Circuit Court for Frederick County
Case No. 10-K-15-057002

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 560

September Term, 2017

STATE OF MARYLAND

v.

YAW POKU PODIEH

Berger,
Friedman,
Beachley,

JJ.

Opinion by Berger, J.

Filed: April 16, 2019

This case is before us on appeal from an order of the circuit court granting in part and denying in part the petition for post-conviction relief filed by Yaw Poku Podieh, appellee/cross-appellant. The circuit court granted Podieh's petition for post-conviction relief on the basis that Podieh received constitutionally ineffective assistance of counsel due to defense counsel's conflict of interest. Podieh raised several other allegations of error in his petition for post-conviction relief, but the circuit denied the petition on all other grounds.

The State filed an application for leave to appeal from the circuit court's grant of post-conviction relief. Podieh subsequently filed a conditional cross-application for leave to appeal on several grounds, including that he received constitutionally ineffective assistance of counsel with respect to the advice he received about the immigration consequences of his guilty plea. This Court granted the State's application for leave to appeal as well as Podieh's conditional cross-appeal as to the immigration issue only. The following two issues, therefore, are before us on appeal:

1. Whether the circuit court erred in determining that Podieh was deprived of effective assistance of counsel because his defense attorney had a conflict of interest that adversely affected his performance.

2. Whether the circuit court erred by determining that Podieh was not deprived of effective assistance of counsel in connection with the advice he received about the immigration consequences of pleading guilty to possession with intent to distribute heroin.

For the reasons explained herein, we shall hold that the circuit court erred in determining that Podieh was deprived of the effective assistance of counsel with respect to the alleged

conflict of interest. We shall further hold that the circuit court did not err by denying Podieh's petition for post-conviction relief as to the immigration issue. Accordingly, we shall affirm, in part, and reverse, in part, the judgment of the circuit court and remand for the entry of an order denying Podieh's petition for post-conviction relief in its entirety.

FACTS AND PROCEEDINGS

The facts of three separate cases are relevant to Podieh's petition for post-conviction relief. Two are criminal cases involving Podieh, and the third is a civil case involving Podieh's defense counsel.

I. Background of the Three Cases Involved in this Appeal

The Traffic Stop Case

On February 10, 2015, Frederick County Deputy Sheriff Michael David Ensor stopped a vehicle driven by Podieh for speeding. When Deputy Ensor approached the vehicle, he smelled an odor of marijuana. Based upon the odor and Podieh's statement that he had "weed" in his pocket, Deputy Ensor searched the vehicle and Podieh. Deputy Ensor recovered a small bag of marijuana from Podieh's pocket as well as four additional small bags of heroin from the vehicle's center console.

Podieh was subsequently charged with possession of heroin and possession with intent to distribute heroin. On February 23, 2015, John R. Discavage, Esquire entered his appearance in the Traffic Stop Case. The possession with intent to distribute heroin charge was dismissed on March 11, 2015, and Podieh prayed a jury trial on the possession of heroin charge.

The Search Warrant Case

This is the case upon which the petition for post-conviction relief giving rise to this appeal is predicated. On July 17, 2015, a warrant was issued for the search of Podieh's girlfriend's residence, where Podieh spent his nights. The application for the warrant was prepared by Frederick County Deputy Sheriff Brian Elliot and cited various facts in support of the warrant request, including the facts of the Traffic Stop case, text messages recovered from two cell phones belonging to Podieh discussing the sale of narcotics, drug paraphernalia recovered from two trash pulls at apartments linked to Podieh, recorded telephone calls from after Podieh's arrest in the Traffic Stop Case during which Podieh referred to "split[ting] the drugs" and directed associates to break into his apartment and remove "all of his 'Stuff,'' and records of prior convictions in Maryland and New Jersey obtained from the National Crime Information Center.

The residence was searched on July 21, 2015. Podieh and his girlfriend were home at the time. The search recovered ten grams of heroin in ten individually-wrapped bags in a backpack that Podieh admitted he had touched and which contained items belonging to Podieh, as well as 4.1 grams of marijuana packaged in bags in plain view. Podieh told the officers that $400.00 in cash was hidden behind a bathroom sink. Officers also found additional cash in the amount of $254.00 in a safe that contained documents with Podieh's name on them.

Podieh was subsequently charged with possession with intent to distribute heroin, possession of heroin, possession of drug paraphernalia, and possession of marijuana with

intent to distribute. Mr. Discavage entered his appearance in the Search Warrant Case on July 21, 2015.

The Civil Lawsuit Involving Mr. Discavage

Mr. Discavage had handled a divorce case for Deputy Ensor (the officer who initiated the February 10, 2015 traffic stop) and his ex-wife, Sarah Ensor, in 2012. On March 17, 2015, Sarah Ensor filed a complaint against Mr. Discavage and his law firm in the Circuit Court for Washington County alleging that Mr. Discavage acted in favor of Deputy Ensor and to Sarah Ensor's detriment in connection with the divorce case. The complaint alleged breach of fiduciary duty, negligence, intentional misrepresentation, and negligent misrepresentation, and sought $75,000.00 in damages. Discovery was ongoing in the civil case in 2015 and early 2016. The case was subsequently dismissed by stipulation, which was filed on March 14, 2016.

II. Circuit Court Proceedings in the Traffic Stop and Search Warrant Cases

At various hearings in 2015, Mr. Discavage informed the circuit court that he was attempting to negotiate a global plea involving both the Traffic Stop Case and the Search Warrant Case. On November 9, 2015, both cases were called before the circuit court. Mr. Discavage sought a postponement, explaining that he and the prosecutor were "trying to resolve all of the case and I'm still hopeful that we can still get there, but we're not there as of today." The circuit court set the Traffic Stop Case for a non-jury trial on November 16, 2015 and, with respect to the Search Warrant Case, explained that "for now [the court will] pass it for trial and then set it in for a follow-up when the cases are ready to be merged."

On November 16, 2015, Mr. Discavage again requested a postponement in the Traffic Stop Case and advised the court that Podieh was willing to waive his right to a speedy trial. The circuit court declined to accept Podieh's waiver and instead granted a one-week postponement. The prosecutor advised the court that the Traffic Stop Case would likely be resolved via dismissal if there were a plea to the felony count in the Search Warrant Case, "or it's gonna be two pleas to two misdemeanors or . . . but I do anti -- we do anticipate a global resolution."

On November 23, 2015, Podieh entered a conditional *Alford* plea to possession of heroin in the Traffic Stop Case. Both the prosecutor and Mr. Discavage placed on the record that the plea was conditioned upon reaching a global resolution in both cases and that if the State and Podieh "are not able to reach a global resolution that this plea would be withdrawn."

On January 5, 2016, the prosecutor emailed Mr. Discavage a plea offer which provided that Podieh would plead guilty to one count of possession of heroin with the intent to distribute. The remaining charges in the Search Warrant Case would be dismissed, as would the Traffic Stop Case in its entirety. The State would also not seek subsequent offender treatment and would recommend an active period of incarceration of one year. The next day, the State served notice that it would seek subsequent offender treatment for Podieh based upon a prior New Jersey conviction. The New Jersey conviction issue had been discussed at a prior pre-trial conference on October 5, 2015, when the prosecutor explained that he had been unable to make a plea offer because Mr. Discavage had provided information disputing whether Podieh in fact had prior convictions in New Jersey.

Mr. Discavage advocated for resolving whether Podieh had actually been convicted in New Jersey prior to reaching a plea agreement. The prosecutor responded by explaining that whether Podieh had a prior conviction in New Jersey would not affect the plea offer:

> I want to make a point more clear than I did in my original email. My offer of [possession with intent to distribute] is based on the facts of this case, not the information from New Jersey. My sentencing recommendation is not inconsistent with someone with absolutely no prior record. I am not sure how much lower my offer could get with or without a New Jersey conviction.

On January 8, 2015, the Traffic Stop Case came before the court for sentencing. Mr. Discavage asked to approach the bench and the trial judge engaged the white noise feature on the bench. At the bench, Podieh informed the court of the plea offer he had received and requested a continuance in order to continue negotiating a plea deal. The stand-in prosecutor agreed to Mr. Discavage's request for a postponement; Mr. Craven, the prosecutor assigned to the case, was not present. In addition, while at the bench, Mr. Discavage advised the court of a "potential conflict" in the following exchange:

> MR. DISCAVAGE: . . . Because the additional discovery poses a potential conflict. I don't know that I need to deal with that, but . . .
>
> THE COURT: Not without Mr. Craven here.
>
> MR. DISCAVAGE: A personal conflict, a personal conflict with one of the witnesses that's involved in this case . . . .

The court advised Mr. Discavage to "go talk" with Mr. Craven. Mr. Discavage agreed that he would speak with the prosecutor and "hopefully . . . come to some type of resolution." The subject of the potential conflict of interest was not raised with Mr. Craven or at any

subsequent proceedings prior to the resolution of the Traffic Stop and Search Warrant Cases.

On January 11, 2016, the cases were recalled and Mr. Discavage again requested a postponement of the Search Warrant Case. Mr. Discavage explained that the parties had not yet reached an agreement as to the plea, discovery was not completed, and he had another trial scheduled in a different county the following day. Mr. Discavage also told the court that he needed more time to evaluate the immigration issues. The State informed the court that it would not use any inculaptory information in the new discovery. The Court denied Podieh's motion to postpone the trial date.

The next day, on January 12, 2016, the Search Warrant Case was resolved by plea, in accordance with the January 6, 2016 plea offer from the State. Podieh entered a plea of guilty to possession with intent to distribute heroin. The remaining counts were dismissed and the Traffic Stop Case was dismissed. The State recommended an active incarceration period of 179 days. Podieh was sentenced on March 7, 2016 to ten years' incarceration with all but 179 days suspended, accompanied by a period of two years of supervised probation. On June 7, 2016, the circuit court modified Podieh's sentence to ten years' incarceration with all but eighteen months suspended. Podieh had moved for modification of sentence in order to avoid deportation while his post-conviction proceedings were pending.

III. The Post-Conviction Proceedings

Podieh raised seven issues in his petition for post-conviction relief, only two of which are at issue in this appeal: the ineffective assistance of counsel claim premised upon

Mr. Discavage's failure to disclose his alleged conflict of interest, and the ineffective assistance of counsel claim premised upon the advice Podieh received about the immigration consequences of his plea. A hearing on Podieh's post-conviction petition was held in the circuit court on January 18 and 19, 2017.

The Alleged Conflict

Podieh testified that Mr. Discavage did not at any point disclose any potential conflict of interest to him. Podieh explained that the first time he learned of the conflict was when he read the transcript of the January 8, 2016 hearing. Podieh testified that, had he known about Mr. Discavage's conflict, he would not have wanted Mr. Discavage to continue to represent him. At this point, Mr. Discavage had not yet testified about the precise nature of the conflict. All that was known at the beginning of the hearing and at the time of Podieh's testimony was that Mr. Discavage had some sort of conflict of interest arising out of his representation of Deputy Ensor.

The post-conviction court inquired as to whether Podieh knew the nature of the conflict, and Podieh responded that he did not know about the nature of Mr. Discavage's conflict. The court commented that the conflict could be that Mr. Discavage "represented [the State's witness] years ago, [or] if he had cleaned his house once." Podieh acknowledged that knowing what the conflict was might have changed his mind as to whether he would have wanted to continue having Mr. Discavage represent him.

Podieh testified that throughout the proceedings, he anticipated receiving a misdemeanor plea offer in the Search Warrant Case. He received a telephone call from Mr. Discavage on January 7, 2016 about a New Jersey conviction. According to Podieh,

Mr. Discavage was "freaking out" and told him that the State was extending a felony plea offer because a New Jersey conviction rendered Podieh a subsequent offender. Podieh testified that he knew that the mug shot from New Jersey was not him, but that Mr. Discavage did not appear to believe him. Podieh testified that this affected his decision to accept the felony plea offer and dismissal rather than going to trial in both cases with a potential total prison sentence of forty years, explaining that "if [Mr. Discavage] didn't believe me I didn't know who was gonna believe me."

Mr. Discavage testified about the potential conflict, explaining that the conflict of interest he had alluded to on January 8, 2016 was not related to new evidence as he had told the court at that time, but was related to Deputy Ensor, the officer who initiated the traffic stop giving rise to the Traffic Stop Case and subsequently searched Podieh's vehicle. Mr. Discavage testified that he had represented Deputy Ensor in a divorce case several years earlier. Mr. Discavage explained that "there was still potential litigation with parties to that case, but [Deputy Ensor] was not a direct party to that litigation." The following exchange occurred:

> THE COURT: But anyway, the bottom line is you, you thought there was a conflict, you mentioned it. But that case where [Deputy Ensor] was a witness got nolle prossed, and therefore your belief was the conflict ended.
>
> MR. DISCAVAGE: . . . [C]orrect. As well as the civil case that was pending that was being dismissed.
>
> THE COURT: Oh, really? So, ok, so the civil case got dismissed, the other one got nolle prossed. Conflict ends.
>
> MR. DISCAVAGE: Correct --
>
> THE COURT: In your opinion.

MR. DISCAVAGE: That's my . . .

THE COURT: Okay.

MR. DISCAVAGE: Rationale.

Mr. Discavage further testified that he did not inform Podieh about his prior involvement with Deputy Ensor. Mr. Discavage testified that "another party to the divorce action" had filed a civil case against him, but explained that Deputy Ensor "was not a party to that case . . . [b]ut he was indirectly related to the original divorce proceeding."

Podieh presented additional evidence regarding the civil suit, which, the circuit court found, "called into question some of Mr. Discavage's testimony." The circuit court permitted Podieh to compile additional information and argument on the limited issue of the Civil Suit and the alleged conflict of interest. The court accepted additional evidence and heard additional argument about the conflict on February 21, 2017. Podieh introduced the entire case file of the civil suit into evidence.

The circuit court made several factual findings about the civil lawsuit and Podieh's criminal cases, which we have summarized below:

- Mr. Discavage was the only attorney of record in the divorce case between Deputy Ensor and his former wife, Sarah Ensor. Mr. Discavage prepared the marital separation agreement signed by both parties on April 1, 2011.

- On March 17, 2015, Sarah Ensor filed suit against Mr. Discavage and his law firm in the Circuit Court for Washington County alleging breach of fiduciary duty, negligence, intentional misrepresentation, and negligent misrepresentation.

- On May 29, 2015, Mr. Discavage's appearance was noted in the Traffic Stop Case. On July 29, 2015, Mr. Discavage

entered into a representation agreement with Podieh for the Search Warrant Case.

- On June 25, 2015, a notice of deposition for Deputy Ensor was filed in the civil suit and deposition *decus tecum* was filed on August 17, 2015. A scheduling order was issued for the civil suit on October 2, 2015, setting the discovery deadline for March 4, 2016, and a settlement and pre-trial conference was set for May 20, 2016. Discovery was propounded by both parties in the civil suit in December 2015 and January 2016.

- On November 23, 2015, Podieh entered his conditional plea of guilty in the Traffic Stop Case. Deputy Ensor was the sole witness in this case.

- On January 8, 2016, Mr. Discavage informed the court of a "potential conflict."

- On January 12, 2016, Podieh entered his *Alford* plea in the Search Warrant Case, a condition of which was dismissal of the Traffic Stop Case.

- On March 14, 2016, the civil lawsuit was dismissed by stipulation.

The circuit court determined that Mr. Discavage had rendered ineffective assistance of counsel by failing to inform Podieh about his "ongoing relationship with Deputy Ensor." The court explained that "[h]ad Mr. Discavage's relationship been limited to [the] original divorce proceeding in 2012, [the c]ourt would not have considered the prior representation of Deputy Ensor to be a significant enough conflict of interest to render Mr. Discavage ineffective as counsel." The circuit cout concluded, however, that "during the time Mr. Discavage was representing [Podieh], Mr. Discavage was engaged in litigation where maintaining a positive r[apport] with Deputy Ensor was in Mr. Discavage's best interest." The circuit court applied the test set forth in *Mickens v. Taylor*, 240 F.3d 348 (4th Cir.

2001) (en banc), *aff'd*, 535 U.S. 162 (2002), and determined that Mr. Discavage's conflict significantly affected his performance. The circuit court found that filing a motion to suppress, in either the Traffic Stop Case or the Search Warrant Case, would have been "inherently in conflict" with Mr. Discavage's interest in the civil suit. Accordingly, the circuit court granted Podieh's petition for post-conviction relief on this basis.

The Immigration Issue

Podieh also alleged before the circuit court that Mr. Discavage provided constitutionally ineffective assistance of counsel in connection with the advice Podieh received regarding the immigration consequences of his plea. At the time Podieh entered his plea, he was not a United States citizen.

The circuit court heard testimony on this issue from Podieh, Mr. Discavage, and Mary Shoff, Esquire, an immigration attorney hired by Podieh. The court also heard testimony from Podieh's expert witness, Adam Crandell, Esquire, who testified as an expert in immigration removal proceedings. The circuit court "commend[ed] Mr. Discavage for acknowledging his own shortcoming [in the area of immigration law] and referring [Podieh] to separate Immigration counsel." The circuit court made the following factual findings regarding the immigration advice Podieh received from Ms. Shoff:

> According to Ms. Shoff's testimony, and [Podieh]'s testimony regarding the advice he received in advance of accepting the plea deal, Ms. Shoff's advice can be summarized as follows: unless [Podieh] was able to negotiate a plea to Possession of Marijuana -- less than 30 grams, [Podieh] was "screwed[,"] therefore it would not, and did, not matter which of the pending charges [Podieh] plead[ed] guilty to.

The circuit court found the testimony from Mr. Crandell "enlightening regarding the complexities of immigration law, specifically as it intersects with [c]riminal law." The court explained:

> According to Mr. Crandell, by pleading guilty to Possession with Intent to Distribute Heroin, [Podieh] not only became "subject to deportation[,"] [Podieh] was immediately subject to administrative removal -- removal without a hearing of any kind -- and would have absolutely no opportunity to available defense to removal from the United States because the Federal Government consider Possession with Intent to Distribute Heroin an "aggravated felony[."] 8 C.F.R. § 1003.41.
>
> Mr. Crandell also testified that the Federal Government does not treat Possession of Heroin or Possession of Paraphernalia, [Podieh]'s Counts 2 and 3, in the same manner. According to Mr. Crandell, had [Podieh] plead[ed] guilty to either of those charges [Podieh] would have, at the very least, a hearing regarding his removal and an opportunity to present a defense. Finally, Mr. Crandell explained "the comparative approach[,"] specifically as it applies to the elements of Possession of Marijuana with the Intent to Distribute. As Maryland law does not require numeration as required under Federal law, the Federal Government treats convictions for Possession of Marijuana with the Intent to Distribute arising out of Maryland differently, thus allowing [Podieh] an even greater opportunity to present defenses to removal.

The circuit court expressly found that Ms. Shoff "gave [Podieh] incorrect advice regarding the distinctions between the various counts to which [Podieh] was charged and the resulting immigration consequences." The court explained:

> Ms. Shoff stated on the record that immigration law is an ever changing field, and that she does independent research each time she is asked for advice. However according to Mr. Crandell's expert testimony, it is clear that Ms. Shoff gave [Podieh] incorrect advice regarding the distinctions between the various counts to which [Podieh] was charged and the resulting immigration consequences. Ms. Shoff wrongfully

> represented to [Podieh] that he would be eligible for an administrative review of his deportation prior to his removal from the country where [Podieh] would be able to present a defense to deportation, which was clearly incorrect based on long standing immigration procedures when an individual has been found guilty to an aggravated felony. Counsel not only incorrectly advised [Podieh] regarding his eligibility for the administrative hearing, she required [Podieh] to pay her additional funds to prepare for a hearing that was a legal impossibility.

Although the circuit court commented on the incorrect advice Podieh received as to the immigration consequences of his plea, the court denied the petition for post-conviction relief on this basis. The circuit court concluded that Mr. Discavage properly advised his client to seek immigration counsel, and, therefore, Mr. Discavage's representation did not fall below an objective level of reasonableness as required by the first prong of *Strickland v. Washington*, 466 U.S. 668 (1964), despite the inaccurate advice Podieh subsequently received from Ms. Shoff.

The circuit court further found that Podieh failed to establish prejudice as required by the second prong of *Strickland*. The court found that Podieh "knew that by pleading guilty that he would be 'subject to deportation.'" The court further found that Podieh "may not have understood the administrative distinctions regarding the phases of removal proceedings, he knew it could and would ultimately result in his removal from the United States."

STANDARD OF REVIEW

We have explained that the following standard of review applies when considering an appeal of a circuit court's ruling on a petition for post-conviction relief:

> The standard of review of the lower court's determinations regarding issues of effective assistance of counsel is a mixed question of law and fact. We will not disturb the factual findings of the post-conviction court unless they are clearly erroneous. But, a reviewing court must make an independent analysis to determine the ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed. In other words, the appellate court must exercise its own independent judgment as to the reasonableness of counsel's conduct and the prejudice, if any. Within the *Strickland* framework, we will evaluate anew the findings of the lower court as to the reasonableness of counsel's conduct and the prejudice suffered. As a question of whether a constitutional right has been violated, we make our own independent analysis by reviewing the law and applying it to the facts of the case. We will defer to the post-conviction court's findings of historical fact, absent clear error, but we will make our own, independent analysis of the appellant's claim.

State v. Jones, 138 Md. App. 178, 209 (2001), *aff'd*, 379 Md. 704 (2004) (internal citations and quotations omitted, alterations from original).

DISCUSSION

I.

The Sixth Amendment to the United States Constitution and Article 21 of the Maryland Declaration of Rights guarantee the right to effective assistance of counsel in criminal proceedings. Effective assistance of counsel includes the right to counsel with undivided loyalty towards his client. *Lettley v. State*, 358 Md. 26, 34 (2000).

In general, in order to prevail on a claim of ineffective assistance of counsel, the convicted defendant must satisfy the two-prong test set forth in *Strickland v. Washington*:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second,

> the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. 668, 687 (1984). *See also State v. Borchardt*, 396 Md. 586, 602 (2007) (reiterating the *Strickland* standard for ineffective assistance of counsel). There is a strong presumption that counsel rendered effective assistance. *State v. Thomas*, 325 Md. 160, 171 (1992).

The deficiency prong of the *Strickland* test is defined by an objective standard and the defendant has the burden of demonstrating "that counsel's representation fell below an objective standard of reasonableness." *Evans v. State*, 396 Md. 256, 274 (2006) (citing *Strickland*, *supra*, 466 U.S. at 688). The deficiency prong "is satisfied only where, given the facts known at the time, counsel's choice was so patently unreasonable that no competent attorney would have made it." *Borchardt*, *supra*, 396 Md. at 623. Courts must apply a highly deferential standard "to avoid the post hoc second-guessing of [counsel's] decisions simply because they proved unsuccessful . . . ." *Evans*, *supra*, 396 Md. at 274. To establish the deficiency prong of the *Strickland* test, Petitioner bears the burden of: (1) identifying the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment; (2) showing that counsel's performance fell below an objective standard of reasonableness; and (3) overcoming the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. *Strickland*, *supra*, 466 U.S. at 690.

Satisfying the prejudice prong under *Strickland* requires more than simply demonstrating that counsel's errors "had some conceivable effect on the outcome of the proceeding . . . ." *Evans*, *supra*, 396 Md. at 275. Rather, Petitioner must establish "that there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). The Supreme Court defined "a reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Id.* "The prejudicial effect of counsel's deficient performance need not meet a preponderance of the evidence standard." *Bowers v. State*, 320 Md. 416, 425 (1990). Rather, "the test is whether the trial can be relied on 'as having produced a just result.'" *Id.* (quoting Strickland, 466 U.S. at 686).

Although the *Strickland* standard set forth above applies generally to claims of ineffective assistance of counsel, a different standard applies to a claim of ineffective assistance of counsel premised upon a conflict of interest. *Taylor v. State*, 428 Md. 386, 400-01 (2012). In such circumstances, when a petitioner has proved an "actual conflict of interest," prejudice to the defense is presumed. *Id.* at 411. "An 'actual conflict of interest,' for purposes of this analysis, is a conflict that adversely affects counsel's representation of the defendant." *Id.*

The rule of legal ethics upon which the circuit court based its finding of a conflict is Rule 1.7 of the Maryland Lawyers' Rules of Professional Conduct ("MLRPC"). That rule provides, in relevant part, that "a lawyer shall not represent a client if the representation involves a conflict of interest" and "[a] conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited . . . by a

personal interest of the lawyer." The circuit court concluded that Mr. Discavage's personal interest in maintaining a positive rapport with Deputy Ensor constituted a conflict of interest pursuant to Rule 1.7. Critically, however, the violation of a rule of legal ethics may establish a "potential conflict," but the presumption of prejudice only applies if the conflict was an "'actual conflict of interest,' due to its adverse effect on" the attorney's representation of the defendant. *Taylor*, *supra*, 438 Md. at 412. This "inquiry is circumstance-specific." *Id.* at 415.

To determine whether a conflict of interest is actual (and therefore entitled to a presumption of prejudice) or only a potential conflict (and therefore not entitled to the presumption of prejudice), we apply a three-part test articulated by the United States Court of Appeals for the Fourth Circuit and adopted by our Court of Appeals. *Mickens v. Taylor*, 240 F.3d 348 (4th Cir. 2001), *aff'd*, 535 U.S. 162 (2002). Under this test, a petitioner must establish:

> (1) a plausible alternative defense strategy or tactic that his defense counsel might have pursued;
>
> (2) that the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney; and
>
> (3) that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.

Taylor, *supra*, 428 Md. at 416 (quoting *Mickens*, *supra*, 240 F.3d at 361). The burden is on the petitioner to establish each prong of the *Mickens* test by a preponderance of the evidence. *Mickens*, *supra*, 240 F.3d at 361. For reasons we shall explain, we shall hold

that the circuit court erred by concluding that Podieh proved the existence of an actual conflict of interest that adversely affected Mr. Discavage's representation.

A. Podieh did not prove that Deputy Ensor's involvement in the civil suit constituted a personal interest of Mr. Discavage.

In the instant case, the circuit court based its conclusion that an actual conflict existed on Mr. Discavage's perceived need to maintain a positive rapport with Deputy Ensor given Deputy Ensor's status as a witness in his ex-wife's civil law suit against Mr. Discavage and his firm. The circuit court did not, however, explain what, if any, evidence supports this conclusion. Our review of the record reveals no evidentiary support for the circuit court's conclusion that Mr. Discavage needed to maintain a positive rapport with Deputy Ensor in order to advance his interest in the civil suit.

First, we observe that there was no evidence presented to show that a "positive rapport" between Mr. Discavage and Deputy Ensor would have in any way affected Deputy Ensor's testimony in the civil suit. Deputy Ensor was not a party to the action. He was, as the circuit court observed, "a fact witness." The complaint filed in the civil suit suggested that Deputy Ensor might have been called to testify about his relationship with Mr. Discavage prior to the representation, the dates that Deputy Ensor and his ex-wife met with members of Mr. Discavage's firm, the advice provided by Mr. Discavage to Deputy Ensor and his ex-wife, and the financial arrangements between Deputy Ensor and his ex-wife during their marriage. When called to testify in the civil law suit, Deputy Ensor's only responsibility would have been to answer the questions presented to him truthfully.

Furthermore, there is no evidence in the record that Mr. Discavage's and Deputy Ensor's interests in the civil suit were in any way aligned, nor was there any evidence presented to demonstrate what stake, if any, Mr. Discavage had in Deputy Ensor's testimony. Indeed, the circuit court did not specifically find that Deputy Ensor would, in fact, testify in the civil suit, nor was any evidence introduced that would have supported such a finding. The circuit court found only that Deputy Ensor "would likely serve as a witness."

On appeal, Podieh does not identify any evidentiary support for the circuit court's conclusion that Mr. Discavage had an interest in maintaining a positive rapport with Deputy Ensor. The only specific example Podieh identifies in support of the circuit court's finding of an ongoing relationship between Mr. Discavage and Deputy Ensor is Mr. Discavage's purported effort to maintain the attorney-client privilege in the civil suit for his communications with Deputy Ensor. Podieh maintains that a positive rapport between Mr. Discavage and Deputy Ensor would affect Deputy Ensor's decisions about whether to waive the privilege. No evidence was presented, however, showing that Mr. Discavage and Deputy Ensor had a common interest in protecting privileged information.[1] Indeed, the circuit court made no findings as to the privilege issue and this issue does not appear to have affected the circuit court's conclusion.

[1] We observe that Mr. Discavage's attorneys in the civil suit did not assert a formal claim of privilege until January 15, 2016, three days after the plea was entered in the Search Warrant Case.

We have explained that a "mere theoretical conflict of interest" does not violate a defendant's right to counsel. *Catala v. State*, 168 Md. App. 438, 460 (2006). In *Catala*, we held that a "'conflict' relied upon by [the] appellant constituted a mere theoretical conflict of interest, as opposed to an actual conflict" when the conflict was premised upon the defense attorney having accepted a position with the State's Attorney's Office to begin in two weeks. *Id.* The appellant in *Catala* argued, *inter alia*, that defense counsel's wish to "maintain a desired level of camaraderie with his future co-worker" would lead him to less zealously represent his client. *Id.*[2] In our view, the instant appeal presents a similarly theoretical conflict with no evidentiary basis for Mr. Discavage's purported need to maintain a positive rapport with Deputy Ensor that would be harmed by his zealous representation of Podieh. Accordingly, we hold that the circuit court's finding of a conflict of interest was conclusory and unsupported by the evidence.

B. Podieh failed to prove that Mr. Discavage's failure to pursue various trial strategies were linked to the alleged personal interest.

Assuming *arguendo* that Mr. Discavage had a personal interest in maintaining a positive rapport with Deputy Ensor, we further determine that the record fails to support the circuit court's finding that filing a motion to suppress, in either the Traffic Stop Case or the Search Warrant Case, would have been "inherently in conflict" with Mr. Discavage's interest in the civil suit. We shall further hold that Podieh has not established that Mr. Discavage's failure to pursue additional strategies was somehow linked to the conflict.

[2] Podieh points out that *Catala* pre-dates the Court of Appeals' 2012 adoption of the *Mickens* test in *Taylor, supra*, 428 Md. 386. Nevertheless, the reasoning set forth in *Catala* is consistent with the *Mickens* test adopted in *Taylor*.

As discussed *supra*, Podieh was required to prove the following three elements to establish an actual conflict of interest: (1) a plausible alternative defense strategy or tactic that Mr. Discavage might have pursued; (2) that the alternative strategy or tactic was objectively reasonable under the facts of the case known to Mr. Discavage; and (3) that Mr. Discavage's failure to pursue that strategy or tactic was linked to the actual conflict. *See Taylor*, *supra*, 428 Md. at 416. Podieh identifies various alternative defense strategies or tactics that he asserts Mr. Discavage could have reasonably pursued under the facts of the case. Specifically, Podieh highlights the circuit court's finding that Mr. Discavage could have pursued a motion to suppress the evidence in both cases. In addition, Podieh asserts that Mr. Discavage could have more vigorously challenged the subsequent offender notice filed by the State and further emphasizes that he had "valid factual defenses to both cases and valuable impeachment evidence that could have been used against Deputy Ensor." The critical question, however, is prong three of the *Mickens* test: whether Mr. Discavage's failure to pursue the strategy or tactic was linked to the actual conflict. *See id.*

In any case, there are many reasons why a defense attorney may reasonably choose not to pursue a motion to suppress evidence. The specific type of conflict alleged must be taken into consideration when determining whether the failure to pursue a tactic was linked to the conflict. Indeed, the Supreme Court has observed that in cases of concurrent representation, there is a "high probability of prejudice" that is difficult to prove, but "[n]ot all attorney conflicts present comparable difficulties." *Mickens v. Taylor*, 535 U.S. 162, 175 (2002).

In this case, the nature of the conflict is, at best, tenuous, as we discussed at length *supra*. Deputy Ensor was a non-party witness in an unrelated civil lawsuit filed against Mr. Discavage. Furthermore, Deputy Ensor's involvement in the two criminal cases was quite limited. He initiated the stop in the Traffic Stop Case, which was subsequently dismissed, and his involvement in the Search Warrant Case was limited to facts of the Traffic Stop Case partially forming the basis for the issuance of the search warrant in the subsequent case. With this in mind, we turn to the specific alternative strategies articulated by Podieh.

First, we emphasize that the circuit court's determination on this issue was based upon Mr. Discavage not filing a motion to suppress. The circuit court determined that Mr. Discavage's decision not to pursue a motion to suppress was "inherently linked" to the conflict. The court reasoned that, by pursuing a motion to supress, Mr. Discavage would need to "potentially attack[] the credibility of his client[3] who he may potentially have needed favorable testimony from in his civil case."

There is no evidence in the record to support the circuit court's conclusion that Mr. Discavage was reticent to cross-examine Deputy Ensor out of concern that it would lead Deputy Ensor to provide less favorable testimony in the civil suit. As a police officer, Deputy Ensor would have been expected to testify regularly in criminal cases, including in the context of motions to suppress evidence. There is no evidence to suggest that Deputy Ensor would in any way feel personally attacked by having a motion to suppress filed for evidence he recovered. Indeed, police officers, by virtue of their training and experience,

[3] The reference to Deputy Ensor as Mr. Discavage's "client" was in error.

appreciate the different roles played by prosecutors and defense attorneys and understand the adversarial system. Furthermore, there is no evidentiary support for the circuit court's inference that Mr. Discavage, an experienced defense attorney and former prosecutor, would have expected Deputy Ensor to take any cross-examination personally and alter his testimony in a future case as a result.

In *Catala*, we commented that it would be "absurd to believe that a licensed Maryland attorney would give less than zealous performance on behalf of his client in a low-profile traffic case such as this one merely because he had accepted future employment with the prosecutor's office." 168 Md. App. at 460. In our view, it would be similarly inappropriate to conclude that Mr. Discavage's advocacy would be less zealous merely because the arresting officer was a witness in an unrelated civil lawsuit. Mr. Discavage testified as such, informing the court that the potential conflict of interest did not adversely affect his representation of Podieh.

Similarly, Podieh failed to satisfy his burden of proving that Mr. Discavage's failure to pursue various other strategies or defense tactics was linked to the conflict. There are myriad reasons why a defense attorney may decide to not challenge a subsequent offender notice, interview certain witnesses, or subpoena particular evidence in a criminal case. Given the tenuous nature of the conflict at issue in this case, the link between the claimed conflict and the alternative litigation strategy must be strong. In this case, there is only a vague link between the conflict and any of the alternative strategies, and in all cases the link is premised upon the belief that Mr. Discavage would somehow represent Podieh less zealously in order to curry favor with Deputy Ensor, thereby ensuring Deputy Ensor would

testify favorably to Mr. Discavage in the unrelated civil lawsuit. In our view, this link is equally tenuous for all of the various potential alternative strategies identified by Podieh, such as Mr. Discavage's failure to investigate certain factual defenses and to subpoena certain evidence.[4]

Podieh asserts that Mr. Discavage's testimony supports his position that the conflict was inextricably linked to Mr. Discavage's trial strategy, but our review of the transcripts does not support such a characterization. As we set forth in further detail *supra*, Mr. Discavage testified that his "rationale" was that the conflict was no longer a problem after the plea deal was accepted. Podieh characterizes this testimony as Mr. Discavage testifying that "the burden of the conflict only lifted *because* of the plea." (Emphasis supplied in Podieh's brief.) In our view, Podieh's characterization of the testimony is not a fair representation of Mr. Discavage's testimony. Moreover, Mr. Discavage expressly testified that his representation of Podieh was not adversely affected by the conflict. The circuit court does not expressly address Mr. Discavage's testimony in its discussion of prong three

[4] Indeed, the circuit court addressed Mr. Discavage's tactical decisions when assessing Podieh's alternative ineffective assistance of counsel claims, none of which are at issue in this appeal. The circuit court rejected Podieh's claims that Mr. Discavage was ineffective in failing to: secure evidence that would have shown that Podieh was not a subsequent offender; obtain certain jail call recordings; secure documentation of Podieh's legitimate business transactions; and investigate and/or interview particular witnesses. The court explained:

> Considering the length of the plea negotiations, counsel's correct belief that the case would resolve itself via a plea, and with significant deference to counsel's [judgment] and strategic decisions, this [c]ourt does not find that Mr. Discavage's conduct was as far as to fall below a[n] "objective standard of reasonableness[."]

of the *Mickens* test. Nonetheless, we observe that to the extent the circuit court relied upon Mr. Discavage's testimony for the basis of its finding that the conflict was linked to counsel's strategic decisions, the record does not support such a finding.

The burden is on the petitioner to establish, by a preponderance of the evidence, that defense counsel's failure to pursue alternative defense strategies or tactics was linked to the actual conflict. Podieh has failed to fulfill this burden in this case. Accordingly, assuming *arguendo* that Mr. Discavage had a personal interest in maintaining a positive rapport with Deputy Ensor, we hold that Podieh failed to establish that Mr. Discavage's failure to pursue alternative strategies or tactics was linked to the actual conflict.[5]

II.

Podieh's second appellate issue is based upon his allegation of ineffective assistance of counsel in connection with the advice he received regarding the immigration consequences of his plea. In *Padilla v. Kentucky*, 559 U.S. 365, 368-69 (2010), the United States Supreme Court held that when the deportation consequence of a conviction is clear, "counsel must inform her client whether his plea carries a risk of deportation" in order to render effective assistance under the *Strickland* test. The *Padilla* Court held that "counsel must inform [his or] her client whether his [or her] plea carries a risk of deportation[,]" and that, "when the deportation consequence is truly clear, . . . the duty to give correct advice is equally clear." *Id.* at 374.

[5] We do not suggest that Mr. Discavage's conduct in this case represents the paragon of ethical behavior, and we recognize that Mr. Discavage was not entirely forthcoming about the nature of the conflict. Nonetheless, as we explained, Podieh failed to satisfy his burden of proving an actual conflict that affected Mr. Discavage's representation.

The Court of Appeals interpreted the *Padilla* standard for effective assistance in the context of immigration consequences in *State v. Sanmartin Prado*, 448 Md. 664 (2016). *Prado* addressed whether defense counsel rendered ineffective assistance of counsel when defense counsel advised the defendant "that there 'could and probably would be immigration consequences' for the defendant's conviction for second-degree child abuse because it was a 'deportable' or 'possibly deportable' offense." 448 Md. at 666-67. The Court of Appeals held that although defense counsel's advisements contained qualifying words, defense counsel provided "correct advice concerning the risk of deportation that [the defendant] faced if convicted of second-degree child abuse." *Id.* at 716-17. The Court of Appeals explained that the advice was correct because when a defendant is convicted of a "deportable" offense, it "does not mean that deportation is an absolute certainty." *Id.* at 718. The Court addressed the prosecutorial discretion the executive branch of the federal government has with respect to deportation proceedings, rendering deportation "not an absolute certainty upon conviction of a deportable offense." *Id.* at 719.

The Court further commented that "it would be unreasonable to require defense counsel, without qualification, to advise noncitizen clients about the risk of deportation such that defense counsel is placed in the position of having to provide detailed and specific information about the risk of deportation and to essentially become an immigration law specialist." *Id.* The Court explained:

> Even in *Padilla*, 559 U.S. at 369, 130 S. Ct. 1473[,] the Supreme Court recognized that immigration law is a "complex" area of law and that there will "undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." Requiring defense

> counsel, who "may not be well versed in" immigration law, *id.*, to become legal experts concerning immigration law places too high a burden on defense counsel, one that surely exceeds the "prevailing professional norms[,]" *id*. at 367, 130 S. Ct. 1473. Moreover, it may not always be easy to tell whether a particular immigration statute is succinct, clear, and explicit. Indeed, even for those who are trained in immigration law, it may be difficult to ascertain whether a particular crime would be considered as a crime involving moral turpitude or as an aggravated felony. In short, it is unreasonable to require that defense counsel investigate and determine that the Federal government will, with certainty, actually deport a particular noncitizen defendant upon conviction of a deportable offense.

Prado, *supra*, 448 Md. at 719-20.

Podieh was advised by defense counsel on the record that he "may or could" have been deported as a result of his guilty plea. On appeal, Podieh concedes that the on-the-record colloquy would have been sufficient under *Padilla* and *Prado*. Podieh's claim is based on two assertions: first, that Mr. Discavage was aware that Podieh believed that he would have a "fair shot" to defend himself at an immigration hearing[6] but failed to correct Podieh's misbelief; and second, that immigration attorney Ms. Shoff provided constitutionally deficient advice.

Podieh cites no authority to support his assertion that Mr. Discavage had a duty to correct Podieh's belief that he would be entitled to an immigration hearing. Indeed, the Court of Appeals made clear in *Prado* that defense counsel is required only to advise that

[6] Mr. Discavage testified to this fact at the post-conviction trial. In addition, Podieh testified that he was advised by Mr. Discavage that "if he got a 6-month sentence, it might not trigger immigration, and if it even did, he'd have only one charge to fight against immigration instead of four charges, and that he should be home by the fall." The circuit court did not refer to this testimony from Podieh in its Statement of Reasons and Order granting post-conviction relief.

a conviction may subject a defendant to deportation. Defense counsel is not required to advise a client as to the certainty of deportation, the process of immigration hearings and removal procedures, or the likelihood of success of any defenses to removal. Mr. Discavage advised Podieh that he "may or could" be deported as a result of his guilty plea. In sum, we reject Podieh's contention that Mr. Discavage's failure to correct Podieh's mistaken belief that he would receive a hearing constitutes ineffective assistance of counsel under *Padilla* and *Prado*.

We next turn to the incorrect advice rendered to Podieh by immigration attorney Ms. Shoff. The circuit court summarized Ms. Shoff's advice to Podieh as follows:

> [U]nless [Podieh] was able to negotiate a plea to Possession of Marijuana -- less than 30 grams, [Podieh] was "screwed[,"] therefore it would not, and did, not matter which of the pending charges [Podieh] plead[ed] guilty to.

Ms. Shoff additionally advised Podieh incorrectly as to his ability to obtain a bond, potential opportunity to gain cancellation of removal, and the effect of his plea on naturalization.

Podieh asserts that Mr. Discavage rendered ineffective assistance of counsel by failing to verify the advice Ms. Shoff provided to Podieh. Podieh contends that Ms. Shoff gave him a "plethora of erroneous advice that greatly influenced his decision to plead guilty" and that Mr. Discavage was "responsible for verifying" the information provided by Ms. Shoff. This argument is inconsistent with the reasoning of the United States Supreme Court in *Padilla*, *supra*. In *Padilla*, the Supreme Court specifically articulated that a defense attorney should, when aware that a client is not a citizen, "advise the client

that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration expert if the client wants advice on that subject." 559 U.S. at 387. The Court recognized that "[i]mmigration law can be complex, and is a legal specialty of its own." *Id.* at 369. The right to effective assistance of defense counsel does not require defense attorneys, who "may not be well versed in" immigration issues to become legal experts in the field. It would be unreasonable to expect a defense attorney with no or little background in immigration law to evaluate the expert recommendations and advice rendered by a specialist in the field.

In support of his assertion that defense counsel rendered ineffective assistance of counsel by failing to verify the advice provided by Ms. Shoff, Podieh cites the case of *United States v. Swaby*, 855 F.3d 233 (4th Cir. 2017). As we shall explain, while *Swaby* has certain factual similarities to the instant appeal, it is nonetheless distinguishable. *Swaby* involved a defendant who was charged with trafficking in counterfeit goods in violation of 18 U.S.C. § 2320, as well as conspiracy to traffic in counterfeit goods. Swaby was a lawful permanent resident at the time, and defense counsel "immediately recognized that immigration status would be a significant consideration for Swaby, who had a green card and intended to apply for U.S. citizenship." *Id.* at 236. Defense counsel "recogniz[ed] that he lacked expertise in immigration law" and contacted an immigration attorney "for advice." *Id.* at 237. Defense counsel sent the immigration attorney a copy of Swaby's indictment and the relevant criminal statute. *Id.*

The immigration attorney recognized immediately the importance of avoiding conviction of an aggravated felony, which would render Swaby "categorically deportable."

Id. at 240. Unfortunately, the copy of the statute the immigration attorney consulted when evaluating the consequences of a guilty plea was incorrect and did not apply to Swaby's case.[7] *Id.* at 237 n.1. The version of the statute applicable to Swaby's case included deception, rendering the offense an aggravated felony, while the version of the statute the immigration attorney consulted did not include the element of deception. *Id.* at 237. Swaby pleaded guilty, having not been informed "that he was pleading guilty to a crime that rendered him automatically deportable." *Id.* at 238. The Court held that defense counsel rendered ineffective assistance of counsel, explaining that defense counsel's "error -- in providing [the immigration attorney] with the incorrect statute, failing to read the statute to verify [the immigration attorney's] advice, or both -- constitutes deficient performance under the Sixth Amendment." *Id.* at 240.

In *Swaby*, the relationship between the criminal defense attorney and the immigration attorney was direct. The criminal defense attorney communicated directly with the immigration attorney about the crime with which Swaby was charged. The immigration attorney specifically advised the criminal defense attorney with respect to the immigration consequences of a guilty plea to a particular offense, and the defense attorney advised his client accordingly. Critically, in the present case, Mr. Discavage did not communicate directly with Ms. Shoff regarding the immigration consequences of any plea. Rather, Mr. Discavage recommended that Podieh seek advice from an immigration

[7] It was unclear from the record whether the defense attorney sent the immigration attorney the incorrect statute, or whether the immigration attorney incorrectly consulted an amended version.

attorney. In doing so, Mr. Discavage satisfied the requirements of *Padilla* and *Prado.* In our view, *Padilla* and *Prado* do not impose on defense counsel an affirmative duty to vet or otherwise verify information provided directly to a defendant by an immigration attorney. Indeed, as we discussed *supra*, the *Padilla* Court recognized the complexities of the field of immigration law. 559 U.S. at 369.

The Sixth Amendment does not entitle a defendant to an immigration attorney, and the jurisprudence interpreting the right to counsel in *Strickland, Padilla* and *Prado* do not stand for the proposition that an ineffective assistance of counsel claim can be premised upon the incorrect advice rendered by an independent immigration attorney directly to a client. We cannot say that Mr. Discavage's conduct fell below an objective standard of reasonableness. A reasonable defense attorney, recognizing his or her limited understanding of the field of immigration law, would recommend that his or her client seek advice from a knowledgeable immigration attorney. This is precisely what Mr. Discavage did in this case. We hold, therefore, that Podieh has failed to establish that defense counsel's conduct satisfied the first prong of the *Strickland* analysis.[8] Accordingly, Podieh's claim for post-conviction relief must fail.

[8] The circuit court additionally concluded that Podieh failed to establish the second prong of *Strickland*. In light of our determination that Podieh has failed to prove deficient performance, we shall not address the prejudice issue. We expressly take no position as to the merits of the prejudice issue.

JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY AFFIRMED, IN PART, AND REVERSED, IN PART. CASE REMANDED TO THE CIRCUIT COURT FOR ENTRY OF AN ORDER DENYING PODIEH'S PETITION FOR POST-CONVICTION RELIEF. COSTS TO BE PAID BY THE APPELLEE/CROSS-APPELLANT.