

1951

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Recommended Citation

Howard C. Jr. Michaelsen, Post-Conviction Due Process Regarding Insanity Claim Prior to Execution, 41 J. Crim. L. & Criminology 639 (1950-1951)

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POST-CONVICTION DUE PROCESS REGARDING INSANITY CLAIM PRIOR TO EXECUTION

Howard C. Michaelsen, Jr.

The extent to which the trial procedure concept of due process is applicable to procedures after conviction has been re-examined by the United States Supreme Court in *Solesbee v. Balkcom*.¹ The petitioner was fairly tried and convicted of first degree murder in a Georgia state court.² While awaiting execution, he petitioned the Governor for a stay, alleging that he had become insane. In accordance with state statute,³ the Governor appointed three physicians who conducted an examination and declared the petitioner sane. Thereupon Solesbee instituted habeas corpus action in a Superior County Court of Georgia, claiming that the method and manner of the inquiry as to his sanity constituted a violation of rights guaranteed him by the Fourteenth Amendment of the Federal Constitution.⁴ The county court sustained a demurrer to the petition and the judgment was affirmed by the Georgia Supreme Court.⁵ Reviewing the case on appeal,⁶ the United States Supreme Court found that the Georgia statute providing for the handling insanity claims by convicted prisoners was not violative of due process of law.⁷

The majority opinion of Mr. Justice Black reiterates the Court's consistent position that a vast distinction exists between the constitutional guarantees which protect the accused before and during trial and those which may survive for his protection after conviction.⁸ The Court has decided that many of those due process rights required to assure trial with "scrupulous fairness"⁹ are not necessary to a just determination of post-conviction questions. At the trial the defendant must have an opportunity to be confronted by, and cross-examine, the witnesses against him,¹⁰ but during a post-conviction inquiry to determine sentence such opportunity may be denied without violation of the Fourteenth Amendment.¹¹ Due process requires that the defendant have notice of the charges and an opportunity to offer evidence at the trial,¹² but the convict need not have like protections in a hearing which results in a parole revocation.¹³ These are examples of the distinction between trial

1. 70 Sup. Ct. 457 (1950).

2. *Soloosbee v. State*, 204 Ga. 16, 48 S.E. 2d 834 (1948).

3. "Disposition of insane convicts. * * * Upon satisfactory evidence being offered to the Governor that a person convicted of a capital offense has become insane subsequent to his conviction, the Governor may, within his discretion, have said person examined by such expert physicians as the Governor may choose; and said physicians shall report to the Governor the result of their investigation; and the Governor may, if he shall determine that the person convicted has become insane have the power of committing him to Milledgeville State Hospital until his sanity shall have been restored, * * *." GA. CODE ANN. sec. 27-2602, Acts 1903, p. 77.

4. *Solesbee v. Balkcom*, 70 Sup. Ct. 457, 458 (1950). (The petitioner contended that the due process clause of the Fourteenth Amendment required that his claim of insanity be determined by a judicial or administrative tribunal after notice and hearing in which he could be represented by counsel, cross-examine witnesses and offer evidence).

5. *Solesbee v. Balkcom*, 205 Ga. 122, 52 S.E. 2d 433 (1949).

6. Appeal taken under 28 U.S.C. 1257(2). (State statute challenged as repugnant to Federal Constitution after highest state court has decided in favor of its validity).

7. Mr. Justice Frankfurter dissenting; Mr. Justice Douglas not sitting.

8. *Williams v. New York*, 337 U.S. 241 (1949).

9. *Solesbee v. Balkcom*, 70 Sup. Ct. 457, 459 (1950).

10. *In re Oliver*, 333 U.S. 257 (1948).

11. *Williams v. New York*, 337 U.S. 241 (1949).

12. *In re Oliver*, 333 U.S. 257 (1948).

13. *Burns v. United States*, 287 U.S. 216 (1932).

court and post-conviction due process which reflect the traditional attitude that the convict, once fairly tried and proven guilty, may gain any type of reprieve only by way of executive clemency.¹⁴ The distinction has also been explained in terms of the need for more detailed safeguards when the determination rests in the hands of a lay jury rather than a judge or expert tribunal.¹⁵ In any event, it appears that due process requires fewer procedural protections after pronouncement of a guilty verdict than before. As a result a more limited group of rights are guaranteed by the Fourteenth Amendment in such post-conviction procedures as the investigation of an insanity claim of a prisoner awaiting capital punishment.

The *Solesbee* case, together with certain language from the previous opinion of *Phyle v. Duffy*,¹⁶ indicates the possible existence of a post-conviction due process right heretofore unestablished; i.e., the right of a prisoner under death sentence not to be executed while insane. This historic prohibition was clearly recognized by the early common law.¹⁷ It has been codified, in one form or another, by a majority of our states.¹⁸ The purpose here is to examine the possibility and propriety of its existence and operation as a part of the due process clause of the Fourteenth Amendment.

As far back as 1897, in *Nobels v. Georgia*,¹⁹ the Supreme Court ruled that a fairly convicted prisoner under death sentence had no due process right to have a claim of supervening insanity tried by a jury. At that time the Georgia statute provided that in order to determine the sanity or insanity of a person under sentence of death, the sheriff should summon a special jury to conduct the inquiry.²⁰ If the jury found the convict insane, the execution was to be suspended until a new execution warrant was issued by the original convicting judge. Although it is evident from the statutory language that the inquisition itself was entirely at the discretion of the sheriff and, in case of suspension, a new execution warrant could be issued anytime at the discretion of the judge, the Supreme Court nevertheless decided that there was no violation of the Fourteenth Amendment. The absolute right to a hearing before a judge or jury was held not to carry over to such a post-conviction inquiry and this position has generally been upheld in both federal and state courts²¹ in the absence of a statutory provision to the contrary.²² The frequently,

14. See *Ex parte Grossman*, 267 U.S. 87, 99 (1928); *Ex parte United States*, 242 U.S. 27, 42 (1916); *Ex parte Garland*, 4 Wall. 333, 380 (1866); *Ex parte Wells*, 18 How. 307, 310 (1855).

15. "We are unable to say that it offends due process for a state to deem its Governor an 'apt and special tribunal' to pass upon a question so closely related to powers that from the beginning have been entrusted to Governors. And here the Governor had the aid of physicians specially trained in appraising the elusive and often deceptive symptoms of insanity." *Solesbee v. Balkcom*, 70 Sup. Ct. 457, 459 (1950).

16. 334 U.S. 431 (1948).

17. "Also, if a man in his sound memory commits a capital offence, . . . and if after judgment he becomes of non-sane memory, execution shall be stayed; for peradventure, says the humanity of the English law, had the prisoner been of sound memory he might have alleged something in stay of . . . execution." 4 Bl. COMM. *24, 25.

" . . . or, if after judgment he become of non-sane memory, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution." 1 HALE PLEAS CR. *34, 35.

18. For the complete list of state statutory provisions, See *Solesbee v. Balkcom*, 70 Sup. Ct. 457, 465 (1950) (appendix to dissenting opinion).

19. 168 U.S. 398 (1897).

20. Ga. Code (1882) sec. 4666, Acts 1859, p. 50.

21. *Williams v. New York*, 337 U.S. 241 (1949); *Burns v. United States*, 287 U.S. 216 (1932); See Notes, 49 A.L.R. 801 (1927); 38 L.R.A. 577 (1898).

22. Not quite one half of the states have provision for hearing claims of insanity super-

cited decision in the *Nobels* case is a basic illustration of the rule that not only does the claimant lack the right to any particular procedure during the sanity inquisition but that he may also be denied a right to any hearing at all.

Recently in *Phyle v. Duffy*²³ the usual holdings upon the issue were subject to considerable clarification, if not modification. Awaiting execution, Phyle had been judged insane according to the California statutory procedure whereby the prison warden must, upon belief that the convict is insane, inform the county court which, in turn, is required to conduct a regular jury trial of the convict's sanity.²⁴ Phyle was committed to the state mental hospital, but shortly thereafter, the superintendent, under statutory authority,²⁵ certified him restored to sanity and a new execution day was set. In challenging the constitutionality of this procedure Phyle brought habeas corpus. After a denial of the writ by the California Supreme Court,²⁶ the United States Supreme Court granted certiorari.²⁷ Referring to a statement filed by the Attorney General of California,²⁸ the Court held that habeas corpus was not the correct remedy, but rather that mandamus should be sought to compel the warden to initiate a new sanity trial. In the opinion the Court, specifically distinguishing the doctrine of the *Nobels* case,²⁹ reopened the question of the right of a prisoner, in a state which bars execution of the insane, to challenge a discretionary *ex parte* determination of sanity. Moreover, in a concurring opinion Mr. Justice Frankfurter, joined by three other justices,³⁰ states his understanding that the majority opinion "presupposes that California affords petitioner the means of challenging in a substantial way the *ex parte* finding * * * and enables him to secure judicial determination of the claims he has made."³¹ Even before the *Phyle* case returned to the California courts, another condemned California prisoner, relying on *Phyle v. Duffy*, brought mandamus to compel the warden to initiate a sanity inquisition. The California Supreme Court denied relief in that case,³² and also in a subsequent mandamus action by Phyle,³³ because of lack of evidence. In both instances, however, the petitioners received an opportunity to present evidence and conduct arguments in court. Presumably, if the California Supreme Court had found evidence showing "a good reason to believe"³⁴ that either convict

vening conviction by a judge or jury. See *Solesbee v. Bolkcom*, 70 Sup. Ct. 457, 465 (1950) (appendix to dissenting opinion).

23. 334 U.S. 431 (1948).

24. "A person cannot be tried, adjudged to punishment, or punished for a public offense while insane." CAL. PENAL CODE, sec. 1367.

"* * * If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney * * * whose duty it is immediately to file in superior court a petition, stating * * * that the defendant is believed to be insane * * * thereupon the court must at once cause to be summoned and impaneled * * * a jury of twelve persons to hear such inquiry." CAL. PENAL CODE, sec. 3701.

25. "* * * When the defendant recovers his reason, the superintendent of such hospital must certify the fact to the Governor, who must thereupon issue to the warden his warrant appointing a day for execution of the judgment * * *." CAL. PENAL CODE, sec. 3703.

26. *In re Phyle*, 30 Cal. 2d 338, 136 P. 2d 134 (1947).

27. *Phyle v. Duffy*, 333 U.S. 841 (1947).

28. "(The Attorney General's) statement on the question is entitled to great weight in the absence of controlling state statutes and court decisions." *Phyle v. Duffy*, 334 U.S. 431, 441 (1948).

29. *Id.* at 439.

30. Mr. Justice Douglas, Mr. Justice Murphy, and Mr. Justice Rutledge.

31. *Phyle v. Duffy*, 334 U.S. 431, 445 (1948).

32. *Williams v. Duffy*, 32 Cal. 2d 578, 197 P. 2d 341 (1948).

33. *Phyle v. Duffy*, 34 Cal. 2d 144, 208 P. 2d 668 (1949).

34. See note 24 *supra*.

was insane, the warden would have been directed to initiate still another trial of the basic sanity question.

Although the *Phyle* case is cited in the majority opinion of the *Solesbee* case, the use made of it is restricted to showing that the constitutional issues are substantial. In general the *Solesbee* opinion indicates a return to *Nobels v. Georgia*, with the exception that some vague area of possible due process violation is suggested. If the Georgia practice were "designed to execute persons while insane,"³⁵ or if it "violated the humanitarian policy of Georgia"³⁶ it is indicated that it might be bad. Yet the Georgia statute comes about as close to a direct practice of executing the insane as any state procedure is likely to reach, so that in direct effect the exception is one of words only. If, however, the due process clause can strike down some, or any, state practice of handling a convict's insanity claim, it would seem that the right not to be executed while insane is a federally protected right. Further, if a discretionary *ex parte* hearing of sanity in a state which bars execution of the insane may be challenged by mandamus or otherwise (as indicated in *Phule v. Duffly*), it would appear that a convict may rely exclusively upon the Fourteenth Amendment to test the refusal of a designated official to initiate a sanity inquisition. And this might be so in spite of the fact that the Court has continuously affirmed the oft-quoted logic of the *Nobels* case:

"If it were true that at common law a suggestion of insanity after sentence, created on the part of the convict an absolute right to a trial of this issue by judge and jury, then (as a finding that insanity did not exist at any one time would not be the thing adjudged as to its non-existence at another) it would be wholly at the will of the convict to suffer any punishment whatever, for the necessity of his doing so would depend solely upon his fecundity in making suggestion after suggestion of insanity, to be followed by trial upon trial."³⁷

It should be noted that, to date, the existence of a due process right not to be executed while insane is dependent upon dicta in the disposition of the *Phyle* and *Solesbee* cases. At least one member of the Court has taken a more definite stand. In an exhaustive dissent to the *Solesbee* opinion Mr. Justice Frankfurter concludes that the Fourteenth Amendment prohibits execution of the insane and further, that the requirements of due process are not met by the procedure under the Georgia statute. The other view relies for support upon the long history of the prohibition³⁸ along with an examination of the manner in which the states have met the problem.³⁹ These criteria, while certainly relevant, have not been determinative of other Fourteenth Amendment problems. (For example, the jury trial and the privilege against self incrimination also have long historic precedent and most of the states have provision for their continuance, yet the Supreme Court has ruled that, under certain circumstances, they may be abolished and justice still be done.)⁴⁰ At the basis of the common law prohibition is the idea that a sane man always has some last chance to save himself from the death penalty.⁴¹ As a practical matter today this idea supposes that the convict, after adequate opportunity

35. *Solesbee v. Balkcom*, 70 Sup. Ct. 457, 458 (1950).

36. *Id.* at 459.

37. *Nobels v. Georgia*, 168 U.S. 398, 405-406 (1897).

38. See note 17 *supra*.

39. See note 18 *supra*.

40. *Twining v. New Jersey*, 211 U.S. 78 (1908) (self-incrimination privilege); *Walker v. Sauvinet*, 92 U.S. 90 (1875) (jury trial).

41. See note 17 *supra*.

to appeal his conviction,⁴² may yet have information to save himself and, if insane, may not be able to impart such information. This presumes a series of possibilities each one of which is remote, and when combined approach impossibility.

The petitioner in the *Solesbee* case suggested another theory for the extension of the common law prohibition to the Fourteenth Amendment in that execution of the insane is a "cruel and unusual punishment."⁴³ The Court did not reach the question but it would seem difficult to establish that the execution of a sane man is more humane than the execution of one who is insane. Whatever element of cruelty might be involved in any of our accepted methods of execution would seem to be in the anguish of awaiting the punishment. Surely the sane prisoner is as aware of his impending fate as the insane prisoner, and perhaps much more so.

The methods employed by the states in handling the problem of execution of the insane presents a somewhat varied picture.⁴⁴ One common characteristic, however, stands out. In all states the initiation of any action whatever is entirely discretionary with a single judge or state official. The exercise of that discretion by a judge is not subject to review.⁴⁵ In only two states, California and Arkansas, does it appear that there is a right to challenge an official's refusal to initiate a hearing. The existence of the right to challenge by mandamus in California was recognized after the Supreme Court's holding in the *Phyle* case. In Arkansas it is discretionary with the court as to whether it will test the official's refusal in "a proper case."⁴⁶ It appears then, that the states have adhered to half the doctrine of the *Nobels* case in that the convict has no absolute right to any sanity inquisition whatsoever. The difference in state legislation is only in the type of procedure which must be provided once discretion has been affirmatively exercised.⁴⁷ Thus the states have avoided the real danger to efficient administration, for as long as non-action can successfully block a worthless claim of insanity, unwarranted delay of execution will not result. In the *Phyle* and *Solesbee* cases it would seem that the court has entered an area which it had formerly decided was potentially dangerous, and one which the states have carefully avoided. If the prohibition against execution of the insane is a due process right, claims of denial of that right will have to be met, and with them will come an indeterminate delay in administration "however informal and expeditious the procedure."⁴⁸

The Supreme Court has decided that due process, in some form, does not end with a verdict of guilty, or with the pronouncement of sentence, or even with confinement to await execution. The possibility of executing an insane prisoner, though thought barbarous at common law, must be examined in the light of the necessities of present judicial administration. The convict's life has already been forfeited to the state in a proper judicial proceeding. No doubt the strain of an impending execution is conducive to mental break-

42. The states must provide an adequate post-conviction method whereby claims of a denial of rights may be raised. *Young v. Ragen*, 337 U.S. 235 (1948); see *Marino v. Ragen*, 332 U.S. 561, 563 (1947) (concurring opinion).

43. See *Francis v. Resweber*, 329 U.S. 459 (1947).

44. See note 18 *supra*.

45. *Bulger v. People*, 61 Colo. 187, 156 P. 800 (1916).

46. *Howell v. Todhunter*, 181 Ark. 58, 25 S.W. 2d 21 (1930).

47. The state procedures range from a regular jury trial, (ILL. REV. STAT. c. 38, sec. 593-594 (1949)) to a determination by the Governor's Council (*Juggins v. Executive Council*, 257 Mass. 386, 154 N.E. 72 (1926)).

48. *Solesbee v. Balkcom*, 70 Sup. Ct. 457, 465 (1950).