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Arthur J. Goldberg

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ARTICLES

The Supreme Court Reaches Out And Touches Someone—Fatally

By ARTHUR J. GOLDBERG*

Dooley said: "The supreme coert follow th ilection returns."[1] Also, it would appear, the Court follows Ma Bell's TV commercials. On August 10, during the summer recess, by an evening telephone conference call, the Court reached out to vacate a stay of execution granted by a lower court, touched a condemned man, Frank J. Coppola, and dispatched him to the electric chair later that evening. The telephone still has the edge over Federal Express.

The bizarre details are recounted in an article by Stuart Taylor, Jr. in the *New York Times*, Wednesday, September 1, 1982.[2] As confirmed and amplified by Court records and officials, they are as follows.

At 7:25 p.m. on August 10, 1982, an application to vacate a stay of execution granted a few hours earlier by Judge John D. Butzner, Jr., of the Court of Appeals for the Fourth Circuit in a Virginia capital case (*Coppola v. Commonwealth*),[3] was presented to the Chief Justice of the United States, Warren E. Burger. The Court was officially on vacation.

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* Former Associate Justice of the Supreme Court of the United States.

The author has written both judicially and off the Court about his views on the death penalty and was of the belief, as stated in his dissent to the denial of certiorari in Rudolph v. Alabama, 375 U.S. 889 (1963), that the death penalty was unconstitutional where the offense involved was not the taking of life. In this view, he was joined by only two Justices, Brennan and Douglas. Since then, his view has been adopted in Furman v. Georgia, 408 U.S. 238 (1972). Since leaving the Court, the author has consistently expressed the view that the death penalty at large continues to be unconstitutional. *See* Goldberg, *The Death Penalty for Rape*, 5 HASTINGS CONST. L.Q. 1 (1978); Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355 (1973); Goldberg, *Supreme Court Review, 1972—Foreword—The Burger Court 1971 Term: One Step Forward, Two Steps Backward?*, 63 J. CRIM. L. & POLICE SCIENCE 463 (1972); Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970).

1. F.P. DUNNE, MR. DOOLEY'S OPINIONS 26 (1901).
2. Taylor, *When Weighing a Stay of Execution*, N.Y. Times, Sept. 1, 1982, at 20, col. 4.
3. 220 Va. 243, 257 S.E.2d 797 (1979).

The regular Term of the Court was to commence on the first Monday in October, 1982.

Chief Justice Burger had previously been alerted by telephone in the early evening that an Assistant Attorney General of Virginia would present the motion to vacate the stay. The motion was presented to the Chief Justice at 7:25 p.m.[4] Chief Justice Burger was empowered by law to pass on the motion on his own.[5] Instead, he elected to refer the motion to the full Court. Normally, disposition of a motion when the Court was on vacation would be deferred until the Court reconvened in regular session in October, leaving the stay in effect until then.

Chief Justice Burger, however, chose not to follow this common practice. Without awaiting a response from lawyers opposing the execution, the Chief Justice hastily arranged a telephone conference call to the available members of the Court to discuss Virginia's motion and decide it.[6]

Chief Justice Burger was able to reach by telephone only seven of the eight associate Justices. Justice Sandra Day O'Connor could not be reached, being outside of the United States.[7]

Of the seven associate Justices in the country, only three were in Washington and at their homes, because of the lateness of the hour. The other four were out of town; some were in attendance at the American Bar Association and American Judicature Society meetings then under way in San Francisco. The seven associate Justices were alerted shortly after 7:25 p.m. Eastern Standard Time by Court officials to expect a telephone conference call, arranged by the Chief Justice for 9:00 p.m.[8] They were not advised, however, of the subject of the call. Moreover, both in the cases of the associate Justices in Washington and those out of town, the ten-page motion to vacate the stay and other relevant documents pertaining to the case were obviously not at hand.

Without awaiting the response from lawyers opposing the execution, the telephone conference call took place at about 9:00 p.m. on August 10, as arranged. A telephone vote was taken. Five Justices, including the Chief Justice, voted to grant the motion to vacate the stay of execution; three Justices voted to deny. At 10:25 p.m., a one-page order[9] drafted by the Chief Justice was filed with the Clerk of the Court

4. Taylor, *supra* note 2, at col. 4.
5. *See* U.S. SUP. CT. R. 44.5, 28 U.S.C.A. (West Supp. 1982).
6. Taylor, *supra* note 2, at col. 5.
7. *Id.*
8. *Id.*
9. Mitchell v. Lawrence, 103 S. Ct. 21 (1982) (mem.).

in which five Justices (Burger, White, Blackmun, Powell, and Rehnquist) vacated the stay, without stating any reasons. The Court's summary order stated that Justices William J. Brennan and Thurgood Marshall would have left the stay in effect, and Justice John Paul Stevens was of the view that the Court should not pass on the motion before hearing from the lawyers seeking to prevent the execution.

The Court's order was filed only three minutes after the lawyers opposing the execution filed their response.[10] Obviously, this response was not available to any of the members of the Court, including the Chief Justice.

The Virginia authorities were then notified over the telephone by officials of the Supreme Court less than an hour before the time fixed for the execution that Virginia was free to proceed. Frank Coppola was electrocuted on schedule at 11:25 p.m.[11]

To complete the record, two petitions for certiorari had previously been filed on Coppola's behalf in the Supreme Court, the first on December 29, 1979, and the second on November 9, 1981. Both were denied.[12] A number of other appeals had been filed with the Virginia courts and also denied.[13]

The proceeding resulting in the stay of execution was a petition for habeas corpus filed in the United States District Court for the Eastern District of Virginia.[14]

Further, while Mr. Coppola had authorized his counsel to file the two petitions for certiorari in the Supreme Court and other collateral attacks on his death sentence in the state court, the petition for habeas corpus in the federal district court was filed without his authorization by his former attorneys and other counsel opposed to the death sentence.[15]

Mr. Coppola was incarcerated in a death cell in the Virginia Penitentiary and had been for several years during the legal maneuvering challenging his sentence. Since he was safely confined, the question arises as to why the customary procedure should not have been followed and the state's motion to vacate the stay of execution referred to the full Court when it reconvened for its next term in October. Had

10. Taylor, *supra* note 2, at col. 5.

11. *See id.*

12. Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 444 U.S. 1103 (1980); Coppola v. Warden, 222 Va. 369, 282 S.E.2d 10 (1981), *cert. denied*, 455 U.S. 927 (1982).

13. *See, e.g.*, Coppola v. Warden, 222 Va. 369, 282 S.E.2d 10 (1981).

14. Lawrence v. Mitchell, No. CA82-0509R (E.D. Va. filed, decided Aug. 9, 1982).

15. Taylor, *supra* note 2, at col. 4.

this traditional practice been followed, all of the members of the Court would have been present and provided with the motion papers and response before deciding the case. Why the haste and the recourse to the telephone? The Court's one-page order does not explain.

There may be exigent circumstances necessitating disposition of a case by a telephone conference call when the Court is not in session and the members widely scattered. But no such circumstances are set forth in the Court's order sending Coppola to the electric chair, nor do any come to mind.

The procedure followed in the *Coppola* case is, in a sense, reminiscent of that employed by the Court in the notorious case involving the Rosenbergs.[16] In that case, Chief Justice Vinson, at the request of the Attorney General, convened the Court in special session on June 18, 1953, after adjournment of the Court's regular session and the commencement of its summer recess, to consider the government's application to vacate a stay of execution granted by Justice Douglas on June 17.[17] At the special session on June 18, the full Court heard oral arguments lasting several hours from both parties. The Court held a lengthy conference following the oral arguments in the afternoon of June 18. It also held another conference in the morning of June 19. This conference lasted several hours. Following the latter conference, the Court issued a written per curiam opinion vacating Justice Douglas's stay and clearing the way for the execution of the Rosenbergs.[18] The per curiam, as is customary with unsigned opinions, was about one and one-half pages in length reciting the reasons for vacating the stay. Concurring opinions were filed by Justice Jackson and Justice Clark, each about three and one-half pages.[19] The concurring opinions also stated reasons for vacating the stay.

Justice Douglas filed a dissenting opinion of about five pages[20] and Justice Black a dissent of similar length,[21] both giving reasons for their dissents. Justice Frankfurter filed a one-paragraph statement—in effect, a dissent—stating that he felt more deliberate consideration of the case was required.[22] He followed this with a lengthy dissent on June 22.[23]

16. Rosenberg v. United States, 346 U.S. 273 (1953) (per curiam).
17. *See id.* at 288.
18. *Id.*
19. *Id.* at 289, 293.
20. *Id.* at 310.
21. *Id.* at 296.
22. *Id.* at 289.
23. *Id.* at 301.

As a result of the action of the Supreme Court vacating Justice Douglas's stay, the Rosenbergs were executed at about 11 p.m. on June 19.

This recital is derived from the lengthy opinion written by Chief Justice Vinson for the Court, which was filed by him on July 16, after the fact.[24]

There has been much justified criticism of the undue haste in this disposition of the *Rosenberg* case, on the ground that there was no need to reconvene the Court in special session during vacation.[25] The Rosenbergs, like Coppola, were in death cells and their case could likewise have been determined when the Court reconvened in October. But, at least in the Rosenbergs' case, the full Court convened in person, not by telephone; heard extensive oral arguments; held two lengthy conferences; and, before sanctioning the execution, handed down opinions, both in majority and dissent, giving reasons for the respective points of view.

I have read the record of the Rosenbergs' case and I am convinced of their guilt. But the undue haste with which the Court acted to send them to the electric chair was not only violative of the deliberative justice expected of the Court, but has served to reinforce the views of those who, wrongfully in my view, believe in their innocence. The Court's image as an independent body, immune from the passions of the moment, was impaired by the procedure followed in the *Rosenberg* case. The same, I fear, is true to a greater degree with the procedure followed in Coppola's case, which, as I have pointed out, was decided in a brief telephone conference call, without consideration of the opposing response or the hearing of oral arguments, by a one-page order giving no reason for the Court's action.

By contrast, a week after Coppola's execution, two Supreme Court Justices declined to act with unseemly haste in a similar motion by the State of Texas to vacate a stay of execution in a capital case, *Bass v. State*.[26]

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24. *Id.* at 277.

25. *See, e.g.*, Note, *Federal Court Procedure—Supreme Court's Power to Review Individual Justice's Stay of Execution*: Rosenberg v. United States, *346 U.S. 273 (1953)*, 32 TEX. L. REV. 459 (1954) [hereinafter cited as Note, *Federal Court Procedure*]; Note, *The* Rosenberg *Case: Some Reflections on Federal Criminal Law*, 54 COLUM. L. REV. 219, 244-48 (1954); *An American Failure*, 176 NATION 533 (1953); *The Crime and Punishment of Julius and Ethel Rosenberg*, NEW REPUBLIC, June 29, 1953, at 6. *But see Wrong by a Damn Sight*, NEWSWEEK, Mar. 1, 1954, at 72 (criticizing Note, *Federal Court Procedure*, *supra*).

26. 626 S.W.2d 769 (Tex. Crim. App. 1982), *stay of execution granted sub nom.*, Bass v. Estelle, No. 82-2341 (5th Cir. Aug. 17, 1982).

Justice White, acting on his own, denied Texas's motion to vacate the stay of execution granted by a lower court.[27] The State renewed its motion before Justice Rehnquist. He referred the matter to the full Court for determination when the Court reconvened in regular session in October.[28]

It has been suggested that the difference is that Coppola, rather than prolong the agony after several appeals proved unavailing, decided that he would rather be executed than prosecute other appeals.[29] He consequently withdrew authorization to his lawyers to proceed further. His doing so raised the legal question of their standing. But standing is an esoteric legal subject, on which the Supreme Court has sounded with an uncertain trumpet.[30] At the very least, the proper resolution of the difficult standing question would appear to require briefing and oral argument. Also, since this was a death case and condemned persons have been known to change their minds about their announced willingness to die, perhaps independent verification of such intentions would be the counsel of wisdom.

If, unlike Bass, Coppola really had a death wish, perhaps it was nurtured by his long confinement, due largely to the fact that the Supreme Court itself had virtually imposed a moratorium on execu-

27. Estelle v. Bass, No. 82-2341 (5th Cir. application filed, denied Aug. 17, 1982).

28. Considerations for granting or denying a stay or vacation of a stay include: 1) whether the lower court decision rejecting the stay or vacation of stay was erroneous; 2) whether denial would work an irreparable injury to the applicant; and 3) whether the issues presented by the case show a "substantial prospect that they will command four votes for review." R. STERN & E. GROSSMAN, SUPREME COURT PRACTICE 577-86 (4th ed., 1969).

In addition, a single Justice may refer an application for a stay or vacation of a stay to the entire Court for determination. This type of referral usually occurs in cases involving very important or complex questions. *Id.* at 575. In fact, two such referrals occurred shortly after the Coppola execution. Both were applications to vacate a stay of execution—one to Justice White and subsequently to Justice Rehnquist, referred to above, and a separate one to Justice Rehnquist. Both were referred to the entire Court for determination and both were ultimately denied. Estelle v. Bass, 103 S. Ct. 36 (1982) (mem.); Estelle v. O'Bryan, 103 S. Ct. 285 (1982) (mem.).

Furthermore, it is perhaps not widely known that in regular Supreme Court procedure, in order to determine whether a conference on a given case is desirable, the Chief Justice circulates a "conference list" of pending cases. Unless a single Justice indicates that he wishes to discuss a particular case, it will not be given detailed deliberation at conference. *Cf.* R.H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 14-15 (1955). It is established Supreme Court practice, however, that every death penalty case *is* listed for discussion. In view of this established doctrine that all death penalty caes must be fully discussed, there is all the more reason that this telephone procedure should not have been followed.

29. *See* Taylor, *supra* note 2, at col. 4.

30. *Compare* Jones v. United States, 362 U.S. 257 (1960), *with* Rakas v. Illinois, 439 U.S. 128 (1978). *Compare also* Doremus v. Board of Educ., 342 U.S. 429 (1952), *with* Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

tions for more than a decade, and more importantly, had significantly altered its views about capital punishment in a number of cases.[31] This left Coppola and other condemned persons in death cells for prolonged periods with their fate subject to pulling and hauling by the court.

More than a thousand condemned prisoners are in death cells throughout the country[32] and have been confined, as I have said, for varying and lengthy periods of time. Coppola was in a death cell for four years; others for much longer periods. These circumstances may have affected Coppola's mental condition, which is a relevant legal factor in determining standing.[33]

Further, the request by a condemned prisoner to be executed and to waive whatever legal rights he has is tantamount to the expression of a desire to commit suicide. The government, by furthering that desire, could be deemed to be aiding or promoting a suicide, which is a crime in twenty-two states.[34]

Finally, in Coppola's case, while he had been denied certiorari by the Supreme Court twice in seeking reversal of his conviction and sentence, the proceeding that led to Judge Butzner's issuing a stay of execution was a habeas corpus action in the United States District Court in Virginia.[35]

The present Court has somewhat limited collateral review in federal habeas corpus proceedings where state courts have reviewed cases on a direct appeal.[36] Nevertheless, recourse to habeas corpus actions in the federal courts, as a safeguard to protect a defendant's rights to consider constitutional issues which have not been adequately considered in state courts, is still preserved. And this is notwithstanding the fact that the Supreme Court on direct review from a state's highest court may have denied certiorari.[37]

The importance of preserving basic habeas corpus jurisdiction to review collaterally what happens in state courts, was pointed out by Justice Powell in a concurring opinion in *Schneckloth v. Bustamonte*,[38]

31. *Compare* McGautha v. California, 402 U.S. 183 (1971), *with* Furman v. Georgia, 408 U.S. 238 (1972).

32. *A 'More Palatable' Way of Killing*, TIME, Dec. 20, 1982, at 28.

33. *See generally* 21 AM. JUR. 2D *Criminal Law* §§ 122-24 (1981).

34. *See, e.g.*, CAL. PENAL CODE § 401 (West 1971); FLA. STAT. ANN. § 782.08 (West 1976); N.Y. PENAL LAW § 120.30 (McKinney 1975); 18 PA. CONS. STAT. ANN § 2505 (Purdon 1973).

35. *See* Lawrence v. Mitchell, No. CA82-0509R (E.D. Va. filed, decided Aug. 9, 1982).

36. *See* Stone v. Powell, 428 U.S. 465, 476 (1976).

37. *See* Brown v. Allen, 344 U.S. 443, 488 (1953) (opinion by Frankfurter, J., stating position of majority on this point).

38. 412 U.S. 218 (1973).

with these words: "[H]abeas corpus . . . *should* provide the added assurance for a free society that no innocent [person] suffers an unconstitutional loss of liberty."[39]

For the reasons stated, it is my view that the manner in which the Supreme Court disposed of the *Coppola* case is contrary to the Court's best traditions and harmful to its role and image as a deliberative body immune from extraneous considerations.[40] Whatever one's view about the constitutionality of the death penalty, due process of law encompasses an adequate hearing.

A distinguished United States district judge said to me recently that he and his judicial colleagues interpret the Supreme Court's action in the *Coppola* case as a signal to "get faster executions."

If justice delayed is justice denied, then justice dispensed in undue haste by telephone and without access to the adversary position papers, is also justice denied.

39. *Id.* at 256 (emphasis in original).

Interestingly, on January 24, 1983, the Supreme Court granted certiorari and stayed the execution of Thomas Barefoot (scheduled for January 25). The parties were ordered to brief and argue "the question presented by the application, namely, the appropriate standard for granting or denying a stay of execution pending disposition of an appeal by a federal court of appeals by a death-sentenced federal habeas corpus petitioner." Barefoot v. Estelle, 596 S.W.2d 875 (Tex. Crim. App. 1980), *cert. granted*, 103 S.Ct. 841 (1983) (mem.). This grant of certiorari may be an indication of concern over the public reaction to the handling of the *Coppola* case.

40. On Monday, March 22, 1983, the Supreme Court granted certiorari in another death penalty case in order to determine whether the Constitution requires any specific form of "proportionality review" by a court of statewide jurisdiction prior to the execution of a state death sentence. Pulley v. Harris, 692 F.2d 1189 (1982), *cert. granted*, 51 U.S.L.W. 3678 (U.S. Mar. 22, 1983) (No. 82-1095). The Court seems to be taking every opportunity to review death penalty cases as it continues, obviously, to be troubled by the issues persistently provoked by the widespread application of the death penalty.