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Due Process -- Post Conviction Supervening Insanity Hearing

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and *Hawn*. Indeed, Justice Stewart's discussion of the latter case is most inadequate. Ironically, in another case decided the same day as *Halecki*, Justice Stewart, again writing for the majority, held on a subsidiary point that an employee of an independent contractor, engaged in repairing an oil pump to facilitate the unloading of a cargo of oil, came within the scope of the unseaworthiness doctrine.[40] The Justice believed that *Hawn* was controlling. Although Justice Stewart has apparently been able to solve the labyrinth of unseaworthiness, he has left the attorney with an ample supply of confused authority for both limiting and expanding the *Sieracki* doctrine.

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DUE PROCESS—POST CONVICTION SUPERVENING INSANITY HEARING

In conducting a proceeding to determine the present sanity of condemned petitioners, the prison warden refused to hear any testimony on their behalf. The petitioners' mandamus petitions contended that his refusal violated the due process clause of the fourteenth amendment. *Held*, the California statute[1] permitting execution of allegedly insane murderer on basis of the warden's unreviewable *ex parte* determination that prisoner is sane does not offend due process. *Caritativo v. California*, 357 U.S. 549 (1958).

The justifications for the common law rule *against* executing an insane man, vary considerably.[2] This concept has been adopted in almost every jurisdiction having capital punishment,[3] either through legislative

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40. The M/V "Tungus" v. Skovgaard, 79 Sup.Ct. 503, 508, n.9 (1959).

1. CAL. PEN CODE §§ 3700, 3701 (Supp. 1949), "[I]f 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 impanneled . . . a jury of twelve persons to hear such inquiry."

2. 4 BLACKSTONE, COMMENTARIES *396 (Blackstone considered the purpose of the rule was to prevent the infliction of punishment upon a person so lacking in mental capacity as to be unable to understand the nature and purpose of the punishment); 3 COKE, INSTITUTES 6 (Lord Coke declared that it was not an example to others to execute an insane man, in addition it would be extremely inhumane and cruel); HALE, PLEAS OF THE CROWN § 34 (Stokes and Ingersol ed. 1847) (Lord Hale reasoned that if he were of sound memory he might allege something to stay execution); 11 HOWELL, ENGLISH STATE TRIALS 474, 477 (1685) (Sir John Hawles reasoned that an inability to prepare for an afterlife was the basis for the rule.)

3. Solesbee v. Balkcom, 339 U.S. 9, 26 (1950) (appendix to dissenting opinion); WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE § 5, 463-470 (1954).

enactment[4] or judicial decision.[5] It is doubtful whether the common law has been translated into a substantive right under the due process clause of the fourteenth amendment, since the Court has never definitely established such a right.[6] The view as expressed by the majority in *Solesbee v. Balkcom*[7] appears to limit the principle to a status of *privilege*.[8] A contrary view establishing the existence of a substantive right may be implied from the dicta of the majority and concurring opinions in *Phyle v. Duffy*.[9] The analogy of post conviction rights to the privilege of reprieve in *Solesbee*,[10] reflects the traditional attitude that the convict, once fairly tried and proven guilty, may gain a reprieve *only* by way of executive clemency.[11] Attempts to regulate state activities on the basis of a substantive right under the due process clause in other situations involving post conviction procedures have similarly failed.[12]

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4. CAL. PEN. CODE § 1367 (Supp. 1949), "A person cannot be tried, adjudged to punishment or punished for a public offense while insane."

5. See, *e.g.*, Perkins v. Mayo, 92 So. 2d 641, 644 (Fla. 1957) (one cannot be tried or executed while insane); *accord*, State *ex rel* Deeb v. Fabisinski, 111 Fla. 454, 152 So. 207 (1933); *Ex parte* Chesser, 93 Fla. 590, 112 So. 87 (1927).

6. *E.g.*, in Solesbee v. Balkcom, 339 U.S. 9, 11 (1950) the court stated "It is suggested that the reasoning of the Georgia Supreme Court in this case requires us to pass upon the state statute as though it had established a state practice designed to execute persons while insane. But we shall not measure the statute by some possible future application."

7. Solesbee v. Balkcom, *supra* note 6. The Court set aside the substantive issue by tenuously construing the Georgia statute, GA. CODE ANNO. § 27-2602 (1936), as being indicative of the existence of a humanitarian policy against executing the insane. In validating the Georgia statutory procedure, the Court took the view that postponement of execution because of insanity had a close affinity not to trial for a crime but rather to reprieves of sentence in general, implying that a stay of execution is considered an act of grace. It may be contended that since both the majority and the dissent felt it necessary to test the constitutionality of the procedures, a substantive right which must be protected by procedural safeguards *does* exist.

8. This view was first expressed in Nobles v. Georgia, 168 U.S. 398, 409 (1897). "[A]t common law a suggestion . . . of insanity did not give rise to an absolute right on the part of a convict to have such issue tried before the court and to a jury, but addressed itself to the discretion of the judge, it follows that the manner in which such question should be determined was purely a matter of legislative regulation. It was therefore a subject within the control of the State of Georgia."

9. 334 U.S. 431 (1948). Petitioner's contention of a denial of due process because of an *ex parte* determination of his restoration to sanity was not considered by the Court, the case being remanded for a further exhaustion of state remedies. However, the Court strongly indicated that California must afford a condemned person a right to demand and obtain a judicial determination as to his sanity based on state law, which impliedly confers an absolute right protected by due process upon the condemned. See CAL. PEN. CODE, note 4 *supra*. "Where life is at stake one cannot be too careful. I's had better be dotted and t's crossed." Phyle v. Duffy, *supra* at 444 (concurring opinion) *Contra*, Phyle v. Duffy, 34 Cal. App. 2d 144, 208 P. 2d 668 (Sup. Ct. 1949) (on remand, dissenting opinion contended hearings of this nature are a privilege).

10. Solesbee v. Balkcom, 339 U.S. 9 (1950).

11. *Cf. Ex parte* Grossman, 267 U.S. 87, 99 (1928); *Ex parte* United States, 242 U.S. 27, 42, (1916); *Ex parte* Garland, 71 U.S. (4 Wall.) 333,380 (1866); *Ex parte* Wells, 59 U.S. (18 How.) 307, 310 (1855).

12. Williams v. New York, 337 U.S. 241, 250-52 (1949) denial of opportunity to be confronted by and cross-examine witnesses during a post conviction hearing to determine sentence, is not a violation of due process); Burns v. United States, 287 U.S. 216 (1932) (due process does not require opportunity to offer evidence at a parole revocation hearing). See also Siipola v. Ness, 90 F. Supp. 18, 21 (N.D. Wash., 1950).

The strong dissent of Mr. Justice Frankfurter in *Solesbee*[13] is the only clear indication that a substantive due process right does exist. He contended that in determining minimum procedural safeguards, it is of paramount importance whether a substantive right exists. If none exists the state may validly exercise its benevolence as a matter of grace. His conception of due process "embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history."[14] Mr. Justice Frankfurter relied on the history of the common law to show that the fourteenth amendment prohibits execution of the insane and that the requirements of due process has not been met by the state's procedure. However, historical criteria, although relevant, have not been determinative in the Court's solution of other fourteenth amendment problems.[15]

Two types of statutory procedures determining a condemned man's sanity have been examined under the light of *procedural due process* by the United States Supreme Court. They are; (1) where the sheriff or warden notifies the court or district attorney and the proceeding is conducted by the court,[16] and (2) where the determination is made by the governor.[17] A "full and adequate administrative and *quasi* judicial process . . . created for the purpose of investigating the suggestion"[18] of insanity *is* sufficient. These administrative determinations by an "apt and special tribunal"[19] have been held not to violate procedural due process, even

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13. Solesbee v. Balkcom, 339 U.S. 9, 14 (1950) (dissenting opinion).

14. Solesbee v. Balkcom, *supra* note 13; *cf.* Irvine v. California, 347 U.S. 128, 142 (1953) (dissenting opinion); Rochin v. California, 342 U.S. 165 (1952); Louisiana *ex rel* Francis v. Resweber, 329 U.S. 459, 466 (1947) (concurring opinion).

15. See Twining v. New Jersey, 211 U.S. 78 (1908) (self incrimination privilege); Walker v. Sauvinet, 92 U.S. 90 (1885) (jury trial).

16. CAL. PEN. CODE §§ 3700, 3901 (Supp. 1949); ILL. REV. STAT. ch. 38, § 593 (1949); NEV. COMP. LAWS § 11192.02 (Supp. 1949); OKLA. STAT. tit. 22 § 1005 (1951); TEX. CODE CRIM. PROC. ANN. art. 921 (Vernon, 1948).

17. ARIZ. CODE ANN. § 44-2307 (Supp. 1951); FLA. STAT. § 922.07 (1951) (has not been construed by the Florida Supreme Court); the leading case on the issue is *Ex parte* Chesser, 93 Fla. 590, 112 So. 87 (1927), an interpretation of the common law; GA. CODE § 27-2602 (1933); MASS. ANN. LAWS ch. 279, § 48 (Supp. 1957) [with the advice and consent of the council, its function being merely advisory, Juggins v. Executive Council, 257 Mass. 386, 154 N.E. 72 (1926)]; Indiana has no statute, but the power is in the governor by judicial decision. Diamond v. State, 195 Ind. 285, 145 N.E. 250 (1924).

18. Nobles v. Georgia, 168 U.S. 398, 405 (1897). In so holding the Court relied upon the common law as set forth in 4 BLACKSTONE, *op. cit. supra* note 2, at 395-96, to the effect that if a prisoner appears to be insane after conviction and before execution the procedure to be followed would be left in the judges discretion, and also cited at 407, Laros v. Commonwealth, 84 Pa. 200, 210 (1877), where it was held that a right to trial by jury to determine the question of sanity after conviction was "inconsistent with the due administration of justice."

19. Solesbee v. Balkcom, 339 U.S. 9, 12 (1950), citing Nobles v. Georgia, 168 U.S. 398, 409 (1897).

though they are ex parte.[20] The state procedures vary, from the minority of states[21] applying the common law,[22] to the majority of jurisdictions which have enacted statutes giving the sheriff or warden authority to institute proceedings.[23] Statutory provisions considered nonexclusive have been held not to deprive the court of its common law power to grant relief if incompetency is brought to its attention in some way other than that proscribed by statute.[24] Even where the provisions are considered exclusive, it has been held that the court has the power to review the official's refusal to act.[25]

In the instant case, based on the authority of *Solesbee v. Balkcom*,[26] the Court in a per curiam opinion held valid the warden's ex parte determination of whether there was good reason to believe the condemned man insane. There has been speculation that if a substantive right served as the basis for the Court's decision, it was defined in terms of customarily afforded procedures.[27] In California these procedures only entitle the condemned person to the exercise of an administrative official's *discretionary* judgment on the issue of insanity. Mr. Justice Harlan, concurring, assumed the existence of a substantive limitation in concluding that the warden's

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20. Solesbee v. Balkcom, 339 U.S. 9 (1950), upholding the Georgia act, which empowers the governor to determine the issue upon a report by experts, but without necessarily hearing any evidence offered by the condemned. The holding severely weakened the contrary implications of Phyle v. Duffy, 334 U.S. 431 (1948), note 9 *supra*, marking a return to the doctrine of Nobles v. Georgia, 168. U.S. 398 (1897), note 8 *supra*.

21. In twelve states there are no statutes outlining the procedure to be followed when a defendant under sentence of death appears or is alleged to be insane. Delaware, Indiana, Kansas, Louisiana, Maryland, New Hampshire, North Carolina, Tennessee, Vermont, Virginia, Washington and West Virginia.

22. Most of these states follow the general common law rule, that if a reasonable doubt is raised in the mind of the trial court of the sanity of a person whom it has sentenced to death, the court, in order to prevent the execution of an insane person may order an inquiry on the matter, and suspend execution if the defendant is found to be insane. See Nobles v. Georgia, 168 U.S. 398 (1897); *Ex parte* Chesser, 93 Fla. 291, 111 So. 720 (1927); *In re* Smith, 25 N.M. 48, 176 Pac. 819 (1918); State v. Bethune, 88 S.C. 401, 71 S.E. 29 (1911); Grossi v. Long, 136 Wash. 133, 238 Pac. 983 (1925).

23. See statutes cited note 16 *supra*.

24. Lewis v. State, 155 Miss. 810, 125 So. 419 (1930); Barker v. State, 75 Neb. 289, 103 N.W. 1134 (1905); *contra*, Howell v. Kincannon, 181 Ark. 58, 24 S.W. 2d 953 (1930).

25. Shank v. Todhunter, 189 Ark. 881, 75 S.W. 2d 382 (1934); Howell v. Todhunter, 181 Ark. 250, 25 S.W. 2d 21 (1930);*cf.* McCracken v. Teets, 41 Cal. App. 2d 648, 262 P. 2d 561 (1953). *Contra*, "Both the *Nobles* and *Phyle* cases stand for the universal common-law principle that upon a suggestion of insanity after sentence, the tribunal charged with responsibility must be vested with broad discretion in deciding whether evidence shall be heard. This discretion has usually been held nonreviewable by appellate courts.'" Solebee v. Balkcom, 339 U.S. 9, 13 (1950) (n. 4, "See cases collected in Notes, Ann. Cas. 1916 E, 424 *et seq.*; 49 A.L.R. 801 *et seq.*; 31 L.R.A. 577 *et. seq.*"

26. 339 U.S. 9 (1950).

27. *Review, The Supreme Court, 1957 Term*, 72 HARV. L. REV. 181, 182 (1958). Another possibility considered was that although the common law rule has been uniformly adopted by the states it does not reflect a currently held moral attitude; or that, despite the attitudes existence, it was insufficient to justify a constitutionally protected right.

refusal did not violate procedural due process. He placed great reliance on the warden's good faith determination[28] and the possible delays that might result from an adversary proceeding. On the other hand, Justice Frankfurter, dissenting, maintained that due process requires some procedure to assure that the warden "hear the other side"[29] although there need not be a formal adversary hearing before him.

In applying the decision in *Solesbee v. Balkcom*[30] to the instant case, the Court firmly re-established its initial view[31] on post conviction procedures, by extending it to a procedure authorizing the warden to make an ex parte determination of supervening sanity. The query of Mr. Justice Frankfurter, "What kind of constitutional right is it, especially if life is at stake, the vindication of which rests wholly in the hands of an administrative official whose actions cannot be inquired into, and who need not consider the claims of the person most vitally affected, the person in whom the constitutional right is said to inhere?"[32] goes directly to the substantive origin of the procedural requirements of due process.

It appears by implication from the present decision that whatever the right under the due process clause, its protective forcefulness as a limitation upon state activity, is almost non-existent. The standards set by the minimum procedures upheld in the case, conceivably can be met by almost any state procedure, no matter how arbitrary, so long as it is carried out in good faith by a responsible official. An affirmative adjudication of the substantive issue, which would require minimum procedural safeguards, seems quite unlikely at the present time.

MARK W. KAY

INSURANCE—SEPARATION AGREEMENT—RELEASE OF ALL CLAIMS

The beneficiary of a life insurance policy, prior to divorce, released all her claims against the insured in a separation agreement. The insured husband subsequently died without having changed the beneficiary in his life insurance policies. In a suit contesting the beneficiary's right to the pro-

28. *Contra*, Mr. Justice Frankfurter, dissenting in Solesbee v. Balkcom, 339 U.S. 9, 25 (1950), argued that it was not a question of good faith. "The fact that a conclusion is reached in good conscience is no proof of its reliability. The validity of the conclusion depends largely upon the mode by which it was reached."

29. Caritativo v. California, 357 U.S. 549, —— (1958) (dissenting opinion). "The right to be heard somehow by someone before a claim is denied, particularly if life hangs in the balance, is far greater in importance to society, in the light of the sad history of its denial, than inconvenience in the execution of the law."

30. 339 U.S. 9 (1950). See notes 6, 20 *supra*.

31. The initial view was set forth in Nobles v. Georgia, 168 U.S. 398 (1897), where it was held that it is within the discretion of the state to determine the nature of post conviction hearing procedures. See also notes 8, 18 *supra*.

32. Caritativo v. California, 357 U.S. 549 (1958).