschwendt's counsel had necessarily raised the argument on direct appeal. *Id.* at 890-91 & 890 n.23.

58. For a discussion of the majority's approach, see *infra* notes 57-89 and accompanying text.

59. *Geschwendt*, 967 F.2d at 882-83.

60. *Id.* at 883-88. The court observed:

Schad teaches us that, in cases involving offenses on a ladder, if the trial court wrongfully refuses to charge the offense at the bottom rung, that error is harmless provided the jury returns a guilty verdict for an offense higher up rather than for an intermediate offense which is also charged.

Id. at 884. The court concluded:

even assuming that the jury had not been given the option of returning a verdict of not guilty by reason of insanity [in the present case], its guilty verdict is similarly reliable because the jury did not return a guilty verdict for either of the lesser included offenses, third degree murder or voluntary manslaughter.

Id. at 885.

61. *Id.* at 888-90.

62. *Id.* at 891.

63. *Id.* at 883-88. Although the court refrained from deciding whether the trial court's refusal was indeed error, the Third Circuit's decision implied that Pennsylvania law did not mandate such an instruction. *Id.* at 883. Noting that Pennsylvania law did not require instructions on the consequences of an insanity verdict at the time of Geschwendt's trial, the *Geschwendt* court suggested that the

on insanity as his sole defense, persuaded the Third Circuit that a general not guilty verdict would have been tantamount to a special verdict of not guilty by reason of insanity.⁶⁴ Thus, the Third Circuit concluded that even if Pennsylvania law required an explicit instruction on the verdict of not guilty by reason of insanity, the trial court's charge, when read as a whole, satisfied the essence of the state law requirement by providing a de facto verdict of not guilty by reason of insanity.⁶⁵

Although the Third Circuit acknowledged that the trial court's failure to provide an explicit instruction on the insanity defense provided sufficient grounds for a state court reversal, the limits of the habeas corpus review precluded the Third Circuit from reversing Geschwendt's conviction without a determination that Geschwendt had suffered a due process violation.⁶⁶ The Third Circuit decided that a due process violation could only materialize if the jury had inferred that a general not guilty verdict, as opposed to a special verdict of not guilty by reason of

jury's ignorance of the consequences of an insanity verdict rendered a special verdict meaningless. *Id.*

Nonetheless, the Third Circuit proceeded to evaluate Geschwendt's claim under the assumption that Pennsylvania law did require the special charge. *Id.* Although the majority failed to explain the origin of the state requirement, the dissent argued that two Pennsylvania statutes mandated the charge on the special verdict of not guilty by reason of insanity. For a discussion of the statutory provisions, see *infra* note 105.

64. *Geschwendt*, 967 F.2d at 882-83. Geschwendt not only failed to challenge the state's evidence that he had caused the victims' deaths, he actually confessed to committing the killings. *Id.* at 879.

65. *Id.* at 883. In part, the trial judge instructed the jury:

In view of what I have said regarding the legal test of insanity and the Commonwealth's burden of proof, you cannot find the defendant guilty unless you are satisfied beyond a reasonable doubt that at the time of the killing either the defendant had no mental disease or defect or, if he did have a mental disease or defect, that he was not as a result of such disease or defect, incapable of knowing what he was doing or of judging that it was wrong to do what you conclude he did.

Brief for Appellant at 108A, *Geschwendt*, 967 F.2d 877 (No. 91-1244).

The Third Circuit noted that reading the jury instructions to encompass the verdict of not guilty by reason of insanity was in accord with the Pennsylvania State court decisions. *Geschwendt*, 967 F.2d at 883. The Pennsylvania Supreme Court plurality stated that Geschwendt's assertion that the verdict of not guilty by reason of insanity was unavailable was not "supported by the record when the charge is viewed as a whole." *Geschwendt*, 454 A.2d 991, 999 n.8 (Pa. 1982). The Pennsylvania Superior Court concluded that the trial instructions provided the jury the options of conviction or "not guilty by reason insanity." *Id.* In total, the trial court instructed the jury:

five times that the Commonwealth bore the burden of proving Geschwendt guilty beyond a reasonable doubt, three times that the Commonwealth bore the burden of proving Geschwendt sane beyond a reasonable doubt, and three times that, if the Commonwealth failed to prove Geschwendt sane beyond a reasonable doubt, the jury should find him not guilty.

Geschwendt, 967 F.2d at 880.

66. *Geschwendt*, 967 F.2d at 883. For a discussion of the limits of federal habeas corpus review, see *infra* notes 81-89 and accompanying text.

insanity, would have resulted in Geschwendt's release back into society.⁶⁷

The Third Circuit determined that, based on the jury instructions, the form of the not guilty verdict did not improperly influence the *Geschwendt* jury.⁶⁸ The Third Circuit concluded, therefore, that if the trial court's failure to instruct the jury on the special insanity verdict was indeed error, such error was only one of state law.⁶⁹

2. Harmless Error Analysis

Notwithstanding its determination that the trial court's instruction satisfied Geschwendt's procedural due process rights, the Third Circuit evaluated whether the alleged procedural error deprived Geschwendt of his substantive due process rights.⁷⁰ The Third Circuit concluded that even if the trial court's refusal to instruct on the insanity verdict amounted to a procedural due process violation, Geschwendt did not suffer a substantive due process violation for two reasons.⁷¹

First, the Third Circuit conducted a harmless error analysis under the reasoning of *Schad v. Arizona*.⁷² The jury's first degree murder verdict rather than a verdict for one of the lesser included offenses (third degree murder or voluntary manslaughter) convinced the Third Circuit that the failure to charge on the insanity verdict, if error, amounted to only harmless error.⁷³ Specifically, the Third Circuit stated that it would

67. *Geschwendt*, 967 F.2d at 883.

68. *Id.* The Third Circuit found "no basis for such a conclusion, as we are confident that in this case the jury would have recognized that the reason for a not guilty verdict could not have been misunderstood." *Id.*

69. *Id.*

70. *Id.* In evaluating whether Geschwendt had suffered a substantive due process violation, the Third Circuit assumed (contrary to its conclusions) that Geschwendt had suffered a procedural due process violation. *Id.*

71. For a discussion of the majority's harmless error analysis, see *infra* notes 72-80 and accompanying text.

72. *Geschwendt*, 967 F.2d at 883. For a discussion of *Schad*, see *supra* notes 21-26 and accompanying text.

73. *Geschwendt*, 967 F.2d at 885. The *Geschwendt* majority focused on the third degree murder charge and recognized that the same analysis would hold true for the manslaughter charge. *Id.* at 885 n.14. The Third Circuit dismissed Geschwendt's contention that the evidence did not support the charge of third degree murder. *Id.* at 884 n.13. Moreover, the Third Circuit stated that by introducing evidence of insanity rather than contesting his role in the killings, Geschwendt provided the jury with sufficient evidence to find him guilty of third degree manslaughter. *Id.* at 886. The Third Circuit stated: "It would defy logic to hold that the jury could not have used this evidence to reach a conclusion that Geschwendt had diminished capacity and was therefore guilty of third degree murder." *Id.*

The Third Circuit also discounted Geschwendt's argument that the jury instructions precluded the use of a diminished capacity defense. *Id.* According to the Third Circuit, if the jury dismissed the evidence of Geschwendt's insanity because it believed him sane, a jury instruction on the defense of insanity would not have yielded a different result. *Id.* If, on the other hand, the evidence had

be "irrational" to conclude that the same jury that had selected first degree murder rather than third degree murder would, if given the option, select acquittal by reason of insanity.⁷⁴

Although the *Geschwendt* court noted that, unlike the defendant in *Schad*, *Geschwendt* sought an instruction on a defense rather than on a lesser included crime, the court's obligation "to follow both the 'reasoning and [the] result' in *Schad*" negated the significance of this distinction.⁷⁵ Furthermore, the Third Circuit reduced the significance of any distinction between third degree murder and the insanity defense by noting that each reduces the defendant's potential responsibility based on his mental capacity.⁷⁶ According to the *Geschwendt* majority, the jury's rejection of third degree murder confirmed the jury's determination that *Geschwendt* was indeed sane and should be held fully responsible for his actions.⁷⁷

In addition to the *Schad* analysis, the *Geschwendt* court viewed the jury's selection of six death penalties rather than a sentence of life im-

persuaded the jury that *Geschwendt* suffered from a reduced mental capacity, the third degree murder option provided the jury with an option to express its belief in *Geschwendt*'s diminished capacity. *Id.* Thus, the Third Circuit adopted the *Schad* ladder approach to measure the reliability of the *Geschwendt* verdict. *Id.* at 884-86.

74. *Id.* at 887.

75. *Id.* at 885 (citing *Planned Parenthood v. Casey*, 947 F.2d 682, 692 (3d Cir. 1991), *aff'd in part, rev'd in part*, 112 S. Ct. 2791 (1991), *injection clarified by* No. CIV.A.88-3228, 1993 WL 213047 (E.D. Pa. June 7, 1993)).

76. *Id.* at 886. Specifically, the court noted that the trial judge directed the jury to consider any mental defect in determining its verdict. *Id.* The trial judge stated:

If you [jury] conclude that the defendant did not possess the capacity to form this specific intent to take life, due to a mental defect or disease, that is to say, that he did not possess the capacity to enter into a deliberately premeditated killing, then for those reasons you would not be justified and could not return a conviction of murder in the first degree against him for there would be no rhyme or reason, no logical escape from a proposition that a person cannot be guilty of wilful, deliberate and premeditated killing when he did not act deliberate, premeditated and was not wilful for he was incapable of mentally doing so. If you find that he did not possess sufficient mental capacity to form this specific intent to kill, but nevertheless the killing did result from his act, and he was sane, then this inability to form such an intent would reduce the killing from first degree murder to third degree murder, and that should be your verdict.

Brief for Appellant at 109A, *Geschwendt*, 967 F.2d 877 (No. 91-1244).

The *Geschwendt* court further argued that the third degree murder option adequately addressed *Geschwendt*'s mental capacity. *Geschwendt*, 967 F.2d at 886-87. Whereas the insanity charge would have explained that an inability to form the required mental intent exculpated the defendant, the third degree murder charge provided the jury with the guilty verdict option consistent with a belief that *Geschwendt* lacked the mental capacity and intent required for first degree murder. *Id.*

77. *Geschwendt*, 967 F.2d at 887.

prisonment as further evidence of the reliability of the verdict.⁷⁸ The Third Circuit found it inconceivable that a jury that improperly returned a verdict of first degree murder out of fear that a not guilty verdict would release an insane defendant into society would then select six death penalty counts rather than a sentence of life imprisonment.⁷⁹ The jury's repudiation of a verdict on the lesser offense combined with the jury's death penalty sentence to confirm the reliability of the verdict and render harmless any error in the trial court's instruction.⁸⁰

3. *The Limits of Habeas Corpus Review*

In addition to its review of the jury instruction and its harmless error analysis, the Third Circuit concluded that the limits of a habeas corpus petition provided a third, independent basis for denying *Geschwendt* relief.⁸¹ The limits of the habeas corpus petition precluded the Third Circuit from granting *Geschwendt* a new trial unless he had suffered a violation of his due process rights.⁸² The Third Circuit found no such violation.⁸³

According to the Third Circuit, the Fourteenth Amendment does not guarantee a defendant raising the insanity defense the right to a jury instruction on the special verdict of not guilty by reason of insanity.⁸⁴ Therefore, whether a state elects to provide for such a charge is a decision beyond the reach of the Fourteenth Amendment and is solely within the discretion of the state legislature.⁸⁵

Furthermore, the *Geschwendt* court noted that the form of a verdict need not alter the consequences of an acquittal based on insanity.⁸⁶

78. *Id.*

79. *Id.* at 887-88. Although the Third Circuit acknowledged that its conclusion was not based on any authority, the *Geschwendt* court stated:

The actual issue is whether a jury which would have returned a verdict of not guilty by reason of insanity if it could have done so would, when denied that option, vote to have an insane man executed rather than sentence him to life imprisonment or convict him of a noncapital offense. This question cannot be reasonably answered affirmatively.

Id. at 888 (footnote omitted).

80. *Id.* at 888. The *Geschwendt* majority questioned: "Why then did this jury find *Geschwendt* guilty of six murders in the first degree and sentence him to die six times? The answer is obvious. It found that the Commonwealth had established beyond a reasonable doubt that *Geschwendt* was sane." *Id.*

81. *Id.*

82. *Id.* at 888-89.

83. *Id.* at 889-90.

84. *Id.* In conducting the Fourteenth Amendment analysis, the court again assumed that a) state law required a charge on the insanity verdict and b) the trial court's instruction did not provide a de facto insanity verdict. *Id.*

85. *Id.* at 890. The Third Circuit found no authority suggesting that a state must accommodate, under the Due Process Clause, a request for a charge on a verdict of not guilty by reason of insanity. *Id.* at 889.

86. *Id.* at 890. Noting that a state could initiate commitment proceedings in response to either a general verdict of not guilty or a special verdict of not guilty

The Third Circuit recognized that a state could commit to a state hospital a defendant acquitted on the basis of insanity regardless of whether the jury articulated the insanity acquittal in a special or general verdict.⁸⁷ Specifically, the *Geschwendt* court ruled that any distinction between a general and special not guilty verdict did not influence the *Geschwendt* jury.⁸⁸ The failure of the Fourteenth Amendment to require a special verdict charge and the conclusion that the trial court's charge failed to improperly constrain the jury's decision combined to deprive the Third Circuit of jurisdiction to grant *Geschwendt* a remedy because this was beyond the scope of habeas review.⁸⁹

B. *The Geschwendt Dissenting Opinion*

The dissent rejected the majority's conclusion that *Geschwendt* had not suffered a prejudicial constitutional violation.⁹⁰ Rather than adopting the majority's analysis of whether the trial court's instructions satisfied the lesser included offense doctrine, the dissent argued that the proper issue on appeal was whether the trial court had provided *Geschwendt* a fair opportunity to present his defense.⁹¹ According to the dissent, the majority reached the wrong result because it had addressed *Geschwendt*'s appeal applying the wrong analytical framework.⁹²

by insanity, the *Geschwendt* majority determined that the form of the not guilty verdict did not affect the defendant's substantive due process liberty interest. *Id.* at 889-90. A commitment proceeding would eliminate the chance that a jury would convict an insane defendant solely to keep him off the streets. *Id.* By removing the potential that the form of the verdict instruction could influence a jury, the absence of a special verdict would not constitute a due process violation because a general not guilty verdict would not improperly influence the jury. *Id.* at 890.

87. *Id.* at 889-90.

88. *Id.* at 890. The Third Circuit emphasized that the trial court's instructions directed the jury to find *Geschwendt* guilty of first degree murder only if the State had proved beyond a reasonable doubt all elements of the crime, including *Geschwendt*'s mental state. *Id.* Even assuming that the denial to provide the requested instruction was error, the *Geschwendt* majority found no deprivation of due process of liberty because the trial court's jury instructions did not compel the jury to find *Geschwendt* guilty on any charge. *Id.*

The *Geschwendt* majority reasoned that the trial court's instructions indicated that if the State failed to prove the required first degree murder mental state, the jury should find *Geschwendt* not guilty on that charge. *Id.* Therefore, though the trial court neglected to instruct the jury on insanity, the alleged error "did not compel the jury to reach a result that it might have otherwise rejected." *Id.*

89. *Id.* at 890. The *Geschwendt* court concluded that if the trial court had committed error, such error violated state law only and did not rise to the level of a violation of the federal constitution. *Id.*

90. *Id.* at 892 (Aldisert, J., dissenting). Judge Aldisert, joined by Judges Stapelton, Cowen and Roth, dissented in *Geschwendt*. *Id.* at 891 (Aldisert, J., dissenting).

91. *Id.* at 893 (Aldisert, J., dissenting).

92. *Id.* (Aldisert, J., dissenting). "The majority improperly confuse defense

1. *Inapplicability of Schad v. Arizona*

First, the dissent repudiated the applicability of *Schad*.⁹³ According to the dissent, *Schad* controls cases involving a range of possible lesser included offenses, not the right to an acquittal based on a special verdict of not guilty by reason of insanity.⁹⁴ Noting that "being acquitted is neither the jurisprudential nor the due process equivalent of being convicted of a lesser-included offense," the dissent rejected the application of a *Schad* analysis to Geschwendt's appeal.⁹⁵

Notwithstanding its conclusion that *Schad* was inapposite to the case before it, the dissent argued that analyzing Geschwendt's appeal under the principles of *Schad* still produced a conclusion of prejudicial error for two reasons.⁹⁶ First, the dissent asserted that the evidence in *Geschwendt* failed to support either the third degree murder or voluntary manslaughter charge.⁹⁷ Because the *Schad* harmless error analysis required that the evidence support a verdict on the lesser included offense, the lack of supporting evidence for the lesser included offenses in

apples with lesser-included offense oranges." *Id.* at 893 (Aldisert, J., dissenting). According to the dissent, the Fourteenth Amendment guarantees a defendant the opportunity to become a "committed acquittee." *Id.* at 895-96 (Aldisert, J., dissenting). The dissent stated:

Based on the Supreme Court's teachings, there is no doubt that when a defendant is denied the opportunity of becoming a committed acquittee and of being placed in a mental institution until he has recovered his sanity or is no longer dangerous and instead is given only the option of the death penalty or of serving six life terms in a penal institution, that individual has been denied due process.

Id. at 896 (Aldisert, J., dissenting).

93. *Id.* at 892 (Aldisert, J., dissenting).

94. *Id.* at 892-93 (Aldisert, J., dissenting). "*Schad* discusses only a range of possible guilty verdicts; there is not one whit or tittle about acquittees." *Id.* at 892 (Aldisert, J., dissenting).

95. *Id.* at 893 (Aldisert, J., dissenting).

96. *Id.* (Aldisert, J., dissenting). The dissent adopted this assumption to further expose the flaws in the majority's analysis. *Id.* (Aldisert, J., dissenting).

97. *Id.* at 893-94 (Aldisert, J., dissenting). As part of its charge to the jury, the trial judge stated:

Murder of the third degree includes all unlawful killings under circumstances of depravity of heart, disposition of mind regardless of social duty, but where no intent to kill exists or can reasonably and fully be inferred. The distinguishing feature between murder of the first degree and murder of the third degree is that there is no specific intent to kill in the latter.

Brief for Appellant at 116A, *Geschwendt*, 967 F.2d 877 (No. 91-1244).

According to the dissent, both a third degree murder verdict and a voluntary manslaughter verdict "would have required the jury to find that Geschwendt's acts were not 'wilful, deliberate, intentional and premeditated.'" *Geschwendt*, 967 F.2d at 893 (Aldisert, J., dissenting). Such a finding, stated the dissent, would be "in stark contrast with the uncontroverted evidence that supported only a verdict of first-degree murder or of not guilty by reason of insanity." *Id.* (Aldisert, J., dissenting).

Geschwendt prevented a harmless error conclusion under the *Schad* test.⁹⁸

Second, the dissent contended that because the two lesser homicide verdicts did not encompass a consideration of acquittal by reason of insanity, the lesser included offenses failed to provide an adequate recognition of *Geschwendt*'s insanity defense theory.⁹⁹ The dissent argued that this failure contradicted the Third Circuit's holding in *Vujosevic v. Rafferty*.¹⁰⁰ Thus, the dissent concluded that the failure of Pennsylvania law to equate the mental capacity required for third degree murder with the mental state required for the defense of insanity, combined with the evidence contradicting a third degree murder verdict, denied *Geschwendt* the availability of a "constitutionally adequate substitute" for a charge on the insanity verdict.¹⁰¹

2. *Due Process*

Unlike the majority, the dissent maintained that the trial court's failure to instruct the jury on the special insanity verdict constituted a violation of due process.¹⁰² Specifically, the dissent argued that the Fourteenth Amendment guarantee against deprivation of liberty without due process of law afforded *Geschwendt* the opportunity to be acquitted by reason of insanity even though such an acquittal would still result in *Geschwendt*'s commitment to a state hospital.¹⁰³ The dissent concluded that *Geschwendt*'s opportunity to be convicted of third degree murder failed to satisfy this due process protection.¹⁰⁴

98. *Geschwendt*, 967 F.2d at 893-94 (Aldisert, J., dissenting).

99. *Id.* at 894-95 (Aldisert, J., dissenting).

100. *Id.* (Aldisert, J., dissenting). For a discussion of *Vujosevic*, see *supra* notes 37-41 and accompanying text. The dissent noted that, in *Vujosevic*, the trial court's failure to provide the jury with a "constitutionally adequate substitute" for the requested instruction defeated a harmless error analysis. *Geschwendt*, 967 F.2d at 894-95 (Aldisert, J., dissenting). In addition, the dissent objected to the majority's comparison of the mental capacity elements of third degree murder and the insanity defense. *Id.* at 894 (Aldisert, J., dissenting). Whereas the mens rea element of third degree murder concerns whether the defendant had the required intent for conviction, the insanity verdict concerns whether the defendant should be held responsible for his acts. *Id.* at 894-95 (Aldisert, J., dissenting). Noting that the Pennsylvania Supreme Court distinguished between the mens rea required for third degree murder and insanity, the dissent concluded that the third degree murder charge failed to produce a viable substitute for an insanity verdict. *Id.* (Aldisert, J., dissenting) (citing *Commonwealth v. Reilly*, 549 A.2d 503 (Pa. 1988)).

Although the dissent neglected to address the impact of *Schad* on the *Vujosevic* holding, the dissent's position that the evidence supported neither a third degree murder or voluntary manslaughter verdict implicitly distinguished the two cases. According to the dissent, because the evidence did not support the lesser included offenses, *Vujosevic* rather than *Schad* should have controlled the court's analysis in *Geschwendt*. *Id.* (Aldisert, J., dissenting).

101. *Id.* at 895 (Aldisert, J., dissenting).

102. *Id.* at 896 (Aldisert, J., dissenting).

103. *Id.* at 895-96 (Aldisert, J., dissenting).

104. *Id.* at 896 (Aldisert, J., dissenting).

First, the dissent asserted that the trial judge had committed error because Pennsylvania law required him to charge the jury on the special verdict of not guilty by reason of insanity.¹⁰⁵ According to the dissent, Pennsylvania provided the procedural means for an insane defendant to become a committed acquittee by requiring the trial judge to instruct the jury on the special verdict of not guilty by reason of insanity.¹⁰⁶ After concluding that Pennsylvania law required the special insanity defense instruction, the dissent contended that the trial court's failure to conform to state law amounted to a violation of due process under the

105. *Id.* at 898 (Aldisert, J., dissenting). The dissent articulated three reasons in support of this conclusion. *Id.* at 899 (Aldisert, J., dissenting). First, at the time of Geschwendt's trial, two Pennsylvania statutes required that a jury acquitting a defendant on the basis of insanity state its reasoning in the verdict. *Id.* at 899-900 (Aldisert, J., dissenting).

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 insanity

PA. STAT. ANN. tit. 19, § 1351 (1964).

(a) 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 reason for acquittal in its verdict.

PA. STAT. ANN. tit. 50, § 4413 (1969) *repealed in part by* Act of July 9, 1976, P.L. 817, § 502, PA. STAT. ANN. tit. 50, § 7502 (1976). Thus, the failure to charge the jury on the possible verdict of insanity enabled the trial judge to frustrate legislative directive by prohibiting the jury from fulfilling its statutory obligation. *Geschwendt*, 967 F.2d at 899 (Aldisert, J., dissenting). Furthermore, sanctioning the arbitrary withholding of the insanity instruction would enable the trial judge, not the legislature, to "create the substantive law of Pennsylvania." *Id.* (Aldisert, J., dissenting).

Second, the dissent noted that in *Commonwealth v. Mulgrew*, 380 A.2d 349 (Pa. 1977), the Pennsylvania Supreme Court directed that a trial court must instruct a jury on the consequences of a not guilty by reason of insanity verdict. *Geschwendt*, 967 F.2d at 900 (Aldisert, J., dissenting). The dissent asserted that, in reaching this conclusion, the Pennsylvania Supreme Court necessarily presupposed that the trial court would instruct the jury on the defense of insanity. *Id.* (Aldisert, J., dissenting). According to the dissent, the *Mulgrew* mandate to instruct on the consequences of a verdict of not guilty by reason of insanity makes little sense if no such verdict is available. *Id.* (Aldisert, J., dissenting).

Third, the dissent stated that the right to an insanity instruction was so well recognized in Pennsylvania that in *Commonwealth v. Gass*, 523 A.2d 741 (Pa. 1987), the Pennsylvania Supreme Court held that the failure to request such an instruction violated the Sixth Amendment right to counsel. *Geschwendt*, 967 F.2d at 900 (Aldisert, J., dissenting). The *Gass* court stated: "Based on the instruction that was given, we cannot assume that they [jury] understood that if they believed the insanity defense, they could find the Appellant not guilty by reason of insanity Nor can we speculate as to what the verdict would have been had they been properly instructed." *Gass*, 523 A.2d at 744.

106. *Geschwendt*, 967 F.2d at 898-900 (Aldisert, J., dissenting).

Fourteenth Amendment.¹⁰⁷ Specifically, the dissent argued that, by recognizing the insanity defense, Pennsylvania created a due process right for a defendant to have the opportunity to become a committed acquittee.¹⁰⁸ The dissent then concluded that the trial court's arbitrary refusal to comply with state law deprived Geschwendt of his liberty without affording him the procedural means to exercise his due process right to the opportunity to become a committed acquittee.¹⁰⁹

The dissent concluded that this violation of due process could not be dismissed as harmless error.¹¹⁰ The dissent argued that without the option of the insanity verdict, the jury may have found Geschwendt guilty under an improper assumption that recognition of his insanity would have resulted in his release into society, possibly to kill again.¹¹¹

V. IMPACT

Ultimately, the majority and the dissent split over how to evaluate the potential impact of refusing to charge a jury on the special verdict of

107. *Id.* at 900-02 (Aldisert, J., dissenting).

108. *Id.* at 895-96 (Aldisert, J., dissenting). At the time of Geschwendt's trial, Pennsylvania criminal statutes provided that a defendant acquitted by reason of insanity would be subjected to a court order of commitment to a mental institution for the duration of the defendant's mental illness. *Id.* at 901-02 (Aldisert, J., dissenting). According to the dissent, the Fourteenth Amendment protected Geschwendt's expectation that a jury would determine the fate of his liberty. *Id.* at 895 (Aldisert, J., dissenting) (quoting *Hicks v. Oklahoma*, 447 U.S. 343 (1980)). Furthermore, the dissent asserted that the most basic tenants of American liberty and law guarantee a defendant due process of law before the state may infringe upon the defendant's liberty. *Id.* at 897 (Aldisert, J., dissenting).

109. *Geschwendt*, 967 F.2d at 897 (Aldisert, J., dissenting). Pennsylvania substantive law guaranteed Geschwendt that only a jury could deprive him of his liberty. *Id.* at 898-99 (Aldisert, J., dissenting). The dissent argued that in arbitrarily prohibiting a jury from returning a special insanity verdict, the trial court foreclosed Geschwendt's right to have the jury affirm his insanity and confine him to a mental institution rather than prison. *Id.* (Aldisert, J., dissenting).

110. *Id.* at 900 (Aldisert, J., dissenting). The dissent maintained that it could not conclude, as a matter of law, that the differences between the special verdict of not guilty by reason of insanity and the general verdict of not guilty would not have influenced the jury. *Id.* at 901 (Aldisert, J., dissenting). The dissent stated that whereas a jury might have inferred that a general not guilty verdict would release Geschwendt back into society, a reasonable jury would have assumed that the special verdict of not guilty by reason of insanity would have subjected Geschwendt to commitment proceedings. *Id.* at 900-01 (Aldisert, J., dissenting). Even though *Mulgrew* had yet to become law, the dissent reasoned that an acquittal based on insanity leads to the assumption of commitment but a straight acquittal leads to the assumption of release. *Id.* at 901 (Aldisert, J., dissenting). In fact, in 1976, a Pennsylvania trial court could not commit a defendant unless he had been acquitted on the basis of insanity. *Id.* (Aldisert, J., dissenting). In addition, the exclusion of the special insanity verdict frustrated legislative aims to provide the insane with help. *Id.* (Aldisert, J., dissenting).

111. *Id.* at 901 (Aldisert, J., dissenting). The dissent was unwilling and unable to speculate as to the verdict the jury would have returned had it been able to consider the special insanity verdict as well. *Id.* (Aldisert, J., dissenting).

not guilty by reason of insanity. The majority viewed the issue to be whether Geschwendt had been deprived of his procedural due process rights.¹¹² The dissent, on the other hand, argued that the real issue was whether Geschwendt had been denied his substantive due process right to a fair trial.¹¹³

The *Geschwendt* decision signals a new direction in the Third Circuit.¹¹⁴ In *Geschwendt*, the Third Circuit adopted a broad reading of *Schad* by interpreting *Schad* to control cases in which the trial judge failed to charge the jury on the possible verdict of not guilty by reason of insanity.¹¹⁵ Furthermore, in trials in which the finder of fact also determined the penalty for conviction, the *Geschwendt* decision authorizes an inspection of the penalty sentence as evidence of the verdict's reliability.¹¹⁶

The *Geschwendt* decision altered the role of compromise verdicts. By explicitly overruling *Matthews*, the *Geschwendt* court indicated that the failure to provide for the possibility of a compromise verdict will likely constitute only harmless error.¹¹⁷ Where a jury has the option to select

112. Although the majority concluded that *Geschwendt* had not suffered a procedural due process error, the majority conceded that *Geschwendt* had suffered a deprivation of his due process rights if the form of the verdict would have influenced the jury. *Geschwendt*, 967 F.2d at 883. For a discussion of the majority's approach, see *supra* notes 57-89 and accompanying text.

113. For a discussion of the dissent's approach, see *supra* notes 90-111 and accompanying text.

114. Indeed, the *Geschwendt* court overruled *Matthews* and undermined the current status of *Vujosevic*.

115. The Third Circuit's willingness to apply the *Schad* test to a case in which the trial court failed to instruct on the insanity verdict may reflect a general societal trend of hostility toward the defense of insanity. See, e.g., *Commonwealth v. Trill*, 543 A.2d 1106, 1120 (Pa. Super. Ct. 1988), *appeal denied*, 562 A.2d 826 (Pa. 1989) (stating Pennsylvania Legislature enacted guilty but mentally ill verdict in response to public pressure); SIMON & AARONSON, *supra* note 2 at 45-56 (noting public pressure after acquittal of John W. Hinckley, Jr. motivated Congress to pass Insanity Defense Reform Act of 1984). Subsequent to the *Geschwendt* decision, the Third Circuit held that, under the *Schad* test, the failure to charge the jury on a requested lesser included offense constitutes only harmless error where the jury was not "forced into an all-or-nothing choice between capital murder and innocence." *Terry v. Petsock*, 974 F.2d 372, 378 (3d Cir. 1992) (quoting *Schad v. Arizona*, 111 S. Ct. 2491, 2504 (1991)), *cert. denied*, *Terry v. Vaughn*, 113 S. Ct. 1338 (1993).

116. For a discussion of the significance of the penalty sentence, see *supra* notes 75-77 and accompanying text.

117. For a discussion of *Matthews*, see *supra* notes 33-36 and accompanying text. In addition to explicitly overruling *Matthews*, the majority suggested (and the dissent strongly argued) that *Geschwendt* might have undermined the precedential value of *Vujosevic*. *Geschwendt*, 967 F.2d at 884 n.13. This ambiguity arises from three sources. First, the *Geschwendt* majority accepted the availability of a compromise offense as evidence of the verdict's reliability even where the state had not satisfied its burden of proof for this offense. *Id.* at 883. This raises doubts as to what constitutes a "nonsensical" verdict. Second, *Vujosevic* based his defense on the theory that he was guilty of a lesser offense. *Vujosevic*, 844 F.2d at 1028. *Geschwendt*'s defense theory, on the other hand, disclaimed crim-

a lesser included offense and still returns a verdict for the highest offense charged, *Geschwendt* dictates that the absence of the availability of a compromise verdict more favorable to the defendant does not improperly undermine the verdict's reliability.¹¹⁸

At the same time, the *Geschwendt* majority held that the existence of a compromise verdict could ensure the reliability of the jury's verdict.¹¹⁹ According to the *Geschwendt* majority, the reliability of a guilty verdict for the highest offense charged will be ensured where a charged lesser included offense presents the jury with a compromise between acquittal and conviction of the highest charged offense.¹²⁰ The qualifications of a viable compromise verdict, however, remain unclear.¹²¹

The *Geschwendt* court both limited and expanded the role of compromise verdicts in the Third Circuit. In extending the scope and span of the *Schad* harmless error analysis, the Third Circuit has invited trial judges to use jury instructions as a means to exert a greater influence over the jury's deliberations.

Robert Ebby

inal responsibility for any offense. *Geschwendt*, 967 F.2d at 879-80. Whether such a defense precludes any lesser included offense from being "nonsensical" remains an open question. Third, the *Geschwendt* majority did not clarify whether a compromise verdict must give recognition to the defendant's theory of defense. Although the majority discussed the similarities between third degree murder and the insanity defense, the majority cited these similarities to equate a lesser included offense with the special insanity verdict rather than to satisfy the requirements of *Vujosevic*. *Id.* at 888.

118. For a discussion of compromise verdicts, see *supra* note 35.

119. For a discussion of the reduced importance of compromise verdicts, see *supra* notes 68-75 and accompanying text.

120. For a discussion of the use of a compromise verdict to ensure the verdict's reliability, see *supra* notes 70-80 and accompanying text.

121. The *Geschwendt* majority stated that the availability of a verdict for such a lesser included offense ensured the reliability of the verdict regardless of whether the jury believed that the defendant was guilty of the lesser included offense. *Geschwendt*, 967 F.2d at 884 n.13. For a discussion of the ambiguity surrounding the qualifications of a compromise verdict, see *supra* note 117.