Circuit Court for Montgomery County
Case No. 116566C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1091

September Term, 2020

BELOR MBEMBA

v.

STATE OF MARYLAND

Zic,
Ripken,
Wright, Alexander, Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: February 16, 2022

In 2011, Belor Mbemba, appellant, a citizen of the Democratic Republic of Congo, pleaded guilty, in the Circuit Court for Montgomery County, to sexual offense in the second degree and was sentenced to 18 months' home detention. Then, in 2018, the United States Department of Immigration and Customs Enforcement ("ICE") initiated removal proceedings against appellant, on the basis of his 2011 Maryland conviction.

The following year, appellant filed a petition for writ of error coram nobis in the circuit court, seeking to vacate his 2011 conviction and thereby stave off removal. In that petition, appellant claimed that he had received ineffective assistance of counsel, in violation of the Sixth Amendment, on the ground that he had not been advised properly of the immigration consequences of his guilty plea. After a hearing, the circuit court found that appellant failed to prove that his counsel had performed deficiently and denied his petition, prompting this appeal. For the reasons that follow, we affirm.

BACKGROUND

The Crime and the Original Proceedings

On a Saturday in August 2010, the victim, D., attended a birthday party for her friend C. at appellant's residence in Silver Spring, Maryland. During that party, D. drank to excess and passed out. She awoke to find that she was partially undressed and that appellant was performing cunnilingus on her. She passed out again and awoke to discover that he was attempting to rape her. D. subsequently was taken to a local hospital, where a sexual assault forensic examination was performed. That examination indicated that D. had suffered vaginal trauma consistent with forced sex. (Subsequently, through forensic

testing, appellant's DNA would be detected in the rape kit that had been prepared at the hospital.[1])

The following day, D. reported the incident to Montgomery County Police officers. The following week, a statement of charges was filed, and, several weeks later, a superseding indictment was returned, charging appellant with rape in the second degree and sexual offense in the second degree. The matter was scheduled for a jury trial in the Circuit Court for Montgomery County.

Over a period of several months prior to the scheduled trial date, the prosecutor and appellant's trial counsel negotiated a plea agreement, whereby appellant would plead guilty to second-degree sexual offense, and he would be sentenced to 18 months' home detention, considerably below the guidelines range of four-to-nine years (and, for that matter, the 20-year statutory maximum). On the scheduled trial date, the prosecutor and trial counsel submitted the plea agreement to the court, which accepted it and then conducted a plea hearing instead of a trial.

At the time of the plea hearing, appellant was a 30-year-old college graduate, holding a bachelor's degree in finance and international business. During the plea colloquy, appellant acknowledged that he had discussed the charges and any possible defenses with trial counsel. Trial counsel explained to appellant the trial and appellate rights he was foregoing, and he acknowledged that he understood. Trial counsel advised

[1] When police officers interviewed appellant, he denied having sex with the victim, but the forensic analysis refuted that claim.

appellant of the elements of second-degree sexual offense, and appellant confirmed that he understood them. Appellant further was advised that, as a consequence of his plea, he would be required to register as a sex offender. Regarding the immigration consequences of the plea, trial counsel asked appellant whether he understood that his guilty plea "may have some collateral consequences as it relates to [his] immigration status," and appellant replied that he did.

Upon the conclusion of the open-court examination of appellant, the circuit court found that his guilty plea was made knowingly and voluntarily. After hearing the State's factual proffer, the court found appellant guilty of second-degree sexual offense, and it scheduled a sentencing hearing two months later.

When the court reconvened for sentencing, appellant moved to withdraw his guilty plea. The following colloquy occurred:

> [TRIAL COUNSEL]: Of course it was a favorable disposition that we walked [sic] out in in light of the charge.
>
> THE COURT: Yes, are there immigration issues here?
>
> [TRIAL COUNSEL]: There are which is why ultimately [the prosecutor] allowed us to do home detention as opposed to PRC[2] because the immigration issues precluded that and I'm quite sure that we addressed that at the time of the plea.

Court and counsel then discussed the victim's status:

> [PROSECUTOR]: I think one of the issues that the defendant has is that he's never seen the victim because the victim has never —

[2] This was a reference to the Montgomery County Pre-Release Center. Trial counsel later explained, during the coram nobis hearing, that appellant was ineligible to serve his sentence at PRC because of the nature of the offense.

THE COURT: Well she doesn't have to be here.

[PROSECUTOR]: I understand.

[TRIAL COUNSEL]: I've gone through that with him.

* * *

[TRIAL COUNSEL]: For what it's worth and I think just piggybacking on what [the prosecutor] said, he doesn't believe that the victim is either in the country, prepared to testify . . . .

The court thereafter examined appellant about the reason he wanted to withdraw his plea. After reminding appellant that, at the plea hearing, he had pleaded guilty freely and voluntarily, appellant replied:

> Well, I just had some concern because at first when my lawyer came with the plea, I wanted to go to trial the first time he ever asked me about you know the deal that the prosecution gave me. That's when I wanted to go to try [sic] and eventually they went back and forth and I got to say he really work hard with the prosecution to get the deal that they gave me.
>
> * * *
>
> And but then, I just had some concern as far as why eventually they didn't want me to go to trial and there was a concern that technically I had addressed a few times with my lawyer but I would say his response was really, really vague and today again, even yesterday, today I kept asking questions especially as far as the witness not coming to all the proceeding for about a year now. I've been coming --

After the court explained that the victim was not required to attend, appellant replied:

> Yes, I know she's not required to, but I've been coming to your Court for about a year right now and I see few sex cases in a courtroom or even (unintelligible) and most of the time I would see the victim, you know coming here because you even said yourself in one of the case one day that usually when the victim is -- one person has been victimized they're looking for justice or you know revenge.

> I remember I was sitting there, there was a case that was here. So, I put the same situation in my case where the victim was claiming that eventually that you know I did rape her, or sexually assaulted her or committed a sexual offense. I just thought that was kind of weird that if she was will be looking for justice or you know make sure that you know the she get revenge for what I did to her, even if she wouldn't come for a year, I kind of feel that should have been at least when I plead guilty or for my sentencing and I know she's not required to be here unless I'm sitting over there at trial and she's produced as a witness.
>
> So, those are concerns that I addressed with my lawyer but again, like I said the answer was really, really vague and that's why you know I was like well, let me take my chance at trial because if she really wants me to go to jail then for what I did to her, she may have to show.

The court then explained why D. was reluctant to appear—that, in her victim impact statement, D. stated that she had been traumatized by the attack, that she felt "unimaginable pain," that she felt as if her "world [was] falling apart," and that she was unsure if she would "ever be the same" again. After warning appellant that if he withdrew his plea and went to trial, D. would appear and testify against him, the court then declared that whether to permit appellant to withdraw his plea ultimately was within its discretion,[3] and it concluded with a warning that, should the case go to trial, "all deals are off." The court, at trial counsel's request, took a brief recess, and when the hearing resumed, no one

[3] The court cited *Fontana v. State*, 42 Md. App. 203 (1979), where our predecessors declared: "We have held repeatedly that the right to withdraw a guilty plea is a discretionary matter which will not be overturned unless abused." *Id.* at 205 (citations omitted). Although *Fontana* was decided under former Md. Rule 731.f.1, the version of the rule effective in 2011, Md. Rule 4-242(g), was similar, and *Fontana* remains good law.

mentioned the motion to withdraw.[4] Instead, the court, with everyone's agreement, imposed a sentence of 18 months' home detention, and the State entered *nolle prosequi* to the remaining count of the indictment.

The Coram Nobis Proceedings

Following the initiation of removal proceedings against appellant, in 2019, he filed a petition for writ of error coram nobis in the circuit court, contending that trial counsel in 2011 had rendered ineffective assistance in failing to advise him that, by pleading guilty to second-degree sexual offense, he would become subject to removal. The following year, two virtual hearings were held on the petition.[5] Two witnesses testified: trial counsel testified for the State, and appellant testified on his own behalf.

Trial counsel testified that he had a "somewhat vivid" recollection[6] of the case "because of the bailable disposition, and that we were able to ultimately avoid incarceration, which was what [appellant] wanted to do all along, so that he wouldn't get caught up in ICE proceedings, and deportation, and removal proceedings."[7] Trial counsel

[4] We infer that appellant withdrew his motion to withdraw his guilty plea because he had an opportunity to object but did not do so; instead, he discussed with the court the arrangements for establishing home detention monitoring.

[5] By that time, the COVID pandemic had broken out, and hearings generally were held virtually under a mandate issued by the Chief Judge of the Court of Appeals.

[6] Trial counsel testified entirely on the basis of his recollection of the case because he failed to produce his file from the underlying criminal case.

[7] Throughout this opinion, we shall use the terms "removal" and deportation" as synonymous. *See Padilla v. Kentucky*, 559 U.S. 356, 364 n.6 (2010).

further averred that "very few of [his] clients have been able to get 18 months home detention after a, you know, second degree rape with DNA evidence, but that's how it ended."

According to trial counsel, appellant had, from the outset, made it plain that, at all costs, he wanted to avoid any kind of incarceration, "even if it was pre-trial, because of the fear that he would be held on some other detainer." Trial counsel further averred that "it was known from the beginning that [appellant] had immigration issues, and that an offense such as a sex assault case, even if not a conviction," could "very well hold him detained in one context or another in the immigration context[.]" In response to the State's query as to whether trial counsel had advised appellant of the immigration consequences of his plea, counsel replied, "No, other than, other than I think what the record reflects, which is that there may be immigration consequences that [were] taken into consideration when we, when we discussed and agreed on his sentence, and that he needed to address those with an immigration attorney." Trial counsel elaborated that he advised appellant only "generically" about the possible immigration consequences, including the possibility of removal (because of the gravity of the offense), and that if appellant had additional questions, he should "see an immigration attorney."

According to trial counsel, the plea agreement "came together at the last moment[.]" Trial counsel further testified that he met appellant at least once "to go over the terms of the plea" and that the meeting took place at the sheriff's detention holding center in the Montgomery County Courthouse. When trial counsel was asked about appellant's response upon being informed of the plea offer, he replied that appellant approved:

> Unequivocally yes. I mean, yeah, again, he's I, I think 18 months, an 18-month sentence, regardless of whether it was executed or unexecuted, (unintelligible) out, out of detention was a big disposition considering the DNA evidence, but considering that his whole objective was to stay out of jail, that was something that was a no-brainer for him, so to speak.

After appellant's coram nobis counsel had concluded cross-examination of trial counsel, the court asked trial counsel some clarifying questions:

> Mr. [trial counsel], did you ever say to [appellant] that if he pled guilty to the charge of second degree sex offense, it would not result in deportation, because he had no prior felony convictions on his record; and that pleading guilty --
>
> [TRIAL COUNSEL]: No, I did not.
>
> THE COURT: -- -- let me finish -- and that pleading guilty to a second degree sex offense would only count as one conviction of a felony? Did you ever say that to him?
>
> [TRIAL COUNSEL]: As I understand the question, and maybe I don't understand the question --
>
> THE COURT: Let me repeat the question. Let me repeat it. Did you ever say to [appellant] that pleading guilty solely to the charge of second degree sex offense would not result in deportation, because he had no prior felony convictions on his record; and pleading guilty to a second degree sex offense would only count as one conviction of a felony? Did you ever say that you [sic] him?
>
> [TRIAL COUNSEL]: Absolutely not.
>
> * * *
>
> THE COURT: Yes. Give me a second. Did you tell him that a PRC [Pre-Release Center] sentence could trigger deportation since he was in jail?
>
> [TRIAL COUNSEL]: I, I think the issue is just on the, one of confinement, not, not PRC.

> THE COURT: No, no, I know. I'm asking very specific questions. Did you ever say to him that a PRC sentence could trigger deportation, because he was in jail?
>
> [TRIAL COUNSEL]: No. No.
>
> THE COURT: All right. Did you ever advise him that he could be deported if he entered into a guilty plea for second degree sex offense?
>
> [TRIAL COUNSEL]: Yes.

Appellant testified that, at the time charges against him were filed, he held an A-2 government official visa and was employed at the Embassy of the Congo. He further testified that, at the urging of a friend, he informed trial counsel "specifically" about his immigration status.

According to appellant, trial counsel informed him of the terms of the plea offer during a telephone call. When trial counsel explained that, under the plea agreement, he would plead guilty to second-degree sexual offense, appellant purportedly objected on two grounds: first, he did not think that the events on the night in question "happened the way they were trying to portray it"; and second, he did not want to plead guilty to a felony because he could be deported as a result. In response to his concern about pleading guilty to a felony, appellant claimed that trial counsel told him that one felony would not result in deportation, but rather, "two or more" felonies were required "before you get deported."

Appellant further contended that trial counsel "did not" recommend that he consult "individually" with an immigration lawyer. Moreover, appellant asserted that seeking a disposition of home detention was trial counsel's idea because he believed it would preclude removal. And, according to appellant, he relied upon trial counsel's advice in

deciding to plead guilty to second-degree sexual offense. When asked whether, had he known in 2011 that he could be subject to removal upon pleading guilty to second-degree sexual offense, he still would have done so or instead gone to trial, appellant replied, "Yes, I would have, I would have gone to trial, and that's for sure."

When the court turned to consider argument by the parties, it expressed its dismay that trial counsel had failed to produce his file from the underlying case. The court ordered a one-week recess to afford trial counsel an opportunity to retrieve his files to refresh his recollection and supplement his testimony. The court further ordered that appellant's coram nobis counsel be provided those materials so that he could prepare for cross-examination.

When the case was called the following week, trial counsel disclosed that he had an electronic file from the underlying case but was unable to obtain the physical file from the storage service he had contracted with. He apparently was unable to upload his electronic file to a cloud sharing service so that appellant's coram nobis counsel could gain access to it. The court sustained appellant's objection to any further testimony by trial counsel because of that failure to provide coram nobis counsel with the file, and the matter proceeded to arguments of counsel.

After hearing arguments of counsel, the court issued an oral ruling denying appellant's coram nobis petition. In doing so, the court found trial counsel's testimony credible in several respects:

> [T]he Co[urt] found [trial counsel] to be credible . . . when he said that [his] recollection of this is vivid because of the favorable disposition, and that we were able to ultimately avoid incarceration, which is what [appellant] wanted

to do all along, so that he didn't get caught up in ICE proceedings, and deportation or removal proceedings.

So, that the Court finds credible that this is not a very typical type of case or result that easily get lost in the midst of many cases.

I also found the testimony of [trial counsel] credible when he said that, when [appellant] was jailed pre-trial, he got almost daily calls, because of [appellant's] fear that he would be held on some other detainer while he was there. And [trial counsel] stated further that it was known from the beginning the immigration consequences and an offense, such as a sex assault, could cause, even if it's not a conviction may very well hold him detained in the immigration context.

He said at the forefront of the entire case, the issue of immigration -- pardon me -- was at the forefront of the entire case, and not wanting to get picked up as he has now. That was the testimony that the Court did find credible.

When asked directly if he had given advice to [appellant] about immigration consequences, [trial counsel] testified that he certainly was not an immigration attorney. He further testified that he had counseled [appellant] to seek advice from immigration counsel. Yes, his words were, no, other than what the record reflects, which is -- I'm sorry. Let me go back.

When asked the question did you give him advice about immigration consequences of the plea, the response was no, other than what the record reflects, which is that there may be immigration consequences, and that he needed to consult immigration counsel, and he further stated that he was not in a position to know more than to say he would not have necessarily said he would be deported, yes, he could have collateral consequences of deportation.

The testimony of [trial counsel] went on further that there was a general concern that if he was confined for any period of time and flagged by some immigration agency, it would be difficult for him, and that's why he wanted home detention. He did not even want PRC, because he thought even that was too much for him; that's why he pushed the envelope with home detention. I find that conversation or that recollection from [trial counsel] to be credible.

* * *

> And when the Court asked, repeating what [appellant] had said, did you ever say to [appellant] that if he pled guilty it would not result in deportation, because he had no prior felony conviction on his record, and that pleading guilty would only count as one conviction of a felony -- I'm kind of paraphrasing what that sentence is, and with that question to [trial counsel], he said absolutely not. There was no hesitation in his response, and he further wanted to inquire of the Court whether or not I heard his clear response. I found [trial counsel's] testimony to be credible.
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> Next the Court asked the witness if he ever said to [appellant] would PRC trigger deportation, since he was in jail, and he indicated no. And did you ever advise him that he would be deported if he entered into a plea, and he indicated that he did so advise.
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> * * *
>
> And I will add to that the Court being mindful of [trial counsel's] testimony being, frankly, a recollection nine years after the event, the Court does find that his recollection as to these specific issues that were discussed were credible, because of the nature of these particular charges, the nature of the sentencing, and the plea agreement that was obtained as further evidence of the credibility the Court placed on his testimony of what was discussed concerning immigration. It was not a small aspect of all of his discussions from the beginning of his representation in trying to get him released from pre-trial detention to the ultimate guilty plea and the sentencing of the defendant in this case.

In contrast, the court found appellant's testimony not credible in several material respects:

> And then we find further that [appellant] testified, in response to [trial counsel's] questions, you know, what was the reason for your interest in withdrawing the guilty plea at the sentencing hearing, and [appellant] then testified that he told [trial counsel] -- in discussing it with [trial counsel], who said that it was in his best interest to take the plea offer, then [appellant] added the reason, being the reason he wanted to withdraw, was I sought to withdraw the plea, because I wanted to make sure that the plea would not result in removal.
>
> Particularly, let me start from that last sentence, I don't find that credible when [appellant] said that I sought to withdraw the plea, because he was concerned about the possibility of removal.

> When he was directly asked this issue by the court -- the court brought it up at the sentencing, and said when there was the interest to withdraw said are there immigration issues here, and [trial counsel] went on to say, yes, there are, all of the concerns that were discussed at length with [appellant] and the court in understanding what his concerns were were focused on the fact that [appellant] believed that the victim was not around; that she had never shown up for any hearing; that she was someone who was not interested in prosecution; and that she was not someone interested in seeking justice.
>
> And it was a very lengthy discussion centered solely around this issue concerning the ability of the prosecution to make their case. And there's a lot of back and forth with the court concerning whether or not this woman was actually available even to post for a trial. And that stands in direct contrast to the testimony of [appellant] when he said that he wanted to withdraw the plea solely because he was worried about removal. That never came up, when there is certainly a clear conversation with the Court about what the cause was of his concerns concerning his with [sic] to withdraw the case.
>
> When [appellant] testified -- and then I'm going backwards in terms of the nature of the testimony and the evidence in this case -- that I could not have a felony, because -- when he said I can't plead guilty, because I could not have a felony, and then to say that [trial counsel] added one felony is not deportable; you need more than one, first, there is the apparent self-awareness in that one sentence, I could not have a felony, because I did not want to be deported seems to belie that he had no knowledge at all about what a guilty plea would entail.

Based upon those findings of fact, the court found that trial counsel "did properly advise [appellant] of the immigration consequences of this case as reflected in the transcript of the plea colloquy[.]" Accordingly, the court concluded that trial counsel's advice to appellant was not "constitutionally deficient as he indicated that he always understood from the very beginning, both in his many conversations during the pre-trial detention of [appellant] about the risk of deportation[.]"

The court issued a written order denying appellant's coram nobis petition, and this timely appeal ensued.

DISCUSSION

Standard of Review

We review a circuit court's fact findings in a coram nobis proceeding for clear error but review its legal conclusions without deference. *State v. Rich*, 454 Md. 448, 471 (2017). "Under the clearly erroneous standard, if there is any competent evidence to support the factual findings below, those findings cannot be held to be clearly erroneous." *Johnson v. State*, 440 Md. 559, 568 (2014) (citations and quotations omitted). Given the extraordinary nature of the remedy, we review a circuit court's ultimate ruling in a coram nobis proceeding for abuse of discretion.[8] *Rich*, 454 Md. at 470-71.

[8] At first glance, it appears that there is tension between the rule that we review a coram nobis court's ruling on an ultimate constitutional issue (that is, a legal conclusion based upon underlying factual findings) without deference but review its decision whether to grant the writ for abuse of discretion. We reconcile the two standards by recognizing that the breadth of a court's discretion is context dependent. *See, e.g.*, *Buck v. Cam's Broadloom Rugs, Inc.*, 328 Md. 51, 58-59 (1992) (observing that the scope of a trial judge's discretion "is not fixed and immutable; rather, it will expand or contract depending upon the nature of the factors being considered, and the extent to which the exercise of that discretion depends upon the opportunity the trial judge had to feel the pulse of the trial and to rely on his own impressions in determining questions of fairness and justice"). The precise extent of a coram nobis court's discretion in denying relief to a petitioner who has otherwise established a fundamental error in the underlying proceeding and is suffering a significant collateral consequence from the challenged conviction is currently before the Court of Appeals. *Smith v. State*, No. 26, Sept. Term, 2021 (argued Jan. 11, 2022). The Court's decision in *Smith* will have no bearing on our decision in this case, which, as we explain, rests on a different basis—that appellant has failed to establish that there was a fundamental error affecting his guilty plea proceeding.

Governing Legal Principles

Coram nobis is an "extraordinary remedy" through which a person who has been convicted of a crime but is no longer serving his sentence (and is therefore ineligible to pursue other remedies such as postconviction or habeas corpus) may collaterally attack his conviction on constitutional grounds. *Skok v. State*, 361 Md. 52, 72, 80 (2000). Originally conceived as a means to reopen a judgment to correct errors of fact, affecting "the validity and regularity of the judgment" and which had been "unknown to the judge" at the time of trial, the scope of coram nobis is now broader and permits consideration of "fundamental" errors of law "where no other remedy is presently available and where there were sound reasons for the failure to seek relief earlier." *Id.* at 71-73 (citations and quotations omitted).[9]

A coram nobis petitioner must satisfy several conditions to establish eligibility for relief:

> (1) "the grounds for challenging the criminal conviction must be of a constitutional, jurisdictional or fundamental character";
>
> (2) "the coram nobis petitioner must be suffering or facing significant collateral consequences from the conviction"; and

[9] The Court of Appeals set forth two principal reasons for broadening the scope of coram nobis. First, the Court noted that over the last few decades, there has been a proliferation of collateral consequences that can be triggered upon a criminal conviction (examples are almost too numerous to mention but include deportation; enhanced penalties for subsequent convictions; legal disabilities such as ineligibility to vote, to possess firearms, and to hold professional licenses; and mandatory sex offender registration). Second, where a conviction results in a "relatively light sanction," a defendant may forego any challenge to the proceedings, even where a fundamental error may have occurred, and if he subsequently becomes subject to a significant collateral consequence, he may be ineligible to seek postconviction relief. *Skok*, 361 Md. at 77.

> (3) "another statutory or common law remedy" is not "then available" for challenging the conviction.

Rich, 454 Md. at 462 (quoting *Skok*, 361 Md. at 78-80).

In addition, two procedural requirements apply:

> (1) "a presumption of regularity attaches to the criminal case, and the burden of proof is on the coram nobis petitioner";[10] and
>
> (2) "[b]asic principles of waiver are applicable to issues raised in coram nobis proceedings[,]" and "[s]imilarly, where an issue has been finally litigated in a prior proceeding, and there are no intervening changes in the applicable law or controlling case law, the issue may not be relitigated in a coram nobis action."

Id. (quoting *Skok*, 361 Md. at 78-79).

The fundamental error alleged here is ineffective assistance of counsel, resulting in a violation of the Sixth Amendment. Such a claim comprises two elements: deficient performance and prejudice. *Newton v. State*, 455 Md. 341, 355 (2017) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)), *cert. denied*, 583 U.S. __, 138 S. Ct. 665 (2018). The petitioner bears the burden of proof as to both elements. *State v. Syed*, 463 Md. 60, 75 (citing *Strickland*, 466 U.S. at 687), *cert. denied*, 589 U.S. __, 140 S. Ct. 562 (2019).

"To establish deficient performance, the petitioner must show that counsel's performance was objectively unreasonable under prevailing professional norms." *State v.*

[10] Although the presumption of regularity ordinarily works in favor of the State, that may not always be true. A notable exception concerns coram nobis petitions raising *Unger* claims in which trial transcripts are unavailable. In such cases, it may be appropriate to presume that the trial court rendered advisory jury instructions as had been required under former Md. Rule 756 (and which was a procedure followed uniformly prior to December 1980, when the Court of Appeals rendered *Stevenson v. State*, 289 Md. 167 (1980), which for the first time restricted the applicability of advisory instructions to "the law of the crime").

Wallace, 247 Md. App. 349, 359 (2020) ("*Wallace I*"), *aff'd*, 475 Md. 639 (2021) ("*Wallace II*") (citations and quotations omitted). "Because our scrutiny of counsel's performance must be highly deferential, we indulge a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Wallace I*, 247 Md. App. at 359 (citations and quotations omitted). "We judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* (citations and quotations omitted).

For completeness, we briefly set out the standard for determining prejudice, although we cannot reach that issue in our analysis given the postconviction court's ruling, based entirely on the performance prong of *Strickland*. "To establish prejudice, the petitioner must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (citations and quotations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (citations and quotations omitted). In the context of a guilty plea, a petitioner establishes *Strickland* prejudice by showing a reasonable probability that, but for counsel's deficient advisement, he would have rejected the State's plea offer and "insisted on going to trial," *Hill v. Lockhart*, 474 U.S. 52, 59 (1985), or, in other words, that "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010) (citing *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000)).

Parties' Contentions

Appellant raises two principal contentions. First, he claims that the coram nobis court clearly erred in finding that trial counsel was credible and that he was not. Second, he claims that the coram nobis judge violated his due process right to an impartial decision-maker.

Subsumed within the first claim are five sub-contentions: (1) trial counsel never advised appellant that he could be deported if he pleaded guilty to second-degree sexual offense; (2) trial counsel misled appellant to believe that a sentence of home detention would protect him from removal; (3) no substantial evidence supports trial counsel's testimony that he advised appellant to seek the advice of an immigration attorney regarding the potential consequences of his guilty plea; (4) the coram nobis court erred as a matter of law in ruling that trial counsel did not render deficient performance; and (5) the coram nobis court's finding that appellant was not credible was clearly erroneous.

The State counters that the coram nobis court's fact findings are "virtually unassailable" because we, as an appellate court, are in no position to reject the coram nobis court's demeanor-based credibility determinations. Specifically, according to the State, the coram nobis court credited trial counsel's testimony that he had advised appellant that he faced "immigration consequences, including deportation," as a result of his guilty plea; and, furthermore, the court "disbelieved [appellant's] testimony to the contrary." Based on these fact findings, the State contends that the coram nobis court "correctly determined as a matter of law that [trial] counsel's actions satisfied" the performance prong of *Strickland*.

Analysis

In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the Supreme Court addressed whether a claim of ineffective assistance of counsel could be raised where a defendant had pleaded guilty but later claimed that defense counsel had misadvised him of a collateral consequence of that plea, namely, whether, as a result, he was subject to deportation.[11] The Court held, in that context, that counsel "must inform" a defendant "whether his plea carries a risk of deportation[,]" and thus, an ineffective assistance claim based upon counsel's failure to so inform is cognizable. *Id.* at 374. Moreover, the Court said that "when the deportation consequence is truly clear," the "duty to give correct advice is equally clear" but that, where "the deportation consequences of a particular plea are unclear or uncertain[,]" counsel's duty "is more limited." *Id.* at 369.

In *State v. Sanmartin Prado*, 448 Md. 664 (2016), *cert. denied*, 581 U.S. __, 137 S. Ct. 1590 (2017), the Court of Appeals considered a similar issue concerning trial counsel's advice about the immigration consequences of a plea. There, the Court explained that the cases applying *Padilla* fall into two categories: those where trial counsel "either failed to advise the defendant whatsoever of the immigration consequences of the defendant's guilty plea, or affirmatively misadvised the defendant about the immigration consequences of the

[11] Prior to *Padilla*, lower courts considering the question generally had held that trial counsel's duty to advise extended only to the direct consequences of a guilty plea. *Id.* at 375-76 (Alito, J., concurring in the judgment) (declaring that, prior to *Padilla*, "the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct* consequences of a criminal conviction") (citations omitted); *Miller v. State*, 207 Md. App. 453, 487, 495-500 (2012), *aff'd*, 435 Md. 174 (2013).

defendant's guilty plea"; and the "[m]urkier" category of cases where trial counsel "advises that an offense is deportable and uses 'qualifying' words[.]" *Id.* at 666. Thus, for cases in the first category, trial counsel clearly has failed to fulfill the duty imposed by *Padilla* and therefore has rendered deficient performance under *Strickland*. Cases in the second category may go either way.[12] The instant case falls within the latter "murkier category" described in *Sanmartin Prado*, which clarified how courts should sort such cases.

In *Sanmartin Prado*, the defendant acknowledged, during the waiver colloquy prior to pleading not guilty plea by way of an agreed statement of facts (which the Court deemed the functional equivalent of a guilty plea under the circumstances of the case, *id.* at 707-09), that he had discussed with trial counsel his "immigration status." *Id.* at 667-68. He further acknowledged that neither trial counsel nor the circuit court was "making any promises about what the federal government could possibly do in the future with respect to reviewing this conviction." *Id.* at 668. The circuit court thereafter found him guilty of second-degree child abuse and imposed sentence. *Id.* at 670. He did not appeal. *Id*.

After Sanmartin Prado had finished serving his sentence, officers from ICE arrested him, and removal proceedings commenced. *Sanmartin Prado v. State*, 225 Md. App. 201, 204 (2015), *rev'd*, 448 Md. 664 (2016). Sanmartin Prado filed a petition for writ of error coram nobis, contending that his trial counsel had rendered ineffective assistance in failing

[12] There is logically a third category left unspecified in *Sanmartin Prado*—those cases where trial counsel clearly and unambiguously gave proper advisements to the defendant, presumably either in open court or memorialized through documentary evidence. Cases within that category, however, are unlikely to result in *Padilla* claims because they would face no prospect of success.

to advise him that he was subject to "automatic deportation" upon his conviction of second-degree child abuse. 448 Md. at 671. Had he been advised properly, Sanmartin Prado alleged, he would not have proceeded on an agreed statement of facts but would have insisted on a full trial instead. *Id.*

A hearing was held on his petition. After hearing testimony by trial counsel and Sanmartin Prado, the circuit court found "as a fact" that trial counsel had met with Sanmartin Prado before trial and had "explained the immigration consequences of a guilty verdict, including that this was a 'deportable offense'" and that Sanmartin Prado "could be deported" if ICE elected to initiate removal proceedings. *Id.* at 676. The circuit court then denied Sanmartin Prado's petition on the basis of waiver (because he had not taken a direct appeal).[13] *Id.*

[13] At the time the circuit court ruled on Sanmartin Prado's coram nobis petition, applicability of waiver to coram nobis claims was in a state of flux. In *Skok*, the Court of Appeals stated that "[b]asic principles of waiver are applicable to issues raised in coram nobis proceedings." 361 Md. at 79 (citing *United States v. Morgan*, 346 U.S. 502, 512 (1954)). Subsequently, the Court of Appeals applied this language very broadly in *Holmes v. State*, 401 Md. 429 (2007), holding that, where a defendant has pleaded guilty and was properly advised of his appellate rights but then fails to file an application for leave to appeal from the judgment entered on his guilty plea, he has rebuttably waived his right to seek coram nobis relief. In other words, *Holmes* applied waiver to the right to seek coram nobis relief generally, instead of on a claim-by-claim basis. That holding was, arguably, in conflict with the Postconviction Procedure Act, which provides that "an allegation of error," that is, a claim, is rebuttably waived under the procedural posture of *Holmes*. Md. Code (2001, 2018 Repl. Vol.), Criminal Procedure Article ("CP"), § 7-106(b)(i)-(ii). Thus, *Holmes* made no distinction between a claim that could have raised on direct appeal (e.g., whether a guilty plea had not been made knowingly and voluntarily, as Holmes alleged) and a claim that could be raised only in a collateral proceeding (e.g., ineffective assistance of counsel).

(continued…)

On appeal, we reversed. *Sanmartin Prado v. State*, 225 Md. App. 201. As for waiver, we applied the decision of the Court of Appeals in *State v. Smith*, 443 Md. 572, 587-95 (2015), and its broad interpretation of the coram nobis anti-waiver statute, Criminal Procedure Article ("CP"), § 8-401, to conclude that Sanmartin Prado had not waived his claim. 225 Md. App. at 206-07. On the merits, we held that Sanmartin Prado's trial counsel had "qualified his statements to Sanmartin Prado as to whether a conviction would render him deportable" instead of giving him the "correct 'available advice'" *Padilla* required. *Id*. at 213. Because of the "sometimes conflicting" advice Sanmartin Prado's trial counsel had provided him, we concluded that trial counsel's performance "fell below an objective standard of reasonableness" and "did not meet the prevailing professional norms of most

In response to *Holmes*, the General Assembly in 2012 enacted a curative statute, CP § 8-401, which provides: "The failure to seek an appeal in a criminal case may not be construed as a waiver of the right to file a petition for writ of error coram nobis." 2012 Md. Laws, ch. 437. Subsequently, the Court of Appeals held that CP § 8-401 applies retroactively. *State v. Smith*, 443 Md. 572, 587-95 (2015). The circuit court, in *Sanmartin Prado*, did not have the benefit of the Court of Appeals' decision in *Smith*.

The Court in *Smith* further applied an extremely broad interpretation of CP § 8-401, holding that Smith had not waived her claim that her guilty plea had not been made knowingly and voluntarily despite having failed to file an application for leave to appeal from the judgment entered on her plea. *Smith*, 443 Md. at 606-10. *Compare with McElroy v. State*, 329 Md. 136, 149 (1993) (holding that a postconviction claim that a guilty plea had not been made knowingly and voluntarily was waived because the defendant had not filed an application for leave to appeal from the judgment entered on his guilty plea).

In light of *Smith*, it was unclear whether waiver could ever apply to a coram nobis claim. In *Hyman v. State*, 463 Md. 656 (2019), the Court of Appeals held that waiver applied, but only because the coram nobis petitioner previously had filed a coram nobis petition in which he had failed to raise the claim he was raising in a successive petition. It remains perversely true that, under current law, it is more difficult to find waiver of a claim raised in a coram nobis petition than the same claim raised in a postconviction petition.

criminal attorneys." *Id.* (citations and quotation omitted) (cleaned up). We therefore remanded so that the circuit court could consider whether Sanmartin Prado could demonstrate prejudice. *Id.* at 213-14. The State petitioned the Court of Appeals for further review of our decision on the merits of Sanmartin Prado's claim.

The Court of Appeals granted certiorari, 446 Md. 291 (2016), and reversed. *State v. Sanmartin Prado*, 448 Md. 664 (2016). The Court of Appeals held that, based on the record and the coram nobis court's findings, trial counsel had provided "correct advice" and had therefore not performed deficiently. *Id.* at 707. The Court emphasized the coram nobis court's findings that trial counsel had advised Sanmartin Prado that he would be convicted of a "deportable offense," that he "could be deported" if ICE "chose to initiate deportation proceedings," and that deportation was "possible." *Id.* (quotations omitted).

Furthermore, the Court of Appeals stressed that *Padilla* did not require trial counsel to "become expert[] in immigration law to provide representation to a noncitizen client at a guilty plea proceeding." *Id.* at 712. Rather, the Supreme Court recognized that immigration law '"can be complex"' and that some defense attorneys '"may not be well versed in it."' *Id.* (quoting *Padilla*, 559 U.S. at 369). Accordingly, the Supreme Court in *Padilla* "did not conclude that 'prevailing professional norms' require defense counsel to inform noncitizen clients that convictions for deportable offenses will absolutely or with certainty lead to deportation." *Sanmartin Prado*, 448 Md. at 712.

Finally, the Court of Appeals contrasted the facts of *Padilla* with those in the case before it. In *Padilla*, trial counsel had given "affirmative misadvice" to his client, advising him that he "did not have to worry about immigration status since he had been in the

country so long[,]" contrary to what a plain reading of the removal statute would have disclosed. *Sanmartin Prado*, 448 Md. at 713 (quoting *Padilla*, 559 U.S. at 359, 368). In contrast, Sanmartin Prado's trial counsel had provided him with "correct immigration advice," as determined from the coram nobis court's express factual findings.[14] *Id.*

Applying the teachings of *Sanmartin Prado*, we conclude that the coram nobis court properly denied appellant's petition. Here, as in *Sanmartin Prado*, 448 Md. at 668, trial counsel advised appellant that his guilty plea "may have some collateral consequences as it relates to [his] immigration status[.]" Here, as in *Sanmartin Prado*, 448 Md. at 676, the circuit court found that trial counsel had met with appellant before trial and had explained the immigration consequences of a guilty plea, in two critical respects: trial counsel never

[14] The Court of Appeals also addressed a related question—whether the trial court had complied with Md. Rule 4-242(e) (now Md. Rule 4-242(f)) in accepting Sanmartin Prado's plea. That subsection of the rule requires that a defendant, prior to entering a guilty plea (or today, a plea of not guilty on an agreed statement of facts), be advised "that by entering the plea, if the defendant is not a United States citizen, the defendant may face additional consequences of deportation, detention, or ineligibility for citizenship"; that he will be required to register as a sex offender if he enters a plea to certain statutorily enumerated offenses; and "that the defendant should consult with defense counsel if the defendant is represented and needs additional information concerning the potential consequences of the plea." The Court did not address the extent to which this rule exceeds constitutional requirements, which arguably, it should have done because non-constitutional claims generally are not cognizable in coram nobis. *See, e.g.*, *Rich*, 454 Md. at 462. Notably, this subsection of the rule was first adopted in 1999, well before it had been established that providing such advisements implicated constitutional issues. One-Hundred Forty-First Rules Order, dated Jan. 20, 1999.

In any event, the Court contrasted this subsection with others in the same rule (which mandate advisements "on the record in open court") and concluded that "Maryland Rule 4-242(f)(1) does not explicitly require that an advisement about additional immigration consequences must be made on the record at a plea proceeding." *Sanmartin Prado*, 448 Md. at 721. Therefore, the Court considered both the plea colloquy and the coram nobis court's findings to conclude that there had been compliance with rule. *Id.* at 721-22.

said, as appellant alleged, that if he pleaded guilty to second-degree sexual offense, he would not face deportation, because he had no prior felony convictions on his record; and trial counsel advised appellant that he "could be deported" if he pleaded guilty.

Moreover, the coram nobis court expressly disbelieved appellant's testimony that the reason he had moved to withdraw his guilty plea at the sentencing hearing was because he was concerned about the possibility of removal. In the view of the coram nobis court, appellant's assertion was belied by the transcript of the sentencing hearing, which related an extended discussion on the record between appellant and the sentencing court exploring in detail why appellant sought to withdraw his plea, in which the possibility of removal was never discussed. The coram nobis court further observed that appellant's testimony regarding his discussions with trial counsel as to whether a single felony could subject him to removal "seem[ed] to belie that [appellant] had no knowledge at all about what a guilty plea would entail."

Given these factual findings, the coram nobis court correctly concluded that trial counsel did not render deficient performance. *See Sanmartin Prado*, 448 Md. at 713-14 (observing that trial counsel correctly advised his client that the offense at issue was a "deportable offense" and that *Padilla* required "[n]othing more"). It therefore correctly denied appellant's claim.

In passing, we note that appellant's complaints about the factual findings of the coram nobis court are unavailing. There was "competent evidence" to support the coram nobis court's factual findings, *Johnson*, *supra*, 440 Md. at 568, specifically, trial counsel's

testimony, which the coram nobis court expressly found credible.[15] The coram nobis court's factual findings were not clearly erroneous. Because those findings led, inexorably, to the legal conclusion that trial counsel's advice satisfied the constitutional requirement, the court's ruling in that regard is likewise correct.

Nor is there any merit to appellant's contention that the coram nobis judge violated due process in failing to fulfill her role as an impartial decision-maker. There "is no blanket rule prohibiting a trial court from questioning witnesses or counsel, particularly at a bench trial." *Furda v. State*, 194 Md. App. 1, 63 (2010). Moreover, appellant's contention of judicial bias is belied by the judge's careful attention to his objection, which she sustained, to additional testimony from trial counsel on the second day of the coram nobis proceedings. Our careful review of the record gives us no reason to question either the fairness, integrity, or impartiality of the judge.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS ASSESSED TO APPELLANT.

[15] As for appellant's contention that no substantial evidence supports trial counsel's testimony that he advised appellant to seek the advice of an immigration attorney regarding the potential consequences of his guilty plea, we think this misapprehends the definition of evidence. Trial counsel's testimony, credited by the court, *was* evidence. Maryland Criminal Pattern Jury Instruction ("MPJI-CR") 3:01 (Maryland State Bar Association 2012, 2018 Repl.). Moreover, there is no corroboration requirement applicable to such testimony. Rather, the finder of fact is free to "believe all, part, or none of the testimony of any witness." MPJI-CR 3:10.