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Comments

The Not Guilty by Reason of Insanity Verdict: Should Juries be Informed of its Consequences?

INTRODUCTION

In October, 1981, the Kentucky Supreme Court, in Payne v. Commonwealth,1 addressed the question of whether the jury should be informed of the consequences of a not guilty by reason of insanity verdict (NGRI). The Court held “that neither the prosecutor, defense counsel, nor the court may make any comment about the consequences of a particular verdict at any time during a criminal trial.”2 This decision overruled prior Kentucky law3 and clarified Kentucky’s position on this issue.

This Comment will examine the decisions which led to Kentucky’s new rule, analyze the law in other jurisdictions, and recommend that an instruction explaining the consequences of a NGRI verdict4 should be given by the judge in all cases where the

2 Id. at 870. Only one justice dissented, disagreeing with the majority “to the extent that the opinion will now prohibit comment during closing argument on the consequences of an insanity verdict.” Id. at 879 (Stephenson, J., dissenting).
3 See Paul v. Commonwealth, 625 S.W.2d 569 (Ky. 1981); Gall v. Commonwealth, 607 S.W.2d 97 (Ky. 1980); Jewell v. Commonwealth, 549 S.W.2d 807 (Ky. 1977).
4 When Payne was decided, the disposition of a person acquitted by reason of insanity was controlled by Ky. Rev. Stat. § 504.030 (Bobbs-Merrill 1975) [hereinafter cited as KRS], which provided:

(I) When a defendant is acquitted of an offense for lack of criminal responsibility by reason of mental disease or defect, as defined in KRS 504.020, the court may on motion of the prosecuting attorney or on its own motion proceed immediately to have the defendant committed for examination and possible detention pursuant to the provisions of KRS chapter 202.
defense of insanity is properly raised.\(^5\)

I. PAYNE AND ITS FORERUNNERS

In five cases from 1977 to 1981, the Kentucky Supreme Court considered the propriety of informing the jury regarding the consequences of an acquittal by reason of insanity.\(^6\) The permissibility of certain comments by the prosecuting attorney was established in \textit{Jewell v. Commonwealth}.\(^7\) A little more than four

\(^5\) A jury in Kentucky may return one of four possible verdicts when "the defendant provides evidence at trial of his mental illness or insanity at the time of the offense." KRS § 504.120 (Cum. Supp. 1982). These verdicts include guilty, not guilty by reason of insanity, and guilty but mentally ill. \textit{Id}. This Comment does not include a discussion of the propriety of informing a jury of the consequences of a guilty but mentally ill verdict. See KRS §§ 504.130-.150 for a description of the grounds and consequences of a finding of guilty but mentally ill. The existence of the guilty but mentally ill verdict further complicates the jury's deliberations in these cases. Thus, the jury should be given an instruction as to the different consequences of each insanity related verdict when the defense of insanity is raised.

\(^6\) See Paul v. Commonwealth, 625 S.W.2d at 569; Gall v. Commonwealth, 607 S.W.2d at 97; Edmonds v. Commonwealth, 586 S.W.2d 24 (Ky. 1979); Edwards v. Commonwealth, 554 S.W.2d 380 (Ky. 1977), \textit{cert. denied}, 434 U.S. 999 (1977); Jewell v. Commonwealth, 549 S.W.2d at 807.

\(^7\) 549 S.W.2d at 807. The Court stated: Certainly [deranged persons] do not belong in penal institutions, but in the absence of some kind of realistic provision for their detention a prosecutor can truthfully remind the jury, as he did in this case, that in the event of an acquittal on grounds of insanity there is very little, if any, assurance that they will not soon be at large again.

\textit{Id}. at 812.
months later, however, in *Edwards v. Commonwealth*, the Court determined that any instruction from the trial judge concerning the disposition of a defendant after a NGRI verdict was improper. The *Edwards* holding was followed in *Edmonds v. Commonwealth*, and explained in *Gall v. Commonwealth*. *Gall* interpreted *Edwards* to mean that defense counsel is not prohibited from briefly explaining to the jury that a defendant acquitted on grounds of insanity could possibly be committed. Thus, although the extent of their remarks is limited, both the prosecuting attorney and defense counsel may make certain comments to the jury during closing argument about the disposition of a defendant following a NGRI verdict, while the trial judge is totally prohibited from giving the jury any instruction on the

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8 554 S.W.2d at 380.
9 *Id.* at 383-84. The Court concluded:

> An instruction of the kind here requested has no legitimate bearing on the issue of fact to be decided by the jury when the defense of insanity has been raised, that issue being whether the defendant was mentally responsible when the criminal act was done, and could, we feel, divert the jury's attention from the resolution of this issue. Moreover, the instruction as requested does not properly declare the law in this state regarding the disposition of a person acquitted of a charged offense because of a mental disease or defect.

*Id.* Thus, such instructions were held improper in general. This instruction in particular was held improper because it was a misstatement of the law. See note 4 *supra* for text of the Kentucky statute which was in effect at the time of *Edwards*.

10 586 S.W.2d at 27.
11 607 S.W.2d at 111.
12 *Id.* The Court in *Gall* explained:

> *Edwards* does not prohibit defense counsel from reminding the jury that if the defendant is acquitted on grounds of insanity at the time of the offense, and if he lapses into that condition again, there are legal means to bring about his commitment, because that is the simple truth. The most defense counsel can say, and we have never held that he cannot say it, is that if after the defendant is acquitted there appear reasonable grounds to believe he is insane and ought to be committed to an institution, he can be tried in a civil commitment proceeding. We adhere, however, to the view that the prospects of what may or can happen after the verdict do not belong in the instructions given by the court to the jury.

*Id.*

13 See *Paul v. Commonwealth*, 625 S.W.2d at 570 ("The reason we have held such remarks [during closing argument by defense counsel and the prosecuting attorney] permissible is that they are within the realm of common knowledge and fair comment. It has never been suggested, however, that they could be introduced in the form of proof, or that the subject might be pursued in further detail").
issue. The inconsistency of this situation was noticed in *Payne v. Commonwealth*.  

*Payne* involved a defendant who had been convicted of eight counts of first-degree sodomy, one count of first-degree sexual abuse and twenty counts of using a minor in a sexual performance. At trial, defense counsel requested that final arguments include a discussion of the consequences of a NGRI verdict. Defense counsel also requested a jury instruction on the consequences of a NGRI verdict. Both motions were denied.

On the basis of the *Gall* decision, defense counsel should have been permitted to comment on the consequences of a NGRI verdict in his summation. In contrast, the reasoning of the Supreme Court in *Edwards* that such information on the consequences of a NGRI verdict should not be involved in the jury’s fact-finding process, supports the view that information regarding such consequences should not be given to the jury by anyone. *Gall* suggested no legitimate distinction between the communication of this information to the jury by counsel during closing argument and the communication of this information by the trial court in its jury instructions. If instructions from the court on this issue could divert the jury’s attention from its proper function, then it seems equally likely, if not more so, that argument from counsel could do so. Indeed, counsel is apt to emphasize the possible result of a NGRI verdict which he feels is most advantageous to his side.

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14 623 S.W.2d at 869-70.
15 Id. at 869.
16 Id.
17 See *Gall v. Commonwealth*, 607 S.W.2d at 111. See note 12 *supra* for the rationale of the court in *Gall*.
18 *Edwards v. Commonwealth*, 554 S.W.2d at 383-84.
19 Defense counsel will emphasize the possibility of commitment, while the prosecuting attorney will emphasize the possibility of release. A brief, unbiased outline of NGRI verdict results from the trial court is the best way to avoid confusion. See *Roberts v. State*, 335 So.2d 285, 288 (Fla. 1976) ("The efforts by counsel for both sides to supply partially accurate information as to those consequences must have served further to confuse the jury. The trial judge should have reduced this confusion by charging the jury in the manner requested by appellant’s trial counsel").
In Payne, the Kentucky Supreme Court decided not to allow anyone to comment on the consequences of a NGRI verdict to the jury. The Court adhered to the reasoning of Edwards, noting: "[E]xternal considerations have no legitimate bearing on the jury's factual determination of guilt or innocence." The Court also expressly overruled Jewell, Gall and Paul v. Commonwealth to the extent that those decisions were inconsistent with Payne. The result of Payne is to align Kentucky with the so-called "majority position."

II. VIEWS IN OTHER JURISDICTIONS

At least three main views have been adopted by the states with respect to the propriety of instructions on the consequences of a NGRI verdict: 1) nineteen states hold that no instruction is proper; 2) six states consider the propriety of such instruction.

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20 623 S.W.2d at 870.
21 Id.
22 Id.
23 See generally Annot., 11 A.L.R.3d 737 (1967), for a review of cases dealing with the propriety or necessity of giving, in a criminal case where the defense of insanity or mental irresponsibility is raised, instructions to the jury as to the hospitalization of the defendant in the event of a verdict of not guilty by reason of insanity.

The Kentucky Supreme Court cited this Annotation in Edwards as support for the conclusion that the majority rule is against the instruction. 554 S.W.2d at 383. This Comment argues that there is no longer a "majority" rule.


Three other states which presently refuse to give such instructions could be classified with the states which leave the question of giving such instruction to the discretion of the trial judge, but due to the lack of decisions allowing such instructions, are properly placed in this category. Carr v. State, 198 So.2d 791, 798 (Ala. Ct. App. 1967) (trial court properly refused to give charge which stated that if verdict were not guilty by reason of
to be a matter of judicial discretion; and 3) eighteen states plus the District of Columbia hold the instruction to be proper. This latter group includes four different approaches: 1) in nine states the instruction must or should be given in any case where the defense of insanity is properly raised; 2) one state and the District of Columbia require the instruction to be given unless the defendant objects; 3) in five states the instruction must be given upon the defendant’s request; and 4) three states allow the instruction to be given upon the request of the defendant or the jury.


[27] State v. Hamilton, 534 P.2d at 226, Kuk v. State, 392 P.2d at 630; Novosel v. Helgemoe, 384 A.2d at 124; State v. Krol, 344 A.2d at 289; Commonwealth v. Mulgrew, 380 A.2d at 349; Mothershed v. State, 578 S.W.2d at 96; State v. Daggett, 280 S.E.2d at 545; State v. Shoffner, 143 N.W.2d at 488; N.Y. CRIM PROC. LAW § 300.10(3) (McKinney 1982).

[28] Lyles v. United States, 254 F.2d at 725; Roberts v. State, 335 So.2d at 285.

[29] Schade v. State, 512 P.2d at 907; People v. Thomson, 591 P.2d at 1031; State v. Amorin, 574 P.2d at 895; State v. Pike, 516 S.W.2d at 505; State v. Hammonds, 224 S.E.2d at 595.

The rule that no instruction is proper has been referred to as the majority position. Obviously, it is no longer clear that there is a majority position. In fact, the recent trend seems to be away from the "no instruction" rule. Yet, Kentucky adheres to the "no instruction rule" as stated initially in Edwards and recently expanded in Payne.

A. "No Instruction" is Proper

One argument is central to all the cases which advocate not giving an instruction on the consequences of a NGRI verdict. This argument rests on the theory that where the assessment of punishment is for the court, instructions as to punishment are unnecessary and should not be given since they will not aid the jury in determining the issue of guilt.

Although the treatment given a person acquitted on grounds of insanity is not generally considered punishment, these cases have held that the same theory applies.

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31 See, e.g., Garrett v. State, 320 A.2d at 749. See also Annot., supra note 23.
32 See notes 24-30 supra and accompanying text for a discussion of the different approaches taken in various states.
33 Several states have recently overturned prior law and are now in favor of giving an instruction on the consequences of a NGRI verdict. See People v. Thomson, 591 P.2d at 1031; Roberts v. State, 335 So.2d at 285; State v. Hammonds, 224 S.E.2d at 595; Commonwealth v. Mulgrew, 380 A.2d at 349. But see State v. Smith, 396 A.2d at 126 (consequences of NGRI verdict should not be charged to the jury).
34 Annot., supra note 23, at 739. See, e.g., State v. Wade, 113 A. at 458. The court in Wade stated:

It is no part of the duty of the jury to pass upon the punishment of the accused. The jury determines the guilt or innocence of the accused; the court pronounces sentence. With the rendering of the verdict the duty and responsibility of the jury ends. The enforcement of the verdict by the pronouncement of sentence and the rendition of judgment is a duty resting wholly with the court. It will not help the jury in the performance of their duty to know what the penalty may be, nor what disposition will be made of accused.

Id. at 460 (citation omitted).
35 Annot., supra note 23, at 739. See, e.g., State v. Park, 193 A.2d at 1. The Court in Park remarked:

It has long been the settled practice in our State that the function of the jury is to find the facts and to apply the law as given by the Court to the facts in reaching their verdict. Punishment, or whatever may transpire after the verdict, is not the concern of the jury.

No exception to this general rule is found in our cases where the plea has been not guilty by reason of insanity.

Id. at 5.
When the defense of insanity is raised, the jury's job is to decide whether or not the defendant was mentally responsible when he committed the crime. Whatever is done with the defendant later should make no difference to this determination. Thus, there is no reason to inform the jury of the possibilities. In fact, giving the jury such information simply invites them to consider the results of a particular verdict and may influence their factual determination.\textsuperscript{36} The fear is that on the basis of this knowledge of the defendant's post-verdict status the jury may reach a compromise verdict. For example, if a jury felt sympathy for a defendant or was unsure of his culpability it might prefer to give a NGRI verdict, knowing that while the defendant would not be set free he or she would not go to prison either.\textsuperscript{37}

The Kentucky Supreme Court accepted this argument in \textit{Edwards}.\textsuperscript{38} By eliminating the possibility that counsel might so inform the jury in closing argument, the Court in \textit{Payne} ended the inconsistency that had developed in Kentucky law.\textsuperscript{39} Kentucky law is now clear:

The main function of the jury is to determine guilt or innocence. The consideration of future consequences such as treatment, civil commitment, probation, shock probation, and parole have no place in the jury's finding of fact and may serve

\textsuperscript{36} See State v. Hamann, 285 N.W.2d at 186 ("Consequently an instruction to the jury regarding the post-trial disposition of a defendant found not guilty by reason of insanity is irrelevant to the jury's proper function. It could only serve to confuse the jury or invite it to consider improperly defendant's post-trial disposition"); State v. French, 531 P.2d at 378 ("[A]n instruction of this type allows irrelevant matters to be considered by the jury which may influence its decision. By instructing a jury on various possibilities of sentence, the court suggests that it should give weight to that possibility in reaching a verdict") (quoting State v. Zuidema, 485 P.2d 952, 956 (Mont. 1971)); Longquest v. State, 495 P.2d at 584 ("The giving of such instruction injects a totally irrelevant element into the jury's deliberations separate and apart from the function they serve and may tend to confuse them. The suggested instruction may be an invitation for the jury to reach a compromise verdict ").

\textsuperscript{37} But see Schwartz, \textit{Should Juries Be Informed of the Consequences of the Insanity Verdict?}, 8 J. Psychiatry & L. 167, 174 (1980). Schwartz points out that there is no solid reason to believe that jurors view commitment as an alternative less drastic than imprisonment. Clearly there has been increasing popular sentiment against asylums. \textit{Id.}

\textsuperscript{38} 554 S.W.2d at 383-84.

\textsuperscript{39} See text accompanying notes 6-19 \textit{supra} for a discussion of the inconsistency that had developed in Kentucky law.
to distort it. For that reason we now hold that neither the prosecutor, defense counsel, nor the court may make any comment about the consequences of a particular verdict at any time during a criminal trial.

[E]xternal considerations have no legitimate bearing on the jury's factual determination of guilt or innocence.\(^{40}\)

### B. The Instruction is Proper

The argument in favor of instructing the jury on the consequences of a NGRI verdict begins with the premise that, as a matter of fact, jurors do consider the consequences of their verdicts.\(^{41}\) Jurors are not sterile intellectual mechanisms making decisions in an emotional vacuum.\(^{42}\) It does seem natural that people who are making such important decisions about another person will be concerned about the results of their decision. In several cases, the jurors have asked questions or otherwise evidenced this concern.\(^{43}\) Thus, whether or not the jurors are supposed to con-

\(^{40}\) Payne v. Commonwealth, 623 S.W.2d at 870.

\(^{41}\) Weihofen, Procedure for Determining Defendant's Mental Condition Under the American Law Institute's Model Penal Code, 29 Temp. L.Q. 235, 247 (1956). Weihofen argues that the Model Penal Code should expressly endorse giving an instruction on the NGRI verdict. He examines the traditional view that jurors should not be concerned with the defendant's post-verdict status, and states:

> But the fact is that jurors do concern themselves with [what will be done to the defendant if he is acquitted by reason of mental irresponsibility]. Preliminary statistics on the jury project being conducted by the University of Chicago Law School show that this is indeed one of the most important factors in the jury deliberations.

\(^{42}\) Commonwealth v. Mutina, 323 N.E.2d at 300.

\(^{43}\) See Campbell v. State, 141 S.E.2d 186, 187 (Ga. Ct. App. 1965) (juror asked whether defendant if sentenced would be automatically given psychiatric treatment or if he would go to the penitentiary); Dipert v. State, 286 N.E.2d at 406 (on voir dire one juror asked what would happen if defendant were found not guilty by reason of insanity); Brown v. State, 260 A.2d at 668 (while the jurors were deliberating, they sent the court a note which read, "If Mr. Brown, the defendant, is found insane by the jury, will he be allowed to go free or will he be put in a mental institution?"); State v. White, 374 P.2d at 956 (after verdict appellant's counsel filed their own affidavit stating the result of their post-trial interviews with seven members of the jury. It showed that the imposition of the death penalty resulted primarily because a majority of the jury felt they could not trust the authorities to keep appellant institutionalized until he was safe to be at large).
cern themselves with the results of verdicts, they probably do.\textsuperscript{44} The situation is complicated when the insanity defense is involved. The District of Columbia Circuit Court of Appeals recognized this problem\textsuperscript{45} and advocated giving the jury instructions on the consequences of a NGRI verdict,\textsuperscript{46} basically on the grounds that the average juror does not have the same understanding of a NGRI verdict as he does of a guilty or not guilty verdict:

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. It means neither freedom nor punishment. 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.\textsuperscript{47}

If the jurors are concerned with the disposition of defendants after a verdict and if they do not have a sufficient understanding of the meaning of a NGRI verdict, then the verdict they reach may be based on a misunderstanding. They might reach a verdict of guilty out of fear that the defendant will go free if acquitted.\textsuperscript{48} The proponents of the “no instruction” rule argue that giving the jury information as to the results of its verdict will lead to result-oriented verdicts.\textsuperscript{49} But denying the jury this information could have the same effect. Worse, the jury might base its verdict on assumptions which may or may not be accurate. If the jury is “aware of the true disposition after a verdict of not guilty

\textsuperscript{44} The trial judge in Payne acknowledged that the jurors might be wondering about the consequences of a NGRI verdict. Brief for Appellant at 10, Payne v. Commonwealth, 623 S.W.2d at 867. In fact, the court even stated that it believed the jurors should know the effect of such a verdict. Brief at 9.

\textsuperscript{45} See, e.g., Lyles v. United States, 254 F.2d at 725. This is the seminal case of those proposing that the jury be given instructions on the consequences of a NGRI verdict. See Schade v. State, 512 P.2d at 918; People v. Thomson, 591 P.2d at 1032; State v. Amorm, 574 P.2d at 898; Novosel v. Helgemoe, 384 A.2d at 130.

\textsuperscript{46} 254 F.2d at 728.

\textsuperscript{47} Id. See note 45 supra for cases referring to this passage in support of giving an instruction on the consequences of a NGRI verdict.

\textsuperscript{48} Commonwealth v. Mutina, 323 N.E.2d at 298; Weihofen, supra note 41, at 247.

\textsuperscript{49} See, e.g., State v. Hamann, 285 N.W.2d at 186.
by reason of insanity, they might [be] more disposed to render a verdict based on the evidence, free from their understandable fears for the safety and security of the public.\footnote{50} At any rate, jurors could make a decision with the benefit of accurate information rather than with questionable assumptions.\footnote{51}

Allowing the jury to proceed on the basis of unenlightened confusion about the consequences of a NGRI verdict increases the possibility of a miscarriage of justice. The Michigan Supreme Court viewed the problem as a choice between:

1. the possible miscarriage of justice by imprisoning a defendant who should be hospitalized, due to refusal to so advise the jury; and

2. the possible "invitation to the jury" to forget their oath to render a true verdict according to the evidence by advising them of the consequence of a verdict of not guilty by reason of insanity \footnote{52}

The Michigan court concluded that the importance of preventing such a miscarriage of justice far outweighed the possibility of inviting the jury to consider matters extraneous to the merits.\footnote{53} Jurors are, and should be, concerned with the protection of society. One of the reasons they give guilty verdicts is to incarcerate dangerous persons. But sending a person who should be hospitalized to prison because of a lack of understanding of the NGRI verdict is unacceptable.\footnote{54}

1. \textit{Counter-Arguments}

There are three main objections to giving an instruction on the NGRI verdict. Some courts have argued that since there is no

\footnotesize{\textsuperscript{50} Commonwealth v. Mutina, 323 N.E.2d at 298.} \\
\footnotesize{\textsuperscript{51} Weihofen, \textit{supra} note 41, at 247.} \\
\footnotesize{\textsuperscript{52} People v. Cole, 172 N.W.2d at 366.} \\
\footnotesize{\textsuperscript{53} \textit{Id.} See also Schade v. State, 512 P.2d at 918; People v. Thomson, 591 P.2d at 1032; State v. Babyn, 319 So.2d at 380.} \\
\footnotesize{\textsuperscript{54} In several cases, the courts felt that this is what happened. See Commonwealth v. Mutina, 323 N.E.2d at 301-02; State v. Hammonds, 224 S.E.2d at 603-04.} \\
\footnotesize{This may have occurred in \textit{Payne}. At the hearing on the motion for a new trial, appellant informed the court that he had spoken with four members of the jury who said they wanted to return a NGRI verdict but did not want appellant to be released. Brief for Appellant at 9, \textit{Payne} v. Commonwealth, 623 S.W.2d at 867.}
instruction on the consequences of other verdicts, there should be no instruction on the consequences of a NGRI verdict. The theory is that giving an instruction as to the consequences of a NGRI verdict will embark the courts on a slippery slope leading to a situation where the jury would be informed of all post-conviction procedures. This argument ignores the basic difference between the NGRI verdict and a simple guilty or not guilty verdict.

Another criticism is that any instruction sufficiently explaining the results of a NGRI verdict would be too confusing. The instruction, however, could be given in such a way as to alleviate rather than create confusion.

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55 See, e.g., Brown v. State, 260 A.2d at 668.
56 See id. See also Payne v. Commonwealth, 623 S.W.2d at 870 (“The consideration of future consequences such as treatment, civil commitment, probation, shock probation, and parole have no place in the jury’s finding of fact and may serve to distort it”).
57 See notes 41-53 supra and accompanying text for a discussion of the difference between a NGRI verdict and a simple guilty or not guilty verdict. Although jurors may not know the specific consequences of a guilty verdict, they do have a general understanding of the verdict’s meaning. With respect to a NGRI verdict, the juror may not have even a general understanding. There is an important difference between being confused or unaware as to a particular result of a verdict, such as length of incarceration, and being confused or ignorant as to the very nature of defendant’s disposition. The latter situation should be rectified. See Government of Virgin Islands v. Fredericks, 578 F.2d 927, 935 (3d Cir. 1978); State v. Babin, 319 So.2d at 380-81; Note, Defendant's Right to Jury Instruction on Consequences of Verdict of Not Guilty by Reason of Insanity, 16 WAYNE L. REV. 1197, 1203-04 (1970).
58 See Garrett v. State, 320 A.2d at 749-50 (“No instruction could have been formulated in this case with any reasonable degree of clarity and certainty. Such instruction would have substituted one unacceptable area of speculation and conjecture for another”); State v. Wallace, 333 A.2d 72, 79 (Me. 1975) (“[N]o instruction could adequately postulate the impact of such a verdict on the appellants future tenure in the institution”).

It is certainly possible that an instruction on the consequences of a NGRI verdict could be confusing. If the instruction attempted to set out every particular possibility and each procedure, jurors might very well end up more confused than they began. Also, a mere reading of the statutory language might only increase confusion. See Note, State v. Hammonds—A New Rule in North Carolina On Instructing the Jury on the Disposition of a Defendant Acquitted by Reason of Insanity, 13 WAKE FOREST L. REV. 201, 212 (1977).
59 The reason for giving the instruction is to clear up any confusion concerning the results of a NGRI verdict. The intent is simply to give the jurors a general understanding of what happens to a defendant acquitted on grounds of insanity.
It is also argued that jurors probably know that hospitalization results from a NGRI verdict anyway, so an instruction of the consequences is unnecessary. But, an instruction would still benefit those jurors who are not so well-informed, and surely would do no harm to those who already possess the information.

2. Variations on the “instruction is proper” rule

Jurisdictions which presently hold that it is proper to give a jury instruction on the consequences of a NGRI verdict have followed four different approaches: (1) the instruction must or should be given in any case where the defense of insanity is properly raised; (2) the instruction must be given unless it appears affirmatively on the record that the defendant does not want the instruction; (3) the instruction must be given upon the defendant’s request; and (4) the instruction must be given upon the request of the defendant or the jury.

Forms (2) and (3) have essentially the same result. Under both variations, the defendant has complete control over whether or not the instruction is given. Generally, giving the instruction will

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61 R. Simon, supra note 60, at 96. She states:

While the data show that a commitment instruction is not specifically needed, we do not offer these results as policy advice. Rather, we think it would be a useful precaution to include such an instruction under all circumstances and not leave it to the common sense of the jury. On occasion it can do some good and it can never do any harm.

Id.

62 See State v. Hamilton, 534 P.2d at 226; Kuk v. State, 392 P.2d at 630; Novosel v. Helgemoe, 384 A.2d at 124; State v. Krol, 344 A.2d at 289; Commonwealth v. Mulgrew, 380 A.2d at 349; Mothershed v. State, 578 S.W.2d at 96; State v. Daggett, 280 S.E.2d at 545; State v. Shoffner, 143 N.W.2d at 458; N.Y. CRIM. PROC. LAW § 300.10(3) (McKinney 1982).

63 See Lyles v. United States, 254 F.2d at 725; Roberts v. State, 335 So.2d at 285.

64 See Schade v. State, 512 P.2d at 907; People v. Thomson, 591 P.2d at 1031; State v. Amorn, 574 P.2d at 895; State v. Pike, 510 S.W.2d at 505; State v. Hammonds, 224 S.E.2d at 595.

65 See State v. Babin, 319 So.2d at 368; Commonwealth v. Mutina, 323 N.E.2d at 298; People v. Cole, 172 N.W.2d at 356.
benefit the defendant, but there may be situations where the instruction is prejudicial to him. Allowing the defendant sole control over when the instruction may be given is not consistent with the purpose of giving the instruction, which is to enhance the reliability of the verdict.

Further, giving the instruction should not be dependent upon the jury's request (Form 4). Jurors who do not know that they have the wrong information will not think to make a request. The instruction may be more likely to influence jurors if prompted solely by their request after deliberation or stalemate.

The purposes of giving an instruction to the jury on the consequences of a NGRI verdict are: (1) to raise the jurors' understanding of the meaning of this verdict to the same level as their

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66 The defendant benefits when the jury is relieved of the misconception that a NGRI verdict lets him go "scot free."

67 See Government of Virgin Islands v. Fredericks, 578 F.2d at 936 (The court notes that a juror who believes the defendant is innocent but dangerous might be willing to compromise to a verdict of NGRI). In several cases where the court addressed the instruction issue, it was the defendant who objected to the instruction. See, e.g., Lyles v. United States, 254 F.2d at 725 (If the record shows that the defendant objected to instructions on the effect of a NGRI verdict, the failure of the trial court to give such instruction will not be considered grounds for reversal).

68 Schwartz, supra note 37, at 175. The defendant's interest is in a verdict that favors him; thus, if he thinks that omitting the instruction will be to his advantage, he will not request it. See Kuk v. State, 392 P.2d at 635 ("In our view the propriety of giving the instruction should not depend on whether the defendant wants it"); State v. Hood, 187 A.2d at 501 ("At best it tends to give justice an a la carte quality in which the defendant may make as wily a choice as possible").

At least two states which have a rule making the instruction dependent upon the defendant's request have recently expanded their position to allow the trial court judge to give the instruction on his own initiative. See Commonwealth v. Callahan, 406 N.E.2d 385 (Mass. 1980) (extending Commonwealth v. Mutina, 323 N.E.2d at 294) (trial court could give such instruction on its own initiative where the issue is fairly raised and the defendant does not object); People v. Tenbrink, 287 N.W.2d 223 (Mich. Ct. App. 1979) (extending People v. Cole, 172 N.W.2d at 354) (trial court may give such instruction on its own initiative absent objection by defense counsel).

Although these two cases now allow the court to give the instruction without defendant's request, the defendant can still prevent the instruction by objection. Thus, their holdings did not go far enough.

See Note, supra note 57 at 1197, 1203, for an analysis of People v. Cole, and for an argument supporting the giving of an instruction whenever the defense of insanity is fairly raised.

69 Schwartz, supra note 37, at 176.

70 Note, supra note 57, at 1202.
understanding of the guilty and not guilty verdicts; (2) to assist the jury in making a fair determination of the facts by removing inappropriate fears and questions; and (3) to prevent the possible imprisonment of a person who should be hospitalized due to a misunderstanding of the NGRI verdict.\textsuperscript{71} The fulfillment of these purposes should not depend on the defendant's, jury's or prosecutor's request. Rather, the instruction should be given by the trial court in every case in which the defense of insanity is properly raised (form(1)).

C. \textit{The Instruction is Discretionary}

The third main view is that the trial court has discretion whether to give the jury an instruction on the consequences of a NGRI verdict.\textsuperscript{72} The argument is that giving the instruction is sometimes good and sometimes bad; thus, any inflexible rule must lead to harsh results.\textsuperscript{73} One commentator has argued:

The trial judge, guided by his instincts and his experience, should be free to "smell out" jury bias, as we trust him to do in other areas of the law. He is in a position better than the appellate courts or the legislatures to detect the danger of jury prejudice in particular cases and to gage how that danger can most effectively be minimized.\textsuperscript{74}

This approach contains at least two problems. First, it will necessarily result in increased litigation.\textsuperscript{75} Requiring an appellate court to try to determine whether the trial judge overstepped the bounds of his discretion is troublesome and easily avoided by simply requiring the trial court to give an instruction. More importantly, leaving this issue to the discretion of the trial court could lead to arbitrary results.

\textsuperscript{71} See, e.g., People v. Cole, 172 N.W.2d at 365-66. See also Schwartz, \textit{supra} note 37, at 171.

\textsuperscript{72} See People v. Mallette, 102 P.2d at 1084; State v. Wade, 113 A. at 458; Albert v. State, 263 S.E.2d at 685; Dipert v. State, 286 N.E.2d at 405; Smith v. State, 220 So.2d at 315; State v. Huettt, 246 S.E.2d at 865.

\textsuperscript{73} Schwartz, \textit{supra} note 37, at 177-78.

\textsuperscript{74} Id.

\textsuperscript{75} Note, \textit{supra} note 59, at 211.
III. Comments by Counsel

An issue which is secondary to the instruction by the court issue is whether counsel should be allowed to make comments to the jury concerning the consequences of a NGRI verdict. If the jurisdiction is one which allows no instruction from the trial court on this issue, then permitting counsel to argue the issue to the jury invites prejudicial and confusing comments which cannot be cured. On the other hand, if the prosecutor and defense counsel explain the consequences of the NGRI verdict, then perhaps an instruction from the court is unnecessary Counsel's arguments, however, will stress the law most advantageous to their respective positions, while an instruction from the court would be unbiased. Also, as was recognized by the Kentucky Supreme Court in Payne, allowing counsel to comment on the consequences of a NGRI verdict is inconsistent with the theory behind the "no instruction is proper" rule.

The situation is different in a jurisdiction which considers an instruction on the consequences of a NGRI verdict to be proper. In such jurisdictions, there is no theoretical reason against allowing counsel to comment. Of course, the trial court has broad discretion in controlling the scope of closing arguments, but the prosecutor and defense counsel should be afforded a full opportunity to advance their competing interpretations, and to em-

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76 People v. Mallette, 102 P.2d 1084, 1086 (Cal. Ct. App. 1940) ("[A]fter the remarks of the district attorney the court declined to explain to the jury that a finding of insanity would require defendant to be confined in the state hospital for the criminally insane. This, he should have done, in view of the remarks of the district attorney"); Roberts v. State, 335 So.2d 285, 288 (Fla. 1970) (Counsel for each side supplied partially accurate information as to the consequences of a NGRI verdict. These efforts must have confused the jury. The trial judge should have reduced this confusion by charging the jury in the manner requested by appellant's trial counsel).

77 Bean v. State, 386 P.2d 251 (Nev. 1965) (refusal to give instruction dealing with consequences of NGRI verdict was error but the error was not prejudicial where defense counsel's jury summation supplied essentially the same information), cert. denied, 384 U.S. 1012 (1966).

78 623 S.W.2d at 869-70.

79 See notes 13-22 supra and accompanying text.

80 See, e.g., Lingo v. State, 162 S.E.2d 1, 8 (Ga.) (court held that the solicitor general's statement to the jury was a correct statement of law and, thus, was not reversible error), cert. denied, 393 U.S. 992 (1968).
phasize the principles of law that favor their respective positions.\textsuperscript{81} As to questions of law, "if the applicable principles are undisputed then a statement by counsel might well be helpful rather than confusing."\textsuperscript{82}

The question, however, is whether it is helpful to permit counsel to comment on the consequences of a NGRI verdict when the trial court is already giving such an instruction.\textsuperscript{83} The purpose of the instruction is to raise the jury's awareness of and to reduce confusion about the NGRI verdict, thus encouraging an unbiased decision on the facts and preventing a miscarriage of justice. Allowing counsel to argue the issue may place too much importance on the results of the verdict and give this issue too much weight in the jury's deliberation. Also, counsel's comments will not be unbiased, so the jury may not receive a clear and accurate idea of the results of a NGRI verdict. An instruction by the trial court will give the jury adequate information. Additional comments by counsel are undesirable.\textsuperscript{84}

**CONCLUSION**

The decision in *Payne* eliminated an inconsistency in Kentucky law. It did so, however, at the expense of all defendants who wish to raise the defense of insanity. A better decision would have been to overrule *Edwards* and *Edmonds*, as well as *Paul*, *Gall* and *Jewell*, and create a rule requiring the trial court to give an instruction on the consequences of the NGRI verdict but preventing the prosecutor or defense counsel from commenting on the issue. The holding in *Payne* ignores the jury's natural concern with the disposition of the defendant. Now a defendant in Kentucky who proves his insanity faces the possibility of conviction, not

\textsuperscript{81} United States v. Sawyer, 443 F.2d 712, 713-14 (D.C. Cir. 1971).
\textsuperscript{82} Id. at 714.
\textsuperscript{83} Id. ("Counsel may emphasize a point that would otherwise be overlooked in the context of lengthy jury instructions that are themselves often confusing"). In the present context, however, such comment might over-emphasize the issue of results of the verdict.
\textsuperscript{84} Catlin v. United States, 251 F.2d 388, 369 (D.C. Cir. 1957) ("We point out, however, that the better practice is for the trial judge, rather than counsel, to give the explanation to the jury"); People v. Staggs, 271 N.W.2d 211, 215 (Mich. Ct. App. 1978) ("We would, however, again caution the attorneys against arguing the issue of disposition before the jury"); see also Note, *supra* note 57, at 1204.
because the jurors think he is guilty of the crime in question, but because they think he is insane and they want to protect society.

In any case in which the defense of insanity is properly raised, the trial court should be required to instruct the jury on the consequences of the NGRI verdict. The instruction should not be so detailed as to create rather than dispel confusion. It should give the jurors an understanding of the meaning of a NGRI verdict. Its purpose is not to encourage a verdict based on results, but to free the jurors from worries about results so they can base their verdict on the facts. The instruction should include a statement to the effect that the instruction is meant to be purely informational and is to have no persuasive bearing on the jury's determination of a proper verdict under the evidence.85 In this way, the court could provide the jury with accurate information and advise the jurors of its correct use. Such an instruction will provide a more equitable result in criminal trials where the defendant pleads not guilty by reason of insanity.

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85 People v. Thomson, 591 P.2d 1031 (Colo. 1979); State v. Amorn, 574 P.2d 895, 899 (Hawaii 1978). These states require that a statement indicating that the instruction is purely informational be included in the instruction.