

case. I repeat that neither party had said the judge's charge in this respect was improper, inadequate or incomplete, and point out again that the *Lyles* majority found it satisfactory. In those circumstances, it seems plain that the whole discussion under Point I is *obiter dictum* which should not be treated as an authoritative holding.

It was not until Point II was reached that the *Lyles* majority began to discuss an issue which was actually presented. The discussion begins thus, *id.* at 26, 254 F. (2d) at 729:

"Having made to the jury the statement above quoted and discussed, the trial judge immediately said:

"I think I should add that Dr. Cushard of St. Elizabeths Hospital testified, as you will recall, that on a prior occasion he found no mental disorder whatever in the defendant, and that the defendant was a man of average intelligence."

Dr. Cushard had so testified. The question is whether the trial judge erred in making the quoted remark at the time and in the context in which he made it. . . ."

This was the portion of the judge's charge that was actually attacked by the appellant. He called it a "gratuitous digression" which "conveyed to the jury that the Appellant would be promptly released due to the fact that Doctor Cushard testified that Lyles was 'without mental disorder during his residence at St. Elizabeths Hospital.'" This, said Lyles, "effectively undermined the defense of insanity."

With respect to this, the Government's brief said:

"Appellant argues still further, not that the trial court failed to instruct in accordance with applicable legal principles, but only that the summarization vitiated by innuendo the otherwise admittedly correct instructions. . . ."

Curiously enough, the *Lyles* majority refused to reverse on Point II. I discuss this Point only to emphasize the fact that Point I was not mentioned in either brief, and that