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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. Supreme Court

Certiorari to Court of Appeals
Op. No. 5352 (S.C. Ct. App. filed September 9, 2015)
From Dorchester County Court of Common Pleas
The Honorable Deandra G. Benjamin, Circuit Court Judge
Appellate Case No. 2015-002396

Ken Lucero,

Petitioner,

vs.

State of South Carolina,

Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General
Bar #68571

Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL1

STATEMENT OF THE CASE2

ARGUMENT

 The Court of Appeals correctly determined that Padilla v. Kentucky,
 130 S. Ct. 1473 (2010) does not apply retroactively.3

CONCLUSION10

TABLE OF AUTHORITIES

Cases:

Alabama v. Shelton, 535 U.S. 654 (2002)7

Chaidez v. United States, 133 S.Ct. 1103 (2013)3, 4, 5

Danforth v. Minnesota, 552 U.S. 264 (2008)8

Gideon v. Wainwright, 372 U.S. 335 (1963).....6

Hamm v. State, 403 S.C. 461, 744 S.E.2d 503 (2013)4

Harmelin v. Michigan, 501 U.S. 957 (1991)3

Neely v. Thomasson, 365 S.C. 345, 618 S.E.2d 884 (2005)3

Padilla v. Kentucky, 130 S. Ct. 1473 (2010) passim

Seckinger v. The Vessel, Excalibur, 326 S.C. 382, 483 S.E.2d 775 (Ct. App. 1997)8

Strickland v. Washington, 466 U.S. 668 (1984).....4

Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (2007).....5, 6, 7

Teague v. Lane, 489 U.S. 288 (1989)..... passim

United States v. Mathur, 685 F.3d 396 (4th Cir. 2012)5, 6

Whorton v. Bockting, 549 U.S. 406 (2007).....6

Other Authorities:

S.C. Code § 17-27-45(B)6, 7, 8

Rule 201(b), SCRE9

CDC Vital signs: Today’s Heroin Epidemic3

ISSUE PRESENTED

The Court of Appeals correctly determined that Padilla v. Kentucky, 130 S. Ct. 1473 (2010) does not apply retroactively.

STATEMENT OF THE CASE

Petitioner Lucero was indicted for trafficking heroin, but allowed to plead guilty to possession of heroin before the Honorable Diane Shafer Goodstein on November 18, 2002. Lucero received a sentence of two years' imprisonment suspended upon three years' probation. Lucero did not file an appeal of her conviction and sentence. App. pp. 15-18.

Lucero filed an application for post-conviction relief (PCR) on April 14, 2011. A hearing was convened at the Orangeburg County Courthouse on May 22, 2012, before the Honorable DeAndrea Gist Benjamin. Lucero was present and represented by Eleanor Duffy Cleary, Esquire. Undersigned counsel represented the State. The State moved to dismiss the application as beyond the statute of limitations and as being barred under the doctrine of laches. Then the PCR court heard testimony from Lucero and her plea counsel. The matter was taken under advisement, and both parties submitted briefs to the PCR court. The PCR court denied the State's motions to dismiss and granted relief by order dated July 25, 2012. App. pp. 123-146.

The State filed a motion pursuant to Rule 59, SCRCP on August 24, 2012. The PCR court issued a modified order on September 19, 2012. The State appealed the grant of relief. After the instant case was transferred from this Court to the Court of Appeals, the Court of Appeals granted the State's petition for writ of certiorari, and following briefing and oral argument, the Court of Appeals reversed the grant of relief. Lucero v. State, 414 S.C. 238, 777 S.E.2d 409 (Ct. App. 2015). Subsequently, the Court of Appeals denied Lucero's petition for rehearing, and Lucero filed a petition for writ of certiorari. This return follows.

ARGUMENT

The Court of Appeals correctly determined that Padilla v. Kentucky, 130 S. Ct. 1473 (2010) does not apply retroactively.

The Court of Appeals correctly determined the PCR court erred in granting Petitioner Lucero's PCR application. The PCR court erroneously found Padilla v. Kentucky, 130 S. Ct. 1473 (2010) should be applied retroactively.¹ Lucero's petition seeks sympathy from this Court and attacks the wisdom of our drug laws² and the federal laws on deportation. It is beyond the purview of this Court and the State to question the wisdom of the federal law, and of course the State is not a party to the deportation proceedings. What is relevant is the regularity of the conviction and the simple question of whether the new rule announced in 2010 applies retroactively to Lucero's 2002 conviction. In this regard, whether or not Padilla should apply retroactively has the same answer for Lucero as it would for a murderer or rapist. It is a simple question of law that applies equally to all similarly-situated.

During the pendency of the State's appeal in the Court of Appeals, the United States Supreme Court issued its opinion in Chaidez v. United States, 133 S.Ct. 1103 (2013), which held that Padilla announced a new rule in rejecting application of Padilla

¹ Since the question as to whether Padilla is retroactive is a question of law, the issue should be reviewed de novo. Neely v. Thomasson, 365 S.C. 345, 618 S.E.2d 884 (2005) (questions of law may be decided with no deference to the trial court).

² The Centers for Disease Control reports 8,200 deaths due to heroin use in 2013. CDC Vitalsigns: Today's Heroin Epidemic fact sheet, accessed at <http://www.cdc.gov/media/dpk/2015/dpk-vs-heroin-epidemic.html> on December 18, 2015. See Harmelin v. Michigan, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring) ("Possession, use, and distribution of illegal drugs represents 'one of the greatest problems affecting the health and welfare of our population.' Petitioner's suggestion that his crime was nonviolent and victimless ... is false to the point of absurdity." (citations omitted)).

retroactively to Chaidez. Relying on Chaidez, this Court subsequently held in Hamm v. State, 403 S.C. 461, 744 S.E.2d 503 (2013) that Padilla does not apply retroactively.

Lucero admits Padilla would not be retroactive applying the federal rule because the new rule constitutes a watershed rule – a question not expressly determined by Chaidez or Hamm. See Chaidez, at 1107 n.3 (noting Chaidez did not argue Padilla announced a watershed rule of criminal procedure). In Padilla, the United States Supreme Court held, for the first time, that criminal defense attorneys render deficient performance under Strickland v. Washington, 466 U.S. 668 (1984) when they fail to advise noncitizen clients about deportation consequences of a guilty plea. The United States Supreme Court, therefore, reversed the Kentucky Supreme Court, which had concluded that the Sixth Amendment does not protect a defendant from erroneous advice about deportation because it is merely a collateral consequence of a guilty plea. Padilla at 1478. However, in reversing Kentucky’s decision, the Supreme Court noted that “[t]he Kentucky high court is far from alone in th[e] view” that the failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel. Id. at 1481.

In determining whether a decision of the United States Supreme Court should be applied retroactively, first it must be determined if the decision amounts to a new rule as defined by Teague v. Lane, 489 U.S. 288 (1989). Chaidez answered the question both parties to this case already agreed upon – Padilla announced a new rule. Chaidez, at 1108-09 (noting Padilla determined deportation was not “categorically removed” from the scope of Sixth Amendment right to counsel merely because deportation was a collateral consequence of a conviction; and this decision contradicted the almost unanimous view of

lower courts that the Sixth Amendment categorically does not apply to collateral consequences such as deportation).

New rules from a United States Supreme Court opinion will generally not be applied retroactively except in the extremely rare exception made if a new rule amounts to a watershed rule of criminal procedure. Where the United States Supreme Court decision announces a new rule, the decision will not be applied retroactively to claims of ineffective assistance of counsel unless the new rule places certain types of primary, private individual conduct beyond the government's ability to proscribe as criminal conduct, or the new rule requires observance of procedures implicit to the concept of ordered liberty that amounts to a "watershed rule of criminal procedure." Talley v. State, 371 S.C. 535, 543, 640 S.E.2d 878, 882 (2007). The first exception does not apply as Padilla does not involve a new rule concerning which type of conduct the government may proscribe. As found in decisions listed below, the second exception does not apply either as the rule announced in Padilla is not a watershed rule of criminal procedure.

Several months prior to the Chaidez opinion, the Fourth Circuit Court of Appeals reviewed and determined that the new rule in Padilla is not a watershed rule. United States v. Mathur, 685 F.3d 396 (4th Cir. 2012). The Fourth Circuit noted a new procedural rule will apply retroactively "if it is implicit in the concept of ordered liberty and if, without the procedure, the likelihood of an accurate conviction is seriously diminished." Id. at 399 (citing Teague, at 311) (internal quotation marks omitted). Mathur noted "[t]his exception is extremely narrow . . . as it is reserved only for watershed rules implicating fundamental fairness." Id. (citations and internal quotation marks omitted). "Since Teague, the [United States] Supreme Court has reviewed numerous claims that new rights fall within this

exception, and it has rejected every single one of them.” Id. Mathur noted that the only case in which it was suggested retroactive application of a new rule as a watershed rule was Gideon v. Wainwright, 372 U.S. 335 (1963), which found the Sixth Amendment right to counsel applies to the states. Id.; see Whorton v. Bockting, 549 U.S. 406, 417 (2007) (“We have observed that it is unlikely that any [watershed rules] have yet to emerge” (citation and internal quotation marks omitted)).

In Whorton, the United States Supreme Court noted: “In order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction. . . . Second, the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.” Id. at 418 (citation and internal quotation marks omitted). The Fourth Circuit, applying Whorton, noted that a criminal defendant’s awareness of deportation consequences when entering a guilty plea “does not cast doubt on the verity of the defendant’s admission of guilt or the propriety of the sentence imposed pursuant to the plea agreement.” Mathur, at 400. Thus, Mathur found Padilla was not a watershed rule.

Further, the Mathur Court noted it had not been directed to any cases suggesting that Padilla was a new rule that should be applied retroactively: “The cases decided under Padilla to date have held *either* that Padilla did not recognize a new right *or* that Padilla did recognize a new right but the right was *not* retroactively applicable to cases on collateral review.” Mathur, at 400 (emphasis in the original). Padilla should not be applied retroactively because its holding, while a new rule, is not a watershed rule.

Further, the Court of Appeals correctly determined that retroactive application is not appropriate under Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (2007) and S.C. Code §

17-27-45(B). In Talley, this Court reviewed the issue of whether Alabama v. Shelton, 535 U.S. 654 (2002) (finding the constitutional right to counsel extends to a defendant who receives a suspended sentence with the potential to result in actual deprivation of the defendant's liberty) should be applied retroactively for collateral review of a conviction. The Supreme Court concluded, without the benefit of United States Supreme Court precedent, that Shelton was a watershed rule of criminal procedure under the Teague analysis and therefore, the PCR court correctly applied section 17-27-45(B) as the applicable statute of limitations to find the application was timely filed because it was filed within one year of the decision in Shelton. Talley, 371 S.C. at 544, 640 S.E.2d at 882.

In beginning its analysis under Teague, the Talley court noted: "In determining whether Respondent was deprived of his federal constitutional right to counsel, **we are required** to follow the United States Supreme Court's decisions on retroactivity." Talley, 371 S.C. at 541, 640 S.E.2d at 880 (emphasis added). Accordingly, the Talley court found section 17-27-45(B) applicable only after determining Shelton announced a new watershed rule of criminal procedure. Talley is inapplicable to the instant case because as discussed above, Padilla did not announce a new watershed rule of criminal procedure and should not be applied retroactively.

Under section 17-27-45(B) :

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, **and if the standard or right is intended to be applied retroactively**, an application under this chapter

may be filed not later than one year after the date on which the standard or right was determined to exist.

(Emphasis added).

In the instant case, the new rule was created by the United States Supreme Court, and under the plain language of the statute, subsection (B) is implicated only **if the United States Supreme Court** intended the right to be applied retroactively, since the United States Supreme Court was the issuing court for the new rule. Accordingly, regardless of the opinion in Danforth v. Minnesota, 552 U.S. 264 (2008) (finding that states may provide their own remedies for new rules that are not applied retroactively pursuant to Teague), Teague analysis is necessary due to state statutory law, which requires a determination of whether the **issuing court** intends the right to be applied retroactively. See Seckinger v. The Vessel. Excalibur, 326 S.C. 382, 483 S.E.2d 775 (Ct. App. 1997) (Statutory language should be given its plain and ordinary meaning unless something else in the statute requires an alternative meaning).

Further, even if Padilla was to be retroactively applied under section 17-27-45(B), the application was not timely because Padilla was decided and announced on March 31, 2010, and the instant application was filed on April 14, 2011. Under the plain language of section 17-27-45(B), an applicant has one year to file the claim from when “the standard or right was determined to exist.” Under the plain language of the statute, the standard or right of Padilla was determined to exist when the opinion was issued on March 31, and not a later date when that court’s mandate was issued.

Additionally, as argued to the Court of Appeals, the PCR court erred in denying the State’s motion to dismiss the application on the basis of laches. In the instant case, the

transcript was destroyed³ and although trial counsel was able to articulate her general practice, she was unable to recall specifics of this case. Tr. pp. 59-63. Further, even Respondent found recalling the colloquy with the trial court difficult. Tr. pp. 50-53. Accordingly, the PCR court should have granted the State's motion to dismiss on the grounds of laches, given the obvious prejudice arising from the delay in Respondent bringing her claim.

³ See App. pp. 21-22; p. 143. The PCR court also improperly took judicial notice that plea courts did not routinely advise defendants of the possibility of deportation. App. p. 143. Such a fact was disputed and judicial notice was improper. Under Rule 201(b), SCRE, a judicially noticed fact: "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." In the instant case, it is quite feasible that the plea court, especially when noticing the use of an interpreter, would have addressed the deportation issue with Applicant.

CONCLUSION

For the above stated reasons, the Court of Appeals opinion should be affirmed. Should this Court see fit to grant the petition for writ of certiorari, Respondent would respectfully request the opportunity to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

DAVID SPENCER
Senior Assistant Attorney General
Bar # 68571

BY: 

ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

December 21, 2016

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STATE OF SOUTH CAROLINA
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S.C. Supreme Court

APPEAL FROM DORCHESTER COUNTY
The Honorable Deandra G. Benjamin, Circuit Court Judge

Appellate Case No. 2015-002396

Ken Lucero,.....Petitioner,

v.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Return to Petition for Writ of Certiorari** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner’s counsel:

**Ms. Eleanor Duffy Cleary, Esquire
Cleary Law, LLC
1116 Blanding Street, Suite 2B
Columbia, SC 29201**

This 21st day of December, 2015.


JENNA CLAIRE BROWN