

with counsel to properly assist in his own defense."

He was thereupon brought before the court on the charge involved here. The prosecutor told the court:

"So I take this attitude, in view of the fact that he has been over there [St. Elizabeths] a couple of times and these cases that were charged against him were dropped, I don't think I should take the responsibility of dropping these cases against him; then Saint Elizabeths would let him out on the street, and if that man committed a murder next week then it is my responsibility. So we decided to go to trial on one case, that is the case where we found him right in the house, and let him bring in the defense, if he wants to, of unsound mind at the time the crime was committed, and then Your Honor will find him on that, and in your decision send him back to Saint Elizabeths Hospital, and then if they let him out on the street it is their responsibility."

Shortly thereafter, when the question arose whether Durham could be considered competent to stand trial merely on the basis of Dr. Silk's ex parte statement, the court said to defense counsel:

"I am going to ask you this, Mr. Ahern: I have taken the position that if once a person has been found of unsound mind after a lunacy hearing, an ex parte certificate of the superintendent of Saint Eliza-

beths is not sufficient to set aside that finding and I have held another lunacy hearing. That has been my custom. However, if you want to waive that you may do it, if you admit that he is now of sound mind."

[1] The court accepted counsel's waiver on behalf of Durham, although it had been informed by the prosecutor that a letter from Durham claimed need of further hospitalization, and by defense counsel that " * * * the defendant does say that even today he thinks he does need hospitalization; he told me that this morning."⁴ Upon being so informed, the court said, "Of course, if I hold he is not mentally competent to stand trial I send him back to Saint Elizabeths Hospital and they will send him back again in two or three months."⁵ In this atmosphere Durham's trial commenced.

[2-4] His conviction followed the trial court's rejection of the defense of insanity in these words:

"I don't think it has been established that the defendant was of unsound mind as of July 13, 1951, in the sense that he didn't know the difference between right and wrong or that even if he did, he was subject to an irresistible impulse by reason of the derangement of mind.

"While, of course, the burden of proof on the issue of mental capacity to commit a crime is upon the Government, just as it is on every

4. Durham showed confusion when he testified. These are but two examples:

"Q. Do you remember writing it? A. No. Don't you forget? People get all mixed up in machines.

"Q. What kind of a machine? A. I don't know, they just get mixed up.

"Q. Are you cured now? A. No, sir.

"Q. In your opinion? A. No, sir.

"Q. What is the matter with you? A. You hear people bother you.

"Q. What? You say you hear people bothering you? A. Yes.

"Q. What kind of people? What do they bother you about? A. (No response.)"

214 F.2d-55

Although we think the court erred in accepting counsel's admission that Durham was of sound mind, the matter does not require discussion since we reverse on other grounds and the principles governing this issue are fully discussed in our decision today in *Gunther v. United States*, — U.S.App.D.C. —, — F.2d —.

5. The court also accepted a waiver of trial by jury when Durham indicated, in response to the court's question, that he preferred to be tried without a jury and that he waived his right to a trial by jury.