

Fall 1960

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### Recommended Citation

Thomas A. Flannery, Meeting the Insanity Defense, 51 *J. Crim. L. Criminology & Police Sci.* 309 (1960-1961)

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## MEETING THE INSANITY DEFENSE

THOMAS A. FLANNERY\*

The author has been an Assistant United States Attorney for the District of Columbia since 1950. During that time, he has prosecuted over 300 jury cases including many notable homicides involving the defense of insanity.

Insanity is frequently a defense in the trial of crimes carrying severe penalties. In this article, Mr. Flannery contends that although this defense is often meritorious, it is also sometimes abused. The author then directs his attention to the problems which arise in the prosecution of those cases where there is genuine disagreement as to the defendant's mental condition or where the defense of insanity actually appears to be spurious. In that connection, he offers a number of suggestions with respect to the timing and thoroughness of the psychiatric examination of the defendant, the problem of recognizing and meeting a case of "prison psychosis," the use of lay witnesses, and the proper formulation and utilization of hypothetical questions. Mr. Flannery also sets forth a series of specific questions which he has found to be effective in the cross examination of psychiatrists testifying for the defense.

This article is substantially based upon lectures on the insanity defense delivered by the author at the 1959 and 1960 Northwestern University Short Courses for Prosecuting Attorneys.—EDITOR.

Insanity as a defense in criminal cases is frequently used and sometimes abused. The frequency of its use as a defense in criminal cases seems to rise almost in direct proportion to the severity of the punishment; it is seldom used in the less serious felony or misdemeanor cases where there is no possibility of the imposition of the death penalty or a long term of imprisonment.

Although the sole purpose of this article is to suggest certain procedures which the prosecutor may follow to counteract this defense when it is interposed in a criminal case, it seems appropriate at the outset to refer to the various definitions of insanity used throughout the United States under which one may be excused from criminal responsibility.<sup>1</sup> Since the District of Columbia at one time

\* The views and opinions expressed herein are solely the writer's based on his personal experience in handling criminal prosecutions.

<sup>1</sup> See A.L.I. MODEL PENAL CODE, Appendix A § 4.01, at 161 (Tent. Draft No. 4, 1955).

### *Right-wrong test.*

31 States, and probably one additional state.

Arizona, California, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Washington, West Virginia, Wisconsin, and probably Rhode Island. In Maine and West Virginia the test apparently is interpreted to require a certain capacity for control as well as cognition.

### *Right-wrong, irresistible impulse test.*

14 States, the federal jurisdiction, U.S. Army, and 1 State with delusional impulse test.

Federal jurisdiction, U.S. Army, Alabama, Arkan-

or another in its history has employed practically all of these different tests, I will advert briefly to the history of the insanity law in the District of Columbia for the purpose of explaining the differences in the several tests currently being used.

Until July 1, 1954, the test of legal insanity in the District of Columbia had been the right and wrong test supplemented by the irresistible impulse test. The rationality test, or right and wrong test, may be traced back to the Roman Law, where it was believed that the insane lacked free will, and ultimately to the Greek philosophers Plato and Aristotle. In the middle of the 19th Century the House of Lords in the famous *McNaghten*<sup>2</sup> case restated this test in a form which since has been followed not only in England but also in most American jurisdictions. In the *McNaghten* case it was stated that:

"The jurors ought to be told in all cases that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for

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sas, Colorado, Connecticut, Delaware, Indiana, Kentucky, Massachusetts, Michigan, New Mexico, Utah, Vermont, Virginia, and Wyoming; Georgia (delusional impulse).

### *Product of mental disease or defect test.*

1 State (New Hampshire) and the District of Columbia.

### *Test not clear.*

1 State (Montana). Failure to meet requirements of the right-wrong, irresistible impulse test seems ground for acquittal, and probably persons incapable of forming a criminal intent are also excused.

<sup>2</sup> 8 Eng. Rep. 718 (1843).

his crimes until the contrary be proved to their satisfaction; and that to establish a defense on the grounds of insanity it must be clearly proved that at the time of the committing of the act the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of what he was doing or if he did know it that he did not know he was doing what was wrong."

In 1929, in the *Smith*<sup>3</sup> case, the irresistible impulse test was added as a supplementary test for determining criminal responsibility in the District of Columbia. In *Smith* it was held that the mere ability to distinguish between right and wrong was no longer the correct test where the defense of insanity was interposed. In this case the court said:

"... the accused must be capable not only of distinguishing between right and wrong but that he was not impelled to do the act by an irresistible impulse which means before it will justify a verdict of acquittal that his reasoning powers were so far dethroned by his diseased mental condition as to deprive him of the will power to resist the insane impulse to perpetrate the deed, though knowing it to be wrong."

In July, 1954, in the now renowned *Durham*<sup>4</sup> case, the United States Court of Appeals for the District of Columbia handed down a new rule on insanity which in effect superseded the right and wrong and irresistible impulse tests. Simply stated this new test held that "an accused is not criminally responsible if his unlawful act was the product of mental disease or defect." Actually the so called *Durham* rule is merely a restatement of the definition of insanity laid down in the *Pike*<sup>5</sup> case decided in New Hampshire in 1869. Under this rule it is now possible for a defendant suffering from a mental disease or defect to win an acquittal by reason of insanity despite the fact that he knew the difference between right and wrong and was not driven by an insane irresistible impulse to commit the criminal act, for the test is no longer, solely, whether the defendant knew the nature and quality of his criminal act, but whether the act was

caused by mental disease or defect.<sup>6a</sup> The terms mental disease and defect encompass a variety of mental conditions.<sup>6</sup>

In certain cases it is now possible for even the psychopath or sociopath to win an acquittal by reason of insanity since many psychiatrists believe that such an individual suffers from a mental disease.<sup>7</sup> In the District of Columbia once a defendant has introduced some evidence of insanity which is sufficient to overcome the presumption of sanity, the Government must then prove sanity at the time of the crime beyond a reasonable doubt. Moreover it has been held that where the evidence of insanity is convincing and the Government has been unable to produce substantial evidence of the defendant's sanity at the time of the crime, the court must take the case away from the jury and direct a verdict of not guilty by reason of insanity.<sup>8</sup>

Although its adherents have vigorously sought to have the *Durham* Rule adopted in other jurisdictions they have been singularly unsuccessful; the overwhelming majority of jurisdictions appear to take the view, at this time, that those who have cognition of the nature and quality of a deliberate criminal act should be held accountable and responsible in the eyes of the law.<sup>9</sup> The *Durham*

<sup>6a</sup> When a defendant has been found not guilty by reason of insanity, the District of Columbia Code provides that he shall remain in a mental institution until the Superintendent certifies that he has recovered his sanity and is no longer dangerous. D. C. CODE, tit. 24, §301.

<sup>6</sup> In defining disease and defect in the *Durham* case, the court said: "We use 'disease' in the sense of a condition which is considered capable of either improving or deteriorating. We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease."

<sup>7</sup> *Blocker v. United States* — F.2d —, decided by United States Court of Appeals for District of Columbia on June 25, 1959, No. 14274; *Overholser v. Leach*, 257 F.2d 667 (D. C. Cir. 1958).

<sup>8</sup> *Douglas v. United States*, 239 F.2d 52 (D.C. Cir. 1956); *Wright v. United States*, 250 F.2d 4 (D.C. Cir. 1957); *Fielding v. United States*, 251 F.2d (D.C. Cir. 1957); *Grover Lee Isaac v. United States* — F.2d —, decided by United States Court of Appeals for the District of Columbia on January 21, 1960.

<sup>9</sup> *State v. Goza*, 317 S.W.2d 609 (Mo. 1958); *Commonwealth v. Chester*, 150 N.E.2d 914 (Mass. 1958); *State v. Goyet*, 120 Vt. 12, 132 A.2d 623 (1957); *Sollars v. State*, 75 Nev. 248, 316 P.2d 917, *rehearing denied*, 73 Nev. 343, 319 P.2d 139 (1957); *People v. Carpenter*, 11 Ill. 2d 60, 142 N.E.2d 11 (1957); *State v. Collins*, 50 Wash. 2d 740, 314 P.2d 660 (1957); *People v. Ryan*, 140 Cal. App. 2d 412, 295 P.2d 496 (1956); *Flowers v. State*, 236 Ind. 151, 139 N.E.2d 185 (1956); *Bryant v. State*, 207 Md. 565, 115 A.2d 502 (1955). Quite recently

<sup>3</sup> *Smith v. United States*, 36 F.2d 548 (D.C. Cir. 1929).

<sup>4</sup> *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

<sup>5</sup> *State v. Pike*, 49 N. H. 399 (1869). See also *State v. Jones*, 50 N. H. 369 (1871).

decision has provoked much discussion and controversy. However, as previously stated, it is not the purpose of this article to discuss the relative merits of the *Durham* Rule as opposed to any other test of legal insanity, but rather to suggest various practical techniques which the prosecutor may fairly employ in combating this defense when it is raised during a criminal trial.

It should never be forgotten that a prosecuting attorney is a servant of the law, and it is his duty to see not only that the guilty shall not escape but also that the innocent and those not legally responsible shall not be convicted. Occasionally cases arise where the evidence unquestionably reveals that the defendant was insane under existing law and therefore not legally responsible for his criminal act. Justice is served in such an instance by a verdict of not guilty by reason of insanity. The situation I will discuss is one where it appears that the defense of insanity is fraudulent or where there is a genuine disagreement as to the defendant's mental condition.

#### HOW TO PREPARE TO MEET THE DEFENSE

Assume that a very vicious murder or rape has been committed in your jurisdiction and you have the duty of prosecuting the defendant. Assume further that you either have been advised or have reasonable grounds to believe that the defense will be insanity. Under these circumstances what steps should the prosecutor take to insure that the defense will be fairly met and that justice will be done to all concerned, bearing in mind that a criminal trial should be a search for truth and justice and not a mere game or battle of experts?

Pennsylvania, in a strong opinion, reaffirmed its adherence to *McNaghten*. See *Commonwealth v. Novak*, 395 Pa. 199, 150 A.2d 102 (1959). See also *State v. Lucas*, 30 N. J. 37, 152 A.2d 50 (1959). *Cf.*, *Sauer v. United States*, 241 F.2d 640 (9th Cir.), *cert. denied*, 354 U.S. 940 (1957); *Anderson v. United States*, 237 F.2d 118 (9th Cir. 1956); *Howard v. United States*, 232 F.2d 274 (5th Cir. 1956). In *Anderson v. United States*, *supra* at 127, the court held that it was bound by the decision of the United States Supreme Court in *Davis v. United States*, 160 U.S. 469 (1895), and *Fisher v. United States*, 328 U.S. 463 (1946), and therefore could not follow *Durham*, but further indicated that "it had no desire to join the courts of New Hampshire and the District of Columbia in their 'magnificent isolation' of rebellion against *McNaghten*, even though New Hampshire has been traveling down that lonesome road since 1870. See *State v. Pike*, 49 N. H. 399. Rather than stumble along with *Pike*, we prefer to trudge along the now well-traveled pike blazed more than a century ago by *McNaghten*."

Arrangements should be made immediately to have the defendant given a thorough psychiatric examination as soon after the crime as possible. This is important because competent, experienced psychiatrists agree that it is usually difficult to render an opinion as to a person's mental condition at a time prior to the time of the original examination. This is particularly true when it appears that the person examined did not suffer from organic brain damage or have a prior history of hospitalization. It is advisable to have at least two psychiatrists examine the defendant and also to have a skilled psychologist conduct a psychological examination. It is preferable to have the psychiatric examination performed in a mental hospital over a period of from 30 to 90 days. In this way malingerers can be more readily detected and a more thorough psychiatric examination conducted.

In a recent case where the defendant had been indicted for first degree murder, the hospital records revealed that when the defendant appeared for his regular interview with the psychiatrists he displayed what appeared to be gross symptoms of mental disease, in that he spoke of hearing voices, was emotionally upset, and appeared to be in a constant state of agitation and fear. However, the hospital records further revealed that the ward attendants noted that on the ward he was lucid at all times, friendly, cooperative, extremely interested in politics and sports, and active in the various programs initiated for the benefit of the patients, i.e., that he didn't display any of the symptoms which he evidenced only when interviewed by the doctors. The jury heard all of this evidence, and their verdict indicated that they were not impressed with the defendant's contention that he was insane, although several psychiatrists had been greatly impressed.

If for some reason it is not possible to have the examination conducted in a hospital, it can be done in jail, but it is emphasized that every effort should be made to have the defendant examined immediately after the crime. The psychiatrists should make a careful examination into the defendant's background and should be given an opportunity to study the facts in the case and to talk to the witnesses so that they may know how the defendant acted on the day of the crime. If at all possible the examination should include a

complete physical and neurological examination, an electro-encephalogram test, as well as the other modern methods of examination.

Not to be overlooked is the importance of the lay witness in proving the defendant's sanity. Juries are often much more impressed with the observations of the victim of a rape or robbery, the persons who witnessed the crime and heard what the defendant said or observed what he did, and the police officers who apprehended the defendant and interrogated him, than they are with the opinion of a psychiatrist who saw the defendant for the first time days, weeks, or months after the crime had been committed and then only for a brief period. A lay witness can testify as to how a defendant acted and, in most jurisdictions, may state his opinion as to the defendant's sanity. A lay witness certainly can testify as to whether a defendant appeared confused and bewildered or whether he perpetrated the crime in an efficient and cunning manner. With respect to lay witnesses it is advisable also to make every effort to secure witnesses who had daily contact with the defendant, including his associates, employers and neighbors. The testimony of the lay witness who has had prolonged and intimate contact with the defendant of course will carry greater weight than the testimony of a lay witness who saw him only for a brief period.

Many people who commit crimes are emotionally unstable or suffer from mild mental disorders. Often after this type of individual has committed a crime and has been incarcerated he may develop what is sometimes termed prison psychosis. This condition is precipitated by incarceration and by the defendant's realization of the consequences of his wrongful act. A psychiatrist may examine a defendant several weeks or months after a crime and discover him to be psychotic at that time and showing true symptoms of mental disease. However, do not overlook the possibility that this may be "prison psychosis." The fact that a defendant may be psychotic after the crime does not necessarily mean that he was psychotic or not mentally responsible on the date of the crime. That is why it is important to have the defendant examined by psychiatrists immediately after the crime and to secure the testimony of lay witnesses who had the opportunity to observe the defendant prior to and during the commission of the crime. Psychosis caused by incarceration often clears up after a defendant is removed from

jail and transferred to a hospital environment or when the pending charges are dropped.

The hypothetical question can often be used to great advantage in cases involving the defense of insanity. In a hypothetical question the expert witness is asked to assume the truth of certain facts and then to express an opinion based upon the truth of the hypothetical facts. Before a hypothetical question may be asked the facts upon which the question is based must be established by the evidence. Suppose as a prosecutor you have the duty of prosecuting a case wherein a psychiatrist has examined a defendant charged with murder several months after the crime and found him to be psychotic evidencing clear symptoms of mental disease. Suppose further, however, that the evidence reveals that the defendant had planned this crime in a cool, calculating manner, had attempted to cover up all traces of the crime by destroying the evidence, had carefully removed his fingerprints at the scene of the crime, and had hidden the stolen money or buried the body. Assume also that when apprehended he at first furnished a false alibi but then finally made a complete confession, and that during this time he was coherent and in full possession of his faculties and displayed no mental symptoms. Suppose further that after having been transferred from jail to a mental hospital the defendant recovered from his psychosis. Assume then that at the trial a psychiatrist called by the defendant testified that the defendant had been of unsound mind on the date of the crime and that a psychiatrist called by you had a different opinion and would testify that the defendant had been of sound mind on the date of the crime. Under these circumstances it would be advisable to ask the prosecution psychiatrist a hypothetical question in which he would be asked to assume that the defendant had committed the crime as outlined, had displayed no mental symptoms at that time and had been found to have a psychosis sometime later which cleared up after he had been transferred to a mental institution. Assuming the truth of those facts and taking them into consideration together with his knowledge of the defendant gained from his personal examination, the witness then might be asked whether he had an opinion as to the defendant's sanity on the date of the crime, whether the defendant knew the difference between right and wrong on the date of the crime, or whether in his opinion based on the hypothetical

facts, the defendant had a mental disease or defect on the date of the crime which caused him to commit the crime. The doctor could also be asked whether assuming the truth of the hypothetical facts he had an opinion whether the defendant developed the psychosis after the crime.

Furthermore it would be possible to ask the witness whether the defendant's actions on the date of the crime were the manifestations and symptoms of a person of unsound mind. At times the same hypothetical question can be used on cross examination of the defense psychiatrist and your case may be helped regardless of the answer of the witness. If the facts clearly show that the defendant had exhibited no unusual mental symptoms on the date of the crime and the defense psychiatrist nevertheless stubbornly insists that the hypothetical facts make no difference as far as his opinion is concerned, then the jury probably will not be impressed with his testimony. On the other hand if the witness concedes that the question revealed no unusual mental behavior by the defendant on the day of the crime, then you have greatly weakened the effect of his testimony.

The hypothetical question is a potent weapon when properly used, but it should be carefully prepared beforehand. The question should be discussed with the witness before trial and should be written out and submitted to the Court for approval before it is asked. This will avoid the possibility of having an objection causing the question to be ruled out during the trial with resulting damage to your case.

Several years ago a most unusual murder case involving the defense of insanity was prosecuted in the District of Columbia.<sup>10</sup> What happened in that case is an outstanding example of how psychosis can develop during incarceration and the value of the hypothetical question in directing the jury's attention to that fact. The facts revealed that in 1938 the defendant had murdered a woman by placing potassium cyanide in a drink of whiskey. He was arrested the day after the crime and dictated a lengthy confession which he signed after reading it carefully and initialing certain corrections. At the time of his arrest and confession the defendant appeared lucid and in full possession of his faculties, and he displayed a clear recollection of what he had done. About a

month later, while incarcerated in jail awaiting trial, the defendant began to display unusual mental symptoms. He was examined by several psychiatrists who found him to be psychotic suffering from dementia praecox, catatonic type. The outstanding symptoms of the disease were stupor and a withdrawal from reality. His recollection was poor and he appeared to have little recollection of the crime. The defendant was thereupon committed to a mental institution where he remained for many years. Finally in 1955, over sixteen years after the crime, he was adjudicated competent and went on trial for the murder. At the trial his confession was read to the jury and there was conflicting psychiatric testimony as to his mental condition on the date of the crime. Lay witnesses testified in regard to the defendant's apparently normal behavior during his confession and the doctors were asked a lengthy hypothetical question which incorporated all the facts and the history of the case. The doctors were then asked to give an opinion whether the defendant had been of unsound mind when he committed the crime or whether he had developed the psychosis after the crime. Several psychiatrists gave different opinions. The jury found the defendant guilty of second degree murder. The jurors later stated that they were impressed by the fact that the defendant had been able to dictate his confession very accurately, even to the extent of initialing certain corrections, and apparently had a clear recollection of events shortly after the crime. They were convinced that the defendant had developed the psychosis while in jail awaiting trial. The result in this case is a striking example of not only the potency of the hypothetical question when properly utilized but also the importance that the jurors sometimes place upon lay witness testimony.

#### HOW TO CROSS EXAMINE A PSYCHIATRIST

After the defense psychiatrist has testified the prosecutor must undertake the delicate task of cross examination. All experienced trial lawyers realize that one must approach the task of cross examining an expert in any field with care and caution. This is particularly true of the medical doctor and psychiatrist. These men have spent years in preparing themselves for their chosen work and most of them are well qualified and able to handle themselves on the witness stand.

Some psychiatrists, however, are not as well

<sup>10</sup> *Askins v. United States*, 231 F.2d 741 (D.C. Cir. 1956).

qualified as others and are extremely vulnerable on cross examination. There are a certain few psychiatrists who appear in case after case to testify that defendants were insane when they committed certain crimes despite the fact that the defendants have been found to be of sound mind by competent psychiatrists or had exhibited no mental symptoms either before, after, or while committing their crimes. It is not unusual to find that such a witness will glibly testify that in his opinion the defendant was of unsound mind on the date of the crime, although he examined him long after the crime and only for a brief period and did nothing else by way of independent investigation. The fact that the expert witness can testify that he was graduated from a medical school and possesses an impressive list of degrees, has written a number of books, and belongs to many medical organizations does not necessarily mean that he is a competent psychiatrist.

It is well to ascertain first of all whether a psychiatrist is a diplomate and has been certified as a specialist in psychiatry by the American Board of Psychiatry and Neurology. In order to be so certified one must have served for three years as a resident in psychiatry at an approved hospital and after that have had two years of practical experience. Then he must pass stringent written and oral examinations before he may be certified as a specialist by the American Board of Psychiatry and Neurology. The prosecutor should check this before the witness takes the stand. If the psychiatrist has not been certified as a diplomate his testimony may be weakened at the outset in the eyes of the jury.

If a psychiatrist is reputed or known to be a "defense expert" by virtue of his appearance on behalf of the defense in numerous criminal cases, it is well to inquire as to how many times he has testified as an expert and then to develop the fact that on all of these occasions he has testified that a defendant was of unsound mind. These matters should be checked beforehand also, since an adverse answer could seriously damage your case.

The fact that a witness may belong to a great number of professional societies may sound impressive to a jury, but the only prerequisite to membership may be the payment of dues. Likewise the witness may have written a number of books, but they may consist of advice to married people or deal with subjects which would hardly qualify him as an expert on insane criminals.

However, it is only fair to state that very few psychiatrists will venture to give an opinion unless they have had the opportunity to make a thorough examination and are in a position to give a valid opinion. My experience has shown that most psychiatrists are men of integrity who have devoted their lives to treating mentally sick people. The great majority of psychiatrists will give an honest opinion of a defendant's mental condition whether they are retained by the prosecution or by the defendant. However, the so-called "professional witness" or "defense psychiatrist" has done much to damage the reputation of psychiatry generally. This is unfortunate because psychiatrists are doing a tremendous job in combating mental illness, which is the nation's most serious health problem.

With regard to qualifications, it is suggested that the qualifications of the prosecution psychiatrist should never be stipulated. Juries are extremely interested in the qualifications of expert witnesses. The prosecution psychiatrist should testify as to his educational background and experience in great detail. For obvious reasons defense lawyers are usually eager to stipulate a doctor's qualifications, particularly if he happens to be an outstanding man in his field. However, it should not be forgotten that although the court and counsel for both sides may know of the doctor's qualifications and have the greatest respect for him, most of the jury probably have never heard of him. Therefore, to stipulate his qualifications at the outset of his testimony, without having him tell the jury about his background, is a mistake, and the jury probably will not accord his testimony the weight they would have given it had they heard about his educational background and experience.

On cross examination every effort should be made to have the psychiatrist explain his diagnosis and opinion in simple, everyday language which a jury can understand. Insist that the witness give common sense, valid reasons to fortify his opinions. The facts in each case are different and no set formula for cross examination can be devised for use in every case. However, there are certain questions which, with some variations, can be asked in most cases involving the defense of insanity and which will aid the jury to understand and intelligently appraise the evidence. Experience has shown that the following questions, when asked during cross examination of a defense psychiatrist, will help the jury to

decide whether the defendant has been given a thorough examination and how much weight should be accorded the testimony:

1. How long after the date of the crime did you first examine the defendant? (This question is important since most competent psychiatrists will state that it is extremely difficult to give an opinion as to a person's mental condition at a time prior to the time he first examined him.)

2. How many times did you examine the defendant?

3. What was the total amount of time you spent with the defendant?

4. Did the defendant have a prior psychiatric history?

5. What independent investigation have you made in this case?

6. Have you talked to defendant's family, fellow employees, friends, neighbors?

7. Do you know the facts in this case?

It is not unusual to find that a psychiatrist will state that a defendant was of unsound mind on the date of the crime, and yet not know exactly how the defendant perpetrated the crime or how he acted on the date of the crime. In another recent case in the District of Columbia, the defendant was indicted for rape and interposed the defense of insanity. The facts revealed that he had kidnapped his victim in Maryland while she was parking her automobile and had driven to a secluded area in Washington where he raped her. He then fled from the scene, but in his haste to escape he dropped a wallet containing his identification. He was apprehended shortly thereafter and vigorously denied the crime and stated that he had an alibi. When confronted with the victim who identified him and the evidence of the wallet, he continued to deny the crime and claimed that he had lost his wallet a week prior to the crime. It appeared that five years before the crime that the defendant had been hospitalized briefly for treatment for psychosis. During the trial several psychiatrists testified for the defendant and expressed the opinion that he had been of unsound mind on the date of the crime. They were then asked to tell the jury what they knew about the facts of the case. It developed that they knew very little of the defendant's actions on the night of the crime, but were relying on his past history of hospitalization plus what the defendant told them while being interviewed. When these doctors were told that the defendant had given several conflicting alibis, had lied about losing his wallet,

and were then asked if this didn't indicate that he really was a very clever individual rather than a person of unsound mind, they merely shrugged their shoulders and stated that even if they had known these facts before they would have attached no significance to them. One doctor went on to state that any one who committed rape had to be suffering from a mental disease in any event. Before cross examination was finally completed some of the jurors were detected looking at the witnesses in a very skeptical manner, and their verdict of guilty returned shortly thereafter indicated that they believed that the government had proven the defendant sane beyond any reasonable doubt.

8. What symptoms did the defendant exhibit when you examined him? (Develop whether the diagnosis fits the action of defendant on date of crime—e.g., a doctor may find a defendant in a catatonic stupor months after the crime, but he may have been very alert while committing the crime.)

9. Did you have psychological tests made?

10. Did you have examinations made to determine the presence of organic brain disease?

(a) An X-ray examination.

(b) A physical examination.

(c) Electro-encephalogram test, e.g., tracing of waves generated by electrical impulses from brain which may indicate epilepsy or brain tumors.

(d) Pneumo-encephalogram test. In this test air is injected into the brain. X-rays of the brain will then show any unusual spaces in the brain.

(e) Neurological examination, e.g., a check of the central nervous system damage.

If the witness did not conduct these various tests it can be argued that his examination was woefully inadequate. If he did conduct the tests and found no organic brain damage then he can be asked the following question:

11. Then, doctor, you are relying entirely on what the defendant told you about his symptoms or what you observed about his behavior while talking to him?

12. Since you found nothing organically wrong there is a possibility that the defendant is malingering since your opinion rests on his demeanor and behavior while being observed by you.

13. Did defendant know the difference between right and wrong?

If the answer is no, then the following questions might be asked depending upon the circumstances.

14. (a) Then why did the defendant flee from the scene?

(b) Then why did he pick a secluded spot to commit the crime?

(c) Then why did he lie to the police if he did not realize he had done wrong?

15. What was the defendant's motive (to secure money, to satisfy his lust, to gain revenge; or was he driven by some insane delusion to commit the crime)?

16. Do you believe that all criminals suffer from mental disease? (There are some psychiatrists who believe that all criminals are suffering from mental disease. When a jury hears a psychiatrist state this, they usually disregard his testimony.)

17. Have you ever testified in court that a defendant was of sound mind? (This question should be saved for the "professional" defense psychiatrist.)

#### CONCLUSION

In this brief discussion, it is impossible to discuss all of the various ways to cross examine a psychiatrist, but the answers to the questions suggested will open up new avenues of cross examination. Occasionally one can spend hours in effective cross examination of a psychiatrist. It is emphasized that the witness should be made to answer questions in language which the jury can understand. If the expert does not give common sense reasons for his opinion in understandable language, the jury will usually disregard his testimony.

Every prosecutor should have a basic knowledge of psychiatry and know about the various

mental diseases and their symptoms. In the District of Columbia last year, certain members of the staff of St. Elizabeths Hospital conducted a series of lectures on mental disease for the benefit of members of the United States Attorney's staff. These lectures proved to be helpful and certainly led to better understanding between the prosecutors and the doctors of the various problems arising from the use of insanity as a defense. Discussions of this nature between law enforcement officials and members of the medical profession constitute an ideal way by which the prosecutor may acquire some understanding concerning mental diseases and defects, and with this knowledge he will then, during the trial, be much better qualified to develop the psychiatric testimony in a clear, intelligent manner for the benefit of the court and the jury.

The defense of insanity is usually a difficult one to overcome. Unquestionably cases occur where defendants are truly mentally sick and commit crimes solely because of insanity. These people are not responsible and belong in hospitals so that they can be treated and society can be protected. However, there are many criminals who hide behind this defense to escape just punishment for their crimes. These defendants should be vigorously prosecuted and convicted. I am convinced that the average American jury composed of intelligent people with common sense can quickly see through a fraudulent defense. The prosecutor, when faced with this defense, must counter it in a vigorous but fair manner, appealing to the common sense and good judgment of the jury, and by so doing, he will make certain that justice is accomplished.