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CONSTITUTIONAL LAW-DUE PROCESS-RIGHT OF CONDEMNED PRISONER TO A HEARING ON CLAIM OF SUPERVENING INSANITY

Robert P. Griffin S.Ed.
University of Michigan Law School

CONSTITUTIONAL LAW—DUE PROCESS—RIGHT OF CONDEMNED PRISONER TO A HEARING ON CLAIM OF SUPERVENING INSANITY—Petitioner was convicted of murder in a Georgia court and sentenced to die by electrocution. He made application to the governor to postpone execution on the ground that he had become insane after conviction. The governor, acting under authority of a state statute,[1] appointed three physicians who conducted an examination of petitioner and found

[1] Ga. Code (1935) §27-2602.

him sane. Thereupon, petitioner filed a petition for a writ of habeas corpus in a state court contending that the due process clause of the Fourteenth Amendment entitled him to a hearing on his insanity claim before a judicial or administrative tribunal at which he could offer evidence, cross-examine witnesses, and be represented by counsel. Dismissal of his petition was affirmed by the state supreme court.[2] On appeal to the Supreme Court of the United States, *held*, affirmed. Georgia's action in constituting its governor as a special tribunal to make the final determination regarding the sanity of a person about to be executed is not a denial of due process of law. One justice dissented. *Solesbee v. Balcom*, (U.S. 1950) 70 S.Ct. 457.

It is well settled both at common law[3] and under the statutes[4] of most states that a prisoner condemned to die should not be put to death while insane.[5] Whether or not the Federal Constitution affords any substantive protection against violation by a state of this well-recognized principle is a question on which the Supreme Court, heretofore at least, has never been required to rule.[6] The majority of the Court, speaking through Justice Black, did not consider that issue necessarily raised by the principal case.[7] However, the fact that the Court even examined the procedure provided by Georgia for disposing of a supervening insanity claim, if only to find it adequate, would seem to justify an inference that some manner of protection is embodied in the due process clause. The concept of due process as a restraint upon the states in their administration of justice is not necessarily confined to the rights of the accused at trial, but may extend beyond to the execution of the sentence.[8] An interpretation of the clause to proscribe state action in putting to death an insane criminal might be justified on the ground that it offends a principle of justice "implicit in the concept of ordered liberty."[9] Among the state courts, however, the prevailing view is that

[2] Solesbee v. Balcom, 205 Ga. 122, 52 S.W. (2d) 433 (1949).

[3] CHITTY, CRIMINAL LAW, Earle ed., 525 (1819); 4 BLACKSTONE, COMMENTARIES, 1st ed., 396 (1765); 1 HAWKINS, PLEAS OF THE CROWN 2 (1716).

[4] The state statutes are collected in an appendix to the principal case at 456.

[5] In general see 49 A.L.R. 804 (1927); Ann. Cas. 424 (1916E); 38 L.R.A. 577 (1898); 14 AM. JUR. 804 (1938).

[6] In Nobles v. Georgia, 168 U.S. 398, 18 S.Ct. 87 (1897), the Court made it clear that upon a mere suggestion of insanity the tribunal charged with responsibility must necessarily be vested with a broad discretion in deciding whether evidence will be heard. In Phyle v. Duffy, 334 U.S. 437, 68 S.Ct. 1131 (1948) the Court examined the California procedure for raising the question of post-sentence insanity, but considered the due process issue not ripe for decision. See note, 47 MICH. L. REV. 707 (1949).

[7] Principal case at 458. On the other hand, Justice Frankfurter, in a vigorous dissenting opinion, maintained that the issue is necessarily raised by the principal case and "now almost summarily answered." Principal case at 460.

[8] Thus, the Supreme Court has reviewed the circumstances under which a prisoner was about to be executed after having been once seated in the electric chair only to survive the throwing of the switch because of mechanical defect. Louisiana v. Resweber, 329 U.S. 459, 67 S.Ct. 374 (1947); 20 TEMPLE L.Q. 584 (1947); 22 ST. JOHNS L. REV. 270 (1947).

[9] See language of Justice Cardozo in Palko v. Connecticut, 302 U.S. 319 at 325, 58 S.Ct. 149 (1937); Green, "The Bill of Rights, the Fourteenth Amendment and the Supreme Court," 46 MICH. L. REV. 869 (1948). Execution of an insane criminal could be characterized as "cruel and inhuman punishment" within the meaning of the Eighth Amendment and thus satisfy Justice Black's theory that the Bill of Rights should be incorporated into the

a prisoner, once duly convicted, has no constitutional right to a sanity hearing. Nor is the procedure where such a hearing is held considered to be circumscribed by the due process clause.[10] If there is a constitutional right not to be executed while insane, certainly only a strange and insubstantial kind of procedural due process is required for its protection. The principal case dispels any inference reasonably drawn from *Phyle v. Duffy*[11] that due process requires a judicial hearing.[12] If an ex parte examination conducted under authority of the governor at which the prisoner is not allowed to be represented by counsel or to offer evidence, and from which he has no right of appeal, is held to be constitutionally unobjectionable, it may be wondered what less in the way of procedural safeguards would satisfy due process. Statutes in a majority of states provide that upon a prima facie showing of insanity, execution will be suspended while a hearing before a court or jury is held.[13] A minority of states designate the governor as final arbiter of a claim of supervening insanity, but in most of these opportunity for an adversary hearing is apparently afforded.[14] Gauged by the principal case, such procedure would be adequate a fortiori. Only in a few states is the disposition of such claim left entirely to the discretion of the governor as part of his general executive power of pardon and reprieve, with no provision for any kind of procedure whereby a claimant may be heard or examined.[15] It would seem that only in these jurisdictions could a case arise to test further the scope of the constitutional right implicit in the principal case.

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Fourteenth Amendment. See Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672 (1947); 46 MICH. L. REV. 372 (1948).

[10] Barrett v. Commonwealth, 202 Ky. 153, 259 S.W. 25 (1923); In re Smith, 25 N.M. 48, 176 P. 819 (1918); Baughn v. State, 100 Ga. 554, 28 S.E. 68 (1897); Ex parte Phyle, 30 Cal. (2d) 838, 186 P. (2d) 134 (1947). See collection of cases in 49 A.L.R. 804 (1927).

[11] 334 U.S. 437, 68 S.Ct. 1131 (1948).

[12] See 47 MICH. L. REV. 707 (1949).

[13] For example: Ala. Code Ann., tit. 15, §427 (1940); Colo. Stat. Ann., c. 48, §§6, 7 (1935); Ill. Rev. Stat., c. 38, §§593, 594 (1949); La. Code Crim. Law & Proc. Ann. §267 (1943). In some states a hearing is granted as a matter of common law procedure. State v. Bethune, 88 S.C. 401, 71 S.E. 29 (1911); Jordon v. State, 124 Tenn. 81, 135 S.W. 327 (1910); State v. Nordstrom, 21 Wash. 403, 58 P. 248 (1899). A comprehensive collection of authorities is collected in an appendix to the principal case at 456.

[14] Iowa Code (1946) §§792.5-792.7. In some of these states it appears to be uncertain whether an opportunity to be heard is afforded. Ariz. Code Ann. (1939) §§44-2307, 44-2309; Fla. Stat. (1941) §922.07; Miss. Code Ann. (1942) §2558.

[15] Diamond v. State, 195 Ind. 285, 144 N.E. 466 (1924); Juggins v. Executive Council, 257 Mass. 386, 154 N.E. 72 (1926). In a number of states, there is no clear indication either in the legislation or judicial decisions regarding the procedure to be followed, if any, in raising a post-conviction claim of insanity. See appendix to principal case at 467.