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TURNER v. JABE 58 F.3d 924 (4th Cir. 1995) United States Court of Appeals, Fourth Circuit

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TURNER v. JABE

58 F.3d 924 (4th Cir. 1995)

United States Court of Appeals, Fourth Circuit

FACTS

On July 12, 1978, Willie Lloyd Turner killed W. Jack Smith during an armed robbery of Smith's jewelry store. In December, 1979, a Virginia jury convicted Turner of capital murder and sentenced him to death. The trial court imposed the death penalty in February, 1980. Turner then appealed his conviction and sentence to the Supreme Court of Virginia. The court affirmed the conviction and sentence and the United States Supreme Court denied Turner's petition for certiorari.¹

Turner's appeals are multiple and, thus, complex. But the history of his case is necessary to an understanding of his substantive Eighth Amendment claim. What follows is a brief summary of that history. Turner filed a state habeas petition in the Virginia Circuit Court. The court denied the petition and the Supreme Court of Virginia refused his petition for appeal. The United States Supreme Court again denied Turner's certiorari petition. Turner next filed his first federal habeas petition in the United States District Court for the Eastern District of Virginia. That court denied the petition and the United States Court of Appeals for the Fourth Circuit affirmed. Turner then filed a second habeas petition in the state court, as well as a second petition in the federal district court, both of which were denied. Turner filed a petition for certiorari with the United States Supreme Court requesting review of the denial of the first federal habeas petition. The Court granted the petition, vacated the death sentence, and remanded for a new sentencing hearing.²

The Virginia Circuit Court held a resentencing hearing in January, 1987. A jury again sentenced Turner to death. The circuit court imposed the death penalty in March. The Supreme Court of Virginia on direct appeal affirmed the sentence. Turner petitioned the United States Supreme Court for certiorari and was denied. Turner filed a habeas petition in the circuit court in September, 1988. The petition was dismissed. In April, 1991, the Supreme Court of Virginia denied Turner's appeal.³

In December, 1991, Turner filed his third federal habeas petition. The district court denied the petition in February, 1992. The court of appeals affirmed in September, 1994. In March, 1995, the United States Supreme Court again denied Turner's petition for certiorari.⁴

On April 24, 1995, the Virginia circuit court scheduled Turner's execution for May 25, 1995. On April 27, 1995, Turner filed his fourth state habeas petition. By this time, Turner had been on death row for fifteen years. In his petition, Turner "argued that to execute him now, after he has endured the psychological torture of fifteen years on death

row, would violate the Eight[h] Amendment's prohibition against cruel and unusual punishment."⁵ On May 15, 1995, the Supreme Court of Virginia dismissed his appeal on the ground that it was defaulted under Virginia's "abuse of the writ" statute.⁶ Turner then filed a petition in the United States district court. The court dismissed the petition on the merits and Turner appealed.⁷

HOLDING

The United States Court of Appeals for the Fourth Circuit held that Turner's petition was an abuse of the writ because he raised issues which could have been raised in his third habeas petition. In addition, the court held that Turner could not "show cause for his failure to raise the claim earlier, and he [could not] show a fundamental miscarriage of justice."⁸

ANALYSIS/APPLICATION IN VIRGINIA

I. *Lackey v. Texas*: A Prolonged Stay on Death Row as Cruel and Unusual Punishment

Turner's claim in his fourth habeas petition was based on Justice Stevens's Memorandum Opinion concurring with the denial of certiorari in *Lackey v. Texas*.⁹ The opinion was handed down on March 27, 1995, seven days after the Court's final denial of certiorari in Turner's case. *Lackey* involved a prisoner's claim that to execute him after seventeen years on death row would violate the Eighth Amendment's prohibition against cruel and unusual punishment. Although the Court denied certiorari, Justice Stevens wrote a special concurrence, noting that "the petitioner's claim is not without foundation."¹⁰

Justice Stevens stated that the Court's decision to uphold the death penalty in *Gregg v. Georgia*¹¹ was justified on two grounds: the Framers thought it was permissible, and it served the social purposes of retribution and deterrence. However, he wrote, "[i]t is arguable that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death."¹² Recognizing the mental suffering to which a death row inmate is subjected,¹³ Justice Stevens suggested that "after such an extended time, the acceptable state interest in retribution has arguably been satisfied by the severe punishment already inflicted."¹⁴

¹ *Turner v. Jabe*, 58 F.3d 924, 926 (4th Cir. 1995). For a more comprehensive discussion of the facts of this case, see *Turner v. Williams*, 35 F.3d 872 (4th Cir. 1994), and case summary of *Turner*, *Capital Defense Digest*, Vol. 7, No. 1, p. 15 (1994).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 927 (citing Va. Code Ann. § 8.01-654(B)(2)). This section, in relevant part, states, "No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition."

⁷ *Id.*

⁸ *Id.* at 932.

⁹ 115 S. Ct. 1421 (1995).

¹⁰ *Id.*

¹¹ 428 U.S. 153 (1976).

¹² *Lackey*, 115 S. Ct. at 1421.

¹³ *Id.* (citing *In re Medley*, 134 U.S. 160, 172 (1890); and *People v. Anderson*, 6 Cal.3d 628, 649, 100 Cal.Rptr. 152, 166, 493 P.2d 880, 894 (1972)).

¹⁴ *Id.*

What have become known as “*Lackey* claims” thus contain two elements: length of time on death row and the conditions which the prisoner endured. It is clear that in order for a *Lackey* claim to be even potentially acceptable, the mental suffering which the prisoner was forced to undergo will be extremely important. Thus, claims should stress the torture of remaining in suspense for many years, as well as the mental torment caused by repeatedly coming within hours of execution before a last minute stay is granted.

This type of claim has succeeded in other countries. In 1993, the Privy Council held that two petitioners who had been on death row from 1979 until 1993 had suffered inhumane punishment and commuted their death sentences.¹⁵ In finding a violation, the court noted that the delay in execution was not attributable to dilatory tactics by the petitioners.¹⁶ Although the violation was under the Jamaican Constitution, which states, “No person shall be subjected to torture or to inhuman or degrading punishment or other treatment,”¹⁷ the ruling is relevant because the Jamaican Constitution is derived from the same English common law which gave rise to the United States Constitution’s Eighth Amendment prohibition against cruel and unusual punishment.¹⁸

II. Procedural Bars

Petitioners raising *Lackey* claims will face the difficulty of two procedural bars. First, as with *Turner*, courts may find abuse of the writ because the claim could have been raised in an earlier petition. The second bar is *Teague v. Lane*,¹⁹ in which the United States Supreme Court ruled that new constitutional rules of criminal procedure cannot be retroactively applied to overturn judgments which were already final (defined as when the United States Supreme Court denies certiorari after the first state appeal of right).

A. Abuse of the Writ

In *Turner*, the Fourth Circuit held that the defendant had abused the writ. One way to disprove abuse of the writ is to show cause for failing to include the claim in an earlier petition and prejudice resulting from the alleged constitutional violation. *Turner* first argued that Justice Stevens’s Memorandum Opinion in *Lackey* made the claim a novel legal issue, but the court rejected his argument. The court reasoned that the Privy Council’s decision in 1993, as well as previous United States cases, gave *Turner* a basis for raising the claim at an earlier time.²⁰

Turner then argued that he could not have raised the claim earlier because the facts which were the basis of the claim had not yet occurred. Specifically, the length of time on death row and the conditions of that

stay had not yet fully developed. The court rejected this argument as well, stating that the necessary facts existed at the time of *Turner*’s third habeas petition. For although he may not have spent fifteen years on death row by this point, he had spent twelve years. In addition, the mental suffering part of his claim—such as repeated stays in the “death chamber”—had already occurred by the time of the third petition. Therefore, the factual basis for the claim did not constitute “cause” for failure to raise the claim earlier.²¹

Because the court found that there was neither a legal nor a factual basis which prevented *Turner* from raising the issue in the third petition, the court stated that it did not need to determine if there was actual prejudice.²²

Alternatively, *Turner* could have shown that because “a ‘fundamental miscarriage of justice’ would result from . . . failure to entertain his claim on the merits,”²³ the court should excuse abuse of the writ. But to show this, *Turner* had to demonstrate his “actual innocence” of the death sentence (i.e., that he was not eligible for the death penalty).²⁴ Because *Turner* admitted that his death sentence was permissible when imposed, however, the court held that he was not “innocent” of the death penalty and that there was no fundamental miscarriage of justice.²⁵

Abuse of the writ will be a significant problem for any defendant attempting to raise a *Lackey* claim, with no easy remedy available. If claims are raised too early, a court is likely to find that there has not been an intolerable delay. But if the claim is raised too late, the court will find abuse of the writ. In addition, if attorneys include an anticipatory claim in the first petition, the courts may then speed up review in order to preempt the claim. Therefore, defense attorneys face the procedural uncertainty of when to raise the claim.

In *Turner*, the court suggested the possibility of amending a pending petition when the issue becomes ripe.²⁶ However, this still leaves open the issue of when a *Lackey* claim becomes ripe—that is, how much time constitutes an intolerable amount of time on death row. As the Fourth Circuit noted, *Pratt & Morgan* held that five years would presumptively be “inhuman or degrading punishment,”²⁷ but given that executions in the United States within five years of conviction are rare, it seems unlikely that this presumption would be accepted by American courts.

B. *Teague v. Lane*

Teague v. Lane held that new rules of constitutional criminal procedure should not be applied retroactively to cases in which final judgment has already been rendered.²⁸ If this rule applies to *Lackey* claims, the result could be cruelly ironic: since a *Lackey* claim by its very nature could only arise after a judgment is “final” under *Teague*,

¹⁵ *Pratt & Morgan v. The Attorney General of Jamaica*, [1993] 2 App. Cas. 1, (P.C. 1993) (en banc) (appeal taken from Jam) reprinted in 33 I.L.M. 364 (1994).

¹⁶ *Id.* at 384, 386.

¹⁷ Jam. Const. § 17(1).

¹⁸ For a more expansive discussion of *Lackey* claims, see Kathleen M. Flynn, Note, *The Agony of Suspense: How Protracted Death Row Confinement Followed by Execution Gives Rise to an Eighth Amendment Claim of Cruel and Unusual Punishment*, 54 Wash. & Lee L. Rev. (forthcoming 1997).

¹⁹ 489 U.S. 288 (1989).

²⁰ *Turner*, 58 F.3d at 927-30.

²¹ *Id.* at 930-31.

²² *Id.* at 931.

²³ *Id.* at 927.

²⁴ *Id.* at 932 (citing *Herrera v. Collins*, 113 S.Ct. 853, 862 (1993)).

²⁵ *Id.* In *Turner*, the court also noted a fear that petitioners would “never raise this Eighth Amendment claim until the eve of execution . . . [and thus] could never abuse the writ by failing to raise the issue in an earlier petition.” *Id.* at 931.

²⁶ *Id.*

²⁷ 33 I.L.M. at 387 (quoting the Constitution of Jamaica, Section 17(1)).

²⁸ *Teague*, 489 U.S. at 316.

the United States Supreme Court could never validly hear a *Lackey* claim, because it would be announcing a "new rule," which is prohibited by *Teague*. The only way out of the *Teague* box, therefore, is if a *Lackey* claim falls under a *Teague* exception or *Teague* does not apply at all.

The most likely *Teague* exception to apply is the first one, which allows retroactive application of a new rule if the new rule prohibits "a certain category of punishment for a class of defendants because of their status or offense."²⁹ Since a *Lackey* claim effectively argues that the state no longer has the power to punish a defendant, the claim should come under this exception.³⁰

The other way around *Teague* is to argue, as some lower courts have held, that *Teague* by its nature is inapplicable to a *Lackey* claim.

²⁹ *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989).

³⁰ The second exception, the "watershed" exception, allows retroactivity for "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 311, 313. Since *Lackey* claims involve a substantive constitutional

For example, in *McKenzie v. Day*, the Ninth Circuit Court of Appeals stated that *Teague* should not apply to *Lackey* claims as they "cannot normally be raised on direct appeal because much of the delay complained of arises in post-conviction proceedings."³¹ Defense counsel, therefore should argue not only that *Lackey* claims fall under a *Teague* exception, but also that *Teague* does not apply at all.

Willie Lloyd Turner was executed on May 25, 1995.

Summary and analysis by:
Jeanne-Marie S. Raymond

claim of violation of the Eighth Amendment, rather than a claim of procedural error, it is difficult to see how courts would allow this second exception to apply.

³¹ 57 F.3d 1461, 1468 n.15 (1991).

TOWNES v. MURRAY

68 F.3d 84 (4th Cir. 1995)

United States Court of Appeals, Fourth Circuit

FACTS

Richard Townes shot Virginia Goebel, the night clerk at a Virginia Beach Majik Market, sometime during the early morning hours of April 14, 1985. Goebel's body was discovered face down in a pool of blood. Townes was indicted for capital murder during the commission of a robbery or attempted robbery. The Commonwealth's primary evidence consisted of empty casings found next to the body that matched a gun owned by Townes, a customer's identification of Townes as being in the store just hours before the killing, and a fellow inmate's statement that Townes had confessed to shooting Goebel.¹

After a public defender withdrew and two new counsel were appointed, Townes petitioned to dismiss counsel and made a motion to proceed *pro se*. The court granted the motion. At trial, the jury returned a guilty verdict, and then, after finding future dangerousness, the jury sentenced Townes to death.²

¹ *Townes v. Murray*, 68 F.3d 840, 843 (4th Cir. 1995).

² *Id.* at 843-44.

³ *Townes v. Commonwealth*, 234 Va. 307, 362 S.E.2d 650 (1987), *cert. denied*, 485 U.S. 971 (1988).

⁴ *Townes v. Murray*, 502 U.S. 912 (1991).

⁵ 114 S.Ct. 2187 (1994).

⁶ *Townes*, 68 F.3d at 845, 847.

⁷ *Id.* at 853. A patron of the Majik Market, Dorothy Moore, had identified Townes and one other man from a photo array of six snapshots. Later, she identified Townes from a five-man lineup. He was the only man who also appeared in the photo array. Townes argued that his being

The Supreme Court of Virginia upheld the conviction and sentence and the United States Supreme Court denied certiorari.³ Townes' state habeas petition was denied by the trial court and subsequently refused by the Supreme Court of Virginia. The United States Supreme Court again denied certiorari.⁴

Townes filed a federal habeas petition, raising three major areas of alleged error. First, Townes asserted that the trial court erred in that it failed to conduct an adequate *Faretta* hearing pre-trial, that it failed to conduct an additional *Faretta* hearing after trial but prior to the sentencing hearing, and that he was incompetent to "stand trial" during the sentencing phase. Second, Townes argued that the trial court violated *Simmons v. South Carolina*⁵ when it refused to instruct the jury as to Townes' parole ineligibility if sentenced to life imprisonment.⁶ Third, Townes raised challenges to the finding of guilt, alleging unduly suggestive identification procedures and *Brady* violations, among others.⁷

the only constant between the photo array and the lineup "unreasonably and impermissibly" indicated to Moore that he had committed the murder. *Id.* The Fourth Circuit noted that there was no "flat prohibition" against making Townes the one constant in the array and the lineup. *Id.* The court concluded that because no constitutional infirmity lay in the lineup itself and in light of the "favorable conditions" under which Moore saw Townes, the district court was within its discretion to dismiss this claim. *Id.* at 853-54. The court's rulings on Townes' remaining claims will not be discussed in this note. These include (1) a second identification (2) an alleged *Brady* violation and (3) a claim that the magistrate judge should have recused himself. *Id.* at 854-55.