IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO. 10-10283

ORAL ARGUMENT REQUESTED

WILLIAM ERNEST KUENZEL,

Petitioner-Appellant,

v.

KIM T. THOMAS, Commissioner of the Alabama Department of Corrections, and the ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Respondents-Appellees.

Appeal from a Final Order Dismissing First Petition for a Writ of *Habeas Corpus* by the United States District Court for the Northern District of Alabama, Case No. CV-00-316-E (IPJ)(TMP)

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Dated: February 22, 2011

CERTIFICATE OF INTERESTED PERSONS

I hereby certify that, in accordance with 11th Cir. R. 26.1, the following is an alphabetical list of persons who have an interest in the outcome of this appeal:

Richard F. Allen: Commissioner, Alabama Department of Corrections (Terminated)

Rick L. Burgess: Co-Counsel for Petitioner

Donal Campbell: Commissioner, Alabama Department of Corrections (Terminated)

J. Clayton Crenshaw: Assistant Attorney General, State of Alabama

David Dretzin: Co-Counsel for Petitioner (Deceased)

Jeffrey E. Glen: Co-Counsel for Petitioner

Joe Hopper: Commissioner, Alabama Department of Corrections (Terminated)

Hon. Inge P. Johnson: United States District Court Judge, N.D. Ala.

Troy King: Attorney General, State of Alabama (Terminated)

David A. Kochman: Co-Counsel for Petitioner

William Ernest Kuenzel: Petitioner

Linda Jean Offord: Victim (Deceased)

William H. Pryor, Jr.: Attorney General, State of Alabama (Terminated)

Hon. T. Michael Putnam: United States Magistrate Judge, N.D. Ala.

Robert L. Rumsey: former-District Attorney, Talladega County

Luther Strange: Attorney General, State of Alabama

Kim T. Thomas: Commissioner, Alabama Department of Corrections

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Respectfully submitted,

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STATEMENT REGARDING AND REQUESTING ORAL ARGUMENT

Petitioner William Ernest Kuenzel respectfully submits that oral argument is warranted and necessary. This is a death penalty case where Petitioner's first *habeas corpus* petition has been summarily dismissed by the District Court on procedural grounds without any substantive review of the many claims of reversible constitutional error that fatally infected his trial.

Petitioner did not commit the crime for which he was convicted and sentenced to death. The issues on which this appeal turns are complex, novel, and in many ways unique to Petitioner. Oral argument will permit counsel to address any questions or reservations this Court may have about the issues at bar which ultimately will determine whether or not Mr. Kuenzel is put to death despite the existence of numerous, meritorious constitutional claims.

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JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. §§ 2241 and 2254(a), the United States District Court for the Northern District of Alabama ("District Court") has jurisdiction over the first *habeas corpus* petition ("Petition") of William Ernest Kuenzel ("Kuenzel"), a prisoner in state custody under a sentence of death. 28 U.S.C. § 2253 vests this Court with jurisdiction to review on appeal the District Court's final order dismissing the Petition.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is Kuenzel entitled to statutory and/or equitable tolling of 28 U.S.C. § 2244(d)'s limitation period during the time that the state court vacated its order dismissing Kuenzel's Rule 32 petition as untimely, restored his Rule 32 petition to the docket, and ordered the State to answer the petition, but where the state court reversed itself three years later – after AEDPA became effective – and dismissed the Rule 32 petition as untimely?

2. Has Kuenzel sufficiently demonstrated a likelihood that any juror would fail to convict him of murdering Linda Jean Offord to avoid any procedural default under the "miscarriage of justice" exception and have the merits of his constitutional claims addressed by the federal courts?

STATEMENT OF THE CASE[1]

Kuenzel, an inmate incarcerated on death row at Holman Correctional Facility since 1988, is before this Court for the third time challenging the dismissal of his first *habeas corpus* petition. Kuenzel always has maintained his complete innocence of the crime for which he was convicted. He had one trial, and was granted only one post-trial opportunity for discovery in over 17 years of post-conviction. Notably, that discovery was granted in 60(b) proceedings after the District Court dismissed the Petition; indeed, without having even taken briefing from the parties on the fact-intensive "miscarriage of justice" exception.

When Kuenzel last appeared before this Court following the District Court's second dismissal of the Petition, also on procedural grounds, he wrote that:

> He does not come within what some might deem as a class of suspect petitioners; namely, prisoners requesting yet another round of review for their case. To the contrary, Kuenzel has had no collateral review of his conviction — neither in federal court nor in the courts of Alabama. His case is the archetype of a proper federal *habeas corpus* claim, clamoring for review.

(R3.112-5 pp.2-3). Each of these statements remain true today. What has changed is that Kuenzel's case is even stronger now than the last time he was before this Court, while Respondents' case is much weaker.

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[1] References to the Record on Appeal indicate the volume number and then the document(s) number(s) ("R3.__"). In some instances, these are followed by page, exhibit and/or paragraph numbers indicated by appropriate abbreviations. References to ("T.___") refer to the pages of the 1988 trial transcript.

The central issue before this Court is not whether Kuenzel's underlying constitutional claims have merit. Kuenzel's Strickland and Brady claims document hornbook errors. In this case, the statement that a cornucopia of constitutional violations warrant reversal is not mere hyperbole — that is, if they are reached. Instead, at its core, the overriding question presented for adjudication is whether William Kuenzel's death sentence should be carried out without any review of his constitutional claims of trial error because he fails to demonstrate enough reasonable doubt about his guilt.

For the reasons set forth herein, Kuenzel respectfully submits that the answer is "No."

This Court has not yet defined the elements of evidentiary innocence required to pass through the Schlup Gateway,[2] but it cannot be the impenetrable fortress erected by the District Court. The price of admission for constitutional review must not be limited to scientific proof of the DNA variety.

Here, Harvey Venn *is* Respondents' evidence implicating Kuenzel in the murder of Linda Jean Offord — a fact Respondents conceded to now-Chief Justice Dubina during oral argument on February 14, 2007.

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[2] The term "Schlup Gateway" refers to the standard established by the Supreme Court in Schlup v. Delo, 513 U.S. 298, 327 (1995) , that a *habeas* petitioner may access a gateway to review of procedurally defaulted claims by demonstrating that, based on the total evidence, old and new, it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt.

While it is possible for a single witness to support an entire case, Venn cannot. The evidence that Venn murdered Ms. Offord without Kuenzel is overwhelming. Venn admits being at the murder scene. Multiple witnesses confirmed that they saw and/or spoke with Venn at the store between 10:00 and 11:10 p.m. Some of those witnesses saw Venn seated in his car with another white male, and we *now* know that not a single one identified Kuenzel as Venn's companion. As of September 2010, we also know about the interaction Venn described to the police between himself and David Pope – a white male he knew from school – in his car, at the store that night, during the disputed time frame.

Additionally, we know now that, on the night of the murder, Venn possessed a .16 gauge shotgun, the same gauge shotgun as the murder weapon.[3] Venn provided multiple inconsistent statements to the police and, most damning, the only physical evidence in this case directly implicates Venn: *Ms. Offord's blood was splattered on Venn's pants*. There was no blood found anywhere outside the convenience store, and Venn testified he never entered the store. There also was no blood in/on the "getaway" car, or on Kuenzel. Facing that conundrum, Venn lied, testifying the blood was squirrel blood. In return for his testimony against Kuenzel, Venn received a reduced sentence and was released in 1998.

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[3] At trial, Venn falsely testified that his shotgun was a .12 gauge, a critical misstatement of fact that the District Attorney heavily leveraged to suggest that the defense's witnesses were lying.

All parties agree that the record is sufficiently developed to fully adjudicate this case and, on this record, Kuenzel maintains there are ample justifications and ways to grant him guilt phase relief. In the first instance, Kuenzel submits that he should prevail on his statutory/equitable tolling arguments. But Kuenzel recognizes this is an ephemeral victory unless he also convinces this Court to allow him passage through the Schlup Gateway, as all of his claims in the Petition are procedurally defaulted. As such, this case will – and should – turn on the merits.

Throughout the two opinions at issue on this appeal, the District Court employed logistical gymnastics and contradictory reasoning to justify dismissing the Petition. Neither the facts nor the law require this inequitable result.

Kuenzel presents an extraordinary fact pattern – both procedurally and substantively – involving cutting-edge issues of *habeas* jurisprudence. Although the intersection of life and liberty is implicated in many cases, the stakes are never higher than where capital punishment and innocence collide. Here, Kuenzel should be afforded passage through the Schlup Gateway, because this is the extraordinary case worthy of establishing the factual benchmark of "gateway" innocence in this Circuit.

STATEMENT OF FACTS

A. Facts Relevant To Kuenzel's Claim For Statutory/Equitable Tolling Between May 6, 1996 and February 18, 1999

On October 4, 1993, within two years of the United States Supreme Court's denial of *certiorari* on direct appeal, Kuenzel filed his Rule 32 state post-conviction petition. On November 8, 1993, Respondents moved to dismiss the petition as untimely because it was filed more than two years after the Alabama Supreme Court denied Kuenzel's direct appeal. On October 6, 1994, the Talladega County Circuit Court ("Circuit Court") granted Respondents' motion to dismiss ("1994 Order").

Kuenzel moved the Circuit Court to reconsider its order dismissing his petition and, on October 18, 1995, a hearing was conducted on Kuenzel's motion.

On May 6, 1996, the Circuit Court vacated the 1994 Order dismissing Kuenzel's Rule 32 petition as untimely, reinstated the petition, and ordered Respondents to answer ("1996 Order"). (R3.112-1). The 1996 Order reads in its entirety:

> The Court sets aside its order of October 6, 1994 and orders this case restored to the docket. The Court further orders that the Respondent State of Alabama file an Answer to the allegations of the petition thirty (30) days from the date of this Order.

Id. Significantly, in advance of issuing the 1996 Order, the Circuit Court expressly advised Kuenzel that, "should I grant your motion [for reconsideration], you

should be prepared to present, and I will be prepared to hear the entire matter on its merits on the date I set your motion for hearing." (R3.112-2). Respondents did not attempt to appeal or set aside the 1996 Order and, on June 5, 1996, Respondents answered Kuenzel's Rule 32 petition.

After Kuenzel's Rule 32 petition was restored to the docket, Kuenzel filed a number of discovery motions in preparation for a hearing on the merits. Respondents did not oppose these motions. Relying upon the 1996 Order and the Circuit Court's instruction that it would hear the Rule 32 petition on its merits, Kuenzel also began, *pro bono*, collecting evidence to present at his evidentiary hearing once it was scheduled by the Circuit Court. (R3.45-2, 5-7).

Three years later, on February 16, 1999, Respondents filed a post-answer "motion to reinstate" the 1994 Order dismissing Kuenzel's petition as untimely. (R3.112-3). Respondents filed their motion without requesting leave or otherwise offering Kuenzel any prior notice of its intent to renew its motion to dismiss for untimeliness.

On February 18, 1999, just two days later, the Circuit Court granted Respondents' "motion to reinstate" without providing Kuenzel any opportunity to submit opposition. (R3.112-4).

On February 7, 2000, Kuenzel filed his federal *habeas corpus* petition while continuing to litigate, for the second time, the timeliness of his Rule 32 petition.[4] The Circuit Court's ruling on February 18, 1999 was eventually upheld by the Alabama appellate courts.

In federal court, Respondents moved to dismiss the Petition as time barred, and the District Court agreed that, because the state courts upheld the second dismissal of Kuenzel's Rule 32 petition as "untimely," § 2244(d)'s limitation period was not tolled between May 6, 1996 and February 18, 1999 — the time period during which the 1996 Order adjudicated the Rule 32 petition "timely."

B. History Since This Court's 2007 Remand

On June 13, 2007, this Court vacated the District Court's second order dismissing the Petition as time barred. Kuenzel v. Allen, 488 F.3d 1341 (11th Cir. 2007) ("Kuenzel II"). In that decision, this Court called for "the district court's express acknowledgement" of Kuenzel's Schlup Gateway claim. Id. at 1343 n.3. With respect to granting Kuenzel discovery and/or an evidentiary hearing, this Court left such determination "to the district court's sound discretion." Id. at 1344.

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[4] Kuenzel acknowledges that 12 days ran off the § 2244(d) one-year statute of limitation between April 24, 1996 – AEDPA's effective date – and May 6, 1996, the date of the 1996 Order. Thus, if the limitation period is tolled between May 6, 1996 and February 18, 1999, 353-days remained for Kuenzel to file his federal *habeas* petition. Because the limitation period expired on Sunday, February 6, 2000, pursuant to the federal rules, Kuenzel's time to file the Petition was extended until Monday, February 7, 2000.

Upon remand to the District Court, on October 31, 2007, Kuenzel submitted a motion for phased discovery and an evidentiary hearing, along with a proposed case management order. (R3.109).[5]

On November 7, 2007, the District Court issued an Order For Briefing limited to "the question of whether the court should, may, or can revisit the time bar defense in light of [Allen v. Siebert]." ("Time Bar Briefing Order") (R3.110).[6] Notably, the Time Bar Briefing Order made no mention of, and requested no briefing concerning, Kuenzel's Schlup Gateway claim.

On December 16, 2009, the District Court issued an opinion and order again dismissing Kuenzel's petition as time barred ("Opinion"). (R3.115). With respect to statutory and/or equitable tolling, the District Court held that Allen v. Siebert "fatally undermined" this Court's decision in Kuenzel II. (R3.115 p.15). The District Court further held that, in any event, Kuenzel failed to act diligently because he should have known to file "a protective *habeas* petition" on or before April 24, 1997, as authorized by "recent authority." (R3.113 pp. 15-16 (citing Rhines v. Weber, 544 U.S. 269 (2005)).

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5 This was Kuenzel's fifth request in post-conviction proceedings for discovery, funding for expert/investigative assistance, and/or an evidentiary hearing. (R3.121 pp. 4-6).

6 On November 5, 2007, the United States Supreme Court held in Allen v. Siebert, 552 U.S. 3 (2007) ("Allen v. Siebert") that a petitioner whose state court post-conviction petition is challenged as untimely cannot wait to file his federal petition until the state courts ultimately determine timeliness. Id. at 3-4 (citing Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005)).

Yet, the Opinion went further. Without ruling on Kuenzel's pending discovery motion, and without the benefit of briefing from the parties concerning Kuenzel's entitlement to pass through the Schlup Gateway, the District Court concluded that Kuenzel was not entitled to gateway relief.[7]

Kuenzel timely filed a notice of appeal (R3.117) and motion for certificate of appealability (R3.119) on January 13, 2010 and January 14, 2010, respectively. Then, while the COA motion remained *sub judice*, something unexpected occurred.

On February 22, 2010, Assistant Attorney General J. Clayton Crenshaw showed up, unannounced, at the home of Venn's former-girlfriend, Crystal ("Floyd") Moore. Mr. Crenshaw proceeded to show Floyd documents that she never had seen before, and cross-examine her about the substance of those documents and her affidavit testimony submitted in post-conviction proceedings.

After Mr. Crenshaw left, Floyd contacted undersigned counsel. At counsel's request, Mr. Crenshaw produced six documents containing statements and grand jury testimony offered by Floyd, Crystal ("Epperson") Ward, and April Harris

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[7] In rendering the Opinion, the District Court ostensibly relied upon the parties' factual analyses contained in briefs submitted to this Court in connection with the 2006 appeal, which both parties attached as exhibits to their respective responses to the Time Bar Briefing Order. (R3.111-1; R3.112-5).

("Harris"), each helpful to demonstrating Kuenzel's innocence. Prior to that time, none of those documents ever had been disclosed in this case.

On March 10, 2010, Kuenzel filed a motion to vacate the Opinion pursuant to Fed. R. Civ. P. 60(b). (R3.121).

On March 26, 2010, the District Court conducted a telephonic conference to discuss Kuenzel's 60(b) motion ("March 26 Conference"). During that conference, Mr. Crenshaw explained that his failure to disclose these materials until now was because he "only recently read the DA's file." (R3.127-1 ¶¶ 2-9). Mr. Crenshaw further stated his belief that no additional favorable and/or exculpatory materials remained in Respondents' possession. (Id.).

On May 14, 2010, Respondents filed a response to Kuenzel's 60(b) motion that included "new" affidavit testimony,[8] along with another previously undisclosed document identifying additional witnesses who saw Venn, but not Kuenzel, at the convenience store between 10:00 and 11:10 p.m. on November 9th. (R3.125). On May 24, 2010, Kuenzel filed a reply brief that included – per the District Court's instructions – requests for discovery. (R3.127).

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[8] As discussed infra, p.56 n.31, among the affidavits Respondents introduced was an affidavit from Mr. Crenshaw attesting to the fact that he personally questioned Floyd, and volunteering his sworn and *wholly irrelevant* personal opinion that Floyd is an unreliable witness.

On August 6, 2010, the District Court issued a "Limited Discovery Order" — the first discovery granted to Kuenzel throughout the entire 18-year tenure of his post-conviction proceedings. (R3.133). The Limited Discovery Order generally required Respondents to produce all undisclosed Brady materials, and all documents having *anything* to do with the shotgun Venn possessed on the night of the murder. (Id. pp.7-8).

On September 3, 2010, Respondents produced 15 additional documents. (R3.134). Contrary to Respondents' assurances during the March 26 Conference, among the documents produced were four previously undisclosed statements that Venn provided to the police within days after the murder took place, but before Venn implicated Kuenzel. (R3.136-2, 136-5, 136-6, 136-8). Glaringly absent from Respondents' production were any documents evidencing any investigation of Venn's borrowed shotgun, Sam Gibbons – the person from whom Venn borrowed the shotgun – and/or David Pope, the white male that Venn names in those statements as his companion at the store.

On September 30, 2010, Kuenzel submitted a response brief. (R3.135). Respondents elected not to file any response to Kuenzel's submission as was authorized by the Limited Discovery Order.

On January 12, 2011, the District Court denied the 60(b) motion ("60(b) Opinion," R3.142), and granted Kuenzel a new COA. (R3.143).

C. Facts Relevant To Kuenzel's Claim That He Has Demonstrated Factual Innocence Sufficient To Satisfy The Schlup Gateway And Avoid Any Procedural Default

1. The Guilt Evidence At Trial

Harvey Venn's testimony is the linchpin of Respondents' case against Kuenzel.[9] As summarized in the Opinion (R3.115, pp.2-5), Venn testified that he and Kuenzel spent the afternoon and evening of November 9, 1987 together riding around Sylacauga in Venn's car, that they both were drinking heavily, and that Venn was smoking marijuana. Venn testified that three guns were present in his car: a .12 gauge shotgun Venn borrowed from Sam Gibbons; a .16 gauge shotgun Kuenzel borrowed from his stepfather, Glenn Kuenzel; and a pistol.

Venn testified that Kuenzel suggested robbing the convenience store to get some "easy money." Venn testified that he and Kuenzel arrived at the convenience store about 10:00 p.m. and waited for customers to leave. Venn testified that he and Kuenzel left the store at some time after 10:00, but returned about 11:00.

Venn testified that around 11:00 p.m. Kuenzel retrieved a shotgun from the backseat of the car and entered the store, while Venn remained in the car. Venn testified that he heard a shot and saw Ms. Offord fall down. Venn testified that Kuenzel told him Ms. Offord refused to hand over any money from the register and that he did not mean to shoot her. No money was taken from the cash register.

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[9] Rumsey Summation, T.666 ("Harvey Vinn [sic] is not circumstantial evidence. Harvey Vinn [sic] is direct testimony."). See also T.682-87.

Testimony indicated that Ms. Offord was killed between 11:05 and 11:20 p.m. with a No.1 buckshot from a .16 gauge shotgun.

It is undisputed that there was no physical evidence linking Kuenzel to the crime scene. As to Venn, however, Ms. Offord's blood was found splattered on his left pants leg.

Notwithstanding the absence of *any* physical evidence connecting Kuenzel to the crime, the prosecution paraded a number of witnesses before the jury to offer into evidence 17 latent fingerprints of value that were recovered from the convenience store (T.254-60, 268-74, 308-18, 426-29, 533-34), and a rape kit, including anal and vaginal swabs taken from the victim. T.335, 363-70, 533-54. It was undisputed then, and remains undisputed now that not a single one of the 17 latent fingerprints match Kuenzel's fingerprints (T.314), and that Ms. Offord was not sexually assaulted. T.370.[10]

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[10] Kuenzel notes that the Opinion also referenced a burned shotgun shell found in a trash basin at Kuenzel's and Venn's shared residence as "other evidence of Kuenzel's involvement." R3.115 p.48. The District Court recognized, however, that the burned shotgun shell was not linked to the ammunition that caused Ms. Offord's death. R3.115 p.4 ("*There was no physical evidence linking Kuenzel to the crime scene*."). Accordingly, this isolated shotgun shell is not probative of Kuenzel's "involvement."

Lastly, in the 60(b) Opinion the District Court considered evidence adduced during sentencing that the jury did not hear during guilt-phase. R3.142 pp.17-18. Disregarding the permissibility or impermissibility of considering sentencing-phase evidence to adjudge an exclusively guilt-phase factual inquiry, Kuenzel does not challenge its introduction because, as discussed infra pp.50-53, all of the District Court's sentencing phase "new evidence" is wholly irrelevant impeachment evidence under the standard that same court adopted. This "new evidence" similarly fails under the standard advanced by Kuenzel because its impeaching purpose does not go to any specific facts testified to by

The prosecution presented additional evidence that, for the most part, corroborated Venn's testimony as to his own involvement in the crime, but not Kuenzel's. Five witnesses testified that they saw Venn's car at the store that evening at various times between 10:00-11:10 p.m., and two of those witnesses identified Venn at the scene. Some witnesses also testified that Venn was seated in his car with another white male whom they could not identify. A sixth witness, April Harris, testified that she was driving past the convenience store at about 9:30 or 10:00 p.m., saw Venn's car in the parking lot, and saw Venn and Kuenzel inside the store. Venn testified, however, that he never entered the store.

Kuenzel's defense at trial was threefold. First, trial counsel presented alibi evidence through Kuenzel's stepfather, Glenn Kuenzel, who testified that he went over to Kuenzel's house that night at 10:30 p.m. and saw Kuenzel asleep. Second, contradicting Venn's testimony that Kuenzel possessed his stepfather's .16 gauge shotgun on the night of the murder, counsel presented testimony from Hope Chamberlain and Glenn Kuenzel that Kuenzel returned this shotgun *before* the murder. Third, trial counsel attempted to impeach Venn using a prior inconsistent statement that did not implicate Kuenzel,[11] and also by cross-examining Venn

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witnesses; undeniably, its sole purpose is to impeach credibility in general, which is improperly considered in the context of the Schlup Gateway analysis. See id.

[11] As discussed more fully herein, in late-2010, Respondents produced six previously undisclosed statements given to law enforcement by Venn. Four of those statements

about the presence of the victim's blood on his pants — prompting Venn to falsely claim the blood was squirrel blood, which forced the prosecution to impeach Venn.

The jury returned a verdict of guilty and Kuenzel was sentenced to death.

2. The New Evidence That The Trial Jury Did Not Hear

As discussed infra pp.66-73, Strickland and Brady violations prevented the trial jury from considering the true quantum of evidence. Each piece of evidence set forth below remained undiscovered at trial because of these constitutional violations. The following evidence, had it been presented at trial, would have cast immutable doubt upon Respondents' case implicating Kuenzel: the testimony of Venn and Harris.

(a) Venn Independently Possessed A .16 Gauge Shotgun In His Car On The Night Of The Murder

At trial, Venn testified that his borrowed shotgun was a .12 gauge, that Kuenzel's borrowed shotgun was a .16 gauge, and that both shotguns were in Venn's vehicle on the evening of November 9, 1987. T.122-24, 135-36, 176; R3.115 p.3; R3.142 p.14. Although Kuenzel presented testimony from two witnesses that he returned his stepfather's .16 gauge shotgun before the murder, and impeached Venn with his prior testimony that he did not know when or how

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were taken in the days following the murder, did not implicate Kuenzel, and were inconsistent in material respects with Venn's trial testimony.

Kuenzel's shotgun was returned (T.170; R3.136-9 p.11), the jury was compelled to reject the two defense witnesses' testimony. Here is why.

It is undisputed that the murder weapon was a .16 gauge shotgun. As such, the jury had to find a .16 gauge shotgun in Venn's car. Given Venn's testimony that the shotgun he borrowed from Sam Gibbons was a .12 gauge, it was necessary for the jury to conclude that Kuenzel's borrowed shotgun was not returned prior to the murder. Thus, leveraging Venn's testimony that he only possessed a .12 gauge shotgun as an evidentiary predicate, the District Attorney argued that Kuenzel's borrowed .16 gauge shotgun *must have* been the murder weapon and, by extension, that Glenn Kuenzel and Hope Chamberlain were lying[12] — a conclusion all the more damaging because Glenn Kuenzel also provided Kuenzel's alibi.[13]

The new evidence first presented 13 years ago is that Mr. Gibbons's shotgun – the same shotgun Venn admittedly possessed in his car that evening – was a .16 gauge and not a .12 gauge. Had the jury known that Venn's gun could have been the murder weapon, it would have eliminated the necessity of concluding that

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12 As the District Court noted, Hope Chamberlain is an independent witness who "was not related to Kuenzel, and had no motive to lie." R3.115 p.52.

13 The District Court plainly misapprehends the significance of this factual inaccuracy. See R3.115 p.46 ("There is no reason to believe that, if faced with testimony that the shotgun Venn borrowed had been a 16-gauge instead of a 12-gauge, the jury would have found the substance of his testimony to be incredible."). See also R3.115 p.46 ("[T]he prosecutor clearly argued that the Kuenzel shotgun was the murder weapon[.]"); Rumsey Summation, T.677 ("[T]here is no other gun, other than a .16 gauge shotgun that killed that woman.").

Kuenzel's shotgun must have been in Venn's car. Disabusing the jury of the false notion that Kuenzel's shotgun was the only .16 gauge shotgun in the car critically changes the evidentiary landscape.

(b) Harris's Positive Identification Was Based Purely On Her Observation Of The Individuals' Height And Hair

Harris was a critical witness for the prosecution. Apart from Venn, she provided the *only* direct evidence that Kuenzel was with Venn during the disputed time frame of 8:00 p.m. to 11:10 p.m. In fact, the Alabama Court of Criminal Appeals specifically discussed Harris's importance in its response to Kuenzel's claim on direct appeal that Respondents lacked sufficient corroboration of Venn's testimony:

> Excluding Venn's testimony, the evidence shows that the murder was committed shortly after 11:00 p.m. April Harris testified that she saw Venn's car at the store between 9:30 and 10:00 p.m. and that she saw both Venn and [Kuenzel] inside the store at that time. Other witnesses testified that Venn and an unidentified white male were at the store sitting in Venn's automobile around 10:00 or 10:30 p.m. In our opinion, this testimony, while certainly not overwhelming, was sufficient to corroborate Venn's testimony and to satisfy the requirements of § 12-21-222.

Kuenzel v. State, 577 So. 2d 474, 514-15 (Ala. Cr. App. 1990).

The defense's cross-examination of Harris primarily explored the fact that Harris placed Venn's vehicle on the side of the store, away from the gas pumps, contrary to the testimony of every other witness who also saw Venn and/or Venn's

car at the store that evening. Declining to reverse for failure to corroborate Venn's testimony, the Alabama Court of Criminal Appeals held that:

> Here, there was sufficient corroboration of the testimony of the accomplice. The credibility of the witnesses who supplied the corroboration of the accomplice's testimony was for the jury and not an appellate court.

Id. at 515. In light of the significant weight placed upon Harris's eyewitness "corroboration," her grand jury testimony – evidence revealed for the first time in 2010 – is startling.

During questioning before the grand jury, Harris confirmed that, "[b]etween ten and fifteen till eleven at the latest," she drove by the convenience store and observed "Harvey Venn's car parked at the side of the building." R3.121-8 p.2.[14] Yet, when asked whether she saw Kuenzel and Venn inside the store, Harris explained that she *thought* she saw them, but that her identification of Kuenzel and Venn inside the store was based *solely upon observing the individuals' height and hair*. See id. pp.2-5.

Six months later, however, Harris testified during Kuenzel's trial – without any equivocation – that she positively indentified both Kuenzel and Venn inside

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[14] Because the District Court argues that Floyd's testimony is unreliable because she is unclear on the timing of Venn's visit (R3.142 p.25), Kuenzel notes that Harris's timing in her grand jury testimony is more consistent with the record evidence, and is at odds with her trial testimony wherein she stated that she drove by the store between 9:30-10:00 p.m.

the store. T.494.[15] Moreover, on cross-examination Harris resisted defense counsel's attempt to impeach her identification, and strenuously re-affirmed her testimony. T.501-02. To be sure, Harris's unwavering trial testimony was sufficiently critical to the prosecution's case that, in summation, prosecutor Rumsey offered the following statement:

> As to where the cars were parked and everything else, I'm not going to continue to go through that. But I'll tell you this. April Harris says she saw them in there. And April Harris ain't no surprise in coming up here. She has been around a long time. Ever since Day One in this case. And she says she saw Vinn [sic] and Kuenzel in there.

T.672.[16]

While the jury heard Harris's conflicting testimony about where the cars were parked, she was not confronted with her grand jury testimony directly undercutting her identification — the lone evidence directly corroborating Venn's claim that Kuenzel was with him at the store.

The jury also did not hear from Epperson – the driver of the vehicle in which Harris was a passenger – and the defense was not provided with her police

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15 It cannot be forgotten that Venn testified he never entered the convenience store at any time between 8:00 p.m. and 11:10 p.m. T.141, 542, 548.

16 Notably, the Court of Criminal Appeals found that Rumsey improperly argued to the trial jury that "Harris has been a witness in this case since Day One, and she is on the subpoena list" because "there was no evidence before the jury that Harris was on the subpoena list or that she gave any statement to the police." Kuenzel v. State, 577 So. 2d at 492. However, the Court of Criminal Appeals concluded that "the present error [was not] so egregious or obvious as to 'seriously affect the fairness or integrity of the judicial proceedings.'" Id. (internal citation omitted).

statement or grand jury testimony. The previously undisclosed testimony provides two pieces of helpful evidence. First, Epperson testified before the grand jury that she thought she saw someone sitting inside Venn's car when she and Harris drove by the convenience store. R3.121-5 pp.4-5; R3.121-6 p.2. Of course, Epperson's testimony is consistent with the testimony of witnesses who were at the store that night, and conflicts with that provided by the passenger in her car, Harris, who testified that she observed both Venn and Kuenzel inside the convenience store.

Second, Epperson made a notation in her calendar that she "[s]aw Harvey" on the night of November 9th. R3.121-5 p.5; R3.121-6 p.3. Because Epperson was familiar with both Venn and Kuenzel (R3.121-5 p.1), the fact that she noted seeing Venn but not Kuenzel also would have substantiated the conclusion that Kuenzel was not with Venn at the crime scene.

(c) Venn's Testimony And The Blood Evidence Implicating Venn Are Buttressed By New Evidence That Venn And The Victim May Have Engaged In A Physical Altercation

Among the documents Respondents produced for the first time in 2010 were four witness statements from Venn taken in the days following the murder, including Officer Dusty Zook's notes of an interview conducted with Venn at 8:33 p.m. on November 11, 1987. See R3.136-2. Among other things, Officer Zook's notes reveal that, two days after the murder but before Venn was arrested, it

appeared "like he [Venn] had a black eye (left)." Id. Several pages later, Zook observed that Venn's "left arm looks bruised." Id.

In light of Zook's notes, Dr. James R. Gill, the Deputy Chief Medical Examiner for Bronx County, examined whether there is scientific support for Kuenzel's claim that Venn and Ms. Offord sustained injuries while struggling with each other prior to Ms. Offord's death. R3.137 ¶ 6. While Dr. Gill acknowledged that "it is unknowable to a degree of 100% certainty whether or not Venn and Ms. Offord actually did engage in a physical altercation shortly before Ms. Offord's death," (id. ¶¶ 9-14), he concluded "to a reasonable degree of medical certainty" that, on the basis of the information he reviewed, "including the location and description of the wounds on Ms. Offord and Venn, the evidence is consistent with Ms. Offord and Venn having recently been engaged in a physical altercation with one another. Id. ¶¶ 8, 15.

Correspondingly, the record also contains Venn's strikingly specific testimony regarding what precisely was said inside the store that evening. On separate occasions months apart, Venn *twice* recalled the exact same words that he claims Ms. Offord used when *she refused* to hand over any money from the cash

register. Compare R3.136-10 p.12, with T.181 and Ex parte Kuenzel, 577 So. 2d 531, 532-33 (Ala. 1991).[17]

Admittedly, this new evidence does not provide DNA conclusiveness.[18] Yet, given that Respondents cannot explain the presence of Ms. Offord's blood on Venn's pants because Venn testified that he never went inside the store, and there was no blood found anywhere else outside the store, including on Kuenzel or his clothing (T.369-76),[19] the total evidence now enables Kuenzel to argue that there was blood on Venn's clothing because Venn struggled with, and killed, Ms. Offord.

(d) Venn Described To The Police An Interaction He Had With David Pope At The Store

Venn's previously undisclosed statements reveal the true extent of Venn's interaction with a white male named David Pope at the convenience store, during the disputed time frame. R3.136-2, 136-7, 136-8. We now know that, on multiple occasions, Venn told the police he arrived at the store alone, and saw Pope come around the side of the store. He stated that he knew Pope from school, and spoke

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17 Although Venn testified that Kuenzel was the person with whom Ms. Offord spoke, based upon the level of detail with which Venn recalls the words said during the exchange, and considering Venn's inability to recall myriad other facts from that night, the presence of Ms. Offord's blood on Venn's clothing, and in light of the new evidence that Venn and Ms. Offord's injuries are consistent with having been in an altercation with one another, any juror could readily infer that Venn knew what was said in the store because he was the person that accosted Ms. Offord.

18 Kuenzel notes that he cannot present further scientific findings based on the blood evidence because Respondents inexplicably have lost Venn's blood-stained pants and the gun presented as the murder weapon.

19 Actually, Venn lied about the blood at trial. T.165-66, 542-43.

with Pope while seated in his car at the store. Venn also gave the police a detailed description of Pope, including his appearance and where he might be living. Id.

Two days after the murder, David Pope appeared to be the most critical suspect to investigate after Venn. Yet, neither Respondents nor defense counsel conducted any investigation into Pope, and the true extent of Venn's initial statements regarding his interaction with Pope at the store were withheld.

The previously undisclosed evidence would have enabled Kuenzel – using Venn's own words – to link Pope to the testimony of numerous witnesses who saw Venn and another white male sitting in Venn's car at the crime scene, and refute Venn's subsequent bald testimony that Kuenzel was his companion. Infra pp.30-32.[20]

(e) Additional Previously Undisclosed Evidence That Kuenzel Was Not With Venn After 8 p.m. On November 9, 1987

Crystal Floyd did not testify at trial, and the defense was not provided with any statements given by her, including her grand jury testimony that she saw Venn, alone, during the disputed time frame. R3.121-4 p.1.

Venn testified that he and Kuenzel were together at all times after 8:00 p.m., while Kuenzel maintains that, after traveling with Venn to the Madex plant in

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[20] Unfortunately, those witnesses could not get a clear view of the person with Venn because the window was fogged up. T.484.

Goodwater, Venn dropped him off at their shared residence also in Goodwater around 8:00 p.m. R3.50.[21] Floyd's testimony allows any juror to reasonably conclude that, after leaving Kuenzel off in Goodwater, Venn stopped by Floyd's home on his way to Sylacauga. Thus, coupling Floyd's grand jury testimony with the fact that Floyd was Venn's girlfriend, testifying about events that occurred only four months prior, and that a 13-year old is unlikely to lie before a grand jury on a capital murder indictment, had Floyd been called to testify at trial, her statements would have significantly bolstered the defense and Kuenzel's alibi.

Moreover, Venn's previously undisclosed statements are consistent with Floyd's grand jury testimony that he visited her alone on the night of the crime. Venn's first statements to the police were that, after dropping off Kuenzel and visiting Chris Morris in Fayetteville, he went to a "friend's house," but claimed to be unable to remember "his name." R3.136-2. While Venn's claimed inability to remember the name of a "friend" he visited just two days earlier is implausible, his reluctance to identify this person is understandable if the "friend" was in fact Floyd, Venn's 13-year old girlfriend. Significantly, Officer Zook noticed that Venn's face "got real flushed" when he referred to this unidentified friend. Id.

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[21] The District Court concludes that it may draw an "adverse inference" against Kuenzel "from his failure to proclaim his innocence under oath" because "[h]e has filed only an *unsigned* affidavit." R3.142, pp.16 n.5, 30 (emphasis in original). Kuenzel notes, however, that a *signed*, *notarized* copy of his Affidavit has been in the record since 2002. See R3.50 substituting R3.45-8.

(emphasis in original). In those statements, Venn also acknowledged that when he left Morris's house, he "came back toward Hollins," (id.; R3.136-8 (same)), which is where Floyd lived. R3.121-4 p.2.

In sum, the new evidence supports the conclusion that Venn visited Floyd during the disputed time frame, that Kuenzel was not with him during that visit, and therefore, Kuenzel was not Venn's companion at the convenience store.

(f) Venn's Motive To Rob The Convenience Store

The final pieces of new evidence indicate that Venn had a motive to commit the crime; specifically, that Venn needed $500 to secure his attorney's appearance at a hearing the following Monday, November 16, 1987. See R3.45-7; R3.50. In contrast, the prosecution never offered any motive for Kuenzel to commit the crime. In light of the other evidence implicating Venn, the existence of a motive on his part would push any juror over the edge to find reasonable doubt.

3. What Really Happened On November 9, 1987

It bears repeating that the underlying question before this Court is whether enough reasonable doubt exists such that the federal courts may examine the underlying Brady and Strickland violations that ravaged the fairness of Kuenzel's trial by preventing the jury from evaluating the complete evidentiary picture. In light of the required total evidence review, Kuenzel respectfully submits the

defense that *should have* been presented at trial to demonstrate the existence of reasonable doubt sufficient to allow Kuenzel passage through the Schlup Gateway.

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On August 1, 1987, Harvey Venn was arrested on a felony drug charge. R3.45-7. Venn, posted a $500 bond and was released from the Clay County jail. Id. On September 15, 1987, Venn appeared before the Circuit Court of Clay County on the drug charge with retained counsel, and again on September 29, 1987, at which time the Circuit Court continued Venn's proceedings until Monday, November 16, 1987. Id. In order to continue to retain the services of his attorneys, including their appearance at the November 16th hearing, Venn's attorneys demanded payment in the amount of $500, and advised Venn that the entire matter would cost him approximately $2,000-$3,000. R3.50.

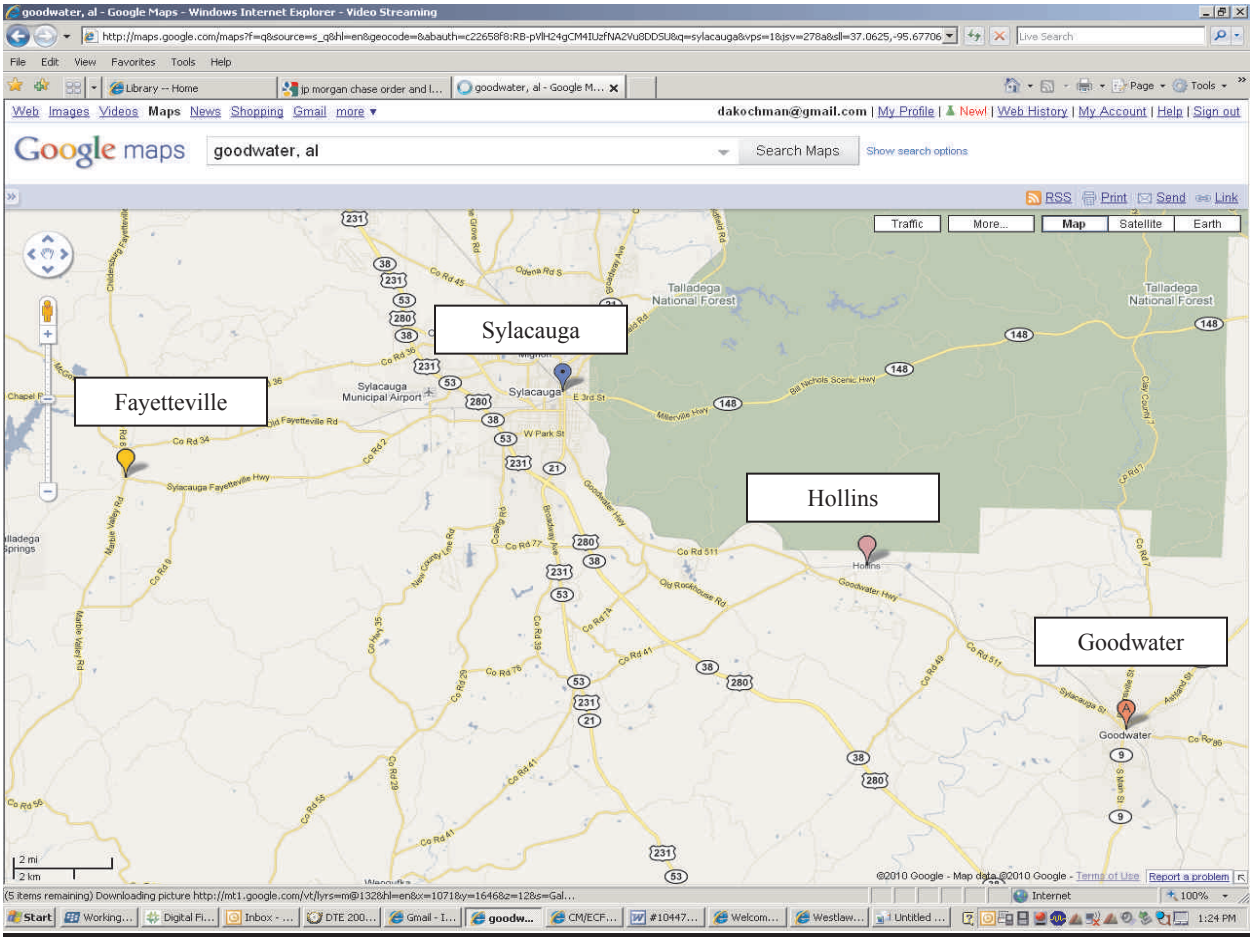
During this time, Venn was employed at the Madex Corporation textile factory outside of Goodwater. T.117. At some point in September 1987, Venn mentioned to a co-worker, William Kuenzel, that he wished to move out of his grandfather's house. T.119-20. In response, Kuenzel offered to let Venn live in his house, rent-free, if Venn contributed to common household expenses. T.119-20; R3.50. By allowing Venn to live with him, Kuenzel – who did not own a car – was able to ride to and from work with Venn. T.120; R3.50.

Despite the fact that Venn was working and living rent-free, Venn consistently found himself in debt and without money. T.177. For example, Venn, who was 18-years old, borrowed $500 from Kuenzel (R3.50), and regularly asked his girlfriend, 13-year old Crystal Anne Floyd, to share her allowance money with him. R3.136-11. In contrast to Venn, Kuenzel had ample funds to meet his needs, arising from a combination of his earnings from working at Madex and the marijuana/diet pills he sold to his friends. R3.50. As his November 16 court date approached, Venn needed to come up with $500 to pay his attorneys' retainer fee. Venn asked Kuenzel whether he could borrow another $500, but in light of Venn's outstanding debt to him, Kuenzel did not express enthusiasm about the idea. Id.

Monday, November 9, 1987 began unremarkably. Kuenzel and Venn went to work together; after work, Kuenzel and Venn hung out, drank beer and smoked marijuana; they drove together to Sylacauga and Hollins, visiting Venn's girlfriend and Kuenzel's parents; later that afternoon, at between 5:00-6:00 p.m., Kuenzel and Venn traveled back to Madex where Kuenzel sold diet pills (represented as "speed") to a co-worker, Johnny Lambert. T.125-32, 448-49; Ex parte Kuenzel, 577 So. 2d at 531-32.

Sometime before 8:00 p.m., Venn and Kuenzel returned to their shared residence in Goodwater. R3.136-14. Shortly thereafter, Venn went out again,

mentioning to Kuenzel that he was going to see his friend Chris Morris who lived in Fayetteville. R3.136-2, 136-6, 136-7, 136-8, 136-14.



Venn arrived at Morris's house in Fayetteville around 8:00 p.m., but Morris did not appear to be at home. R3.136-2, 136-7, 136-8. Venn left Morris's house at approximately "8:35-8:40 p.m." (R3.136-6), and headed "back toward Hollins" to visit his girlfriend, Crystal Floyd, a distance of approximately 20 miles traveling on back-country roads. R3.136-2, 136-8.

When Venn arrived at Floyd's house, Floyd observed that Venn was "clearly high on drugs and/or alcohol and that [Venn] was acting nervous and paranoid."

R3.136-11 pp.3-4. Floyd also observed that Venn was alone. Id. p.4. See also R3.136-15 p.1. Venn stayed at Floyd's house for approximately ten minutes. R3.136-11.

Upon leaving Floyd's house, Venn drove back towards Sylacauga to Joe Bob's Crystal Palace convenience store, a distance of approximately 10 miles. R3.136-2, 136-5, 136-6, 136-7, 136-8. Venn arrived at the convenience store and used the restroom. Id. Upon exiting the restroom, Venn spotted an old friend of his from school, David Pope. R3.136-2, 136-7, 136-8. As Venn explained it, "He [David Pope] came around [the] bldg. I ain't pulled up [to the store] w/nobody … I was alone." R3.136-2. See also R3.136-8. Pope, a white male, and Venn spoke together while seated inside of Venn's car. R3.136-2, 136-7, 136-8. During this time, Venn recalls saying "hi" to Phillip Roberts. R3.136-2, 136-5, 136-6, 136-7, 136-8. Venn also saw Wayne Culligan, and noticed that Culligan was with approximately three other people. R3.136-2, 136-5, 136-6, 136-7.

Entirely consistent with Venn's statements, ten individuals independently observed the following that evening between 10:00 p.m. and 11:10 p.m.: (i) Venn was there; (ii) Venn's car was there; and (iii) Venn was seated inside his car with an unidentified white male:

1. **Dale Templin** stated that, after playing in a basketball game, he arrived at the convenience store around 10:15 p.m. and observed two males sitting in Venn's car. T.470; R3.136-16 p.7. Templin stayed at the store "for about 10 minutes," and the two males still were seated

in Venn's car when he left. Id. Templin recalls that the driver of the car nodded his head at Wayne Culligan. Id.

2. **Wayne Culligan**, who was with Templin after the basketball game, also testified that Venn's car was parked outside of the convenience store when he arrived at 10:15 p.m., and that two white males were seated inside of Venn's car. T.479; R3.136-16 p.7.

3. After refereeing a basketball game, **James Clement** arrived at the convenience store at 10:15 p.m. T.459; R3.136-16 p.7. Like Templin and Culligan, Clement also observed two white males sitting in Venn's car, and later was able to identify Venn as the person in the driver's seat. T.459; R3.136-16 p.7. Additionally, Clement recalls that when he left the store 10 minutes later, the two males "were still there." Id.

4. Like Templin, Culligan, and Clement, **Larry Pruitt** was at the convenience store and also observed two white males seated inside a car at around 10:30 p.m. R3.136-16 p.8.

5. **Phillip Roberts** recalls that he was at the convenience store sometime after 10:30 p.m., and spoke with Venn for a few minutes. T.484. Although Roberts observed a man sitting in Venn's car, he could not identify this person because the car window was fogged. T.484.

6. **Jackie Castleberry** was with Roberts, and also observed two males in the vehicle parked at the convenience store. R3.136-16 p.7.

7. **Tammy Allen** was with both Roberts and Castleberry at the convenience store that evening at some point after 10:30 p.m. R3.136-16 p.7. Allen too observed two white males seated in Venn's car. Id.

8. While driving by the convenience store between 10:00 and 10:45 p.m., **April Harris** recalls seeing Venn's car parked outside. R3.121-8 pp. 2-3.

9. Similarly, **Crystal Epperson**, the driver of the car in which Harris was a passenger, recalls that between 10:30 and 10:45 p.m., she observed Venn's car parked outside of the convenience store. R3.121-6 p.2.

10. **Dan Lasser** likely was the last customer inside the convenience store that evening before the murder took place. T.504; R3.136-16 p.7. Lasser recalls that around 11:00 p.m. he went inside the convenience store for 10 minutes, and that he observed Venn's vehicle parked outside. Id. "The last sale shown on the cash register at the convenience store was 11:05 p.m." Ex parte Kuenzel, 577 So. 2d at 533.

Thus, each of the foregoing ten witnesses – Templin, Culligan, Clement, Pruitt, Roberts, Castleberry, Allen, Harris, Epperson, and Lasser – separately confirmed that, between 10:00 p.m. and 11:10 p.m., Venn was at the convenience store and was seated in his car for a period of time with another white male. Although none of the ten witnesses were able to identify the person with whom Venn was speaking inside his car, Venn identified that individual as David Pope. R3.136-2, 136-7, 136-8.[22]

With his court date looming and the urgent need to obtain $500 to pay his attorneys' retainer fee weighing heavily on his mind, and having already spent all the money from the paycheck he received the previous Friday (T.177), Venn waited until after Lasser left the convenience store to act. R3.136-9 pp.6-7.

Venn first placed a paper sack over the rear license plate on his car. T.140; R3.136-10 p.13. Next, Venn made sure that no one was around before grabbing the

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[22] There is no evidence that Respondents showed these ten witnesses a photograph of David Pope, or that Respondents conducted **any** investigation whatsoever into Pope.

.16 gauge shotgun he borrowed from a co-worker, Sam Gibbons, and entered the convenience store to commit a robbery. T.122-24, 135-36, 140, 176; R3.45-2.

Intending only to frighten the store clerk, Venn laid the shotgun over the counter and – quoting Venn's *own* words – told the clerk, Linda Jean Offord, to "give him the money." T.181; R3.136-10 p.12. Ms. Offord responded, "do you mean the money in the register," and Venn replied "Yeah." Id. Defiantly, Ms. Offord told Venn, "*Well, you can't have it, go ahead and pull the trigger*." Id.; Ex parte Kuenzel, 577 So. 2d at 532-33 (emphasis added).

An altercation ensued between Venn and Ms. Offord, and Venn was struck in the left eye and left arm. R3.136-2; R3.137 ¶¶ 8-15. During the course of the struggle, Venn, whose faculties still were impaired from an afternoon of drug and alcohol abuse, tensed up and pulled the trigger on the shotgun fatally wounding Ms. Offord from "point-blank range." Ex parte Kuenzel, 577 So. 2d at 532. Venn had not meant to discharge his weapon. T.142, 144, 145, 175, 181; Ex parte Kuenzel, 577 So. 2d at 533. Now, staring down at Ms. Offord, whose pierced lung left her gasping for air, Venn panicked. Id. He fled the store without taking a single dollar from the register. T.183.[23]

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[23] "I'm just sorry that it happened, you know. It won't ever happen no more." R3.136-9 p.13 (Venn's final statement at 2:20 a.m. on November 15, 1987).

As Venn sped away from the store, he recalled seeing a car following behind him as he headed back to Goodwater from Sylacauga. T.143-44; R3.136-10 p.13. Diane Mason was the driver of the vehicle Venn observed, and Mason confirms that she observed Venn's car's license plate covered with something. T.521; R3.136-16 p.8.

When Venn arrived at home, he found his roommate, William Kuenzel, asleep. R3.136-2 (Venn recalled that "He [Kuenzel] was in bed. Far as I can remember he was."). Kuenzel's stepfather had also observed Kuenzel asleep at home around 10:30 p.m. that same evening. T.566-68.

Ms. Offord was found alive by the convenience store's third-shift employee around 11:20 p.m., but she succumbed to her injuries on the way to the emergency room. Ex parte Kuenzel, 577 So. 2d at 533.

The only physical evidence related to the crime implicates Venn as Ms. Offord's killer. First, Ms. Offord's blood was found on the "left thigh area of Venn's blue jeans." Kuenzel v. State, 577 So. 2d at 493. Since her blood was located on only one person, and in only one place – it was not found in or on Venn's car, or on any other piece of evidence recovered by the State (T.369-75) – the identity of Ms. Offord's assailant was, and remains, unmistakable. Second, she physically resisted Venn's robbery attempt, as evidenced by bruising observed two

days later on Venn's left eye and arm that is consistent with injuries on Ms. Offord's right hand and arm. R3.136-2; R3.137 ¶¶ 8-15.

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This is the evidence that Kuenzel would have presented to the jury but for the violations of his constitutional rights. When reviewing the defense that Kuenzel offers as unassailable reasonable doubt, the Court should be mindful of two things. First, Kuenzel recognizes that there is one – but only one – piece of evidence that doesn't align perfectly based on the total evidence. Templin and Roberts each testified that they *thought* the person seated in Venn's car at the convenience store wore a mustache. See Phillip Roberts, T.484; Dale Templin, T.470. The apparent inconsistency is that, in describing Pope, Venn stated that Pope lacked facial hair, but Kuenzel did wear a mustache at the time. See R3.136-2.

Having pointed out that potential inconsistency, it can easily be dismissed. In the same breath, Roberts testified that Venn's car "window was fogged up," and that the fog obscured his ability to see into Venn's car and/or make a precise identification. T.484. Indeed, Roberts thought that he saw a "little mustache," but identified Venn's companion as male based solely upon seeing a shadow. Id. With the exception of this isolated pseudo-inconsistency, every aspect of the foregoing defense is perfectly harmonious with the record evidence.

Second, the only evidence for which Kuenzel's testimony is exclusively relied upon is to help establish Venn's motive; specifically, that Venn needed $500 to pay his attorneys' retainer fee on November 16th and that Kuenzel was not enthusiastic about loaning Venn any more money. Apart from those two small points of testimony, every aspect of the defense case is established through independent witnesses, direct physical evidence, or Venn's own words.

SUMMARY OF THE ARGUMENT

Kuenzel first submits that the Petition is entitled to statutory or equitable tolling between May 6, 1996 and February 18, 1999. If the time period between the 1996 Order and February 18, 1999 is excluded/tolled, the Petition is timely filed. See supra, p.8 n.4. Here, Kuenzel did not file the Petition on or before April 24, 1997 because he reasonably relied upon the Circuit Court's reinstatement of his Rule 32 petition as an adjudication of timeliness. This is the fundamental reason why this case is materially distinguishable from Allen v. Siebert. Accordingly, whether statutory or equitable tolling applies, the Petition is timely.

But the inquiry does not end there. In light of Siebert v. Allen, 455 F.3d 1269, 1271-72 (11th Cir. 2006) (citing Hurth v. Mitchem, 400 F.3d. 857 (11th Cir. 2005)), Kuenzel acknowledges that once the Petition is deemed timely, he still must convince this Court of his probable acquittal to excuse a state court procedural default and gain access to merits review of his constitutional claims.

The Schlup Gateway should not, and cannot be, the fortress erected by the District Court. Kuenzel does not challenge the necessity of ensuring that the Schlup Gateway remains an exacting standard, but he does submit that there must be a way for a *habeas* petitioner, absent DNA evidence or an unearthed videotape of the crime, to demonstrate reasonable doubt warranting reviewing of otherwise procedurally defaulted claims. Indeed, the Supreme Court in Schlup expressly considered and rejected the Jackson v. Virginia standard necessarily adopted by the District Court below. Acknowledging he must satisfy a high burden, Kuenzel submits that his is the paragon of a valid Schlup Gateway case.

If this Court wishes to define with precision the architecture to the Schlup Gateway, then this is the case to use. Kuenzel presents the unique situation where: (1) the prosecution's case at trial was exceptionally threadbare, relying almost exclusively on the lone accomplice's testimony; (2) the evidence that the accomplice committed the murder alone is very compelling; (3) trial counsel was profoundly ineffective, failing to pursue obvious avenues of investigation and/or cross-examine witnesses properly; and (4) the defense's case at trial was improperly handicapped by the prosecution's failure to disclose Brady materials. Here, the conclusion that Venn acted without Kuenzel is so logical, so persuasive, so supported by the evidence, that it can be classified as nothing less than self-

evident reasonable doubt. It truly will be the extraordinary case that can match Kuenzel's gateway claim of likely acquittal.

At bottom, the total evidence allows William Kuenzel to pass through the Schlup Gateway. Not because he can prove his innocence to a degree of absolute certainty, but because he has proven Venn's guilt to such a degree that any juror probably would find Venn's self-interested and thoroughly-impeached testimony shifting blame onto Kuenzel untrustworthy. Given that Respondents rely upon Venn to establish every material aspect of its case, the evidence known today establishes reasonable doubt; any other determination by a hypothetical juror would be unreasonable, and thus would fail the Schlup Gateway standard.

To validate that his evidence is "new evidence" under the Third Circuit standards, and also because Kuenzel presents the extraordinary case worthy of gateway relief, this Court may examine, *de novo*, the rampant constitutional violations – magnified and compounded by the weakness of the prosecution's case – that render his conviction unworthy of confidence. This Court has the power to evaluate the entire picture borne out through all the evidence, old and new. Hanging in the balance on this Court's ruling is the life of a person whose trial represents everything our Constitution protects against. Kuenzel implores this Court to end his 23-year nightmare in our justice system.

ARGUMENT

I. STANDARD OF REVIEW

This Court may conduct a *de novo* review of the District Court's dismissal of the Petition on grounds of procedural default. See Elder v. Holloway, 510 U.S. 510, 516 (1994); McNair v. Campbell, 416 F.3d 1291, 1297 (11th Cir. 2005). "Whether a particular claim is subject[ ] to the doctrine of procedural default … is a mixed question of fact and law, subject to *de novo* review." Henderson v. Campbell, 353 F.3d 880, 891 (11th Cir. 2003), cert. denied, 543 U.S. 811 (2004); Mincey v. Head, 206 F.3d 1106, 1131-35 (11th Cir. 2000). Because the state court did not adjudicate Kuenzel's claims "on the merits," if Kuenzel overcomes any procedural default, this Court may also review his constitutional claims *de novo*. 28 U.S.C. § 2254(d). Accordingly, this Court has full power to examine the facts of this case, apply them anew to the relevant legal standards, and grant Kuenzel all relief requested herein.

II. KUENZEL IS ENTITLED TO STATUTORY OR EQUITABLE TOLLING OF THE § 2244(D) LIMITATION PERIOD BETWEEN MAY 6, 1996 AND FEBRUARY 18, 1999

Kuenzel respectfully submits that he is entitled to statutory or equitable tolling between May 6, 1996 and February 18, 1999. AEDPA establishes a one-year period of limitation in which to file a petition for a writ of *habeas corpus*. 28 U.S.C. § 2244(d)(1). The limitation period begins to run from the "latest of" four enumerated events, and "[t]he time during which a properly filed application for

State postconviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. § 2244(d)(1) and (2).

Further, if a *habeas* petition is otherwise "untimely" filed under § 2244(d)(1), equitable tolling may apply to save a petition when a petitioner demonstrates "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." Holland v. Florida, 130 S. Ct. 2549, 2563 (2010) (quoting Pace, 544 U.S. at 418); Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000).

The rule upheld by Allen v. Siebert is that when a state court post-conviction petition is challenged as untimely, the petitioner cannot wait to file his federal petition until after the state courts ultimately determine timeliness. 552 U.S. at 6-7; Pace, 544 U.S. at 417. Thus, under Allen v. Siebert, a petitioner must file his federal petition within one year of notice that the timeliness of his state petition is being actively challenged. Here, Kuenzel did just that.

Unlike in Siebert, the Circuit Court vacated its initial ruling of untimeliness and treated Kuenzel's Rule 32 petition as "timely" between May 6, 1996 and February 18, 1999. Accordingly, February 18, 1999 is the operative date when Kuenzel's AEDPA clock re-started.

This is the critical distinction between Allen v. Siebert and this case. Throughout the entire period that Siebert's Rule 32 petition was pending in state court, he had actual notice that the timeliness of the filing of his state post-conviction petition was in question. In Siebert, the State raised the time bar defense on April 4, 1995, prior to the effective date of AEDPA. See Siebert v. State, 778 So. 2d 842, 846 (Ala. Cr. App. 1999). When AEDPA went into effect on April 24, 1996, no Alabama court ever had concluded – or would ever conclude – that Siebert's Rule 32 petition was timely. Because Siebert had notice that the timeliness of his Rule 32 petition was in question during the entire period when his federal statute of limitation was running under AEDPA, it follows that Siebert should have known to file his federal *habeas* petition by April 24, 1997. See Allen v. Siebert, 552 U.S. at 5-7.

In stark contrast to Siebert, the 1996 Order vacated the Circuit Court's finding of untimeliness, restored Kuenzel's Rule 32 petition to the docket, and ordered Respondents to answer the petition. Respondents did not appeal, petition for mandamus relief, or move to reconsider the 1996 Order under any possibly applicable rule. Accordingly, Kuenzel had no reason to believe that the timeliness of his Rule 32 petition was subject to re-challenge between May 6, 1996 and February 18, 1999.

Concluding that § 2244(d)'s limitation period was not statutorily tolled, the District Court faults Kuenzel for failing to protect his right to federal *habeas* review "by filing a protective *habeas* petition" as authorized by "recent authority." See R3.115 pp.15-16 (citing Rhines v. Weber, 544 U.S. 269 (2005)). First, Kuenzel has not found a single case where a *habeas* petitioner, actively litigating a state court post-conviction petition at the time of AEDPA's enactment that the state court adjudicated as "timely," filed a prophylactic federal *habeas* petition within one-year of AEDPA's effective date.

Second, the District Court fails to acknowledge that the "recent authority" authorizing "protective place-holder petitions" plainly did not exist at the time that Kuenzel's Rule 32 petition was pending. In fact, the jurisprudence in existence at that time indicated that Kuenzel was barred from doing so. See Holland, 130 S. Ct. at 2562 ("A petitioner cannot bring a federal habeas claim without first exhausting state remedies[.]") (citing Rose v. Lundy, 455 U.S. 509 (1982)). Since the 1996 Order was tantamount to a state court adjudication of timeliness, § 2244(d)(2) provides that Kuenzel's Rule 32 petition was "properly filed" for purposes of tolling AEDPA's one-year statute of limitation until February 18, 1999.

In the alternative, equitable tolling should apply. The District Court reasoned that Kuenzel is not entitled to equitable tolling of AEDPA's one-year statute of limitation because he "is unable to demonstrate the requisite diligence to

be entitled to equitable tolling of the limitations period," and implicitly held that the circumstances of this case do not rise to the level of "extraordinary." R3.115 p.16.

With respect to diligence, Kuenzel's reliance upon the 1996 Order reinstating his state Rule 32 petition as "timely" was the only reason that he did not file a prophylactic federal *habeas* petition within one year of AEDPA's effective date. The Circuit Court's 1996 Order, and Respondents' failure to in any way challenge the 1996 Order until three years later, justify Kuenzel's belief that the timeliness of his Rule 32 petition was a settled issue.[24] Moreover, had Kuenzel filed his federal *habeas* petition on April 24, 1997, it would have been dismissed. See Holland, 130 S. Ct. at 2562 (requiring state court exhaustion as a predicate).

Further, there can be little question that "extraordinary circumstances" are present in this case. To counsel's knowledge, this is the only case in the United States in which a federal court concluded that the one-year limitation period under

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[24] Courts have held in a broad variety of contexts that detrimental reliance on a singular course of conduct which precludes another party from asserting or preserving its rights warrants equitable tolling. See, e.g., Miller v. Marsh, 766 F.2d 490, 493 (11th Cir. 1985); Martinez v. Orr, 738 F.2d 1107, 1112 (10th Cir. 1984); Hentosh v. Herman M. Finch University of Health Sciences, 167 F.3d 1170, 1174 (7th Cir. 1999). See also Black v. Dist. Att'y of Phila. City, 246 Fed. Appx. 795, 2007 WL 2570809, *2 (3d Cir. 2007) ("[E]quitable tolling may be applied where principles of equity would make rigid application of the statute [AEDPA] unfair.") (citing Miller v. N.J. State Dep't of Corrections, 145 F.3d 616, 618 (3d Cir. 1998)).

AEDPA was running at a time when a state court had considered the issue of timeliness, and treated the petitioner's post-conviction petition as "timely."

Granting Kuenzel the benefit of equitable tolling is consistent with this Circuit's recognition that state or court action may be the basis for a showing of extraordinary circumstances. See, e.g., Lawrence v. Florida, 421 F.3d 1221, 1226 (11th Cir. 2005); Spottsville v. Terry, 476 F.3d 1241, 1245-46 (11th Cir. 2007); Knight v. Schofield, 292 F.3d 709, 711 (11th Cir. 2002); Sanchez v. U.S., No. 10-0020, 2010 WL 991583 (S.D. Ala. 2010). See also U.S. v. Miller, 197 F.3d 644, 653 (3d Cir. 1999). Denying Kuenzel the benefit of equitable tolling – and, correspondingly, any federal review of his meritorious constitutional claims – would be an unduly harsh result. Given the finality of a death sentence, these principles have particular urgency in Kuenzel's case.

Here, Kuenzel should not be punished by precluding any federal review simply because he failed to file a prophylactic *habeas* petition at a time when his state Rule 32 petition was restored to the docket and a prior order dismissing it as untimely had been expressly vacated. Thus, in the event that statutory tolling is unavailable, equitable tolling between May 6, 1996 and February 18, 1999 is warranted.

III. KUENZEL PRESENTS EVIDENCE OF REASONABLE DOUBT SUFFICIENT FOR HIS CONSTITUTIONAL CLAIMS TO PASS THROUGH THE SCHLUP GATEWAY

On the day of his sentencing in 1988, Kuenzel spoke the following words:

> [A]s I stand here before this Court to receive a sentence, of possibly the death penalty, for a crime of which I'm not guilty, … I pray that when a higher Court hears my case, I will be freed of this heavy burden which has been bestowed upon me by this Court system. … I hope that some day soon, all will see a mistake has been made.

Sentencing before Judge Sullivan, November 7, 1988, T.R3(S)-R4(S).

Over twenty years have passed since Kuenzel's trial and sentencing. Since then, Kuenzel's claims and evidence have "run headlong into the thicket of impediments erected by courts and by Congress." Burton v. Dormire, 295 F.3d 839, 842 (8th Cir. 2002). The Eighth Circuit explained its statement as follows:

> [T]he *writ* of *habeas corpus* is not a one-way path designed to defeat prisoners' claims. Rather, our *habeas* jurisprudence is a balancing act requiring careful attention to each of the important, yet often opposing, principles at stake. Even as we screen meritless petitions, therefore, we must take care not to shut the door to prisoners whose claims cause us to doubt the fairness of their convictions.

Id. at 841-42.[25]

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[25] In Burton, the Eighth Circuit found petitioner's "gateway argument [] compelling because the new evidence he has gathered casts considerable doubt upon the eyewitness recollections of Simmons and Walker, the only evidence of Burton's guilt proffered at trial [and] the state produced no physical evidence linking Burton to Ball's shooting, and because some of the eyewitness testimony adduced at trial looks increasingly like perjured testimony[.]" Burton, 295 F.3d at 846. While acknowledging Burton's likely innocence, the Eighth Circuit (expressing regret) denied Burton relief because his

On this appeal, this Court has the power to grant Kuenzel the justice he deserves. Keeping in mind that Kuenzel need only demonstrate a likelihood – *not* a certainty – that any reasonable juror would acquit based on the totality of the evidence, Kuenzel offers the following arguments to pass through the Schlup Gateway and obtain review of his constitutional claims that will otherwise be forever foreclosed.

A. An Actual Innocence Exception Should Be Read Into § 2244(d)

The District Court held "that [United States v.] Montano [398 F.3d 1276 (11th Cir. 2005)] provides binding precedent that an 'actual innocence' exception applies to time-barred claims as well as those that have been procedurally defaulted or are successive." R3.115 p.22. In so ruling, the District Court recognized that "the Eleventh Circuit has never decided whether 'actual innocence' is an exception to the time bar of § 2244(d)[.]" Id. p.17 n.6. See also id. p.19. The District Court further noted that "failing to recognize such an exception might violate the Suspension Clause of the Constitution with respect to *habeas* petitioners who can demonstrate their actual innocence." Id. p.17 n.6.

Kuenzel agrees with the District Court's ruling that the Schlup Gateway is an exception to the § 2244(d) time bar, and is necessary to protect the purposes of

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underlying constitutional claims were legally insufficient. This Court is not encumbered by the same dilemma.

the Great Writ as well as Alabama's interest in just capital judgments. See Lonchar v. Thomas, 517 U.S. 314, 324 (1996) (cautioning that "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty"); Reed v. Ross, 468 U.S. 1, 10 (1984). Accordingly, Kuenzel submits that satisfaction of the Schlup Gateway should excuse any time bar or procedural default preventing adjudication of the Petition.

B. The Benchmark Standard To Satisfy the Schlup Gateway

The standard to obtain relief under the Schlup Gateway is whether, based on the old and new evidence, it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt. See Schlup, 513 U.S. at 327-29; House v. Bell, 547 U.S. 518, 538 (2006) (removing the "double negative," "[a] petitioner's burden at the gateway stage is to demonstrate … that more likely than not any reasonable juror would have reasonable doubt."). "In other words, he would have to show it is probable that, given the new evidence, no reasonable juror would have convicted him." Mize v. Hall, 532 F.3d 1184, 1195 (11th Cir. 2008).

The Schlup Gateway inquiry asks the court to make a probabilistic determination as to what reasonable jurors would do by "assess[ing] the probative force of the newly presented evidence in connection with the evidence of guilt

adduced at trial." Schlup, 513 U.S. at 332. This requires a "fact-intensive," "holistic judgment about 'all the evidence,' and its likely effect on reasonable jurors applying the reasonable-doubt standard." House, 547 U.S. at 539 (quoting Schlup, 513 U.S. at 328). Accordingly, the existence of reasonable doubt is the salient inquiry, not the sufficiency of the evidence to convict.[26]

Reasonable doubt means "a real doubt, based upon reason and common sense after a careful and impartial consideration of the entire evidence in this case, or the lack of evidence." U.S. v. Hansen, 262 F.3d 1217, 1249 (11th Cir. 2001); U.S. v. Ford, No. 10-10463, 2010 WL 3374116, *1 (11th Cir. Aug. 27, 2010) (quoting 11TH CIR. PATTERN JURY INSTRUCTIONS 3). Because this inquiry does not constitute a substantive ground for relief, but rather is intended to prevent a miscarriage of justice, even evidence that is inadmissible may be considered. Schlup, 513 U.S. at 327-28.

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[26] Compare Schlup, 513 U.S. at 330 (rejecting and distinguishing the standard of Jackson v. Virginia, 442 U.S. 307 (1979), explaining that: (i) "[t]he Jackson standard … looks to whether there is sufficient evidence which, if credited, ***could support the conviction***"; (ii) "under Jackson, the assessment of the credibility of witnesses is generally beyond the scope of review"; and (iii) "under Jackson the mere existence of sufficient evidence to convict would be determinative of petitioner's claims" whereas under the Schlup Gateway standard, "petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict") (emphasis added), with R3.142 pp. 33-34 ("[I]f a reasonable juror *can* believe Venn's story, that alone is enough to convict the petitioner and reject his [gateway] claim… [and] it is hard to see how it would be *impossible* for a reasonable juror to accept his testimony.") (emphasis in original), and R3.115 pp. 53-54 ("Kuenzel's evidence does not persuade the court that no reasonable juror ***could have*** found the petitioner guilty beyond a reasonable doubt.") (emphasis added).

Although cases permitting passage through the Schlup Gateway based upon new evidence that presents a more credible and plausible alternate suspect are not the norm, they do arise. See, e.g., Schlup 513 U.S. at 329-33; House, 547 U.S. 548-53; Brown v. Singletary, 229 F. Supp. 2d 1345, 1363-66 (S.D. Fla. 2002) (allowing passage through the Schlup Gateway where the petitioner "had no clearly established motive and came forward with new evidence pointing to a different suspect, in addition to strong evidence that the petitioner's own confession was false and a product of police coercion").

Significant to Kuenzel's gateway claim, the Alabama Court of Criminal Appeals expressly has noted the well-settled proposition that "[a] defendant can disprove his guilt by proving the guilt of some other person." Banks v. State, 845 So. 2d 9, 26-27 (Ala. Cr. App. 2002) (quoting Houston v. State, 208 Ala. 660, 95 So. 145, 147-48 (Ala. 1923) (citing Brown v. State, 120 Ala. 342, 25 South. 182 (1899), and McDonald v. State, 165 Ala. 85, 51 South. 629 (Ala. 1910))).

To be clear, Kuenzel does not assert that his new evidence satisfies the Herrera standard to establish a free-standing innocence claim; this is not a case whose fact pattern lends itself to the opportunity to find a "silver bullet" piece of exculpatory evidence like an unearthed videotape of the crime in progress.

However, the law does not require a "silver bullet" for Kuenzel to obtain review of procedurally defaulted claims.[27]

What Kuenzel must demonstrate is that the scales have tipped. At trial, there was evidence on both sides. Now it has been shown that the scales tip decidedly toward the conclusion that Venn had a motive to commit this robbery-murder, that Venn murdered Ms. Offord, that almost every piece of evidence implicates Venn – and not Kuenzel – and that Venn changed his story to frame Kuenzel and save his own life. The evidence also demonstrates that the State impermissibly improved its odds of prevailing at trial, and that Kuenzel's trial counsel was horrifically ineffective. At bottom, Kuenzel's constitutional claims should not be disposed of on a procedural default. This is a case where substance must prevail over form.

C. Kuenzel's New Evidence Is Reliable And Urges The Jury Towards Acquittal

Open questions remain concerning the specific standards in this Circuit governing consideration of "new evidence" under the Schlup Gateway. Generally, courts disregard "new evidence" that consists solely of recantations, hearsay, or re-packaged evidence that was presented at trial. Courts also "consider how the

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[27] "Enter ye in at the strait gate: for wide *is* the gate, and broad *is* the way, that leadeth to destruction, and many there be which go in thereat: Because strait *is* the gate, and narrow *is* the way, which leadeth unto life, and few there be that find it." Matthew 7:13-14.

timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence." Schlup, 513 U.S. at 332.

Here, none of the evidence Kuenzel relies upon is recanted or hearsay testimony. Almost all of the evidence was uncovered after the 1996 Order in preparation for what Kuenzel's counsel was told would be a forthcoming evidentiary hearing, and was presented to the federal court in Kuenzel's first *habeas* petition. See R3.36; R3.45. The only evidence that was not presented in that filing are the materials disclosed by Respondents in 2010.

With respect to reliability, the District Court dismisses Kuenzel's new evidence as "nothing more than an attack on the credibility of Venn […]; an attack on the credibility of Harris […]; and evidence that Venn also had access to a 16-gauge shotgun that could have been the murder weapon." R3.115 pp.52-53. The District Court's rejection of Kuenzel's new evidence as unavailing is mistaken.

In a variety of contexts, courts conducting "total evidence" analyses consider new impeachment evidence that does not go to credibility in general, but to the substance of a witnesses' factual testimony. See Banks, 845 So. 2d 9; Farris v. State, 890 So. 2d 188 (Al. Cr. App. 2003); U.S. v. Leon-Lopez, 891 F. Supp. 138 (S.D.N.Y. 1995). As explained by the Alabama Court of Criminal Appeals in the context of a motion to withdraw a guilty plea, whether evidence is "merely cumulative or impeaching" turns on whether the evidence "seek[s] to discredit the

veracity of any witnesses" or whether it "serve[s] to controvert, that is, disputed the State's witnesses' *findings* and opinions, not their *credibility*." Banks, 845 So. 2d at 26-27 (emphasis in original).[28]

The Southern District of New York made the same observation in the context of a motion for a new trial. In Leon-Lopez, the new evidence consisted of a testifying agent's prior conviction for theft of government property, and another agent's placement on limited duty as a result of his improper relationship with a cocaine trafficker. 891 F. Supp. at 149. The court held this new evidence insufficient because "it would only be used to impeach the agents' credibility in general, and could not be used to impeach their credibility as to any specific statement or issue of fact." Id. Thus, the new evidence in Leon-Lopez fell short because it "merely discredits a government witness, but does not contradict the prosecution's case." Id.

Here, none of Kuenzel's new evidence attacks the prosecution's witnesses or case in a general manner; rather, it attacks the prosecution's case and/or the credibility of prosecution witnesses as to specific statements or issues of fact. By way of comparison, the "other evidence" mentioned by the District Court – that

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[28] See also Farris, 890 So. 2d at 192-93 (remanding because "[i]f the circuit court's original finding was that Gibson's and Hughley's testimony was merely impeachment evidence [and irrelevant], that finding was error[.]"); Schlup, 513 U.S. at 330 ("The newly presented evidence may indeed call into question the credibility of witnesses presented at trial.").

Kuenzel's mother committed inexcusable witness tampering, the notebook, and co-worker hearsay (R3.142 pp.17-18) – is probative only of credibility in general, if at all.

Moreover, the District Court's findings of witness unreliability are due no deference because the District Court took no live testimony, ruling solely based upon the same documents and affidavit testimony now before this Court. As discussed below, each piece of new evidence is sufficiently reliable for gateway purposes.

1. Carolyn Gibbons/Sam Gibbons/Gibbons Gun

Carolyn Gibbons, a 59-year old African American woman from Ashland, Alabama who never met Kuenzel, lacks any motive to lie about what she knows with respect to her late-husband's shotgun. Indisputably, Kuenzel retrieved Mr. Gibbons's shotgun from Mrs. Gibbons, and that shotgun is a .16 gauge.

In response to this new evidence, the District Court went beyond the record and Respondents' arguments to postulate that Venn might have had *another* shotgun with him that evening, and that such shotgun was a .12 gauge. R3.142 p.20 ("[Mrs. Gibbons] cannot possibly say that Venn never … borrowed a 12-gauge shotgun from someone else.").

Yet, the District Court's hypothetical disregards the record evidence. Venn testified that there were three guns in his car: a handgun, Kuenzel's stepfather's

shotgun, and the shotgun Venn borrowed from Sam Gibbons. T.122-24, 135-36, 140, 176; R3.115 p.3; R3.142 p.14. No other gun was mentioned by Venn at any other point. Further, Mrs. Gibbons states that:

> **Mr. Gibbons only owned one shotgun**; he loaned that shotgun to Venn prior to the murder; after the murder Mr. Gibbons showed the shotgun to the police; the shotgun was subsequently returned to Mr. Gibbons and was stored in their bedroom until Mr. Gibbons's death in 1991; following Mr. Gibbons's death, Mrs. Gibbons moved the shotgun to a van parked in front of their house that was used solely for storage purposes; the shotgun remained untouched until March 28, 1998, when she showed the shotgun to Kuenzel's investigators who examined it and photographed it; after the investigators left, Mrs. Gibbons returned the shotgun to the same van where it remained until May 5, 1998, when she again removed the shotgun to show to Kuenzel's prior counsel, David Dretzin; **she provided that same shotgun to Mr. Dretzin** who wrapped it in her presence, and presented her with a letter documenting same.

R3.45-2. Carl Majeskey, a firearms expert, states that he retrieved the shotgun sent to him by Mr. Dretzin, and that it was a .16 gauge Iver Johnson Champion top-break shotgun. R3.45-3. Thus, the record is clear that the only shotgun Mr. Gibbons owned was a .16 gauge, and that Venn possessed Mr. Gibbons's .16 gauge shotgun on the night of the murder.[29]

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[29] Attempting to buttress its speculation, the District Court argues that, on November 11, Venn "stated explicitly that he want squirrel hunting the day before the shooting with a *12-gauge* shotgun. R3.142 p.20 (citing R3.136-2) (emphasis in original). The District Court's argument is factually inaccurate. In that statement, Venn said he went squirrel hunting, but made no mention of a .12 gauge shotgun. See R3.136-2.

That fact stood unchallenged for almost a decade until, on May 14, 2010, Respondents revealed a previously undisclosed witness list whereupon it was written, next to Mr. Gibbons's name, "Loaned Venn the 12 Ga Shotgun." See R3.125-11 p.9. The affiant lacks any recollection of *who* obtained this information, and speculates that Mr. Gibbons (mistakenly) stated that he loaned Venn a .12 gauge shotgun. Tellingly, Respondents cannot produce anything to document its investigation beyond this handwritten notation, produced for the first time in 2010, without any underlying attribution. Respondents' "proffer" is woefully insufficient to credibly cast doubt upon Kuenzel's new evidence.

Instead, the witness list is most notable for the three new witnesses it identifies and Respondents' corresponding concession that it did, in fact, investigate Mr. Gibbons's shotgun.

Kuenzel has the Gibbons shotgun and it is a .16 gauge. It was error for the District Court to find Mrs. Gibbons's testimony unreliable. If there is any fault for Mr. Gibbons not having testified at trial, it can be attributed directly either to Respondents' failure to investigate/disclose, or trial counsel's failure to investigate. Indeed, trial counsel presented alibi evidence that Kuenzel was not present with Venn at the crime scene, and evidence from two witnesses that Kuenzel returned his stepfather's .16 gauge shotgun before the murder.

In the absence of any meaningful rebuttal evidence, it is now beyond dispute that the shotgun Venn borrowed from Mr. Gibbons and possessed on November 9th was a .16 gauge. The inaccuracy of that one fact critically alters the evidentiary landscape in the assessment of whether Venn's trial testimony implicating Kuenzel is credible.

2. Crystal Floyd

Floyd also lacks any motivation to fabricate a story to benefit Kuenzel. At the time that she first offered her non-hearsay testimony before the grand jury, Floyd was Venn's 13-year old girlfriend with nothing more than a passing familiarity of Kuenzel. For these reasons, it is likely that, had she testified at trial, the jury would have believed her testimony.

The District Court faults Floyd's reliability because her grand jury and affidavit testimony are inconsistent on the precise time that Venn visited her that night. Kuenzel agrees that Floyd is unreliable as to whether Venn visited her at 8:00-8:30 p.m. or closer to 10:00 p.m. Yet, it is the substance of her testimony that matters, and that substance never has credibly been challenged.[30] Indeed, we now

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[30] Notably, the District Court's 60(b) Opinion fails to mention Mr. Crenshaw's affidavit or disclaim any reliance thereupon; surprising, because that affidavit contains highly improper *praeteritio* and *ad hominem* attacks, including, *inter alia*, the suggestion that Kuenzel's counsel is homosexual, and the absurd argument that Floyd's testimony is unreliable because, although she believes Kuenzel's counsel to be homosexual, she nevertheless contacted Kuenzel's counsel to inform him of Mr. Crenshaw's visit. R3.125-7. Simply stated, Mr. Crenshaw's subjective opinions submitted in affidavit form cannot in any way be deemed a legitimate basis for discounting Floyd's testimony. The

know that Floyd's prior affidavit testimony truthfully asserts that she spoke with the police, and informed them about Venn's visit that night.

In the context of the Schlup Gateway analysis, Floyd's testimony that Venn visited her that evening, alone, is entirely consistent with the record evidence and further substantiates Kuenzel claim that he was not with Venn when the crime was committed.

3. April Harris

We now know that all Harris confidently saw is exactly what the eight witnesses physically present at the store that evening saw: Venn and Venn's car. See supra pp.18-21, 30-32. Given that Harris's grand jury testimony coincides better with the record evidence than her trial testimony, there is no reason to find her grand jury testimony unreliable.

4. Dr. James Gill

The District Court failed to give appropriate weight to Dr. Gill's testimony because it is not dispositive of Venn's guilt, and articulates one of many possible scenarios. The District Court's conclusion was misguided.

What Dr. Gill states based on record and new evidence is that both Venn and Ms. Offord exhibit injuries consistent with having been engaged in a physical

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remainder of Respondents' newly-submitted affidavits are of equally low quality (R3.125-7 through 13), and Kuenzel is willing to stand on his previously-submitted response to these materials. See Kuenzel's 60(b) Reply, R3.127 pp.28, 31-36.

altercation with one another just prior to Ms. Offord's murder. Dr. Gill does not opine that this theory is to the exclusion of all other explanations. Nonetheless, his opinion is meaningful because of its consistency with Venn's detailed and arguably revealing testimony regarding the acrimonious interaction between Ms. Offord and her assailant, and because it explains the presence of the victim's blood on Venn's pants.

The District Court misconstrues its purpose and improvidently dismisses Dr. Gill's testimony. While not a "silver bullet," it is admissible for gateway purposes and certainly would urge any juror towards acquittal. See U.S. v. Brown, 415 F.3d 1257, 1270 (11th Cir. 2005) ("Questions about the weight given to testimony, as distinguished from the issue of its admissibility, are for the factfinder.").

5. David Pope

In September 2010, Respondents produced four new witness statement from Venn taken mere days after the crime. In three of those statements, Venn provides detailed accounts of his interaction with a white male named David Pope, in his car, outside the store around 10:00 p.m. See R3.136-2, 136-7, 136-8. Venn explains that he knew Pope from school, and Venn gave the police a precise identification of Pope. See id.

It is difficult to understand how no one spoke with, or even attempted to interview, David Pope. See Kyles, 514 U.S. at 445 (noting that the previously

undisclosed evidence would have challenged "the thoroughness and even the good faith of the [police's] investigation" by "reveal[ing] a remarkably uncritical attitude on the part of the police."). That aside, if Respondents rely upon Venn's testimony being credited by the jury on myriad other points, there is no reason to dismiss Venn's prior identification of Pope. Undoubtedly this evidence would have cast considerable doubt upon Venn's later identification of Kuenzel as his companion.

6. Venn's Motive

The District Court does not challenge the reliability of this evidence, and we anticipate no dispute that the court records evidencing Venn's August 1987 arrest and upcoming hearing on November 16, 1987 are reliable. Floyd and Kuenzel state that Venn regularly borrowed money from them, and that Venn lacked the means to pay his attorneys. Further, Venn testified that, as of Monday, November 9th, he had spent his entire paycheck received the previous Friday. T.177. Thus, Kuenzel presents a credible motive for Venn to commit this robbery-murder. See House, 547 U.S. at 541 ("From beginning to end the case is about who committed the crime. When identity is in question, motive is key.").

7. Venn's Testimony

When assessing witness reliability, it is necessary to acknowledge that Respondents' case rises or falls with the jury's willingness to accept the credibility

of Venn's testimony. Leaving aside its rampant inconsistencies (see, e.g., R3.36 ¶ 96), the jury would inherently view Venn's testimony with suspicion given that he is an admitted accomplice facing a mountain of evidence indicating that he committed this crime. See Giglio v. U.S., 405 U.S. 150, 154-55 (1972) ("Here the Government's case depended almost entirely on Taliento's testimony [an alleged co-conspirator]; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case[.]"); U.S. v. Eley, 723 F.2d 1522, 1525 (11th Cir. 1984) ("A false explanatory statement may be viewed by a jury as substantive evidence tending to prove guilt.").

Courts and state legislatures rightly recognize that uncorroborated accomplice testimony must be viewed skeptically. See Ala. Code § 12-21-222; Bruton v. U.S., 391 U.S. 123, 136 (1968) (accomplice testimony is "inevitably suspect"); U.S. v. Hinds, 662 F.2d 362, 370 (5th Cir. 1981) (recognizing that an "accomplice is thought to have a 'motive to lie'"). See also Kyles, 514 U.S. at 461 (Scalia, J. dissenting) ("[I]t is not unusual for a guilty person who knows that he is suspected of a crime to try to shift blame to someone else[.]").

Once the above new evidence is considered with the evidence adduced at trial – the presence of Ms. Offord's blood on Venn's pants, Venn's presence at the crime scene shortly before the murder, Hope Chamberlain's testimony that

Kuenzel returned his stepfather's shotgun a day before the murder, and Glenn Kuenzel's testimony that he saw Kuenzel asleep at home at 10:30 – it is likely that any juror would believe that Venn was inside the convenience store when Ms. Offord was shot, that Kuenzel was not with Venn, and that Venn was framing Kuenzel to save his life and obtain release from prison in 10 years.

Given the volume of "direct" evidence the jury did not hear from witnesses lacking any discernable bias or motive to fabricate non-hearsay testimony, Kuenzel submits that a new factfinder should be charged with determining his fate. See Boyd v. Allen, 592 F.3d 1274, 1312 (11th Cir. 2010) (citing United States v. Prince, 883 F.2d 953, 959 n. 3 (11th Cir. 1989) and United States v. Copeland, 20 F.3d 412, 413 (11th Cir. 1994)). In light of Respondents' crucial reliance upon Venn's testimony, see Holmes v. South Carolina, 547 U.S. 319, 329-31 (2006), Kuenzel submits that the quantity and quality of the new evidence is sufficiently reliable such that any juror probably would acquit.

D. Kuenzel's Evidence Is New Because It Was Neither Presented At Trial Nor Discovered Earlier Because Of Shameful Constitutional Violations

Lacking binding precedent against which to assess Kuenzel's new evidence, the District Court applied the standards for consideration of "new evidence" in the Schlup Gateway context as promulgated by the Fifth Circuit in Lucas v. Johnson, 132 F.3d 1069 (5th Cir. 1998) and Dowthitt v. Johnson, 230 F.3d 733 (5th Cir.

2000). See R3.115 pp.53, 49 n.29. Applying the Fifth Circuit's "new evidence" standards, the District Court held that Kuenzel must demonstrate that "the evidence is newly discovered and was unknown to the defendant at the time of trial [and that] the defendant's failure to detect the evidence was not due to a lack of diligence." Id. p.25.

Over the past two decades, Kuenzel's *pro bono* counsel and their agents have literally criss-crossed the southeastern United States collecting the evidence now before this Court. Without court-ordered discovery, expert/investigative funding, or any subpoena power, Kuenzel found and interviewed relevant witnesses, and amassed a significant quantity of new, probative evidence. While Kuenzel painstakingly located this evidence, Respondents failed to conduct even a cursory examination of the original prosecution file until last year. Respondents' examination revealed their failure to disclose numerous documents to which Kuenzel was entitled, and that would have expedited the presentation of new evidence to the courts. If blame is to be assessed, it should rest squarely upon Respondents' inexcusable lack of production that hindered Kuenzel's evidence collection efforts, as well as trial counsel's constitutionally ineffective investigation of this case.

According to the District Court, however, Kuenzel's evidence is not "new" because it existed "at the time of trial," and thereby *theoretically* could have been

discovered, and *theoretically* could have been presented. See generally R3.115; R3.142. The District Court rejected Kuenzel's argument that his evidence is both "newly presented" and "newly discovered" because, although it existed at the time of trial, it was suppressed by Brady violations and/or not uncovered and presented because of Strickland violations.

Confusion regarding the applicable standard for consideration of new evidence is understandable given that courts do not uniformly define the modifier "new" in the gateway context. Some courts only recognize evidence as "new" if it relies upon a factual predicate that arose well after trial. See Osborne v. Purkett, 411 F.3d 911, 920 (8th Cir. 2005). Other courts treat evidence as "new" if it was available, but not presented at trial. See Gomez v. Jaimet, 350 F.3d 673, 679 (7th Cir. 2003); Griffin v. Johnson, 350 F.3d 956, 963 (9th Cir. 2003).[31] Thus, the salient question is "whether Schlup requires 'newly discovered' evidence or merely 'newly presented' evidence." Wright v. Quarterman, 470 F.3d 581, 591 (5th Cir. 2006).

On this appeal, Kuenzel maintains that his new evidence satisfies the Fifth Circuit's stringent standards. Yet, this case highlights why rigid application of the

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[31] This debate may stem in part from Justice O'Conner's separate concurring opinion in Schlup wherein she uses the term "newly discovered" as opposed to the majority's use of the phrase "new reliable evidence … that was not presented at trial." See Griffin, 350 F.3d at 961-62.

Fifth Circuit's standards might subvert the underlying purposes of the Schlup Gateway and the Great Writ.

Kuenzel respectfully submits that the standards recently articulated by the Third Circuit strike the appropriate balance. See Houck v. Stickman, 625 F.3d 88 (3d Cir. 2010). In Houck, the Third Circuit squarely addressed the problem with dogmatically applying a "newly discovered" or "diligence" standard to new evidence. Id. at 94. The issue of concern to the Third Circuit was that, "arguably it is unfair to a petitioner to apply the [newly discovered standard] in cases in which the petitioner claims that he has had ineffective assistance of counsel by reason of his attorney not discovering exculpatory evidence when the petitioner is relying on that very evidence as being the evidence of actual innocence in a gateway case to reach the ineffective assistance of counsel claim." Id.

Indeed, the Seventh Circuit in Gomez v. Jaimet recognized the same problem with limiting "new evidence" to "newly discovered" evidence, stating:

> If procedurally defaulted ineffective assistance of counsel claims may be heard upon a showing of actual innocence, then it would defy reason to block review of actual innocence based on what could later amount to the counsel's constitutionally defective representation. The burden for proving actual innocence is sufficiently stringent and it would be inappropriate and unnecessary to develop an additional threshold requirement that was not sanctioned by the Supreme Court.

Gomez, 350 F.3d at 679-80 (internal citation omitted).

To strike a balance, the Third Circuit rejected a "newly presented" standard as "too expansive," and instead defined "new evidence" to mean evidence not available at trial and that could not have been discovered earlier through diligence "with the narrow limitation that if the evidence was not discovered for use at trial because trial counsel was ineffective, the evidence may be regarded as new provided that it is the very evidence that the petitioner claims demonstrates his innocence." Houck, 625 F.3d at 94. Kuenzel agrees with the Third Circuit's adopted standard, and submits that the foregoing "narrow limitation" also should encompass evidence that was not discovered because of Brady violations.

Accordingly, the above standard requires addressing the merits of Kuenzel's Brady and Strickland claims so as to justify why his evidence constitutes "new evidence." Id. at 94 n.13 ("The adoption of the modified [Eighth Circuit] definition would parallel our recognition [] that sometimes a court must get ahead of itself and address issues relating to the merits of apparently procedurally barred claims in a determination of whether a petitioner's claims meet the threshold[.]").

E. The Constitutional Violations That Fatally Infected Kuenzel's Trial

1. Strickland Claims[32]

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel's performance, including its investigation, is deficient where it "fell below an objective standard of reasonableness." Id. at 688. "In assessing prejudice, the reviewing court must consider the totality of the evidence, mindful that 'a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.'" Williams v. Allen, 542 F.3d 1326, 1342 (11th Cir. 2008) (quoting Strickland, 466 U.S. at 696).

By its ruling that Kuenzel's evidence is not "new" because it was *theoretically* obtainable at trial, the District Court necessarily allows that Kuenzel's trial counsel's investigation was deficient. R3.142 pp.7-8 (finding that Kuenzel's evidence existed at the time of trial, but was neither investigated by trial counsel nor presented to the jury). See also R3.115 p.52 n.33. Here, just as in Williams, "[t]rial counsel's failure to pursue [] additional evidence cannot be characterized as the product of a reasonable strategic decision." 542 F.3d at 1340.

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[32] See R3.36 ¶¶ 48-64, 70-72.

The defense at trial was that Kuenzel was not with Venn during the disputed time frame, Kuenzel's shotgun was returned before the murder and was not the murder weapon, and that Venn sought to frame Kuenzel to save his own life. Accordingly, trial counsel's failure to investigate, *inter alia*, (i) Mr. Gibbons and the gauge of his shotgun; (ii) Floyd; (iii) Pope; (iv) Venn's motive to commit the crime; and (iv) whether an altercation occurred between Venn and Offord, cannot fairly be characterized as the product of a reasonable strategic decision. Indeed, "no competent counsel would have taken the action that his counsel did take." Chandler v. U.S., 218 F.3d 1305, 1313-15 (11th Cir. 2000) (*en banc*). As evidenced by the factual presentation set forth herein, prejudice to Kuenzel stemming therefrom is axiomatic. See generally House v. Bell, No. 96-CV-883, 2007 WL 4568444, *7-9 (E.D. Tenn. Dec. 20, 2007) (granting House's *habeas* petition following remand and holding that, in the event evidence was not "suppressed" under Brady, trial counsel's performance was constitutionally ineffective).

2. **Brady Claims**[33]

At trial and throughout post-conviction, Kuenzel repeatedly requested production and disclosure of, among other things, all exculpatory and/or impeachment materials. See R3.121 pp.4-6. In response, Respondents vehemently

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[33] See R3.36 ¶¶ 73-95.

denied the existence of any outstanding materials (id.), including specifically denying the existence of any additional statements given by Venn. See T.174.

The District Court did not hide its reluctance to conclude that Respondents "actively or tacitly assisted Venn in framing [Kuenzel]." (R3.133 p.7). Indeed, the District Court stated that it "has a very had time swallowing this theory." Id. pp. 6-7. Mindful of the unpalatable finding Kuenzel asks this Court to render, he submits that the evidence leads inescapably to this regrettable conclusion.

In Brady v. Maryland, 373 U.S. 83 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused ... violates due process where the evidence is material either to guilt or to punishment." Id. at 87. A Brady violation exists where a defendant demonstrates: "(1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been revealed to the defense, there is a reasonable probability that the outcome of the proceeding would have been different." Arnold v. Sect'y, Dep't of Corrections, 595 F.3d 1324 (11th Cir. 2010) (adopting in whole the opinion of Arnold v. McNeil, 622 F. Supp. 2d. 1294, 1310 (M.D. Fla. 2009)) (quoting U.S. v. Newton,

44 F.3d 913, 918 (11th Cir. 1995), cert. denied, 516 U.S. 857 (1995)). See also Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

The prejudice or materiality requirement is satisfied if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." U.S. v. Bagley, 473 U.S. 667, 682 (1985) (internal quotation marks omitted); Kyles v. Whitley, 514 U.S. 419, 433 (1995). Materiality requires asking whether "the government's evidentiary suppressions, viewed cumulatively, undermine confidence in the guilty verdict." Smith v. Sect'y, Dep't of Corrections, 572 F.3d 1327, 1334 (11th Cir. 2009) (citing Kyles, 514 U.S. at 434, 436-37 n.10).

Eight items were unconstitutionally withheld from Kuenzel: (i) the grand jury testimony of Harris, Floyd, and Epperson; (ii) four Venn statements; and (iii) the true gauge of Venn's borrowed shotgun.

There can be no question all four elements of Brady are satisfied with respect to Harris and Floyd's grand jury testimony, and the four Venn statements.[34] Respondents possessed and suppressed these materials despite Kuenzel's repeated requests for production. Moreover, had these materials been disclosed, there is a

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[34] See, e.g., Lambert v. Beard, No. 07-CV-9005, 2011 WL 353209 (3d Cir. Feb. 7, 2011) (granting *habeas* petition on Brady claim under factually similar circumstances); Norton v. Spencer, 351 F.3d 1, 9 (1st Cir. 2003) ("Confidence in the outcome is particularly doubtful when the withheld evidence impeaches a witness whose 'testimony is uncorroborated and essential to the conviction.'") (internal citation omitted).

reasonable probability of a different outcome. By withholding this evidence, Respondents violated Kuenzel's constitutional rights, see Banks v. Dretke, 540 U.S. 668, 696 (2004), and their official duties grounded in the recognition that "the prosecutor's role transcends that of an adversary: he is the representative not of an ordinary party to a controversy, but of a sovereignty … whose interest … in a criminal prosecution is not that is shall win a case, but that justice shall be done." U.S. v. Bagley, 473 U.S. 667, 675 n.6 (1985) (quoting Berger v. U.S., 295 U.S. 78, 88 (1935)). See also Giglio, 405 U.S. at 154 ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within th[e] [Brady] rule.") (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959)).[35]

As to the gauge of Venn's shotgun, the first two elements of the analysis are slightly more difficult; but not enough to avoid reaching the same result.[36] In 2010, Respondents adopted the position that they investigated the shotgun and (incorrectly) believed it to be a .12 gauge. Thus, culpability aside, Respondents are deemed to have possessed knowledge that the Gibbons/Venn shotgun is a .16

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[35] Respondents' suppression also supports the finding that Kuenzel's "new evidence" was diligently collected. See Banks, 540 U.S. at 693 ("[B]ecause the State persisted in hiding Farr's informant status and misleadingly represented that it had complied in full with its Brady disclosure obligations, Banks had cause for failing to investigate, in state postconviction proceedings, Farr's connections to Deputy Sheriff Huff.").

[36] Kuenzel notes Epperson's grand jury testimony as evidence subject to disclosure under Brady, and which thereby is properly factored into the cumulative evidence analysis. See Kyles, 514 U.S. at 450.

gauge. Kyles, 514 U.S. at 437; Martinez v. Wainwright, 621 F.2d 184, 186-87 (5th Cir. 1980).

The key question therefore becomes whether Respondents "suppressed" the shotgun's true gauge within the meaning of Brady. Kuenzel offers two reasons why suppression exists. First, Respondents now admit that *someone* investigated the Gibbons/Venn shotgun. As such, the prosecution *should have* known that Venn's shotgun was a .16 gauge – it is stated on the weapon itself – and should thereby be deemed to have "suppressed" the shotgun's gauge. See Brady, 373 U.S. 86-87; Arnold 622 F. Supp. 2d at 1313-16.[37]

Second, suppression exists because Venn possessed Mr. Gibbons's shotgun and thereby had at least constructive – if not actual – knowledge of the weapon's true gauge. Given Respondents' total reliance upon Venn's testimony to convict Kuenzel, for purposes of establishing suppression under Brady, Venn was "so intimately connected to the [] investigation that [Venn] himself should be considered a member of the prosecution team." Id. at 1314. See also id. at 1319 ("Here, where the prosecutor placed such great emphasis on the credibility of Sinclair, evidence which would tend to impugn Sinclair's credibility would be

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[37] Kuenzel does not necessarily allege knowing impropriety on Respondents' part. If the police spoke with Mr. Gibbons but did not examine the gun for themselves, it is possible that Mr. Gibbons inadvertently told the police that he owned a .12 gauge. Mr. Gibbons was not a hunter, and he only used the shotgun once a year on New Year's. R3.45-2.

particularly probative. Although Arnold's trial counsel attempted to highlight discrepancies between Sinclair's testimony and the testimony of [other witnesses] … by its verdict, the jury very likely credited Sinclair's testimony."); Napue, 360 U.S. at 269.

Weighing the total suppressed evidence against the weak evidence of Kuenzel's guilt, Kuenzel submits that his constitutional rights under Brady were violated. See Davis v. Zant, 36 F.3d 1538, 1546 (11th Cir. 1994) ("Clearly, where the evidence against the accused is very strong, in order to merit relief, prosecutorial misconduct would have to be even more egregious and pervasive than in cases where the evidence is less compelling, e.g. where the defendant has a viable defense."). See also Holmes, 547 U.S. at 329-31; Smith v. Sect'y Dept. of Corr., 572 F.3d 1327, 1347 (11th Cir. 2009); Wilson v. Beard, 589 F.3d 651, 667 (3d Cir. 2009). Here, Respondents' case is wholly founded upon Venn, an admitted accomplice with the ultimate motive to lie, who "had been drinking heavily" on the night of the murder, and whose testimony was "inconsisten[t] with previous statements and [included a] vague memory of several details." R3.115 p.46. That Respondents chose to do so is a strategy with ramifications, including less new evidence needed for Kuenzel to challenge Respondents' case and gain review of otherwise procedurally defaulted claims. Considering the suppressed

evidence cumulatively, just as in Kyles, "'fairness' cannot be stretched to the point of calling this a fair trial." 514 U.S. at 454.

CONCLUSION

For the reasons set forth above, the judgment of the District Court should be vacated and reversed, the Petition should be reinstated, and the Petition should be conditionally granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, David A. Kochman, hereby certify, relying on the word count provided by Microsoft Word, that the foregoing Petitioner-Appellant's Brief contains 17,389 words. On February 18, 2011, this Court granted Kuenzel's motion to enlarge the word count permitted by 11th Cir. R. 32(a)(7)(B) for the parties' principal briefs to 17,500 words.

/s/ David A. Kochman
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CERTIFICATE OF SERVICE

I, David Kochman, hereby certify that on the 22nd day of February 2011, I served a copy of the foregoing Petitioner-Appellant's Brief and Record Excerpts upon the attorneys for Respondents-Appellees by delivering the same to UPS Overnight Mail, postage prepaid, addressed as follows:

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