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**TOWNES v. MURRAY 68 F.3d 84 (4th Cir. 1995) United States  
Court of Appeals, Fourth Circuit**

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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."<sup>29</sup> 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.<sup>30</sup>

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.

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<sup>29</sup> *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989).

<sup>30</sup> 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."<sup>31</sup> 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

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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.

<sup>31</sup> 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.<sup>1</sup>

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.<sup>2</sup>

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

<sup>2</sup> *Id.* at 843-44.

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

<sup>4</sup> *Townes v. Murray*, 502 U.S. 912 (1991).

<sup>5</sup> 114 S.Ct. 2187 (1994).

<sup>6</sup> *Townes*, 68 F.3d at 845, 847.

<sup>7</sup> *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.<sup>3</sup> 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.<sup>4</sup>

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*<sup>5</sup> when it refused to instruct the jury as to Townes' parole ineligibility if sentenced to life imprisonment.<sup>6</sup> Third, Townes raised challenges to the finding of guilt, alleging unduly suggestive identification procedures and *Brady* violations, among others.<sup>7</sup>

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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.

A magistrate conducted an evidentiary hearing on Townes' incompetency to stand trial and the *Brady* claims. Following the hearing, the magistrate recommended that all claims be dismissed. The district court, adopting the magistrate's report, dismissed the petition. Townes appealed to the United States Court of Appeals for the Fourth Circuit.<sup>8</sup>

### HOLDING

The Fourth Circuit held that Townes' *Faretta* claims were procedurally defaulted<sup>9</sup> and that *Teague v. Lane*<sup>10</sup> barred his *Simmons* claims.<sup>11</sup>

### ANALYSIS/APPLICATION IN VIRGINIA

#### I. *Simmons v. South Carolina*: Who Must Raise Parole Eligibility?

##### A. The Need for a Defendant to Request a *Simmons* Instruction

At sentencing, in the process of its deliberations, Townes' jury asked for an instruction from the court on what kind of parole eligibility attached to a life sentence. The court replied that parole eligibility was not an appropriate factor for the jury to consider in sentencing Townes. After dismissing the jury, the court asked if either party had an objection to this reply. Neither did. In his appeal, Townes argued that under *Simmons v. South Carolina*, the court's refusal to inform the jury about his parole eligibility violated his right to due process.<sup>12</sup> In *Simmons*, the United States Supreme Court had held that a defendant must be allowed to inform a jury that he is ineligible for parole.<sup>13</sup>

The Fourth Circuit ruled, however, that *Simmons*' holding was too narrow to encompass Townes' claim and, therefore, Townes was arguing for a new rule barred by *Teague*.<sup>14</sup> The court concluded that *Simmons* does not require that parole ineligibility information come from the judge, but only requires that a defendant be given the opportunity to present parole ineligibility information. Because Townes could have told the jury he was parole ineligible in closing argument, in the Fourth Circuit's view, no constitutional violation under *Simmons* occurred. Due process is violated only when the defendant is prevented from informing the jury of his parole ineligibility either through a jury instruction or a direct argument to the jury.<sup>15</sup> Thus *Simmons*, according to the Fourth Circuit, is not self-executing and defense counsel must raise the issue at the earliest possible moment and keep raising it in order to avoid procedural default.

<sup>8</sup> *Id.* at 844-45.

<sup>9</sup> *Id.* at 847-48.

<sup>10</sup> 489 U.S. 288 (1989).

<sup>11</sup> *Townes*, 68 F.3d at 848.

<sup>12</sup> *Id.* at 847.

<sup>13</sup> 114 S.Ct. at 2196.

<sup>14</sup> *Townes*, 68 F.3d at 851-53.

<sup>15</sup> *Id.* at 849-50.

<sup>16</sup> *Id.* at 851.

<sup>17</sup> *Simmons*, 114 S.Ct. at 2198 (Souter, J., concurring).

<sup>18</sup> *Id.*

<sup>19</sup> *Townes*, 68 F.3d at 852.

<sup>20</sup> These decisions include: *Beck v. Alabama*, 447 U.S. 625, 638 n.13 (1980) (stating that "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and

#### B. The Denial of *Simmons* Instruction As Cruel and Unusual Punishment

In addition to arguing that due process placed an affirmative duty on the judge to give a parole ineligibility instruction, Townes also argued that such a duty was compelled by the Eighth Amendment. The Fourth Circuit did concede that his argument was supported by Justice Souter's concurrence in *Simmons*.<sup>16</sup> Justice Souter asserted that in all capital cases, even if the prosecution does not argue future dangerousness, the Eighth Amendment imposes a duty on courts to instruct juries on the meaning of life imprisonment. The Eighth Amendment requires such an instruction, explained Justice Souter, because of an inherent need for heightened reliability in a jury's decision that death is the appropriate sentence.<sup>17</sup> Knowledge that the defendant is ineligible for parole would, according to Justice Souter, make the jury's death sentence more reliable.<sup>18</sup> Despite its willingness to entertain Townes' claim, the Fourth Circuit ultimately rejected this argument.

As it did with the due process claim, the court decided that even if the Eighth Amendment imposed an affirmative duty to give a jury instruction, it would be a "new rule" under *Teague v. Lane*.<sup>19</sup> The court noted the tension between the United States Supreme Court's pre-1988 decisions that struck down certain procedures because they rendered a death sentence unreliable<sup>20</sup> and the Court's decision in *California v. Ramos*<sup>21</sup> which had concluded that the states should be given leeway in deciding whether sentencers could consider matters such as commutation and parole. The court determined that this ambiguity, which existed at the time Townes' conviction became final, meant that the rule sought by Townes was a new rule not "compelled by existing precedent."<sup>22</sup> Thus, Townes could not benefit from it unless it fell within one of the two exceptions to *Teague*.<sup>23</sup>

Townes' claim clearly did not fall within the first *Teague* exception—that it "place[d] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe."<sup>24</sup> The Fourth Circuit also concluded that it could not find that Townes' "rule" comprised a "watershed rule[] of criminal procedure"<sup>25</sup> under the second *Teague* exception, noting that it believed that a majority of the United States Supreme Court would not recognize such a right in the first place, let alone view it as a "watershed rule."<sup>26</sup>

In summary, the Fourth Circuit read *Simmons* narrowly as not imposing an affirmative duty on courts to instruct a jury as to what life imprisonment means, even where the jury requests clarification. It appears that the Fourth Circuit will find *Simmons* applicable only in cases where a defendant has been completely precluded from getting parole

Fourteenth Amendments" (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (stating that because death is a qualitatively different punishment, there is a need for a correlative "reliability in the determination that death is the appropriate punishment in a specific case").

<sup>21</sup> 463 U.S. 992, 997-1009 (1983) (holding that the Federal Constitution does not bar state courts from informing a capital sentencing jury that the Governor may commute a life sentence without parole).

<sup>22</sup> *Townes*, 68 F.3d at 852 (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)).

<sup>23</sup> *Id.*

<sup>24</sup> *Teague*, 489 U.S. at 307 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971)).

<sup>25</sup> *Id.* at 311.

<sup>26</sup> *Townes*, 68 F.3d at 852-53.

ineligibility before the sentencing jury. Thus, the burden is on defense counsel to raise the issue to avoid procedural default.

### C. The Fourth Circuit's Analysis of *Simmons v. South Carolina* Is Dicta

In his concurrence, Judge Luttig faulted the majority for ignoring the mandate of *Teague v. Lane*<sup>27</sup> because they addressed the merits of Townes' *Simmons* claim without first deciding if *Simmons* announced a new rule. If *Simmons* did announce a new rule, that would end the inquiry altogether by making the ruling unavailable to Townes, whatever its scope, since his case was already on habeas.<sup>28</sup> Instead, the majority's first step was to analyze whether *Simmons*' holding was too narrow to benefit Townes, which meant that the court had to actually decide the merits of Townes' claim under *Simmons*. As the concurrence pointed out, because the court later found *Simmons* itself to be a new rule, its earlier discussion of *Simmons*' scope is dicta unnecessary to resolving Townes' claims.<sup>29</sup> All of the court's statements interpreting *Simmons*' scope, therefore, are not binding. Nonetheless, the opinion is a strong indication that the Fourth Circuit will not be receptive to Townes' argument that *Simmons* places an affirmative duty on courts to instruct juries about a defendant's parole ineligibility where the defendant does not request an instruction.

## II. *Faretta* and the Capital Sentencing Phase: An Independent Requirement?

In addition to his *Simmons* claims, Townes argued that his Sixth Amendment rights were violated when, after his conviction but before his sentencing hearing, the trial court failed to conduct both a new *Faretta* hearing and, *sua sponte*, a competency hearing. Townes' first theory was that the Sixth Amendment conferred a general right to a new or renewed *Faretta* hearing before the sentencing phase. Second, Townes alleged that he experienced a sudden loss of mental capacity after hearing the guilty verdict which required both a new *Faretta* inquiry and a pre-sentencing phase competency determination.<sup>30</sup>

The Fourth Circuit ruled that these claims were procedurally defaulted because Townes failed to present them fairly either on direct appeal at the state level or on state habeas.<sup>31</sup> Nonetheless, they were not without merit. The fact that a capital sentencing proceeding is a bewil-

dering undertaking for experienced attorneys alone suggests a special *Faretta* inquiry is necessary, but the point is made even more emphatic by the court's lengthy discussion of the complexities of Townes' *Simmons* claims. Townes clearly was completely unaware of the arguments afforded by *Simmons* or the related body of law that would suggest he had an Eighth Amendment right for the judge to give the jury a meaningful definition of life imprisonment.

Similarly, Townes' argument that the court should have held a competency hearing after the guilty verdict and prior to the sentencing hearing was not want of merit. In *Drope v. Missouri*,<sup>32</sup> the United States Supreme Court stated that a judge has a *sua sponte* duty to suspend a trial and conduct an evaluation of a defendant's competency when changed circumstances call the defendant's competency into question.<sup>33</sup> Since a lack of competency places a defendant beyond the power of a state to prosecute, courts have an affirmative duty to ensure that defendants are not "tried or convicted" while incompetent. A failure to meet this duty results in a violation of the defendant's due process rights.<sup>34</sup> In Townes' case, if he were, as he claimed, so devastated by the guilty verdict that he became incompetent, the reasoning in *Drope* suggests that the court had a constitutional duty to suspend his sentencing until after it conducted a competency evaluation.

Moreover, Townes' competency argument also supports his claim that he was entitled to a new *Faretta* hearing. If a defendant is or becomes incompetent, then he does not possess "a rational as well as factual understanding of the proceedings against him."<sup>35</sup> It follows that incompetency makes it impossible for a defendant to proceed *pro se* under *Faretta* because without an understanding of the proceedings against him, he no longer can be seen as making a knowing and intelligent waiver of his right to counsel. Thus, where a defendant manifests signs of incompetence during a proceeding, *Drope* and *Faretta* require a court to suspend the trial, to conduct a competency evaluation, and if the defendant is proceeding *pro se*, to hold a new *Faretta* hearing. Had his *Faretta* claims not been procedurally defaulted, Townes would have had the opportunity to make these arguments. Thus, defense counsel are reminded of the importance of raising all claims, both generally and specifically, at the first opportunity to do so because the ripple effects of failing to do so are grave.

Summary and analysis by:  
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<sup>27</sup> 489 U.S. 288 (1989). *Teague* held that where a United States Supreme Court ruling established a "new rule," a rule that could not be predicted by existing precedent, that rule could not be applied retroactively to a conviction which is already final.

<sup>28</sup> *Townes*, 68 F.3d at 855-56.

<sup>29</sup> *Id.* at 856.

<sup>30</sup> *Id.* at 845.

<sup>31</sup> *Id.* at 846.

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<sup>32</sup> 420 U.S. 162 (1975).

<sup>33</sup> *Id.* at 181.

<sup>34</sup> *Id.* at 171-72.

<sup>35</sup> *Dusky v. United States*, 362 U.S. 402 (1960).