

After the charge was concluded, the court called a bench conference at which defense counsel expressed substantial¹ satisfaction with the instructions, making no reference to or request concerning the so-called *Lyles* instruction on mandatory commitment of persons found not guilty by reason of insanity. Thereupon the court told the jury:

"I am going to repeat something that I said to you earlier and that is that you may return any one of five possible verdicts in this case. Your verdict may be either guilty of second degree murder or guilty of manslaughter or guilty of assault with a dangerous weapon or guilty of assault or not guilty." (Tr. 290.)

The Government urges us to find from defense counsel's failure to object to the court's charge that it "appears affirmatively" that appellant did not want the *Lyles* instruction on hospital confinement, and that the omission of an insanity verdict from the court's lists of alternatives must be deemed harmless because of reference to it elsewhere. The Government also urges that the evidence was insufficient to require an instruction on responsibility, hence any defects in the instruction are immaterial. We do not agree that the instruction was unnecessary.

I.

Under *Davis v. United States*, 160 U.S. 469, if there is "some evidence" supporting the defendant's claim of mental disability, he is entitled to have that issue submitted to the jury. Under *Durham v. United States*, 94 U.S.App. D.C. 228, 214 F.2d 862, evidence of a "mental disease" or "mental defect" raises the issue. The subject matter being what it is, there can be no sharp quantitative or qualitative definition of "some evidence." Certainly it means more

¹ Defense counsel requested a further charge upon a matter not relevant here. The court denied the request.