

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

No.2019-KP-01929

VS.

FABIO FERREIRA

IN RE: State of Louisiana - Applicant Plaintiff; Applying For Supervisory Writ,
Parish of Orleans Criminal, Criminal District Court Number(s) 489-173, Court of
Appeal, Fourth Circuit, Number(s) 2019-K-0875;

October 14, 2020

Writ application granted. See per curiam.

JHB

BJJ

JLW

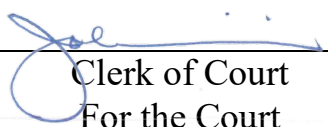
JDH

SJC

JTG

WJC

Supreme Court of Louisiana
October 14, 2020



Clerk of Court
For the Court

10/14/20

SUPREME COURT OF LOUISIANA

No. 2019-KP-01929

STATE OF LOUISIANA

versus

FABIO FERREIRA

**ON SUPERVISORY WRITS TO THE CRIMINAL
DISTRICT COURT, PARISH OF ORLEANS**

PER CURIAM:

Writ granted. In 2009, defendant, a resident alien in the United States, pleaded guilty to simple burglary of an inhabited building, La.R.S. 14:62.2. In 2018, he filed an application for post-conviction relief in which he claimed he received ineffective assistance of counsel when he pleaded guilty because counsel did not advise him that he would lose his permanent resident status, citing *Lee v. United States*, 532 U.S. —, 137 S.Ct. 1958, 198 L.Ed.2d 476 (2017). He was subsequently removed from the United States.

Defendant's guilty plea was final and the post-conviction limitations period had passed by the time he filed his application for post-conviction relief. Nonetheless, the district court granted the application and vacated the plea, accepting defendant's argument that an exception to the limitations period applied, La.C.Cr.P. art. 930.8(A)(2),¹ because the application was filed within one year of *Lee v. United States*.

¹ Code of Criminal Procedure art. 930.8 provides:

A. No application for post-conviction relief, including applications which seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of Article 914 or 922, unless any of the following apply:

...

In *Lee*, the United States Supreme Court found that Jai Lee had adequately demonstrated a reasonable probability that he would have rejected a plea offer and pleaded not guilty had he known that the guilty plea would lead to mandatory deportation—even though Lee had no viable defense and would have been highly likely to lose at trial. *Lee*, 542 U.S. at —, 137 S.Ct. at 1967–68. The court decided *Lee* after it had held in *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010), that counsel must inform her client whether his plea carries a risk of deportation: “Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.” *Id.*, 559 U.S. at 374, 130 S.Ct. at 1486.

In *Chaidez v. United States*, 568 U.S. 342, 358, 133 S.Ct. 1103, 1113, 185 L.Ed.2d 149 (2013), the United States Supreme Court found, under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), that defendants whose convictions became final prior to *Padilla* cannot benefit from its holding. Likewise, defendants whose convictions became final prior to *Lee* cannot benefit from its holding. In *Lee*, the court simply refused to adopt the government’s proposed “per se rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial.” *Lee*, 542 U.S. at —, 137 S.Ct. at 1966. The court explained that the government’s position was contrary to existing precedent. *See id.*, explaining that “common sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial.”

Because *Lee* no more established a theretofore unknown interpretation of

2) The claim asserted in the petition is based upon a final ruling of an appellate court establishing a theretofore unknown interpretation of constitutional law and petitioner establishes that this interpretation is retroactively applicable to his case,

constitutional law that is retroactively applicable than *Padilla* did, the district court erred in failing to deny defendant's application for post-conviction relief as barred by the limitations period. Accordingly, we grant the State's application and we vacate the district court's ruling, which set aside defendant's guilty plea. We reinstate defendant's 2009 guilty plea to simple burglary of an inhabited building, La.R.S. 14:62.2, and we dismiss defendant's application for post-conviction relief.

Defendant has now fully litigated his application for post-conviction relief in state court. Similar to federal habeas relief, *see* 28 U.S.C. § 2244, Louisiana post-conviction procedure envisions the filing of a second or successive application only under the narrow circumstances provided in La.C.Cr.P. art. 930.4 and within the limitations period as set out in La.C.Cr.P. art. 930.8. Notably, the legislature in 2013 La. Acts 251 amended that article to make the procedural bars against successive filings mandatory. Applicant's claims have now been fully litigated in accord with La.C.Cr.P. art. 930.6, and this denial is final. Hereafter, unless he can show that one of the narrow exceptions authorizing the filing of a successive application applies, applicant has exhausted his right to state collateral review. The district court is ordered to record a minute entry consistent with this per curiam.