

fendant acquitted by reason of insanity, and we are unable, from our study of the record, to say that this defendant affirmatively waived it. *Lyles v. United States*, supra, 103 U.S.App.D.C. at 25-26, 254 F.2d at 728-729. Since the case will have to be retried, it may be well simply to note two other inadvertences in the court's charge which we are confident will not recur on retrial.

As heretofore indicated, following a bench conference after the judge had concluded his charge, an additional instruction was given the jury, outlining the alternative possible verdicts, without including not guilty by reason of insanity. Also, in its concluding remarks relating to mental responsibility of the accused, the court charged as follows:

"If you find that this defendant committed this offense, that is, murder in the second degree or the lesser included offenses and you further find that at the time he committed this offense he was suffering from a mental disease or defect which affected him, that he was incapable of distinguishing right from wrong or if he could tell right from wrong was incapable of controlling his actions, then you would find that the defendant's act was the product of the defendant's mental abnormality." (Tr. 283.)

This is not an accurate statement of the *test* for criminal responsibility in this Circuit. We think the jury may be instructed, provided there is testimony on the point, that capacity, or lack thereof, to distinguish right from wrong and ability to refrain from doing a wrong or unlawful act⁹ may be considered in determining whether there is a re-

⁹ An expert may not be compelled to testify in these terms if he believes they are essentially moral or legal considerations beyond the scope of his special competence as a behavioral scientist. *Stewart v. United States*, 101 U.S.App. D.C. 51, 53, 247 F.2d 42, 44.