Circuit Court for Baltimore County
Case No. 03-K-97-005134

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1183

September Term, 2016

EDWARD ERNEST MCCORKLE

v.

STATE OF MARYLAND

Nazarian,
Shaw Geter,
Davis, Arrie W.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: January 26, 2018

In 1998, a jury, in the Circuit Court for Baltimore County, convicted Edward McCorkle, appellant, of first-degree murder and use of a handgun in the commission of a crime of violence. McCorkle was sentenced to a term of life imprisonment without parole for the murder conviction and a consecutive term of twenty years' imprisonment for the handgun conviction.

In 2016, McCorkle filed a Petition for Writ of Actual Innocence and Request for Hearing based on newly discovered evidence. The circuit court denied McCorkle's petition without holding a hearing. In this appeal, McCorkle presents the following question for our review:

Did the circuit court err in denying his petition without a hearing?

For reasons to follow, we answer McCorkle's question in the affirmative and reverse the judgment of the circuit court.

BACKGROUND

On December 1, 1997, at approximately 1:00 p.m., Kevin Reynolds was shot and killed at an apartment complex in Baltimore County. Hours later, McCorkle was arrested in connection with the shooting.

At trial, evidence was presented that Reynolds had been "involved" with McCorkle's ex-girlfriend and that, a few months prior to the shooting, Reynolds and McCorkle had engaged in a violent encounter, during which both men received stab wounds. McCorkle was ultimately charged as a result of that incident and was scheduled to go to trial on December 2, 1997. At trial, the State theorized that McCorkle murdered Reynolds to prevent him from testifying at the trial on December 2nd.

During its case-in-chief, the State called two witnesses who were present at the apartment complex around the time of the shooting. The first witness, Aaron Grimes, testified that he saw an individual matching McCorkle's description fleeing the scene on a bicycle moments after the shooting. Grimes later identified McCorkle as the fleeing man after Grimes saw McCorkle on a television news broadcast following his arrest. The second witness, Mario Williams, testified that he also saw a man on a bicycle fleeing the scene of the shooting, but Williams' description of that individual differed from Grimes'. Moreover, Williams testified that he did not recognize McCorkle and that McCorkle was not the individual he witnessed fleeing the scene. The State also called Ricky Kemper, an inmate housed with McCorkle at the Baltimore County Detention Center, who testified that McCorkle confessed to killing Reynolds.

McCorkle later testified that he never confessed to Kemper and that Kemper manufactured his testimony after stealing legal documents from McCorkle. In support of his claim, McCorkle called several inmates as witnesses, one of whom testified that he saw Kemper enter McCorkle's cell and leave with "a legal pad and other court documents."

McCorkle also denied killing Reynolds, testifying that, at about 1:30 p.m. on the day of the shooting, he was paying a bill at the Baltimore Gas & Electric ("BG&E") store in Mondawmin Mall, which was about a 30-minute drive from the apartment complex. As corroboration, McCorkle presented a receipt of the transaction from that day; however, the exact time of the transaction could not be confirmed by the receipt because a time stamp was not included. McCorkle also introduced into evidence a statement by the BG&E teller who handled his transaction, which indicated that the teller processed 351 transactions that

day; that McCorkle's transaction was number 236; and, that the teller had reached transaction number 100 at approximately 10:30-11:00 a.m. Jose Pineda, head custodian of records for BG&E, testified that, based on the number of transactions and customer frequency that day, McCorkle's transaction may have occurred around 1:30 p.m.

McCorkle was ultimately convicted and, approximately 18 years later, he filed the instant Petition for Writ of Actual Innocence and Request for a Hearing (the "Petition"). In his Petition, McCorkle alleged that he had recently become aware of two pieces of evidence to support his claim of innocence. The first piece of evidence came to McCorkle's attention during a conversation he had with a childhood friend, Richard Dismel, in 2009. During that conversation, Dismel stated that two of his older sisters, Gail and Cynthia Dismel, had told him "they had seen 'Tommy' (Mr. McCorkle's nickname) at BG&E on the day that he was arrested." McCorkle's attorney later met with Gail Dismel, "who confirmed that she had seen Mr. McCorkle in the BG&E payment center on December 1, 1997, about 1:30 p.m." In his Petition, McCorkle claimed that he was "previously unaware that Ms. Dismel could have confirmed his alibi," despite efforts made by McCorkle to "identify any witness that could affirmatively corroborate his claim that he personally paid the BG&E bill sometime shortly after 1:30 p.m."

The second piece of evidence offered by McCorkle concerned an individual, Nelson Reid, about whom McCorkle had "only a general knowledge" prior to trial but who McCorkle later learned more about after speaking with another inmate in 2012. According to McCorkle, in the months leading up to the murder of Reynolds, Reid was wanted by the police for the shooting death of his estranged girlfriend, for firing a gun through his

vehicle's sunroof when the police attempted a traffic stop and, for beating and robbing someone in the 3800 block of Clairemont Avenue in Baltimore City. McCorkle also alleged that Reid matched the description provided by the eyewitnesses to the Reynolds shooting; that Reid occupied an apartment in the same apartment building where Reynolds was killed; that Reid was present at that apartment at the time of the shooting and, that "the apartment complex was attempting to evict him for nonpayment of rent." McCorkle's attorney ultimately made contact with Reid, who confirmed that he resided at the apartment complex and was present at the time of the shooting; however, Reid denied any involvement in Reynolds's death. Reid also stated that, at the time of the shooting, he was wanted for murder and was hiding from police and that he had access to multiple firearms.

In his Petition, McCorkle asserted that both pieces of evidence constituted "newly discovered evidence" and gave rise to "a substantial possibility that the jury would have acquitted [him] of murder." As for the evidence concerning Reid, McCorkle maintained that, had he known that Reid was at the apartment complex at the time of the shooting, he could have argued at trial that Reid killed Reynolds "because he feared that Mr. Reynolds had identified him as a wanted fugitive or perhaps because Mr. Reynolds was involved in efforts to evict Mr. Reid." McCorkle also noted that Reid fit the description of the person seen fleeing the scene of the shooting; that Reid was wanted for shooting someone to death; and, that Reid had a history of violent behavior, including shooting at the police to avoid capture.

As for Ms. Dismel's testimony, McCorkle claimed that such evidence would have corroborated his alibi and established reasonable doubt. McCorkle maintained that, given

the timeframe established by the State, in order for the jury to convict him of murder, it would have had to believe that McCorkle killed Reynolds at 1:00 p.m., fled on a bicycle, changed clothes, disposed of the weapon, traveled to Mondawmin Mall and arrived at the BG&E store by 1:30 p.m. to pay his bill. McCorkle averred, therefore, that Ms. Dismel's testimony "would have rendered the State's theory of the case implausible."

The circuit ultimately denied McCorkle's Petition without a hearing. In so doing, the court found that McCorkle failed to exercise due diligence in discovering, in a timely fashion, the information provided by Gail Dismel:

> Contained within the discovery was an interview with Yvonne Brisco, the BG&E teller who handled [McCorkle's] transaction which was 236 of 351 for the day….[McCorkle] could have subpoenaed the BG&E records of those customers numbered between 1 and 350….Additionally, those records could have been examined for familiar names. Although the Petition is silent as to why Ms. Dismel was at Mondawmin Mall on December 1, 1997, she may have been there to pay a BG&E bill….Had [McCorkle's] inquiry of the BG&E records revealed the name of Dismel, certainly he would have known the name and conducted further inquiry of those acquaintances prior to trial or in preparation for argument in support of his Motion for a New Trial.

The circuit court also found that, even had McCorkle exercised due diligence in discovering Gail Dismel's testimony, his Petition failed to establish that the evidence was material or that there was a substantial or significant possibility that the jury's verdict would have been affected by the evidence:

> Here, the statement from Ms. Dismel, even if credible, might provide corroboration to [McCorkle's] testimony that he was at BG&E paying his utility bill around the time of the murder. However, that does not mean that [McCorkle] still would not have had time to murder the victim.
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> [In addition], the information provided by [McCorkle] comes from an individual who [McCorkle] describes as a childhood friend. It is suspicious

> that Ms. Dismel has stood silent for eleven years with the supposed knowledge that she saw [McCorkle] on the very day he was arrested for murder. [McCorkle] does not explain how Ms. Dismel is certain that she saw [McCorkle] on the day and time alleged in the Petition.
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> Indeed…the only information provided in the Petition is that: "Ms. Dismel confirmed that she had seen Mr. McCorkle in the BG&E Payment Center on December 1, 1997, about 1:30 p.m." Allegedly she was there with her now deceased sister, Cynthia Dismel. There is no explanation as to why the Dismel sisters were at the Mondawmin Mall or why eleven years later a seemingly innocuous encounter would leave a lasting impression. If indeed the Dismel sisters were there to pay a BG&E bill, then, as suggested previously, that could have been discovered had [McCorkle] subpoenaed the records of those paying BG&E bills at or around the time [McCorkle] was allegedly paying his utility bill.
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> [McCorkle] claims that Richard Dismel told him that his sisters knew [McCorkle] as "Tommy," which he claims is his nickname. Nothing in the affidavit provided by [McCorkle's attorney] suggests that Ms. Dismel knows [McCorkle] as "Tommy." [McCorkle] presents no independent evidence that his nickname is "Tommy."

As for the evidence regarding Nelson Reid, the circuit court likewise found that McCorkle's Petition failed to establish that the evidence created a substantial or significant possibility of a different result at trial:

> Nothing in the affidavit provided by [McCorkle's attorney] suggests with any clarity that Reid actually knows the date on which Reynolds was murdered….[N]one of the information presented by [McCorkle] regarding Mr. Reid indicates that he was involved in the murder of Mr. Reynolds. In fact, Reid denies murdering Mr. Reynolds.
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> The claim that Reid may have been present in the general vicinity of the scene of the crime, on December 1, 1997, is purely speculative. Reid told [McCorkle's attorney] that he "specifically recalled hearing shots." There is not trustworthy or independent evidence that the shots he heard related to the murder of Reynolds.
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> At best, the information, if believed, places Reid, a violent offender, as a possible resident within the grounds of Owings Manor Apartment Complex in Reisterstown. Other than the location, there is no link between Reid and Reynolds….[McCorkle] cannot affirmatively identify any motive for Reid to harm the victim.
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> The State argues that there is no corroborating evidence to confirm that any of Reid's statements are true. Even the affidavit signed by [McCorkle's attorney] admits that Reid claimed to have lived at the apartment complex under the name of an associate the name of whom Mr. Reid was unable to provide….The State's argument concludes with the fact that there is no evidence that Mr. Reid knew Mr. Reynolds or was connected to him in any way or had any motive to kill him.
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> The State's argument is more compelling than [McCorkle's].

STANDARD OF REVIEW

"The standard of review is *de novo* when appellate courts consider the legal sufficiency of a petition for writ of actual innocence that was denied without a hearing." *State v. Ebb*, 452 Md. 634, 643 (2017) (internal citations omitted). "The appellate court reviews the claims and allegations set forth in the petition and decides whether, on the face of the petition, they satisfy the [statutory pleading requirements]." *Hawes v. State*, 216 Md. App. 105, 133 (2014). Additionally, we determine whether the allegations in a petition "could afford [the petitioner] relief, if the allegations can be proven at the hearing, and we assume the facts in the light most favorable to [the petitioner], accepting all reasonable inferences that can be drawn from his petition." *Ebb*, 452 Md. at 656.

DISCUSSION

McCorkle argues that the circuit court erred in denying his Petition without first holding a hearing. McCorkle maintains that his Petition met all the statutory requirements

for pleading a petition for Writ of Actual Innocence and that, as a result, he was entitled to a hearing on his Petition. McCorkle also maintains that many, if not all, of the reasons provided by the court in denying his Petition were inappropriate given the procedural posture of the case.

The State counters that the circuit court properly denied McCorkle's Petition without a hearing because the Petition failed to make a *prima facie* showing of newly discovered evidence of actual innocence. Regarding Gail Dismel's testimony, the State argues that the testimony was "clearly discoverable" and that McCorkle failed to show how he exercised due diligence in attempting to discover the testimony in a timely manner. The State further maintains that Dismel's testimony was not material and did not tend to exonerate McCorkle because the testimony was both vague and unsupported by an affidavit and because "contrary evidence adduced at trial and believed by a jury established that McCorkle admitted to others that he killed Reynolds." As for the evidence concerning Nelson Reid, the State avers that McCorkle provided "no proof of diligence with respect to obtaining this information" and that "nothing in McCorkle's petition connected Reid to Reynold's murder."

Section 8-301 of the Criminal Procedure Article of the Maryland Code provides that certain individuals convicted of a crime in circuit court may file a petition for writ of actual innocence based on "newly discovered evidence." Md. Code, Crim. Proc. § 8-301(a). Upon such a filing, the court is required to hold a hearing on that petition if one is requested

and if the petition satisfies certain pleading requirements.[1] Md. Code, Crim. Proc. § 8-301(e). The court is permitted, however, to dismiss the petition without a hearing "if the court finds that the petition fails to assert grounds on which relief may be granted." *Id*. The "grounds" on which relief may be granted include a claim by the petitioner "that there is newly discovered evidence that: (1) creates a substantial or significant possibility that the result may have been different, as that standard has been judicially determined; and (2) could not have been discovered in time to move for a new trial under Maryland Rule 4-331."[2] Md. Code, Crim. Proc. § 8-301(a).

Maryland Rule 4-332, which was adopted in 2011, further elucidates the pleading requirements set forth in § 8-301. *See Smallwood v. State*, 451 Md. 290, 321 (2017) (noting that Rule 4-322 provides "procedural guidance on how to properly implement Crim. Proc. § 8-301[.]"). Specifically, Maryland Rule 4-332(d) provides, in pertinent part, that a petition filed under § 8-301 must state:

> (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;

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[1] The pleading requirements set forth in § 8-301, aside from those discussed herein, are mostly technical and not applicable in the instant case. Md. Code, Crim. Proc. § 8-301(b).

[2] Maryland Rule 4-331 provides, in pertinent part, that a court may grant a new trial or other appropriate relief based on newly discovered evidence, provided that the evidence could not have been discovered by due diligence within ten days of the verdict. Md. Rule 4-331(c). Except in cases involving certain DNA identification testing, such a motion must be filed "within one year after the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post-conviction relief[.]" Md. Rule 4-331(c)(1).

> (7) a 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 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;
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> (8) that the newly discovered evidence creates a substantial or significant possibility, as that standard has been judicially determined, that the result may have been different, and the basis for that statement[.]

Like § 8-301, Rule 4-332 requires a hearing to be held if one is requested and if the petition meets the procedural requirements set forth in the Rule. Md. Rule 4-332(j). Rule 4-332 also permits a court to dismiss a 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[.]" Md. Rule 4-332(i)(1). If, however, "a petitioner substantially complies with the requirements of CP § 8-301(b) and Rule 4-332(d) and asserts grounds that could, if proven, entitle the petitioner to relief, then he or she is entitled to a hearing on that petition." *Patterson v. State*, 229 Md. App. 630, 638 (2016), *cert. denied* 451 Md. 596 (2017).

In *Douglas v. State*, 423 Md. 156 (2011), the Court of Appeals discussed in detail the pleading requirements established by § 8-301 and, in particular, a petitioner's burden in establishing those requirements in order to merit a hearing:

> The language of the statute is key. It requires that a petition "assert" grounds for relief; it does not require the petitioner to satisfy the burden of proving those grounds in the papers submitted. Additionally, the plain language of the statute declares that a petitioner has the requisite grounds if he "*claims* that there is newly discovered evidence that: (1) creates a substantial or significant possibility that the result may have been different…; and (2) could not have been discovered in time to move for a new trial under Maryland Rule 4-331." C.P. § 8-301(a) (emphasis added). Nothing in the language of

> the statute requires more than that a petitioner plead those assertions before the hearing requirement is triggered.
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> This standard does not require that a trial court take impossibilities as truths. For example, if a petition asserts, as "newly discovered," evidence that was clearly known during trial, then the evidence cannot be "newly discovered," and the trial court may dismiss the petition without a hearing. Similarly, if a petition asserts procedural errors committed by the trial court, that is not "newly discovered evidence." If, however, the petition alleges newly discovered evidence that "could not have been discovered in time to move for a new trial under Maryland Rule 4-331," and which creates a substantial or significant possibility that the result may have been different," then it would be error to dismiss the petition merely because the petition itself did not convince the trial court without a hearing.

Id. at 179-81.

In *State v. Hunt*, 443 Md. 238 (2015), the Court of Appeals reaffirmed its holding in *Douglas*:

> We determined in *Douglas* that § 8-301 "imposes a burden of pleading, such that a petitioner is entitled to a hearing on the merits of the petition, provided the petition sufficiently pleads grounds for relief under the statute, includes a request for a hearing, and complies with the filing requirements" of § 8-301(b). *Douglas*, 423 Md. at 165, 31 A.3d at 255. Petitioners must "'assert' grounds for relief; [§ 8-301] does not require the petitioner to satisfy the burden of proving those grounds in the papers submitted." *Douglas*, 423 Md. at 179, 31 A.3d at 264. If a petitioner satisfied the pleading standard, § 8-301(e)(1) directs that a hearing be held.

Id. at 250-51.

In *State v. Ebb*, *supra*, the Court of Appeals again reaffirmed its holding in *Douglas*, this time noting that questions regarding whether a petitioner could prevail on his petition did not preclude his ability to obtain a hearing on that petition. *Ebb*, 452 Md. at 660. In that case, the petitioner, Jeffrey Ebb, was convicted on several charges, including felony murder, after a witness testified at trial that Ebb was the person who shot two individuals

during an armed robbery. *Id.* at 637-38. Twenty years later, the witness recanted his testimony and informed Ebb that he had lied during trial. *Id.* at 638. Ebb filed a petition for writ of actual innocence based on newly discovered evidence, and that petition was ultimately denied without a hearing. *Id.* at 640. Ebb appealed and, after this Court reversed the circuit court's decision, the State noted a petition for writ of certiorari, which the Court of Appeals granted. *Id.* at 643.

Although the Court of Appeals ultimately reversed this Court's decision on unrelated grounds, the Court held that Ebb was entitled to a hearing on his petition. *Id.* at 660. In so doing, the Court addressed an argument raised by the State, wherein the State challenged the credibility of the newly discovered evidence:

> We agree that there are serious questions regarding whether [Ebb] will be able to demonstrate that he should be entitled to a new trial, but that does not preclude his ability to obtain one. Consistent with *Douglas* and *Hunt*, although we conclude that [Ebb] may be entitled to a hearing on his petition, "it does not follow automatically…that he can prove his claim at that hearing." *See Hunt*, 443 Md. at 257, 116 A.3d at 488 (quoting *Douglas*, 423 Md. at 186, 31 A.3d at 268) (internal quotation marks omitted).
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> While it is unclear at this juncture whether [Ebb] will prevail on his petition, we hold that he has alleged sufficient "newly discovered evidence" that could create a "substantial or significant possibility" that his original trial may have been different, and is therefore entitled to a hearing under Crim. Proc. § 8-301(e)(1).

Ebb, 452 Md. at 659-60.

Thus, the question here is whether McCorkle's Petition set forth sufficient evidence that, if proven, was "newly discovered" and "creates a substantial or significant possibility that the result may have been different." For the evidence to be newly discovered, a petition

must plead facts showing that the evidence, with due diligence, could not have been discovered in time to move for a new trial under Rule 4-331. As for whether the evidence creates a "substantial or significant possibility" that the result may have been different, the Court of Appeals has established that the standard "'falls between 'probable,' which is less demanding than 'beyond a reasonable doubt,' and 'might,' which is less stringent than probable.'" *McGhie v. State*, 449 Md. 494, 510 (2016) (citations omitted). Finally, the petitioner merely needs to assert grounds for relief; he does not need to prove them in order to be entitled to a hearing. In deciding whether a petitioner has met that threshold burden, we assume the facts in a light most favorable to the petitioner and accept as true all reasonable inferences that can be drawn therefrom.

We hold that McCorkle has alleged sufficient grounds on which relief may be granted and, as a result, is entitled to a hearing on his Petition. McCorkle's Petition states that the evidence concerning Ms. Dismel and Nelson Reid was not discovered, despite due diligence, until 2009 and 2012, respectively, and both dates are beyond the point at which McCorkle could have moved for a new trial pursuant to Rule 4-331.[3] Additionally, McCorkle provided detailed descriptions of both pieces of evidence, explanations as to the circumstances surrounding when both pieces of evidence were discovered, and assertions as to why both pieces of evidence could not have been discovered earlier. In short, McCorkle satisfied his burden of pleading that each piece evidence was "newly discovered."

[3] McCorkle's direct appeal was filed by this Court on July 17, 2000.

As for their impact, a reasonable inference can be drawn that both pieces of evidence presented by McCorkle, if proven, create a substantial or significant possibility that the result of McCorkle's trial may have been different. McCorkle's primary defense at trial was that he was not present at the apartment complex around the time of the shooting, which occurred at approximately 1:00 p.m. In support, McCorkle testified that he was at the BG&E store at Mondawmin Mall around 1:30 p.m to pay a bill. Although McCorkle presented some evidence to corroborate his claim that he went to the BG&E store that day, he was unable to present any evidence, other than his own testimony, that he was at the store at 1:30 p.m. On cross-examination, the State challenged the veracity of McCorkle's claim and his inability to present independent evidence to pinpoint exactly when he was at the BG&E store. Thus, had Ms. Dismel testified, McCorkle would have had independent corroboration of his alibi, and a jury very well may have concluded that McCorkle was in fact at the BG&E store at 1:30 p.m.

Likewise, had McCorkle presented the evidence concerning Nelson Reid at trial, there is a significant possibility that such evidence may have led to a different result. According to McCorkle's Petition, Reid was at the apartment complex at the time of Reynold's murder and matched the description of the suspect who was seen fleeing the scene of the shooting. In addition, Reid was a violent fugitive who, at the time, had access to multiple firearms and was being actively pursued by the police in connection with a string of crimes, including the shooting death of his ex-girlfriend. When considered in conjunction with the general lack of evidence connecting McCorkle to Reynold's death and McCorkle's assertions that he was not present at the time of the shooting, the evidence

concerning Reid creates a substantial or significant possibility that the result of McCorkle's trial may have been different had that evidence been submitted to the jury. *See Moore v. State*, 154 Md. App. 578, 604 (2004) (noting that evidence proffered to show that someone other than the defendant committed the crime may be admissible).

To be sure, we are not suggesting that the circuit court's conclusions regarding McCorkle's "newly discovered evidence" are necessarily wrong, nor are we suggesting that McCorkle will, or should, ultimately prevail on his Petition. Rather, we simply hold that McCorkle's Petition has met the pleading requirements set forth in § 8-301 and Rule 4-332, such that he was entitled to a hearing on his Petition. Accordingly, the court erred in denying the Petition without a hearing.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED. COSTS TO BE PAID BY BALTIMORE COUNTY.