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"I Did Not Want a Mad Dog Released" - The Results of Imperfect Ignorance: Lack of Jury Instructions Regarding the Consequences of an Insanity Verdict in State v. Okie

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JURY INSTRUCTIONS REGARDING THE
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STATE V. OKIE

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Christopher J. Rauscher*

I. INTRODUCTION

In 2007, John Okie, an allegedly schizophrenic twenty-year-old, brutally murdered his father and his nineteen-year-old friend.¹ At trial, Okie asserted an insanity defense.² The jury found him guilty of intentional and knowing murder; he will be incarcerated until he is at least seventy-two years old.³ During trial, Okie requested that the jury receive an instruction regarding what would happen to him if they returned a verdict of not criminally responsible by reason of insanity (NCRRI).⁴ The instruction was refused.⁵ He appealed to the Maine Supreme Judicial Court, sitting as the Law Court, which affirmed the trial court’s decision.⁶

Generally, Maine common law bars a jury instruction as to the consequences of a NCRRI verdict.⁷ This tenet finds its genesis in the 1963 case of *State v. Park*,⁸ which the Law Court has reaffirmed numerous times.⁹ The precedent is largely based on the reasoning that, in Maine, juries serve only a fact-finding function, while judges impose sentences, and thus, “the consequences of a particular verdict are therefore technically irrelevant to the jury’s task.”¹⁰ Outside of Maine there is no consensus on the issue. In 1994, the United States Supreme Court ruled that federal district courts should not give such an instruction to the jury;¹¹ however, the decision came with a strong dissent.¹² In state courts there is a near-even split, with

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1. *State v. Okie*, 2010 ME 6, ¶¶ 2-3, 987 A.2d 495, 496.

2. *Id.* ¶ 3, 987 A.2d at 496.

3. *Id.* ¶ 6, 987 A.2d at 497.

4. In Maine, the NCRRI defense is the analog to other jurisdictions’ “not guilty by reason of insanity.” Due to the wide jurisdictional variance in nomenclature, this Note will use “NCRRI” as well as “insanity” or “insanity defense,” to refer to all verdicts that are commonly known as “not guilty by reason of insanity.”

5. *Okie*, 2010 ME 6, ¶ 4, 987 A.2d at 496.

6. *Id.* ¶ 1, 987 A.2d at 496.

7. *Id.* ¶ 9, 987 A.2d at 498. The Law Court has suggested that this general prohibition may allow an exception for an “opening the door” scenario whereby the jury is affirmatively misled into thinking that an insanity verdict would allow the defendant to “go free,” or other similar situations. *Id.* ¶ 10 n.2, 978 A.2d at 498 (citation to footnote only) (citing *Shannon v. United States*, 512 U.S. 593, 587 (1994)).

8. 159 Me. 328, 193 A.2d 1 (1963).

9. *Okie*, 2010 ME 6, ¶ 9, 987 A.2d at 498.

10. *Id.* ¶ 11, 987 A.2d at 498.

11. *Shannon*, 512 U.S. at 575.

12. *Id.* at 588-93.

more than twenty states allowing the instruction.¹³ These jurisdictions hold that the jury should be informed on the consequences of a NCRRI verdict in order to dispel the perhaps common misconception that an extremely dangerous defendant may “go free” if found insane.¹⁴

This Note will examine Maine precedent, the relevant Maine statutory law on the insanity defense, mandated commitment following an insanity acquittal, and the procedures for subsequent review. Further, it will discuss federal and state positions. This Note will then turn to studies of the public’s perception of the insanity defense before focusing on juror-based studies and examining scholarly commentary on the issue. Ultimately, after discussing the reasoning in *Okie*, it will argue that the Law Court’s decision was unwise because some of the precedent relied on should no longer be considered authority. Further, it will argue that jurors in insanity trials in Maine serve a quasi-sentencing function in light of Maine’s mandated commitment statute, whereby an insanity acquittee is automatically confined to a mental institution. The majority of other states with a similar statutory scheme instruct the jury on the dispositional consequences of a NCRRI verdict and this Note will reason that Maine should follow their lead. Finally, this Note will argue that any possible detriment in giving the instruction is far outweighed by the risk of not giving it because of the possibility of a miscarriage of justice and the incarceration and punishment of a very sick individual.

II. THE LAW

A. Applicable Maine State Law

In 1963, the Law Court in *State v. Park*¹⁵ laid down the precedent that a judge should refuse a defendant’s request for a jury instruction as to the effect of a NCRRI verdict.¹⁶ On a camp road, defendant Park, a fifteen-year-old boy, “bumped into” one Avis Longfellow, who was carrying a two-year-old child.¹⁷ Avis then called Park a “queer,” whereupon Park drew his pocketknife, stabbed Avis more than forty times and then chased and stabbed the child.¹⁸ The child survived, though Avis did not.¹⁹ At his murder trial, Park pled not guilty by reason

13. See Thomas M. Fleming, Annotation, *Instructions in State Criminal Case in Which Defendant Pleads Insanity as to Hospital Confinement in Event of Acquittal*, 81 A.L.R. 4TH 659, § 3 (1990 & Supp. 2010) (cataloging jurisdictions).

14. *Id.* at § 2[a].

15. 159 Me. 328, 193 A.2d 1 (1963).

16. *Id.*

17. *Id.* at 329, 193 A.2d at 2.

18. *Id.* Apparently, Park understood “queer” to mean a “filthy thing . . . a common sexual perversion.” *Id.* In order to use the NCRRI defense, a defendant must argue that he suffered from some “mental disease or defect.” ME. REV. STAT. ANN. tit. 17-A § 39(1) (2006). It is unclear what “mental disease or defect” Park was arguing afflicted him. However, until a revision took effect in 1980, homosexuality was defined as a psychiatric disorder in the American Psychiatric Association’s (APA) Diagnostic and Statistical Manual of Mental Disorders (DSM). APA, HOMOSEXUALITY AND SEXUAL ORIENTATION DISTURBANCE: PROPOSED CHANGE IN DSM-II POSITION STATEMENT (RETIRED) 44 (6th ed. 1973). Homosexuality, perhaps accounted for part, or all, of his insanity plea given that Avis called Park a “queer.” See *infra* note 26 for a similar discussion.

19. *Park*, 159 Me. at 329, 193 A.2d at 2.

of insanity.²⁰ In refusing to instruct the jury on the consequences of such a verdict,²¹ the court reasoned that:

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.²²

In 1975, *Park* was upheld in *State v. Wallace*.²³ In *Wallace*,²⁴ the defendant was charged with felony murder for raping a young boy and then rolling him up in a blanket whereby he died of asphyxiation.²⁵ The underlying felony was sodomy and, in a bit of lawyerly cleverness, the defendant pled not guilty by reason of insanity due to his homosexuality.²⁶ Ultimately, the court cited *Park* in refusing to allow a jury instruction on the consequences of an insanity verdict.²⁷ Further, the court stated that:

[B]ecause of the numerous approaches authorized by 15 M.R.S.A. 104 to resolve this subsequent issue of whether a person found not guilty by reason of insanity may be released or discharged without likelihood that he will cause injury to himself or to others due to mental disease or mental defect, no instruction could adequately postulate the impact of such a verdict on the appellant's future tenure

20. *Id.* at 329, 193 A.2d at 2. At the time of *Park*, this plea/defense was not called NCRRI in Maine, but it was the same in practice. *Id.* at 336, 193 A.2d at 5.

21. In 1963, the applicable Maine statute pertaining to persons acquitted on the basis of mental disease or defect was M.R.S. ch. 149, § 38-B (Supp. 1961), which read:

When the respondent is acquitted on the ground of mental disease or mental defect excluding responsibility, the verdict and the judgment shall so state and the court shall order him to be committed to the custody of the Commissioner of Mental Health and Corrections to be placed in an appropriate institution for the mentally ill for custody, care and treatment.

22. *Park*, 159 Me. at 336, 193 A.2d at 5.

23. 333 A.2d 72 (Me. 1975).

24. *Id.*

25. *Id.* at 82-83.

26. *Id.* at 75-76. During the trial there was a war of witnesses, with the State's psychiatrist testifying that homosexuality was not a mental disease or defect and the defense's psychiatrist arguing that it was. *Id.* The defense's psychiatrist contended that homosexuality was an impulse disorder and that this "disease" would, at times, have the effect of stripping the defendant of his ability to control himself. *Id.* at 76. The argument is not particularly pertinent to this Note, but is historically interesting. In order to impute malice, and find Wallace guilty of murder (and not just manslaughter), the prosecution had to charge him with a felonious act. At that time sodomy (an act distinct from sexual assault) was a felony. The defense, then, was put in the peculiar position of arguing that Wallace was in fact a deviant, but that his deviance (homosexuality) was so sordid that it rose to the level of mental disease or defect, thereby relieving him of criminal responsibility because of his "homosexual disease." This could be extrapolated to excuse responsibility in every sodomy case; if Wallace were found not guilty by reason of insanity a strange precedent would have been set. By the norms of the times, the very condition (homosexuality) giving rise to the criminal act (sodomy) would excuse the criminal responsibility for that act (not criminally responsible by reason of insanity due to homosexuality). Whether or not a fear of this precedent influenced the Law Court will never be known. However, this logic may cloud the strength of *Park*, *Wallace*, and their progeny.

27. *Id.* at 78.

in the institution.²⁸

Thus, the court held, because it might be difficult to formulate a jury instruction there should not be one.²⁹ Prior to *Okie*, the court had relied on these two cases a number of times in ruling that a jury instruction should not be given as to the consequences of a NCRRI verdict.³⁰

Turning from common to statutory law, the current Maine state law governing the insanity defense reads: “A defendant is not criminally responsible by reason of insanity if, at the time of the criminal conduct, as a result of mental disease or defect, the defendant lacked substantial capacity to appreciate the wrongfulness of the criminal conduct.”³¹ The statute then goes on to clarify that mental disease or defect encompasses only those conditions that “grossly and demonstrably impair a person’s perception or understanding of reality.”³² Further, it states that the insanity defense is an affirmative one, and that external manifestations in the form of repeated criminal conduct or abuse of drugs or alcohol, will not, of themselves, be enough to constitute the defense.³³

The relevant portion of the Maine state law governing the effects of an insanity verdict on the defendant’s institutional disposition reads:

§ 103. Commitment following acceptance of negotiated insanity plea or following verdict or finding of insanity

When . . . a defendant is found not criminally responsible by reason of insanity by jury verdict or court finding, the judgment must so state. In those cases the court shall order the person committed to the custody of the Commissioner of Health and Human Services to be placed in an appropriate institution for the care and treatment of persons with mental illness or mental retardation for care and treatment. Upon placement in the appropriate institution and in the event of transfer from one institution to another of persons committed under this section, notice of the placement or transfer must be given by the

28. *Id.* at 79 (internal quotations omitted). In 1980, Section 104 was repealed and was replaced by ME. REV. STAT. ANN. tit. 15 §§ 103, 104-A (2003 & Supp. 2010). The procedures under current Sections 103 and 104-A are substantively similar to the repealed Section 104, but the language is much clearer.

29. *Wallace*, 333 A.2d at 79. The defendant suggested the following as a jury instruction:

The matter of sentencing is for the court and not a matter with which you are to be concerned. However, if you find the Defendant not guilty by reason of insanity, he will be confined to a mental hospital until it is determined that he can be released without likelihood of causing injury to himself or others.

Id. at 78.

30. See *State v. Condon*, 468 A.2d 1348, 1351 (Me. 1983); *State v. Ruybal*, 398 A.2d 407, 415 (Me. 1979); *State v. Dyer*, 371 A.2d 1079, 1083 (Me. 1977); *State v. Armstrong*, 344 A.2d 42, 46-47 (Me. 1975). These cases added nothing to the substance or reasoning of the precedent from *Park* and *Wallace*; they merely relied on it to deny the proposed instruction. See, e.g., *Condon*, 468 A.2d at 1351.

As the final point on appeal, the defendant assigns as error the court’s refusal to instruct the jury concerning the consequences of a verdict of not guilty by reason of insanity. We have repeatedly stated that whatever may transpire after the verdict is not the concern of the jury. No sound reason has been advanced for altering our view.

Id. (internal citations omitted).

31. ME. REV. STAT. ANN. tit. 17-A § 39(1) (2006).

32. ME. REV. STAT. ANN. tit. 17-A § 39(2) (2006).

33. ME. REV. STAT. ANN. tit. 17-A §§ 39(2), (3) (2006).

*commissioner to the committing court.*³⁴

Pursuant to Section 103 above, Maine is a “mandated commitment” jurisdiction; that is, a defendant found NCRRI is *automatically committed* to the custody of the Commissioner of Health and Human Services and is not eligible for immediate release.³⁵ Further, pursuant to Section 104-A, the superior court for the county in which the defendant is institutionalized has the ultimate authority as to whether and when a committed NCRRI defendant will be released.³⁶ If the Commissioner of Mental Health determines that an individual may be ready for release, the superior court must promptly conduct a hearing.³⁷ The prosecuting district attorney, and the district attorney into whose jurisdiction the individual may be released, must be given notice of the hearing.³⁸ At the hearing, at least one “psychiatrist who has treated the person and a member of the State Forensic Service who has examined the person” must testify.³⁹ Further, the superior court may receive any other relevant testimony including “the testimony of any independent psychiatrist or licensed clinical psychologist who is employed by the prosecutor and has examined the person.”⁴⁰

Ultimately, even if the court finds that an acquittee is eligible for release, the individual is tracked very closely, may continue to be treated, and may be recommitted by the Commissioner or the court at any time, with a post-hoc hearing determining his or her subsequent status.⁴¹ Thus, the Maine statutory scheme is fairly clear with regard to what happens to an insanity acquittee: “[A] person found not criminally responsible by reason of insanity would be institutionalized by the Commissioner of the Department of Health and Human Services, and certain [] criteria must be met, with court oversight, before that person could be discharged from institutional care.”⁴²

B. Perspective

Nationally, there is no consensus on the issue of whether jury instructions should include the consequences of a NCRRI verdict. The federal circuits were split until 1994 when, in *Shannon v. United States*,⁴³ the United States Supreme Court held that federal district court judges generally *should not* instruct the jury as to the consequences of a NCRRI verdict.⁴⁴ Prior to this decision, many federal

34. ME. REV. STAT. ANN. tit. 15 § 103 (Supp. 2010) (emphasis added).

35. *Id.*

36. ME. REV. STAT. ANN. tit. 15 § 104-A (Supp. 2010). Further, the superior court judge is not required to follow treating psychiatrists’ conclusions as to whether a NCRRI psychiatric patient is ready for release from commitment. *In re Fleming*, 431 A.2d 616, 618 (Me. 1981).

37. ME. REV. STAT. ANN. tit. 15 § 104-A (Supp. 2010).

38. *Id.*

39. *Id.*

40. *Id.*

41. ME. REV. STAT. ANN. tit. 15 § 104-A(1)(A)(1) (Supp. 2010).

42. *Okie*, 2010 ME 6, ¶ 4, 987 A.2d at 496.

43. 512 U.S. 573 (1994).

44. *Id.* at 575. The Court also noted that an instruction may be necessary in certain circumstances, e.g., to counteract an affirmative misleading of the jury. *Id.* at 587.

courts followed the holding in *Lyles v. United States*:⁴⁵ whenever a defendant successfully raises the defense of insanity the judge shall instruct the jury that a verdict of not guilty by reason of insanity will result in the accused being “confined in a hospital for the mentally ill until” it has been properly determined, with court oversight, “that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or to others, in which event and at which time the court shall order his release either unconditionally or under such conditions as the court may see fit.”⁴⁶ Further, the *Lyles* court held that the instruction should be withheld upon request by the defendant.⁴⁷

Thirty-four years later, *Shannon* abrogated the use of the *Lyles* rule in federal courts. *Shannon* was the first United States Supreme Court case to take up this issue following the federal Insanity Defense Reform Act of 1984 (IDRA).⁴⁸ The IDRA was enacted in response to public pressure surrounding the use of the insanity defense by John Hinckley, President Reagan’s would-be assassin, who was acquitted on all charges because the jury found him insane.⁴⁹ Prior to the IDRA, defendants in federal court who successfully pled not guilty by reason of insanity were simply acquitted; there was no specialized NCRRI verdict, nor a commitment procedure.⁵⁰ Rather, federal authorities relied on the individual states to ensure that the acquitted insane person was properly treated, and, if necessary, committed.⁵¹ The IDRA created a federal commitment procedure; clarified that the defense was an affirmative one, with the burden on the defendant; redefined what constitutes insanity for purposes of the defense; and toughened the standard for the application of the defense in federal courts.⁵² The much-publicized trial of John Hinckley, and the resultant Congressional action, perhaps contributed to the common misperception of the expedited release of defendants found NCRRI.⁵³

The decision in *Shannon*, interpreting the IDRA’s impact on jury instructions, came with a very strong dissent by Justices Stevens and Blackmun in which they lamented the over-turning of the forty-year-old *Lyles* precedent that they argued had “minimized the risk of injustice” by addressing a jury’s ignorance about the insanity defense and their fear of letting loose a dangerous criminal.⁵⁴ Further, the dissent stated that:

The Court suggests that the instruction might actually prejudice the defendant. That argument lacks merit, as there is no need to give the instruction unless the

45. 254 F.2d 725 (D.C. Cir. 1957).

46. *Id.* at 728.

47. *Id.* at 728-29.

48. 18 U.S.C. § 17.

49. Jay M. Zitter, Annotation, *Construction and Application of 18 USCS § 17, Providing for Insanity Defense in Federal Criminal Prosecutions*, 118 A.L.R. FED. 265 (1994).

50. Masha Bach, *The Not Guilty by Reason of Insanity Verdict: Should Juries Be Informed of Its Consequences?*, 16 WHITTIER L. REV. 645, 663-64 (1995).

51. *Id.* at 664.

52. Zitter, *supra* note 49, at § 2[a].

53. Bach, *supra* note 50, at 665 (internal quotations and citations omitted). The author also suggests that the IDRA was enacted, in part, as a response to the general perception that the insanity defense was used excessively and illegitimately and that this confused and misguided jurors in their fact-finding role. *Id.* (internal quotation and citations omitted).

54. *Shannon*, 512 U.S. at 588 (Stevens, J., dissenting).

defendant requests it. Alternatively, the Court advances the tired argument that if we followed the practice approved in *Lyles*, the rule against informing jurors of the consequences of their verdicts would soon be swallowed by the exceptions. Given that the *Lyles* rule has survived in the District [of Columbia] since 1957 without such consequences, this concern is illusory. Some courts have assumed that the instruction would help jurors focus on issues of guilt instead of punishment. Freed from confusion and fear as to the practical effect of a verdict of not guilty by reason of insanity, jurors should be able to decide the insanity issue solely on the evidence and law governing the defense. Rather than relying on a totally unsubstantiated qualm belied by history, it would be far wiser for the Court simply to recognize both the seriousness of the harm that may result from the refusal to give the instruction and the absence of any identifiable countervailing harm that may result from giving it.⁵⁵

The dissenting justices continued, “[i]ndeed, one recent study concluded that ‘the public overestimates the extent to which insanity acquittees are released upon acquittal and underestimates the extent to which they are hospitalized as well as the length of confinement of insanity acquittees who are sent to mental hospitals.’”⁵⁶ Further, the dissent stated that nobody suggests that the level of understanding of insanity verdicts even approximates that of the more common “guilty” and “not guilty” verdicts.⁵⁷ Therefore, the dissent reasoned, as long as a significant number of ordinary people (that is, potential jurors) think that a person found NCRRI will be immediately released, an instruction to disabuse them of that misconception should be allowed.⁵⁸

The majority’s holding in *Shannon*, which was only binding on federal district courts, has not been uniformly followed by the states. More than twenty states follow the dissent and require juries to be informed of the consequences of an insanity verdict “either as a general rule, upon request of the defendant or jury, or absent defense objection.”⁵⁹ The general reasoning in these courts is that although juries are supposed to abide by the legal fiction of not considering consequences when weighing guilt or innocence, in reality they will certainly consider and discuss consequences of different verdicts, and such consideration and discussion may proceed on an erroneous basis in the absence of a corrective instruction.⁶⁰ The

55. *Id.* at 591-92 (internal quotations and citations omitted).

56. *Id.* at 592 (quoting Eric Silver, Carmen Cirincione & Henry J. Steadman, *Demythologizing Inaccurate Perceptions of the Insanity Defense*, 18 LAW & HUM. BEHAV. 63, 68 (1994)).

57. *Shannon*, 512 U.S. at 592.

58. *Id.*

59. Fleming, *supra* note 13, at § 3. Specifically, the jurisdictions that hold an NCRRI instruction may be allowed are: Alaska, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Tennessee, Utah, and West Virginia. *Id.*

60. *See, e.g.*, *Erdman v. State*, 553 A.2d 244, 249 (Md. 1989). In that case, the court stated:

The word “responsible” stood naked before the jury. The jury received no indication whatsoever by way of court proceedings as to what happens to a defendant found to be not criminally responsible for his criminal conduct. The curtain was drawn on that matter and no light seeped through officially. All the jury had before it was the test for its determination whether the defendant was “responsible” or not. There was no suggestion as to what effect a finding of not criminally responsible would have. The common meaning of “responsible” is “likely to be called upon to answer (a man is [responsible]

jury's unwarranted but understandable fear that a dangerous person will go *free* risks *incarcerating* and *punishing* an insane defendant, instead of *hospitalizing* and *treating* him. Generally, when a jury instruction is given, it is simple and concise without delving into statutory nuances. For example, the Supreme Court of Indiana held that an instruction properly informing an Indiana jury could read:

Whenever a defendant is found guilty but mentally ill at the time of the crime, the court shall sentence the defendant in the same manner as a defendant found guilty of the offense. At the Department of Correction, the defendant found guilty but mentally ill shall be further evaluated and treated as is psychiatrically indicated for his illness.⁶¹

In state courts that find an instruction that includes the consequences of a NCRRI verdict generally inappropriate or unnecessary, the courts typically follow the majority's reasoning in *Shannon*. That is, they place strong emphasis on the jury's fact-finding function, as distinguished from sentencing.⁶² In addition, many of these courts reason that accurately instructing the jury as to the consequences of a NCRRI verdict is so difficult as to be prohibitive.⁶³ For example, the Supreme Court of Michigan reasoned:

Assuming it is possible to draft an instruction which completely and accurately describes the disposition to be made of a person found not guilty by reason of insanity, we hold that any attempt to do so is unacceptable. The basic dispositional statute refers, in its text, to nine other statutes, without which it cannot be understood. Some of these referred to statutes in turn refer to other provisions. If the jury's "right to know the meaning" of its verdict is to be fulfilled, the jurors would have to be read many of these provisions.⁶⁴

The Michigan court, expressly following the reasoning in a Maine case, *Wallace*, held that regardless of the possibility of juror confusion, the jury should not be instructed as to the dispositional consequences of an insanity verdict because the instruction would be difficult to formulate.⁶⁵

Turning to secondary sources, the American Bar Association (ABA) is in favor of instructing the jury as to the dispositional consequences of a NCRRI verdict. According to the ABA's *Criminal Justice Mental Health Standards*: "The court should instruct the jury as to the dispositional consequences of a verdict of not

for his acts)." *Webster's Third New International Dictionary of the English Language Unabridged*. Or as *Webster* also defines it, "chargeable with the result." It follows that if one is not responsible he is not likely to be called upon to answer for his acts or chargeable with their result. This leads to a reasonable connotation that a defendant found to be not responsible for his criminal conduct will walk out of the courtroom, not only unpunished but free of any restraint.

Id.

61. *Georgopolus v. State*, 735 N.E.2d 1138, 1143 n.3 (Ind. 2000). Note that the Indiana procedure differs in substance from the Maine procedure under ME. REV. STAT. ANN. tit. 15 §§ 103, 104-A (2003 & Supp. 2010).

62. *See, e.g.*, *State v. Smith*, 396 A.2d 126, 129 (Vt. 1978).

63. *See, e.g.*, *People v. Goad*, 364 N.W.2d 584, 589-92 (Mich. 1984); *Hand v State*, 354 A.2d 140, 141-42 (Del. 1976).

64. *Goad*, 364 N.W.2d at 590 (citations omitted).

65. *Id.*

guilty by reason of mental nonresponsibility [insanity].”⁶⁶ In its commentary to that section the ABA notes:

Both stances [on the issue] are based on assumptions about jury knowledge and the effects of instructions. Given the absence of solid empirical data supporting either view, common sense and policy considerations must provide guidance. Providing for an instruction seems the most sensible approach given the potential for prejudice to defendants when the alternative course is followed. Particularly in cases in which defendants are charged with violent crimes (which is usually the case if the nonresponsibility issue is tried to a jury, as opposed to a judge), juries need to be told about the effect of a finding of mental nonresponsibility [insanity] if the possibility of a serious injustice is to be avoided. The fear of compromise verdicts is misplaced.⁶⁷

There are a number of studies that provide critical insight into the issue. They show that the media tend to portray the criminally insane as violent and vicious characters who get “off scot free.”⁶⁸ Studies of the media show that the public is most aware of the use of the insanity defense when it is invoked by high profile murder defendants, such as Charles Manson, Jeffrey Dahmer, and Andrea Yates.⁶⁹ However, in reality, the defense is raised most often for less serious crimes, and in total raised only in less than one percent of all criminal cases.⁷⁰ This is in stark contrast to the public’s belief that it is raised much more frequently; one study reported that the public believed it was raised in thirty-seven percent of cases.⁷¹

Ultimately, it appears that the defense is only successful in about a quarter of the cases in which it is used,⁷² compared with the public’s belief that it has a forty-four percent success rate.⁷³ The defendants who most successfully invoke the defense are generally unglamorous mentally ill repeat robbers and burglars from marginal backgrounds.⁷⁴ The successful use of the defense, especially in murder cases, is extremely rare and understandably garners much media attention; this contributes to the skewed public perception that the typical NCRRI defendant is a bizarre and vicious masterful murderer.⁷⁵ In sum, this sensationalism is in contradiction to the data showing that the insanity defense is almost never used; when it is, it is pled quietly as a defense to lesser crimes than murder, and it is usually rejected by the jury equally as quietly.

Another area of misconception is what actually happens to a defendant found NCRRI. The studies show that, considered generally, the public believes that the insanity defense is a “loophole” whereby persons found insane are subjected to

66. ABA CRIM. JUST. MENTAL HEALTH STANDARDS § 7-6.8 (1989) (brackets in original).

67. *Id.* at § 7-6.8 cmt. at 381.

68. Silver, Circincione & Steadman, *supra* note 56, at 65.

69. *Id.* See also CHARLES PATRICK EWING, *INSANITY: MURDER, MADNESS, AND THE LAW* xxiii – v (2008).

70. EWING, *supra* note 69, at xxii (collecting data from a number of jurisdictions).

71. Silver, Circincione & Steadman, *supra* note 56, at 67.

72. *Id.*

73. Richard A. Pasewark & Deborah Seidenzahl, *Opinions Concerning the Insanity Plea and Criminality Among Mental Patients*, 7 BULL. AM. ACAD. PSYCHIATRY & L. 7(2), 199, 201 (1979).

74. Steadman & Cocozza, *Public Perceptions of the Criminally Insane*, HOSPITAL AND COMMUNITY PSYCHIATRY 29(7), 459 (1978).

75. Silver, Circincione & Steadman, *supra* note 56, at 65.

much less confinement and fewer restrictions than those found guilty.⁷⁶ One study indicates that only around one percent of insanity acquittees actually “goes free” by being released unconditionally.⁷⁷ This compares with the public’s perception that twenty-five percent “go free.”⁷⁸ The data from these studies show that the public greatly overestimates the proportion of insanity pleas invoked as a defense to murder, as opposed to other crimes, and greatly “underestimates the extent to which [insanity acquittees] are hospitalized as well as the length of confinement of insanity acquittees who are sent to mental hospitals.”⁷⁹ Furthermore, there is data suggesting that defendants who unsuccessfully plead insanity fare worse in actual length of sentence than those who do not raise the defense at all.⁸⁰ It appears that the public’s perception of the insanity defense as a “loophole” may in fact make raising the defense unwise, except in situations of last resort.⁸¹

Apart from studies done on the general public, there is data gained from studies of jurors specifically. However, unlike the general public studies, it must be acknowledged that the majority of empirical data on both sides of the jury instruction issue is quite dated, with the resulting questions about methodology and contemporary worth.⁸² Yet, there is no particular reason to assume that the studies are not still relevant to some degree. These juror-focused studies indicate, congruent with common sense, that sentencing plays a large role in jury deliberations.⁸³ One such study indicates that the consequences of an NCRRI verdict are “indeed one of the most important factors in the jury deliberations. ‘If we acquit him on the ground of insanity,’ the jury wants to know, ‘will he be set at

76. *Id.*

77. *Id.* at 68.

78. *Id.*

79. *Id.* at 68.

80. Jeraldine Braff, Thomas Arvinites & Henry J. Steadman, *Detention Patterns of Successful and Unsuccessful Insanity Defendants*, 21 *CRIMINOLOGY* 439, 439-48 (1983). The study showed a twenty-two percent increase in detention time for those who unsuccessfully raised the defense as compared to those who did not raise it at all. *Id.* at 445.

81. See Silver, Circincione & Stedman, *supra* note 56, at 69 (“[P]ublic perceptions to the contrary, the insanity plea is relatively rare; lawyers consider it the defense of last resort . . .”) (citation omitted).

82. Bach, *supra* note 50, at 675-76. Further, the very nature of the American jury, which makes it the hallmark of our justice system, also makes it very difficult to study: it is a protean and capricious “black-box” comprised of everyman. “Whatever the reasons may be, it appears that the vast majority of researchers are unable to obtain results which could be characterized as conclusive or dispositive on the subject [of the impact of the concerned jury instruction].” *Id.* at 676. The results obtained from juror studies often represent the idiosyncrasies of the particular individuals sampled and of the particular jury dynamic, not of jurors in general. *Id.* Further, studies have indicated that there is even a high degree of “intrajury cognitive dissonance”; that is, individual jurors may disagree about whether or not dispositional consequences of a verdict were even discussed during deliberations, let alone the effect that they had. Grant A. Morris, Louis P. Bozzetti, Thomas N. Rusk & Randolph A. Read, *Whither Thou Goest? An Inquiry into Jurors’ Perceptions of the Consequences of a Successful Insanity Defense*, 14 *SAN DIEGO L. REV.* 1058, 1067-68 (1977).

83. See, e.g., Morris, Bozzetti, Rusk & Read, *supra* note 82, at 1067 (twelve out of fifty jurors surveyed acknowledged having discussions during deliberations about what would happen to the defendant if he was found NCRRI); Henry Weihofen, *Procedure for Determining Defendant’s Mental Condition Under the American Law Institute’s Model Penal Code*, 29 *TEMP. L.Q.* 235, 247 (1956) (“Not a single jury studied . . . refrained from considering what would happen to the defendant as a precondition for arriving at a decision concerning his guilt or innocence, sanity or insanity.”).

liberty to repeat his act?”⁸⁴ This same study also observed that “[d]uring the deliberations, many jurors who were somewhat disposed toward a verdict of insanity were brought over to a guilty verdict by the argument that if declared insane the defendant would go ‘scot free.’”⁸⁵ Another study also reflected that jurors often fear that a criminal defendant will be released if found NCRRI.⁸⁶ One of the studied jurors, who deliberated in a criminal case where the defendant pled NCRRI, stated that he found the defendant guilty, and not insane, because he “*did not want a mad dog released.*”⁸⁷ Of greatest import to this Note, studies have found that when juries did not receive an instruction, they speculated as to the consequences of a NCRRI verdict, often in error.⁸⁸

However, the results of one study indicate that when jurors receive an instruction as to the dispositional consequences of an insanity verdict, it has little effect on the actual outcome of their deliberation.⁸⁹ This study found that where an instruction was given, sixty-seven percent of jurors would return a NCRRI verdict, compared to sixty-five percent when the instruction was not given.⁹⁰ Thus, the absence of the instruction appeared to have no significant impact despite the fact that jurors may be ignorant about the dispositional consequences of an insanity verdict, and yet do consider those consequences.⁹¹ However, this study’s experimental methodology has been critiqued by subsequent researchers.⁹²

III. THE OKIE CASE

In July of 2007, John A. Okie, went to Alexandra Mills’s house where the two had sex and then Okie attacked and murdered her; six days later, Okie had an argument with his father and then attacked and killed him.⁹³ Okie told psychologists and psychiatrists, who testified at the trial, that he killed Mills because he believed that she was controlling his thoughts.⁹⁴ Okie was questioned

84. Weihofen, *supra* note 83, at 247.

85. *Id.*

86. Morris, Bozzetti, Rusk & Read, *supra* note 82, at 1068.

87. *Id.* at 1074 (emphasis added).

88. Weihofen, *supra* note 83, at 247.

89. RITA JAMES SIMON, *THE JURY AND THE DEFENSE OF INSANITY* 92-93 (1967). The study, conducted at the University of Chicago School of Law, used an “experimental jury” model. The authors of the study used actual jurors serving their jury duty, exposed them to recorded trials, and then surveyed them. *Id.* at 12. This study differs from other methodologies, which poll jurors about the trial that they actually participated in. *Id.* Despite her empirical findings, the author believed “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.” *Id.* at 96.

90. *Id.* at 92.

91. *Id.* at 92-93. See also Weihofen, *supra* note 83, at 247 (finding that dispositional consequences are generally considered by juries).

92. See, e.g., Morris, Bozzetti, Rusk & Read, *supra* note 82, at 1061 (“Whatever the merits of Dr. Simon’s study, we believe that definitive answers to questions involving attitudes and behaviors of real juries cannot be made by studying hypothetical juries. We decided to study the real thing.”).

93. *Okie*, 2010 ME 6, ¶ 2, 987 A.2d at 496. These were among the facts conceded by Okie at trial. *Id.* Mills had been Okie’s friend and occasional sexual partner. *Id.*

94. Betty Adams, *Okie Given 60 Years for ‘Unfathomable’ Killings*, PORTLAND PRESS HERALD, Mar. 12, 2010, at A1. Okie first bludgeoned Mills with a four-foot long wooden railing post from a stairway and then slit her throat. *Id.*

by police after killing Mills, but apparently did not arouse enough suspicion to warrant his arrest.⁹⁵ Six days after her murder, he was arrested on unrelated alcohol and driving charges and was bailed out by his father.⁹⁶ Later that day, Okie sat in wait for his father to come into the house to start supper after doing yard-work.⁹⁷ Okie argued with his father and then stabbed him repeatedly with a knife.⁹⁸ Okie subsequently showered and changed, picked his mother up from work, and then expressed shock and surprise when they returned to the house and happened upon his father's body.⁹⁹ Okie had previously been hospitalized for mental illness in 2004, at which time he was diagnosed with paranoid schizophrenia.¹⁰⁰ He was prescribed anti-depressant and anti-psychotic medication, but had stopped taking them some time before the killings.¹⁰¹

At trial, Okie pleaded not criminally responsible by reason of insanity due to paranoid schizophrenia.¹⁰² He requested "an instruction informing the jury that a person found not criminally responsible by reason of insanity would be institutionalized by the Commissioner of the Department of Health and Human Services, and that certain criteria must be met, with court oversight, before that person could be discharged from institutional care."¹⁰³ The request was denied.¹⁰⁴ He was convicted of two counts of intentional and knowing murder in 2008, and sentenced to two consecutive terms of thirty years in prison.¹⁰⁵ Okie appealed to the Law Court and claimed that the trial court erred in not instructing the jury as to the institutional consequences of an insanity verdict.¹⁰⁶

IV. ANALYSIS

A. The Law Court's Reasoning

On the issue of jury instructions, the *Okie* case proceeded in the Law Court as a microcosm of the national debate. Following the *Lyles* reasoning and the dissent in *Shannon*, John Okie argued that a jury instruction was necessary in order to "dispel the jurors' natural assumption that an insanity verdict would result in Okie's immediate release from custody."¹⁰⁷ Okie also reasoned that "an insanity

95. Kim Fletcher, *Final Arguments in the Okie Case*, THE LINCOLN COUNTY NEWS, Dec. 3, 2008. According to the Assistant Attorney General: "When interviewed by Deputy Tupper about the Mills murder, [John Okie was] so good, [that] Tupper [let] him go." *Id.*

96. Adams, *supra* note 94.

97. *Id.*

98. *Id.*

99. *Id.*

100. Fletcher, *supra* note 95.

101. *Id.* See also Adams, *supra* note 94.

102. *Okie*, 2010 ME 6, ¶ 3, 987 A.2d at 496.

103. *Id.* ¶ 4, 987 A.2d at 496 (emphasis added). Note that this instruction is a rather accurate, clear, and concise restatement of title 15 of M.R.S.A. Sections 103 and 104-A.

104. *Id.* ¶ 7, 987 A.2d at 497. Instead, the jury received this instruction: "You must not consider or be concerned about the consequences of any verdict you may reach in this case." *Id.* ¶ 12, 987 A.2d at 499.

105. *Id.* ¶ 6, 987 A.2d at 497.

106. *Id.* ¶ 7, 987 A.2d at 497.

107. *Id.*

verdict presents unique circumstances subject to common jury misunderstanding” because jurors have a common (and largely correct) understanding that someone found guilty would be incarcerated,¹⁰⁸ but “may have no such common understanding of what would happen if a defendant was found to be not criminally responsible for his crimes.”¹⁰⁹ Further, Okie reasoned that the legal fiction that juries do not consider the consequences of a verdict in their decision-making because they are instructed by the court not to is simply that—a *fiction*.¹¹⁰ Therefore, Okie argued, refusing his requested instruction may result in a “guilty verdict even though the jurors believe the defendant is insane because they wish to avoid the risk that a dangerous person will otherwise go free.”¹¹¹

However, in rejecting these arguments, the court pointed to its historical precedent, beginning with *Park* and *Wallace*, to hold that such an instruction would be inappropriate.¹¹² The court noted that it has reconsidered and reaffirmed this chain of precedent numerous times since 1963.¹¹³ Further, the court stated that this line of Maine cases is in conformity with the practice in federal courts as set forth in *Shannon*.¹¹⁴ Following the majority’s reasoning in that case, the court held that “instructing the jury on the consequences of an insanity verdict [would be] improper” because of the distinct fact-finding role that the jury plays.¹¹⁵ The court reasoned that when a jury has no sentencing function, as in the *Okie* case, “it should be admonished to reach its verdict without regard to what sentence might be imposed.”¹¹⁶ The court continued to hold that because juries are charged only with fact-finding, and decide a defendant’s guilt based on those facts, “the consequences of a particular verdict are therefore technically irrelevant to the jury’s task.”¹¹⁷

The court then reasoned that if jurors were provided with the sort of instruction that Okie had requested, they would be invited by that instruction to consider matters that are not within their domain.¹¹⁸ The court also stated that such an instruction might distract jurors from their fact-finding responsibilities and create a strong possibility of confusion.¹¹⁹ Thus, the court held that by not providing jurors with an instruction on the consequences of an NCRRI verdict, they will be “discouraged from deciding cases on improper bases, such as sympathy for the

108. And by the corollary, an acquitted defendant would be released from custody.

109. *Okie*, 2010 ME 6, ¶ 13, 987 A.2d at 499.

110. *Id.*

111. *Id.* The court, at this juncture in its decision, took the time to note that “[t]here is significant complexity to the possibilities for a defendant who is determined to be not guilty by reason of insanity, including the *possibility of fairly expedited release* from any psychiatric hospitalization or restriction.” *Id.* ¶ 13 n.4, 987 A.2d at 499 (citation to footnote only) (emphasis added). The implications of this comment are curious, as the court seems to be indicating that perhaps some of the jurors’ fears are well founded.

112. *Id.* ¶ 9, 987 A.2d at 498.

113. *Id.* Besides *Park* and *Wallace*, the court pointed to four other cases: *State v. Condon*, 468 A.2d 1348, 1351 (Me. 1983); *State v. Ruybal*, 398 A.2d 407, 415 (Me. 1979); *State v. Dyer*, 371 A.2d 1079, 1083 (Me. 1977); *State v. Armstrong*, 344 A.2d 42, 46-47 (Me. 1975). *Id.*

114. *Okie*, 2010 ME 6, ¶ 10, 987 A.2d at 498.

115. *Id.*

116. *Id.* ¶ 11, 987 A.2d at 498 (citations omitted).

117. *Id.*

118. *Id.*

119. *Id.* The court borrowed much of this reasoning from *Shannon*.

victim, or from issuing results-oriented verdicts that deviate from the applicable law.”¹²⁰

The court did note, however, that some twenty states do require or allow an instruction as to the consequences of an NCCRI verdict.¹²¹ The court attempted to distinguish some of those states by noting that they “also afford the jury a role in sentencing defendants in at least some types of cases; more particularly, most states that give such a jury instruction are death penalty states that require the jury to sentence in capital cases.”¹²²

In its closing sentences about the issue, the court noted that empirical data supporting either side of the debate seems to be “conspicuously absent.”¹²³ Thus, the court reasoned, there is no justification for believing that jurors are under a misconception as to the consequences of a NCCRI verdict.¹²⁴ The decision ended by leaving the door on the issue slightly ajar: “Unless and until such empirical data or other persuasive evidence indicate otherwise, we decline Okie’s invitation to reconsider *Park* and its progeny.”¹²⁵

B. Critique and Impact

Because the risk of error is incarcerating and punishing a very sick individual, who instead should be treated and monitored by professionals in the mental health field, the Law Court should no longer rely on bad precedent to refuse to give an instruction as to the consequences of a NCCRI verdict to Maine juries. In general, the Law Court has not treated the insanity defense very favorably in the last few decades, and it continued this in *Okie* by ignoring very compelling reasons for overturning its precedent. In the sentencing phase of capital cases the jury is informed of the consequences of their decision because they are serving a sentencing function that the judge usually occupies;¹²⁶ thus, the jury is in an informed position (knowledge). In most non-capital criminal cases the jury’s ignorance about sentencing is not prejudicial to the extent that it is near absolute (perfect ignorance).¹²⁷ However, unlike a capital case, where the jury’s awareness of sentencing is accurate, and unlike standard criminal cases where a jury’s ignorance is indiscriminating, in a NCCRI case jurors may bring a very specific misconception (imperfect ignorance) to their consideration of a defendant’s guilt. Thus, absent the corrective instruction, in their imperfect ignorance Maine juries may be inaccurately considering sentencing when deliberating.

Stated another way, a juror knows what occurs with a not guilty verdict (the defendant goes free). A juror knows that, because it is a judge’s province, they generally have no control over sentencing if they return a guilty verdict (the

120. *Id.* ¶ 11, 987 A.2d at 499.

121. *Id.* ¶ 11 n.3, 987 A.2d at 498 (citation to footnote only).

122. *Id.*

123. *Id.* ¶ 14, 987 A.2d at 499.

124. *Id.*

125. *Id.*

126. *Id.* ¶ 11 n.3, 987 A.2d at 498 (citation to footnote only).

127. That is, jurors generally do not know what sentence would be imposed on a person found guilty, of, say, grand theft. Normally, a situation of pure juror ignorance would be optimal for jurors to best serve their fact-finding function.

defendant is sentenced). Yet, a juror may not know what the effect of a NCRRI verdict is and may infer something, either erroneously or not (the defendant goes free, or is sentenced, or is committed). The *Okie* court reasoned that when a jury has no sentencing function, “it should be admonished to reach its verdict without regard to what sentence might be imposed.”¹²⁸ However, a jury’s return of a NCRRI verdict supplants a judge’s normal sentencing function,¹²⁹ thus, in essence, giving the jurors, unbeknownst to them, a sentencing power more akin to capital cases than standard criminal cases. Mandated commitment jurisdictions, like Maine, give juries the power to sentence a defendant to be automatically committed to a mental institution with the only possibility of release being a strict and comprehensive judicial hearing process. Yet, because juries in Maine do not receive the instruction, they go to this quasi-sentencing task in imperfect ignorance, bringing their misconceptions of the law with them.

Further, unlike the rest of the criminal trial, in Maine, the defendant has the burden of production as to the insanity defense. The court may remove from the jury the issue of insanity and the option of a NCRRI verdict, if the defendant does not present sufficient evidence to generate the issue.¹³⁰ Thus, in every case where an instruction would be appropriate on the dispositional consequences of a NCRRI verdict the defendant will have already met a substantial burden on the question of his sanity. The jury would only receive the instruction in cases where the very complex issues of sanity, and punishment versus treatment, are already very close. This is contrary to the public’s perception of the insanity defense as being abused as a “loophole” by cunning defendants.¹³¹

The *Okie* court in part relied on a legal fiction to justify denying the proposed instruction: “Because juries are presumed to follow the court’s instructions, in the absence of evidence to the contrary, the law assumes that the jury does not consider

128. *Okie*, 2010 ME 6, ¶ 11, 987 A.2d at 498 (internal quotations and citations omitted).

129. That is, pursuant to ME. REV. STAT. ANN. tit. 15, § 103 (2009), once a jury returns a verdict of NCRRI it has effectively “sentenced” the defendant to be committed to the custody of the Commissioner of Mental Health.

130. See *State v. Michaud*, 513 A.2d 842, 849-50 (Me. 1986).

131. Due in part to the ultimate judicial oversight on release, the insanity defense is anything but a “loophole” when successfully used in Maine. See *In re Donald Beauchene*, 2008 ME 110, 951 A.2d 81. In that case, Beauchene was appealing a superior court order denying his release from a state mental institution to which he was confined in 1970 after being found NCRRI to a charge of murder. *Id.* ¶¶ 1-2, 951 A.2d at 83. At his trial in 1970, Beauchene successfully argued that he was NCRRI because he suffered from “explosive personality disorder,” which, at that time, was classified in the Diagnostic and Statistical Manual of Mental Disorders (DSM II) as a mental disease or defect. *Id.* However, “explosive personality disorder” is not listed in the current DSM, and the superior court, at Beauchene’s 2008 release hearing, “found that Beauchene did not nor does have a mental disease or defect.” *Id.* ¶ 6, 951 A.2d at 84 (internal quotation marks omitted). Despite his apparent sanity, the superior court found that because his actual condition had not changed since a jury of his peers found him insane in 1970 he was not eligible for release. *Id.* This was upheld on appeal to the Law Court, which also held that an insanity acquittee must be eligible for release by the standard under which he was committed by a jury, not by modern standards of mental illness. *Id.* ¶ 10, 951 A.2d at 85. Thus, far from being abused as a “loophole,” in Maine a verdict of NCRRI may, by judicial decision alone, keep a sane man (by modern standards) locked in a mental institution for forty years. Further, the holding in *Beauchene* suggests that if the defendants in *Park* or *Wallace* had been found NCRRI they would, today, continue to be institutionalized in an asylum until they were “cured” of their homosexuality. See *supra*, text accompanying notes 14, 20.

the consequences of its verdict whether the verdict is not guilty, guilty, or not criminally responsible by reason of insanity.”¹³² This legal fiction is directly contrary to both common sense and the studies mentioned above. As noted by one researcher: “Notwithstanding the law’s attempt to mask their role by calling them mere fact finders, the jurors [in the study] were keenly aware of the importance of their decision. They were frustrated that the trial inadequately prepared them to do their task.”¹³³ Jurors do not operate as machines that clinically “find facts.” They do not operate in a vacuum. Jurors are all too aware that it is up to them to determine a defendant’s fate,¹³⁴ and they should not go to this in imperfect ignorance. Further, the *Okie* court reasoned that if jurors were provided with the sort of instruction that *Okie* had requested, they would then be invited by that instruction to consider sentencing matters that are not within their domain. This relies on the assumption that, contrary to the studies cited above, jurors do not already consider sentencing when deliberating.¹³⁵ Further, trial courts often flag an issue for the jury, and then instruct the jury to not consider the flagged issue in their decision-making.¹³⁶ This is accepted, and sound, practice. If, as the Law Court reasoned, the jury would be “discouraged from deciding cases on improper bases” by not receiving an instruction, then why would a court instruct juries that they may not consider, for example, a defendant’s invocation of their Fifth Amendment right against self-incrimination as an admission of guilt?¹³⁷ Omitting that instruction, following the Law Court’s reasoning, would better discourage juries from deciding cases on improper bases.

Further, following the court’s reasoning, because “juries are presumed to follow the court’s instructions,” the court could simply have allowed *Okie*’s proposed instruction and combined it with the limiting instruction that the jurors actually received.¹³⁸ Thus the instruction would be:

A person found not criminally responsible by reason of insanity would be

132. *Okie*, 2010 ME 6, ¶ 12, 987 A.2d at 499.

133. Morris, Bozzetti, Rusk & Read, *supra* note 82, at 1075.

134. *Id.*

135. See Weihofen, *supra* note 83, at 247 (“Not a single jury studied . . . refrained from considering what would happen to the defendant as a precondition for arriving at a decision concerning his guilt or innocence, sanity or insanity.”).

136. See, e.g., DONALD G. ALEXANDER, MAINE JURY INSTRUCTION MANUAL § 6-16 (LexisNexis Mathew Bender ed., 4th ed. 2010).

§ 6-16 Prior Convictions – Defendant. Instruction.

You must not consider the evidence of [the defendant’s] prior convictions as part of the proof of the acts alleged in this case. You may only consider the prior convictions in evaluating the believability of [the defendant’s] testimony. And believability is determined based on your evaluation of all of the evidence in the case, not just prior convictions.

137. *Id.* at § 6-8.

138. The jurors received this instruction: “You must not consider or be concerned about the consequences of any verdict you may reach in this case.” *Okie*, 2010 ME 6, ¶ 12, 987 A.2d at 499. Via limiting instructions, jurors are frequently told to use information only for a particular purpose. For example, evidence of past crimes, which would create the inference that a witness is a “bad person,” is generally inadmissible; but this same evidence may often be allowed in for impeachment. The jury is instructed to use the evidence only for the appropriate purpose. Compare M.R. Evid. 404(a) with M.R. Evid. 609.

institutionalized by the Commissioner of the Department of Health and Human Services, and certain criteria must be met, with court oversight, before that person could be discharged from institutional care However, you must not consider or be concerned about the *consequences* of any verdict you may reach in this case.¹³⁹

This both accurately states the law in 15 M.R.S.A. Sections 103 and 104A, and ensures, through the “presumption” that jurors follow the court’s instructions, that the jury will not consider things outside of their province.¹⁴⁰

In light of the feasibility of the above instruction, the reasoning in *Wallace*, which the court looked to for precedent, should no longer be considered authority. The *Wallace* court stated that because of the numerous approaches authorized by former Section 104, no jury instruction could accurately capture what the consequences of a NCRRI verdict would be.¹⁴¹ However, Section 104 was repealed and the approach under Sections 103 and 104A were very accurately represented in Okie’s proposed instruction. The *Okie* court noted that there “is significant complexity to the [subsequent dispositional] possibilities for a defendant who is determined to be not guilty by reason of insanity.”¹⁴² It is true that there would be no way for a jury to be instructed as to what would ultimately happen to an insanity acquittee. However, that is not what the proposed instruction endeavors to do. The instruction is merely to apprise the jury of the subsequent *legal and medical procedures* that an insanity acquittee is subject to, and to disabuse them of the notion that the acquittee will be immediately released. Thus, the unfeasibility argument from *Wallace* should no longer be considered authority.

As noted above, the court attempted to distinguish the jurisdictions that do require or allow an instruction by saying that “most of these states also afford the jury a role in sentencing defendants in at least some types of cases.”¹⁴³ However, this does not appear to be quite accurate. In perhaps the most seminal pro-instruction case on the matter, *Lyles v. United States*, the United States Court of Appeals for the District of Columbia Circuit recognized that juries should not be concerned with sentencing, but found this to be entirely inapplicable to the problem at issue here.¹⁴⁴ Instead, the court concluded that jurors have a right to understand a NCRRI verdict as accurately as they understand, through “common knowledge,” the meaning of the other two possible verdicts.¹⁴⁵

139. *Okie*, 2010 ME 6, ¶ 4, 987 A.2d at 496 (this is the Author’s combination of the proposed and actual instructions).

140. Some jurisdictions that follow the practice of correctly informing jurors of the consequences of a NCRRI verdict also warn them that they are not to consider sentencing when rendering a verdict. *See Fleming, supra* note 13, at § 3. Going further, a California court gave a three-prong instruction to the jurors by informing them: (1) that acquittal on grounds of insanity will not automatically result in the defendant’s release; (2) of the statutory procedures for institutionalization and treatment, and possible release; and (3) that the defendant’s post-verdict disposition must not be weighed in deciding whether the defendant is guilty, innocent, or NCRRI. *People v. Moore*, 211 Cal. Rptr. 3d 856, 866 (Cal. Ct. App. 1985).

141. *State v. Wallace*, 333 A.2d 72, 79 (Me. 1975).

142. *Okie*, 2010 ME 6, ¶ 13 n.4, 987 A.2d at 499 (citation to footnote only).

143. *Id.* ¶ 11 n.3, 987 A.2d at 498 (citation to footnote only).

144. 254 F.2d 725, 728 (D.C. Cir. 1957).

145. *Id.*

Jurisdictions are much more likely to be distinguished by whether or not they are “mandated commitment” states than whether they afford the jury a role in sentencing. In *Erdman v. State*, the Court of Appeals of Maryland stated:

In our scanning of the cases, we notice that, no matter what the reasons given or the rationale advanced, there is a correlation between the status of the law with respect to the disposition of a defendant found to be not criminally responsible and the determination whether to inform the jury on the matter. It appears that, usually, the instruction is required or permitted in those jurisdictions in which commitment, in practical effect, is automatic, and the eligibility of the committed individual for release is so structured as to give reasonable assurance that he will not be returned to society while still a danger to himself or to the person or property of others So, the weight of authority is not to be ascertained simply by the number of jurisdictions which require or permit the instruction as against the number of jurisdictions which preclude it. The decision in a particular jurisdiction must be viewed in the context of the status of the law with regard to commitment in that jurisdiction. *When the cases are examined in that light, a clear majority of the jurisdictions which have mandated commitment require or permit the instruction.*¹⁴⁶

Maine is a “mandated commitment” state, pursuant to Section 103.¹⁴⁷ This means that if the jury returns a verdict of NCRRI the defendant will be automatically committed and will only be released following a very structured procedure to ensure that he is no longer a danger to society.¹⁴⁸ Although the presiding judge serves no sentencing function, the superior court always has the ultimate authority on whether to authorize release or not.¹⁴⁹ In Maine, it is rather clear what the disposition of a defendant found NCRRI would be, and many other mandated-commitment states with clear statutory structures find a jury instruction appropriate and favorable.¹⁵⁰

Likewise, such an instruction may not be appropriate where automatic commitment is not mandated and, due to the amount of discretion vested in the responsible officials or the complexity of procedures governing commitment, it is unclear what disposition, in fact, would be made of a defendant found not responsible on grounds of insanity.¹⁵¹

Thus, whether a state has a mandated-commitment statute or not should

146. 553 A.2d 244, 247 (Md. 1989) (emphasis added) (citations omitted).

147. ME. REV. STAT. ANN. tit. 15, § 103 (2003 & Supp. 2010).

148. ME. REV. STAT. ANN. tit. 15, § 104-A (2003 & Supp. 2010).

149. Thus, to reiterate, the jury serves a quasi-sentencing function because insanity acquitees are automatically committed and the judge does not rule on sentencing following the verdict. Therefore, following the *Okie* court’s attempt to distinguish jurisdictions based on the jury’s sentencing function, Maine should fall in the category of pro-instruction states. Those states with mandated-commitment statutes effectively give the jury a quasi-sentencing power, and those juries should be fully informed.

150. *See, e.g., Erdman v. State*, 553 A.2d 244, 250 (Md. 1989). The court explained:

We do not prescribe a form of instruction [I]n . . . this case, the proposed instruction was sufficient. We suggest, however . . . that a recitation of the statutory procedure in great detail, such as reading the entire section of the statute, would tend to increase confusion.

Id. (internal quotations and citations omitted).

151. Fleming, *supra* note 13, at § 2b.

perhaps be the test for determining the propriety of the jury instruction. Further, the clarity of the statutory scheme can help determine the feasibility of such an instruction. Maine is a mandated-commitment state and its statutory language is very clear; thus the jury should receive the instruction.

In the *Okie* decision the court noted the relative dearth of reliable empirical data on this issue and stated that if future data suggested that jurors may be operating under misconceptions, then the court might reconsider *Park* and its progeny.¹⁵² However, in light of the risk that an insane person might be locked up with sound-minded and violent criminals it would seem more prudent to allow such an instruction until empirical data shows that it is unnecessary.¹⁵³ If it were to be later shown to be superfluous because jurors actually had no misperceptions, then what prejudice could such an instruction do to justice?¹⁵⁴ Certainly the risk that a jury may be “invited” to neglect their oath to give a true verdict according to the evidence is far outweighed by the possible miscarriage of justice when a sick individual is incarcerated and punished instead of being hospitalized and treated.

V. CONCLUSION

In *Okie*, the Law Court refused to follow other mandated-commitment jurisdictions by denying jury instructions on the consequences of a not criminally responsible by reason of insanity verdict. For its reasoning, the court looked to fifty-year-old precedent as well as the legal fiction that jurors are not supposed to consider the consequences of a verdict when deliberating. This decision continues a practice in Maine that has a very severe and very likely risk: the jurors may return a guilty verdict because they do not want a “mad dog” released into their communities. This fear is perpetuated by the media in its sensationalistic treatment of an already very sensational topic. Further, this fear is well documented by the empirical studies cited above.

Yet, this fear is not an accurate one in Maine. Maine has a clear, comprehensive, and safe statutory scheme for ensuring that mentally ill insanity

152. *Okie*, 2010 ME 6, ¶ 14, 987 A.2d at 499. As noted above, there are numerous, albeit old, studies on the subject indicating that jurors consider sentencing when deliberating on a verdict, and that they do this while under misconceptions about the sentencing. See, e.g., Weihofen, *supra* note 83, at 247. Further, there is extensive data on the public’s perception of the insanity defense. See, e.g., Silver, Cirincione & Stedman, *supra* note 56. Since the jury is composed of individuals from the public, it is not a drastic inferential step to extrapolate that the public’s misperceptions are carried over into jury deliberations. Thus, the court’s assertion as to the lack of empirical data is, although technically accurate, not wholly reflective of reality.

153. See, e.g., SIMON, *supra* note 89, at 96. The author, using an experimental method, conducted a study of jury behavior, which suggested that giving a jury instruction on the consequences of a NCRRI verdict might have no impact on the jury’s return of a verdict. *Id.* However, despite her findings, the author cautioned that this should be read not to show the superfluity of such an instruction, but rather “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.” *Id.*

154. See *Shannon*, 512 U.S. at 592 (Stevens, J., dissenting).

As long as significant numbers of potential jurors believe that an insanity acquittee will be released at once, the instruction serves a critical purpose. Yet even if, as the Court seems prepared to assume, all jurors are already knowledgeable about the issue, surely telling them what they already know can do no harm.

Id.

acquittees get the professional help that they need, and are not incarcerated alongside sane and potentially violent criminals. Maine's statutory scheme also ensures that communities will be kept safe because insanity acquittees are automatically committed; their status is not left to the whim of a mental health professional. Further, ultimate judicial oversight of release procedures guarantees that an insanity acquittee will not rejoin the community without a transparent, comprehensive, and trustworthy procedure.¹⁵⁵

However, all of these carefully crafted safeguards are meaningless if the potential imperfect ignorance of Maine's jurors is allowed to result in compromise verdicts because these jurors are merely trying to keep their communities safe. The victims of the *Okie* decision are the truly sick defendants who plead NCRRI, the very validity of Maine's statutory scheme, and Maine jurors who may make a terrible decision for all the right reasons. The *Okie* court should have followed California, Massachusetts, New Hampshire, and New York, among others, and allowed the instruction because "it can do some good and it can never do any harm."¹⁵⁶

155. As opposed to, say, the Commissioner of Mental Health solely making the determination based on his professional opinion. Judicial oversight ensures that someone other than a member of the professional mental health community makes the final determination. While this may cut both ways, this Author believes that it is in the best interests of the community into which the acquittee may be released to have the judge for that community, and not a more disinterested psychologist, make the final decision.

156. SIMON, *supra* note 89, at 96.

