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Shaneel Myles

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RECENT DEVELOPMENT

STATE V. EBB: A PETITION THAT FAILS TO INCLUDE AN AVERMENT OF INNOCENCE BUT OTHERWISE COMPLIES WITH MARYLAND RULE 4-332(d) MAY BE AMENDED IF DOING SO WOULD DO SUBSTANTIAL JUSTICE; A WITNESS' RECALLED TESTIMONY IS CONSIDERED SUFFICIENT NEWLY DISCOVERED EVIDENCE, ENTITLING DEFENDANT TO A HEARING.

By: Shaneel Myles

The Court of Appeals of Maryland held that a petitioner asserted sufficient newly discovered evidence under Maryland Rule 4-332(d) that could create a “substantial or significant possibility” that the outcome of his original trial may have been different. *State v. Ebb*, 452 Md. 634, 654, 158 A.3d 965, 977 (2017). The newly discovered evidence contained a witness’ recanted testimony, which the prosecution had relied on to secure the petitioner’s conviction. *Id.* at 658, 158 A.3d at 979. This entitled the petitioner to a hearing under section 8-301(e) of the Maryland Criminal Procedure Code. *Id.* at 660, 158 A.3d at 980. The court further held that a petition for a writ of actual innocence that complies with the pleading standards of 4-332(d), but fails to aver actual innocence, may be granted leave to amend. *Id.* at 660-61, 158 A.3d at 980-81. However, leave to amend will only be granted if the court determines that allowing the amendment would do substantial justice. *Id.*

In 1993, Jeffrey D. Ebb, Sr. (“Ebb”) was convicted of two counts of felony murder for killing two men during an attempted robbery. The State produced several witnesses who testified about Ebb’s criminal agency, the most pertinent being Stephanie Stevenson (“Stevenson”) and Jerome House-Bowman (“House-Bowman”). Stevenson testified that she participated in the robbery, but stated that Ebb, acting alone, shot the victims. House-Bowman, Stevenson’s uncle, corroborated her testimony and testified that Ebb admitted to him that he committed the robbery, shot three employees and then described how he fled the scene. Ebb was subsequently convicted and sentenced to life without the possibility of parole.

In May 2015, Ebb filed a *pro se* petition for a writ of actual innocence under section 8-301 of the Maryland Criminal Procedure Code (“section 8-301”). The petition alleged newly discovered evidence regarding the credibility of House-Bowman’s testimony. In January 2013, House-Bowman admitted to lying in court at Ebb’s trial to save his niece, Stevenson, from being convicted of murder. Despite the new evidence, the Circuit Court for Montgomery County denied the petition. The circuit court found that Ebb only alleged impeaching evidence, rather than material, since Ebb had been linked to the crime by several witnesses. Furthermore, the

court stated that because there was overwhelming evidence of Ebb's guilt outside of House-Bowman's testimony, his recantation would not create a "substantial possibility of a different outcome." Ebb appealed the circuit court's denial, which was reversed by the Court of Special Appeals of Maryland. In response, the State appealed and was granted certiorari.

The Court of Appeals of Maryland began its analysis by determining whether granting Ebb leave to amend his petition, pursuant to Maryland Rule 4-332(i)(1)(B) and (h), would provide "substantial justice." *Ebb*, 452 Md. at 660-61, 158 A.3d at 980-81. In its discussion, the court first considered whether Ebb's petition complied with the pleading requirements of section 8-301(b) and Maryland Rule 4-332(d). *Id.* at 643, 158 A.3d at 970-71. The court noted that under section 8-301, the petition is not required to prove its allegations. *Id.* at 645, 158 A.3d at 971. Instead, the petition only needs to assert sufficient grounds for relief in order to be granted a hearing. *Id.* (citing *Douglas v. State*, 423 Md. 156, 179, 31 A.3d 250, 267 (2011)).

In the instant case, the court held that Ebb's petition satisfied section 8-301(b)(3)'s "newly discovered evidence" requirement. *Ebb*, 452 Md. at 647-48, 158 A.3d at 972-73. Under section 8-301, petitions must also meet the pleading standard of Maryland Rule 4-332(d)(1)-(13). *Id.* Rule 4-332 was adopted by the court to provide further clarification on the pleading requirements of section 8-301(b). *Id.* Since the rule's adoption, to qualify as "newly discovered evidence," the new evidence proffered must meet the standard of Rule 4-332(d)(6) and (8). *Id.*

The court then analyzed the technical and substantive pleading requirements of Rule 4-332(d). *Ebb*, 452 Md. at 649-50, 158 A.3d at 973-74. Under section 8-301, petitions are not required to be dismissed solely for failing to comply with Rule 4-332's technical requirements. *Id.* Rather, Rule 4-332(h) allows amendments to be freely given to serve "substantial justice." *Id.* Additionally, under Rule 4-332(d)(6), the petition must allege newly discovered evidence that could not have been discovered in time to move for a new trial, pursuant to Maryland Rule 4-331. *Id.* at 643-44, 158 A.3d at 970-71. The new evidence must create a "substantial or significant possibility" that the outcome of the trial *may* have been different. *Id.* at 652, 158 A.3d at 975.

In his petition, Ebb asserted that House-Bowman did not recant his false testimony until 2013, twenty years after his trial. *Ebb*, Md. 452 at 651, 158 A.3d at 975. Ebb further stated that he had no means of knowing that House-Bowman would lie under oath and later recant his testimony. *Id.* Thus, in analyzing Ebb's petition, the court found that his statements sufficiently satisfied the newly discovered evidence requirement of Rule 4-332(d)(6). *Id.* Furthermore, the court found that the State extensively relied on House-Bowman's testimony to establish Ebb's guilt. *Id.* at 657-58 A.3d at 978-79. This created a "substantial or significant possibility" that the outcome of Ebb's trial may have been different, thereby satisfying Rule 4-332(8)'s requirement. *Id.*

Lastly, the court addressed whether Ebb's petition should be dismissed for failure to aver his innocence, as required by Maryland Rule 4-332(d)(9). *Ebb*, 452 Md. at 652-54, 158 A.3d at 975-76. In its analysis, the court concluded that a petition that only excludes an averment of innocence is not a sufficient basis for dismissal under section 8-301. *Id.* at 654, 158 A.3d at 976 (citing *Keyes v. State*, 215 Md. App. 660, 84 A.3d 141 (2014)). Also, the court noted that even though Ebb was entitled to a hearing, the ultimate decision on his claims would be left to the trial court's discretion. *Ebb*, 452 Md. at 660, 158 A.3d at 980. The court remanded, requiring that Ebb declare he is "actually innocent" should the lower court grant leave to amend his petition. *Id.* at 655, 185 A.3d at 977.

In *Ebb*, the Court of Appeals of Maryland elaborated on what constitutes newly discovered evidence that creates a "substantial or significant possibility" that the outcome of a trial could have been different. The court's holding demonstrates its leniency in applying the amendment provision of Maryland Rule 4-332 (i)(1)(B) and (h) to accomplish "substantial justice." The court further noted that *pro se* petitions will continue to be liberally construed. But, despite its leniency, the court expressly requested that Ebb declare that he is "actually innocent" of the charges against him in his amended petition. This indicates the court's interest in preserving the writ of actual innocence for petitioners who have been innocently imprisoned. Finally, the court emphasized the importance of granting a petitioner's request for a hearing when they have complied with the pleading requirements because *viva voce* communication may be more persuasive than a written document. Thus, petitioners who have requested and satisfied the hearing requirements are entitled to the benefit of vocal communication with a judge under section 8-301(e)(1) and Maryland Rule 4-332(j).