

the defendants' self-serving statements which in my view did not constitute even a scintilla of evidence of insanity.

In the *Tatum* case, this court said:⁷ "In essence, however, the entire defense [of insanity] rested upon appellant's insistence that he remembered nothing of what happened at the time the offense was committed." Tatum's trial counsel did not request, and the trial court did not give, an instruction on insanity, and the omission was not urged as error on appeal. But this court, acting under the "plain error" rule,⁸ held the instruction should have been given because the issue was raised by Tatum's statement that he did not remember committing the crime. In its opinion the court said:⁹

"... '[I]n criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense is his own.'..."

This statement is at variance with the majority's pronouncement in this case—in which I heartily join—that a scintilla is not enough, under which Tatum's conviction could not have been reversed. It is essential, I think, that the *Tatum* case be overruled.

The *Clark* case is of the same type and, pursuant to what the majority now says, should be repudiated. There, this court said: "Defense counsel's attempt to take the issue of insanity out of the case was error."¹⁰ Defense counsel had

⁷ 88 U. S. App. D. C. at 388, 190 F. (2d) at 614.

⁸ Rule 52(b), Fed. R. Crim. P.

⁹ 88 U. S. App. D. C. at 391, 190 F. (2d) at 617, quoting 53 Am. Jr., Trial, § 580, p. 458.

¹⁰ I suppose the court meant to say this amounted to ineffective assistance of counsel.