

Rule 4-332. The Court made no decision regarding those other matters but acquiesced in the Committee's suggestion that Rule 4-332 be given further consideration by the Committee in light of the discussion generally and comments offered by members of the Court.

With one other exception not relevant here, the Court formally adopted all of the other proposals in the 168th Report, including the amendments to Rules 4-403, 4-705, and 4-706. We respectfully suggest that was an unintended oversight, as it was agreed that those Rules needed to be amended to refer to the Collateral Review Division, rather than the Office of the Public Defender. Submitted with this Supplement are the appropriate amendments to those Rules, to make them conform to what we believe was the Court's actual wish.

Following the open hearing, the Chair and the Reporter reviewed their notes regarding the discussion on Rule 4-332, prepared some amendments to take account of the discussion, and sent those proposals to the principal consultants that had worked with the Committee in the development of the Rule. With one exception, there was a consensus on the proposed changes, which were then sent to the members of the Rules Committee for their review and comment. No comment was received.

The one lingering area of disagreement between the Committee and the Public Defender's Office concerns subsection (d)(8) of the proposed Rule. As submitted with the 168th Report, that section required that the petition allege that the newly discovered evidence creates a substantial or significant possibility that, *if that evidence had been admitted at trial*, the result may have been different. Two concerns were raised with respect to that provision. One was that it did not take account of a conviction based on a guilty plea, where there would have been no trial. The Committee has addressed that problem by (1) proposing an amendment to subsection (d)(8) to clarify that it applied only where the conviction followed a trial, and (2) proposing a new subsection (d)(9) dealing with a conviction based on a guilty plea. The Public Defender also objected to any reference to whether, if the new evidence had been available at trial, it would have been admissible (or, in a guilty plea situation, it would have impacted on the court's finding of a factual basis for the plea), and the Public Defender continues to maintain that objection.

To present that policy issue for the Court's consideration and resolution, the Committee submits with this Supplement two alternative versions of Rule 4-332. They both incorporate all of the agreed-upon changes and are identical to

that extent. Alternative A presents the Committee's proposal with respect to the one lingering issue in section (d). Alternative B presents the Public Defender's proposal.

Respectfully submitted,

Alan M. Wilner
Chair

Linda M. Schuett
Vice Chair

AMW/LMS:cdc

MARYLAND RULES OF PROCEDURE
TITLE 4 - CRIMINAL CAUSES
CHAPTER 300 - TRIAL AND SENTENCING

ADD new Rule 4-332, as follows:

Rule 4-332. WRIT OF ACTUAL INNOCENCE

(a) Scope

This Rule applies to an action seeking a writ of actual innocence as provided by Code, Criminal Procedure Article, §8-301.

(b) Filing; Caption

An action for a writ of actual innocence is commenced by the filing of a petition in the court where the conviction took place. The caption of the petition shall state the number of the criminal case to which the petition relates. If practicable, the petition shall be filed in the criminal action.

(c) Timing

A petition under this Rule may be filed at any time.

(d) Content of Petition

The petition shall be in writing, shall be signed ~~and~~ verified by the petitioner or the petitioner's attorney, and shall state:

(1) the court in which the indictment or criminal information was filed and the file number of that case;

(2) if the case was removed to another court for trial, the identity of that court;

(3) each offense of which the petitioner was convicted, the date of the judgment of conviction, and the sentence imposed;

(4) if the judgment was appealed, the case number in the appellate court, a ~~detailed~~ concise description of the issues raised in the appeal, the result, and the date of the appellate court's mandate;

(5) for each motion or petition for post-judgment relief, the court in which the motion or petition was filed, the case number assigned to each proceeding, a ~~detailed~~ concise description of the issues raised, the result, and the date of disposition;

(6) that the request for relief is based on newly discovered evidence which, with due diligence, could not have been discovered in time to move for a new trial pursuant to Rule 4-331;

(7) a ~~detailed~~ description of the newly discovered evidence, how and when it was discovered, why it could not have been discovered earlier, and, if the issue of whether ~~due diligence would have revealed the newly discovered evidence~~ the evidence could have been discovered in time to move for a new trial pursuant to Rule 4-331 was raised or decided in any earlier appeal or post-judgment proceeding, the identity of the appeal or proceeding and the decision on that issue;

(8) if the conviction or sentence being challenged followed a trial, including a trial based on agreed-upon facts or stipulated evidence, that the newly discovered evidence creates a substantial or significant possibility, as that standard has been

judicially determined that, **if it the evidence had been admitted at trial**, the result may have been different, ~~as that standard has been judicially determined, and the factual and legal the~~ basis for that statement;

~~(9) that the petitioner is actually innocent and did not commit the crime;~~

(9) if the conviction or sentence being challenged followed the court's acceptance of a guilty plea, that, if the evidence had been known when the plea was entered, there is a substantial or significant possibility, as that standard has been judicially determined, that the court would not have found a factual basis for the plea, and the basis for that statement;

(10) that the conviction sought to be vacated is based on an offense that the petitioner did not commit;

~~(10)~~ (11) if the petitioner is not already represented by counsel, whether the petitioner desires to have counsel appointed by the court and, if so, facts establishing indigency;

~~(11)~~ (12) that a copy of the petition, together with all attachments, was mailed to the State's Attorney of the county in which the petition was filed;

~~(12)~~ (13) the relief requested; and

~~(13)~~ (14) whether a hearing is requested.

(e) Notices

(1) To State's Attorney

The petitioner shall send a copy of the petition with all

attachments to the State's Attorney of the county in which the petition was filed.

(2) To Victim or Victim's Representative

Upon receipt of the petition, the State's Attorney shall notify any victim or victim's representative of the filing of the petition, as provided by Code, Criminal Procedure Article, §11-104 or §11-503.

(3) To Public Defender

If the petitioner has requested an attorney and has alleged inability to employ one, the court shall send a copy of the petition and attachments to the Collateral Review Division of the Office of the Public Defender.

(f) Response by State's Attorney

Within 90 days after receipt of the petition and attachments, the State's Attorney shall file a response, serve a copy on the petitioner, and, if indigency is alleged, send a copy to the Collateral Review Division of the Office of the Public Defender.

(g) Response by Public Defender

Within 30 days after ~~receipt of the petition and attachments,~~ the State files its response, or, if no response is timely filed, the expiration of the time allowed for the State's response in section (f) of this Rule, the Office of the Public Defender shall (1) enter its appearance, (2) or notify the court in writing that it declines to provide representation to the petitioner, or (3) request from the court an extension of the

time for deciding whether to provide representation to the petitioner and state a specific reason for the request.

(h) Amendments

Amendments to the petition shall be freely allowed in order to do substantial justice. If an amendment is made, the court shall allow the State a reasonable opportunity to respond to the amendment.

(i) ~~Denial~~ Dismissal of Petition; Appointment of Counsel

(1) ~~Denial~~ Dismissal of Petition

Upon consideration of the petition and the State's response, the court may (A) ~~deny~~ dismiss the petition if it finds as a matter of law that the petition fails to comply substantially with the requirements of section (d) of this Rule or otherwise fails to assert grounds on which relief may be granted or (B) grant leave to amend the petition to correct the deficiency. If the court finds a lack of proper venue, the court shall transfer the petition to the court with proper venue.

(2) Appointment of Counsel

If the court finds that a petitioner who has requested the appointment of counsel is indigent and the Office of the Public Defender has declined to provide representation, the court may appoint counsel after the State has filed its response unless (A) the court denies the petition as a matter of law or (B) counsel has already filed an appearance to represent the petitioner.

(j) Hearing

(1) When Required

Except as provided in subsection (i)(1) of this Rule, the court shall hold a hearing on the petition if the petition substantially complies with the requirements of sections ~~(b) and~~ (d) of this Rule and a hearing was requested.

(2) Right of Victim or Victim's Representative to Attend

A victim or victim's representative has the right to attend a hearing on the petition as provided under Code, Criminal Procedure Article, §11-102.

(k) Burden of Proof

The petitioner has the burden of proof to establish a right to relief.

(l) Ruling

(1) Actions of Court

If the court finds that the petitioner is entitled to relief, it may set aside the verdict or judgment of conviction, grant a new trial, re-sentence the petitioner, or correct the sentence.

(2) Reasons for Ruling

The court shall state the reasons for its ruling on the record.

Source: This Rule is new.

MARYLAND RULES OF PROCEDURE
TITLE 4 - CRIMINAL CAUSES
CHAPTER 300 - TRIAL AND SENTENCING

ADD new Rule 4-332, as follows:

Rule 4-332. WRIT OF ACTUAL INNOCENCE

(a) Scope

This Rule applies to an action seeking a writ of actual innocence as provided by Code, Criminal Procedure Article, §8-301.

(b) Filing; Caption

An action for a writ of actual innocence is commenced by the filing of a petition in the court where the conviction took place. The caption of the petition shall state the number of the criminal case to which the petition relates. If practicable, the petition shall be filed in the criminal action.

(c) Timing

A petition under this Rule may be filed at any time.

(d) Content of Petition

The petition shall be in writing, shall be signed ~~and~~ verified by the petitioner or the petitioner's attorney, and shall state:

(1) the court in which the indictment or criminal information was filed and the file number of that case;

(2) if the case was removed to another court for trial, the identity of that court;

(3) each offense of which the petitioner was convicted, the date of the judgment of conviction, and the sentence imposed;

(4) if the judgment was appealed, the case number in the appellate court, a ~~detailed~~ concise description of the issues raised in the appeal, the result, and the date of the appellate court's mandate;

(5) for each motion or petition for post-judgment relief, the court in which the motion or petition was filed, the case number assigned to each proceeding, a ~~detailed~~ concise description of the issues raised, the result, and the date of disposition;

(6) that the request for relief is based on newly discovered evidence which, with due diligence, could not have been discovered in time to move for a new trial pursuant to Rule 4-331;

(7) a ~~detailed~~ description of the newly discovered evidence, how and when it was discovered, why it could not have been discovered earlier, and, if the issue of whether ~~due diligence would have revealed the newly discovered evidence~~ the evidence could have been discovered in time to move for a new trial pursuant to Rule 4-331 was raised or decided in any earlier appeal or post-judgment proceeding, the identity of the appeal or proceeding and the decision on that issue;

(8) that the newly discovered evidence creates a substantial or significant possibility, ~~that, if it had been admitted at trial~~ as that standard has been judicially determined, that the result may have been different, ~~as that standard has been~~

~~judicially determined, and the factual and legal~~ the basis for that statement;

~~(9) that the petitioner is actually innocent and did not commit the crime;~~

(9) that the conviction sought to be vacated is based on an offense that the petitioner did not commit;

(10) if the petitioner is not already represented by counsel, whether the petitioner desires to have counsel appointed by the court and, if so, facts establishing indigency;

(11) that a copy of the petition, together with all attachments, was mailed to the State's Attorney of the county in which the petition was filed;

(12) the relief requested; and

(13) whether a hearing is requested.

(e) Notices

(1) To State's Attorney

The petitioner shall send a copy of the petition with all attachments to the State's Attorney of the county in which the petition was filed.

(2) To Victim or Victim's Representative

Upon receipt of the petition, the State's Attorney shall notify any victim or victim's representative of the filing of the petition, as provided by Code, Criminal Procedure Article, §11-104 or §11-503.

(3) To Public Defender

If the petitioner has requested an attorney and has

alleged inability to employ one, the court shall send a copy of the petition and attachments to the Collateral Review Division of the Office of the Public Defender.

(f) Response by State's Attorney

Within 90 days after receipt of the petition and attachments, the State's Attorney shall file a response, serve a copy on the petitioner, and, if indigency is alleged, send a copy to the Collateral Review Division of the Office of the Public Defender.

(g) Response by Public Defender

Within 30 days after ~~receipt of the petition and attachments,~~ the State files its response, or, if no response is timely filed, the expiration of the time allowed for the State's response in section (f) of this Rule, the Office of the Public Defender shall (1) enter its appearance, (2) or notify the court in writing that it declines to provide representation to the petitioner, or (3) request from the court an extension of the time for deciding whether to provide representation to the petitioner and state a specific reason for the request.

(h) Amendments

Amendments to the petition shall be freely allowed in order to do substantial justice. If an amendment is made, the court shall allow the State a reasonable opportunity to respond to the amendment.

(i) ~~Denial~~ Dismissal of Petition; Appointment of Counsel

(1) ~~Denial~~ Dismissal of Petition

Upon consideration of the petition and the State's response, the court may (A) ~~deny~~ dismiss the petition if it finds as a matter of law that the petition fails to comply substantially with the requirements of section (d) of this Rule or otherwise fails to assert grounds on which relief may be granted or (B) grant leave to amend the petition to correct the deficiency. If the court finds a lack of proper venue, the court shall transfer the petition to the court with proper venue.

(2) Appointment of Counsel

If the court finds that a petitioner who has requested the appointment of counsel is indigent and the Office of the Public Defender has declined to provide representation, the court may appoint counsel after the State has filed its response unless (A) the court denies the petition as a matter of law or (B) counsel has already filed an appearance to represent the petitioner.

(j) Hearing

(1) When Required

Except as provided in subsection (i)(1) of this Rule, the court shall hold a hearing on the petition if the petition substantially complies with the requirements of sections ~~(b) and~~ (d) of this Rule and a hearing was requested.

(2) Right of Victim or Victim's Representative to Attend

A victim or victim's representative has the right to attend a hearing on the petition as provided under Code, Criminal Procedure Article, §11-102.

(k) Burden of Proof

The petitioner has the burden of proof to establish a right to relief.

(l) Ruling

(1) Actions of Court

If the court finds that the petitioner is entitled to relief, it may set aside the verdict or judgment of conviction, grant a new trial, re-sentence the petitioner, or correct the sentence.

(2) Reasons for Ruling

The court shall state the reasons for its ruling on the record.

Source: This Rule is new.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 400 - POST CONVICTION PROCEDURE

AMEND Rule 4-403 to add the words "Collateral Review Division of the" and to correct an obsolete cross reference, as follows:

Rule 4-403. NOTICE OF PETITION

Upon receipt of a post conviction petition, the clerk shall promptly notify the county administrative judge and the State's Attorney. When the petition relates to an action tried in that court, it shall be filed in the action. If the petition alleges that the petitioner is indigent, the clerk shall promptly notify the Collateral Review Division of the Office of the Public Defender by forwarding a copy of the petition.

Cross reference: Code, ~~Article 27A, §4~~ Criminal Procedure Article, §16-204.

Source: This Rule is derived from former Rule BK41 e.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 - POST CONVICTION DNA TESTING

AMEND Rule 4-705 to add the words "Collateral Review Division of the" to section (b), as follows:

Rule 4-705. NOTICE OF PETITION

(a) To State's Attorney

Upon receipt of a petition, the clerk promptly shall forward a copy of it to the State's Attorney and the county administrative judge. If the petition seeks a search of the DNA database or log of an identified law enforcement agency, the State's Attorney shall send a copy of the petition to that law enforcement agency.

(b) To Public Defender

If the petition alleges that the petitioner is unable to pay the costs of testing or to employ counsel, the clerk shall promptly forward a copy of the petition to the Collateral Review Division of the Office of the Public Defender.

Source: This Rule is new.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 700 - POST CONVICTION DNA TESTING

AMEND Rule 4-706 to add the words "Collateral Review Division of the," as follows:

Rule 4-706. ANSWER; MOTION TO TRANSFER

. . .

(d) Service

The State's Attorney shall serve a copy of the answer or motion to transfer on the petitioner and, if the petitioner alleges an inability to pay the costs of testing or to employ counsel, on the Collateral Review Division of the Office of the Public Defender.

Source: This Rule is new.