

Before EDGERTON, BAZELON and WASHINGTON, Circuit Judges.

BAZELON, Circuit Judge.

Monte Durham was convicted of housebreaking,¹ by the District Court sitting without a jury. The only defense asserted at the trial was that Durham was of unsound mind at the time of the offense. We are now urged to reverse the conviction (1) because the trial court did not correctly apply existing rules governing the burden of proof on the defense of insanity, and (2) because existing tests of criminal responsibility are obsolete and should be superseded.²

I.

Durham has a long history of imprisonment and hospitalization. In 1945, at the age of 17, he was discharged from the Navy after a psychiatric examination had shown that he suffered "from a profound personality disorder which renders him unfit for Naval service." In 1947 he pleaded guilty to violating the National Motor Theft Act³ and was placed on probation for one to three years. He attempted suicide, was taken to Gallinger Hospital for observation, and was transferred to St. Elizabeths Hospital, from which he was discharged after two months. In January of 1948, as a result of a conviction in the District of Columbia Municipal Court for passing bad checks, the District Court revoked his probation and he commenced service of his Motor Theft sentence. His conduct within the first few days in jail led to a lunacy inquiry in the Municipal Court where a jury found him to be of unsound mind. Upon commitment to St. Elizabeths, he was diagnosed as suffering from "psychosis

with psychopathic personality." After 15 months of treatment, he was discharged in July 1949 as "recovered" and was returned to jail to serve the balance of his sentence. In June 1950 he was conditionally released. He violated the conditions by leaving the District. When he learned of a warrant for his arrest as a parole violator, he fled to the "South and Midwest obtaining money by passing a number of bad checks." After he was found and returned to the District, the Parole Board referred him to the District Court for a lunacy inquiry, wherein a jury again found him to be of unsound mind. He was readmitted to St. Elizabeths in February 1951. This time the diagnosis was "without mental disorder, psychopathic personality." He was discharged for the third time in May 1951. The housebreaking which is the subject of the present appeal took place two months later, on July 13, 1951.

According to his mother and the psychiatrist who examined him in September 1951, he suffered from hallucinations immediately after his May 1951 discharge from St. Elizabeths. Following the present indictment, in October 1951, he was adjudged of unsound mind in proceedings under § 4244 of Title 18 U.S.C., upon the affidavits of two psychiatrists that he suffered from "psychosis with psychopathic personality." He was committed to St. Elizabeths for the fourth time and given subshock insulin therapy. This commitment lasted 16 months—until February 1953—when he was released to the custody of the District Jail on the certificate of Dr. Silk, Acting Superintendent of St. Elizabeths, that he was "mentally competent to stand trial and * * * able to consult

1. D.C.Code §§ 22-1801, 22-2201 and 22-2202 (1951).

2. Because the questions raised are of general and crucial importance, we called upon the Government and counsel whom we appointed for the indigent appellant to brief and argue this case a second time. Their able presentations have been of great assistance to us. On the ques-

tion of the adequacy of prevailing tests of criminal responsibility, we received further assistance from the able brief and argument of Abram Chayes, *amicus curiae* by appointment of this Court, in *Stewart v. United States*, — U.S.App. D.C. —, 214 F.2d 879.

3. 18 U.S.C. § 408 (1946). 1948 Revision, 18 U.S.C. §§ 10, 2311-2313.