

13th of July? A. No, not *how far* they were, that is correct." [Emphasis supplied.]

Thereafter, when the prosecutor on recross asked Dr. Gilbert whether he would change his opinion concerning Durham's mental condition on July 13, 1951, if he knew that Durham had been released from St. Elizabeths just two months before as being of sound mind, the court interrupted to say: "Just a minute. The Doctor testified in answer to my question that he doesn't know and he can't express a definite opinion as to his mental condition on the 13th of July." This, we think, overlooks the witness' unequivocal testimony on direct and cross-examination,¹¹ and misconceives what he had said in response to questioning by the court, namely, that certain symptoms of mental disorder antedated the crime, although it was impossible to say how far they had progressed.

Moreover, any conclusion that there was "no testimony" regarding Durham's mental condition at the time of the crime disregards the testimony of his mother. Her account of his behavior after his discharge from St. Elizabeths in May 1951 was directly pertinent to the issue of his sanity at the time of the crime.

(2) On re-direct examination, Dr. Gilbert was asked whether he would say that Durham "knew the difference between right and wrong on July 13, 1951; that is, his ability to distinguish between what was right and what was wrong." He replied: "As I have stated before, if the question of the right and wrong were propounded to him he could give you the right answer." Then the court interrupted to ask:

"The Court. No, I don't think that is the question, Doctor—not whether he could give a right answer to a question, but whether he, himself, knew the difference between right and wrong in connection with governing his own actions. * * * If you are unable to answer, why,

you can say so; I mean, if you are unable to form an opinion.

"The Witness. I can only answer this way: That I can't tell how much the abnormal thinking and the abnormal experiences in the form of hallucinations and delusions—delusions of persecution—had to do with his anti-social behavior.

"I don't know how anyone can answer that question categorically, except as one's experience leads him to know that most mental cases can give you a categorical answer of right and wrong, but what influence these symptoms have on abnormal behavior or anti-social behavior—

"The Court. Well, your answer is that you are unable to form an opinion, is that it?

"The Witness. I would say that that is essentially true, for the reasons that I have given."

Later, when defense counsel sought elaboration from Dr. Gilbert on his answers relating to the "right and wrong" test, the court cut off the questioning with the admonition that "you have answered the question, Doctor."

The inability of the expert to give categorical assurance that Durham was unable to distinguish between right and wrong did not destroy the effect of his previous testimony that the period of Durham's "insanity" embraced July 13, 1951. It is plain from our decision in *Tatum* that this previous testimony was adequate to prevent the presumption of sanity from becoming conclusive and to place the burden of proving sanity upon the Government. None of the testimony before the court in *Tatum* was couched in terms of "right and wrong."

[5] Finally, even assuming *arguendo* that the court, contrary to the plain meaning of its words, recognized that the prosecution had the burden of proving Durham's sanity, there would still be a fatal error. For once the issue of

11. See note 10, *supra*.