FILED
2010 Sep-30 AM 11:24
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

WILLIAM ERNEST KUENZEL,

Petitioner,

- against -

RICHARD F. ALLEN, Commissioner of the Alabama Department of Corrections, and the ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Respondents.

Case No. 1:00-cv-316 (IPJ) (TMP)

Oral Argument Requested

PETITIONER WILLIAM ERNEST KUENZEL'S SUPPLEMENTAL EVIDENTIARY RESPONSE IN FURTHER SUPPORT OF HIS MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FED. R. CIV. P. 60(b)

David A. Kochman (*pro hac vice*)
Reed Smith LLP
599 Lexington Avenue
New York, New York 10022
Tel: (212) 521-5400

Jeffrey E. Glen (*pro hac vice*)
Anderson Kill & Olick P.C.
1251 Avenue of the Americas
New York, New York 10020
Tel: (212) 278-1000

Rick Burgess
215 North 21st Street
Birmingham, AL 35203
Tel: (205) 328-6710

Co-Counsel for William Ernest Kuenzel

TABLE OF CONTENTS

Page

Petitioner, William Ernest Kuenzel ("Kuenzel"), by and through counsel, respectfully submits the foregoing supplemental evidentiary response in further support of his motion, pursuant to Federal Rule of Civil Procedure 60(b)(1), (2), (3), and (6), for relief from the judgment of the Court denying and dismissing Kuenzel's first petition for a writ of *habeas corpus* on procedural grounds, dated December 16, 2009. Doc. 115 (the "Opinion") and Doc. 116 (the "Order").

PRELIMINARY STATEMENT

The Likely Acquittal Gateway should not be an impenetrable fortress.[1] The necessity of ensuring that the gateway remains an exacting standard is not challenged. Nor is the fact that this Court can and should summarily dismiss post-conviction claims of innocence that are clearly without merit. But Kuenzel also submits that there must be a way for a *habeas* petitioner to meet the gateway standard absent DNA evidence and obtain review of otherwise procedurally defaulted claims.

As this Court recognized in the Opinion, there is not a single decision from either the Northern District of Alabama or the Eleventh Circuit establishing the factual benchmark of innocence sufficient to pass through the Likely Acquittal Gateway. When a case comes before this Court where factual innocence can be established with scientific certainty such as with DNA evidence, unquestionably relief will be forthcoming. But unless this Court intends to limit relief to cases of scientific certainty, the total evidence in this case constitutes the quality and quantity of proof that no reasonable jury could reject as compelling a finding of reasonable doubt.

---

[1] Kuenzel's reference to the term "Likely Acquittal Gateway" refers to the standard set forth in Schlup v. Delo that a *habeas* petitioner may access a gateway to review of his otherwise procedurally defaulted claims if he can demonstrate that, based on the total evidence, old and new, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt.

At the time of the murder, Kuenzel claims that he was at home sleeping. An alibi witness attests to his whereabouts just prior to the murder, as does Venn shortly after the murder. There is no physical evidence connecting Kuenzel to the crime, and we now know that there are **no** witnesses who corroborate any aspects of Venn's story that purport to implicate Kuenzel.

Conversely, all of the evidence has pointed to, and the new evidence continues to point to, Venn as the perpetrator: Venn knows every detail of the crime; he was placed at the scene by 10 separate witnesses within 10 minutes of the murder; he cannot explain how or why the victim's blood is on his clothes if he never entered the store; and Venn's story does not align with the evidence unless it is acknowledged that Venn was the true killer. Every material part of the State's case against Kuenzel requires the jury to believe those portions of Venn's testimony that fit into the State's theory, and ignore those portions of Venn's testimony that do not. Indeed, without Venn, the State cannot place Kuenzel with Venn or even at the store at any point between the hours of 8 p.m. and 11 p.m.

In sum, the new evidence renders the possibility that Venn acted alone to be so logical, so persuasive, so supported by the evidence, that it can be classified as nothing less than self-evident reasonable doubt. And it is the existence of this compelling reasonable doubt – of whatever form it may take and order in which it may be revealed – that Kuenzel submits is the factual innocence he must demonstrate to pass through the Likely Acquittal Gateway. "[T]he Schlup standard does not require absolute certainty about the petitioner's guilt or innocence … [rather] [a] petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt." House v. Bell, 126 S. Ct. 2064, 2077 (2006). House counsels that this inquiry "requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented

record … includ[ing] consideration of 'the credibility of the witnesses presented at trial.'" Id. at 2078 (quoting Schlup v. Delo, 513 U.S. 298 (1995) ("Under the gateway standard … the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such case, the habeas court may have to make some credibility assessments.")).

This Court is vested with the power and express authority to consider **all** the evidence. Based on the total evidence, this Court is empowered to render an assessment of whether the evidentiary landscape has changed such that Kuenzel now demonstrates the existence of reasonable doubt that no juror could ignore.

The total evidence allows Kuenzel to present a compelling narrative that Venn and Venn alone committed this crime. Kuenzel's theory of the case is rooted in, and is fully consistent with the new and old evidence. Without a doubt, Kuenzel's theory of the case identifies Venn as a better, more logical and likely suspect. Only because the State strategically withheld evidence that would have both (i) detracted from the plausibility and veracity of Venn's story in the eyes of the jury and (ii) added to the existing evidence strongly suggesting that Venn murdered Linda Offord, coupled with the horrific ineffectiveness of Kuenzel's trial counsel, did the jury not acquit Kuenzel based on incontrovertible reasonable doubt.

It is now beyond dispute that Kuenzel's trial was constitutionally unsatisfactory. Thus, at its core, the question presented to this Court is whether Mr. Kuenzel should be sent to die without a review of his constitutional claims of reversible trial error because he fails to demonstrate enough reasonable doubt about his guilt.

Kuenzel respectfully submits that the answer is "No."

RESPONSE TO THE LIMITED DISCOVERY ORDER

I. THE SIGNIFICANCE OF THE NEW EVIDENCE REVEALED BY THE STATE'S SEPTEMBER 3, 2010 PRODUCTION, INCLUDING THE IMPORTANCE OF WHAT THE STATE DID *NOT* PRODUCE

On August 6, 2010 this Court issued a "Limited Discovery Order." Doc. 133. The Limited Discovery Order required the State to produce "any and all documents, statements, recordings, reports, and other information (other than such created by or known to petitioner or his counsel) in any investigative or prosecutorial file created by law enforcement personnel, forensics personnel, or prosecutors in relation to the murder of Linda Offord, that:

1. State or imply that petitioner did not kill Linda Offord;

2. State or imply that petitioner was not present at or during the murder of Linda Offord;

3. State or imply that petitioner is innocent of the murder of Linda Offord;

4. Expressly or implicitly contradicts or impeaches the trial testimony of any prosecution witness presented during petitioner's trial;

5. State or imply that the murder weapon was anything other than the Harrington and Richardson .16 gauge shotgun petitioner borrowed from his stepfather;

6. State or imply that Harvey Venn possessed a .16 gauge shotgun (other than the shotgun borrowed from petitioner's stepfather), rather than a .12 gauge shotgun, at the time of the murder of Linda Offord;

7. State or imply that anyone other than petitioner was with Harvey Venn at the time of the murder of Linda Offord, or that Harvey Venn was and acted alone at the time;

8. State or imply whether and how police investigated whether the shotgun Harvey Venn borrowed from Sam Gibbons was a .12 or .16 gauge shotgun, and how (if at all) it was excluded as the murder weapon."

Limited Discovery Order, Doc. 133, pp. 7-8. The Limited Discovery Order clarified that "[t]he express purpose of this Order is to require the respondents to assure that there no longer exist any previously undisclosed documents or information in the investigative or prosecutorial files of this case that might support the petitioner's twenty-year contention that he is innocent of the murder of Linda Offord." Id. at p. 8.

In response to the Limited Discovery Order, the State produced 15 documents. See Respondents' Certification and Listing of Documents, Doc. 134. Among the documents produced by the State were four (4) never-before disclosed statements provided by Venn to the police shortly after the murder took place, but before Venn implicated Kuenzel. Affidavit of David A. Kochman, dated September 30, 2010 ("Kochman Aff."), Exhs. B, E, F, and H. The State's production provides crucial insight into Venn's demeanor shortly after the murder, and Venn's confidence that he was not seen at the convenience store after 10:00 p.m. The new evidence also reveals the true significance of partially disclosed evidence, including the existence of a second piece of physical evidence linking Venn to the murder. When the substance of and implications contained in these materials are combined with the cumulative evidence already before this Court, a clear picture of what actually transpired on November 9, 1987 is revealed.

A. Kuenzel Has Tipped the Scale Decidedly In Favor Of Reasonable Doubt; The Law Does Not Require Him to Knock It Over

This is not a case whose fact pattern lends itself to the opportunity to find a "silver bullet" piece of exculpatory evidence. It is submitted, however, that a standalone "silver bullet" is not what the law requires Kuenzel to locate to obtain review of procedurally defaulted claims.

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 in favor of the

conclusion that Venn had a motive to and did commit this murder, that Venn framed Kuenzel to save his own life, and that the State impermissibly improved its odds of prevailing at trial.

Analyzing a claim for passage through the Likely Acquittal Gateway requires a "fact-intensive," "holistic judgment about 'all the evidence,' and its likely effect on reasonable jurors applying the reasonable-doubt standard." House v. Bell, 547 U.S. 518, 539 (2006) (quoting Schlup v. Delo, 513 U.S. 298, 328 (1995)). 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. Id. at 327. The Likely Acquittal 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." Id. at 332. See also Souter v. Jones, 395 F.3d 577, 592-93 (6th Cir. 2005) (petitioner's new evidence not only "adds to the defense, but also deducts from the prosecution").

In a variety of contexts, courts conducting "total evidence" analyses have considered new impeachment evidence that does not go to credibility in general, but to the substance of a witnesses' factual testimony. See Banks v. State, 845 So. 2d 9 (Ala. Cr. App. 2002); 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's *findings* and opinions, not their *credibility*." Banks, 845 So. 2d at 26-27 (emphasis in original).[2]

[2] See also Farris, 890 So. 2d at 192-93 (remanding with directions to determine "whether the court found that Farris's newly-discovered-evidence claim was meritless because the newly discovered

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. Leon-Lopez, 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.

As discussed herein, none of Kuenzel's new evidence attacks the prosecution's witnesses or case in a general manner. Rather, all of Kuenzel's new evidence attacks the prosecution's case and/or the credibility of prosecution witnesses as to specific statements or issues of fact. For this reason, Kuenzel's new evidence properly is factored into the assessment of whether reasonable doubt now exists such that it is likely that any juror would acquit.

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, 845 So. 2d at 26-27 (quoting Houston v. State, 208 Ala. 660, 95 So. 145 (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))). See also Houston, 95 So. at

---

evidence constituted impeachment evidence or because the newly discovered evidence was not credible … [because] [i]f the circuit court's original finding was that Gibson's and Hughley's testimony was merely impeachment evidence, that finding was error … and the circuit court should reconsider Farris's newly-discovered-evidence claim …[but if] the circuit court's original finding was that Gibson's and Hughley's testimony was not credible, the court should clarify that credibility choice and make a specific finding as to whether the outcome of Farris's trial would have been different had Gibson and Hughley testified."); Schlup, 513 U.S. at 330 ("The newly presented evidence may indeed call into question the credibility of witnesses presented at trial."); Giglio v. U.S., 405 U.S. 150, 154 (1972) ("Impeachment evidence, ... as well as exculpatory evidence, falls within the Brady rule.").

147-48 ("This witness Felton was the most important one who testified against the defendant, and it is in fact questionable as to whether or not the state made out a case without his testimony and we are not able to say that proof of these statements would not probably change the result.").

Finally, Kuenzel notes that although cases permitting passage through the Likely Acquittal Gateway based upon new evidence that present a more credible and plausible alternate suspect are not the norm, they do arise. See, e.g., House, 547 U.S. 548-53 (allowing passage through the Likely Acquittal Gateway where petitioner House presented the victim's husband as a credible alternate suspect with a motive and, although the evidence was "by no means conclusive," when considered in the context of the total evidence it "likely would reinforce other doubts as to House's guilt"); Brown v. Singletary, 229 F. Supp. 2d 1345, 1363-66 (S.D. Fla. 2002) (allowing passage through the Likely Acquittal 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").

With the foregoing principles of law in mind, Kuenzel turns to why the documents produced by the State since March 2010 demonstrate a clear "defect in the integrity of the federal habeas proceedings" because the total evidence would now create reasonable doubt in the mind of any juror.

B. Conclusions Based Upon The State's September Production

Subsequent to the Court's Opinion and Order, the State made two productions of documents: the "March Production" and the "September Production." Both are properly considered on this 60(b) motion. Kuenzel's Reply in support of the 60(b) motion discusses the findings that arise based upon the State's March Production. See Kochman Aff., Exh. A, pp. 6-

14. Below are the three most important revelations based upon what was included in the State's September Production.

1. It is Likely That Ms. Offord Physically Resisted Venn's Robbery Attempt

Among the documents in the State's September Production were Officer Dusty Zook's notes of an interview conducted with Venn at 8:33 p.m. on November 11, 1987. See Kochman Aff, Exh. B. Officer Zook's notes reveal that, two days after the murder, it appeared "like he [Venn] had a black eye (left)." Id. Several pages later, Zook observed that Venn's "left arm looks bruised." Id.[3]

As the Court is aware, Kuenzel always has maintained that he had nothing to do with Ms. Offord's murder, and the only known physical evidence in this case had been, to date, the unexplained presence of Ms. Offord's blood on Venn's pants. In light of Zook's notes, there now exists another form of physical evidence potentially linking Venn directly to this crime.

Dr. James R. Gill is the Deputy Chief Medical Examiner of the Bronx County office of the Office of the Chief Medical Examiner for the City of New York. See Affidavit of James R. Gill, M.D., dated September 27, 2010 ("Gill Aff."), ¶ 2. At the request of Kuenzel's counsel, Dr. Gill reviewed Officer Zook's notes, dated November 11, 1987, the Report of Autopsy, dated November 10, 1987, and nineteen (19) photographs taken during the autopsy examination. Id. ¶ 7. Dr. Gill was asked to determine whether there is scientific support for the theory that Venn and Ms. Offord engaged in a physical altercation prior to Ms. Offord's death. Id. ¶ 6.

After reviewing the above materials, Dr. Gill concluded "to a reasonable degree of medical certainty" as follows:

---

[3] Because Officer Dusty Zook separately references bruises on both Venn's eye and arm, we know that Zook was not referring to Kuenzel in her notes. To be sure, we know that Officer Zook could not have been talking about Kuenzel because the officer that interviewed Kuenzel that same night surely would have noted the appearance of bruises on Kuenzel in his notes. Yet no such notation was made. See Kochman Aff., Exh. S. See also id. ¶¶ 21-22.

> First, both Ms. Offord and Venn exhibit signs consistent with having recently been involved in a physical altercation. Second, based on the information I 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. Dr. Gill goes on to explain the bases of his findings, as well as the reasons "it is unknowable to a degree of 100% certainty whether or not Venn and Ms. Offord engaged in a physical altercation shortly before Ms. Offord's death." Id. ¶¶ 9-14. Nevertheless, Dr. Gill is able to opine "to a reasonable degree of medical certainty that the evidence supports a conclusion that Ms. Offord and Venn were involved in a physical altercation with one another immediately prior to Ms. Offord's death." Id. ¶ 15.

Buttressing the medical evidence is record evidence that also is consistent with an altercation having taken place between Venn and Ms. Offord. Venn offered strikingly specific testimony regarding what exactly was said inside the store that evening, twice recollecting the precise words Ms. Offord used when she refused to hand over any money from the cash register. Compare Kochman Aff., Exh. J, p. 12, with T.181 and Ex parte Kuenzel, 577 So. 2d at 532-33. See also infra, p. 23. Although Venn states 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, 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, it can readily be inferred that Venn knew what was said in the store because he was there not as an accomplice, but as the perpetrator of the crime. Absent the benefit of Zook's notes, Kuenzel never would have been able to establish this additional basis for the jury to conclude that Venn sought to frame Kuenzel for Ms. Offord's murder.

2. Venn Corroborates Moore's Affidavit and Grand Jury Testimony That He Visited Her After 8 p.m.

The March Production included Crystal (Floyd) Moore's testimony before the grand jury that Venn visited her, alone, during the disputed time frame on November 9, 1987. Kochman Aff., Exh. O, p. 1. Floyd's recollection of this visit has remained consistent in all material respects for over twenty years. See Kochman Aff., Exh. K.

We now have available a statement that Venn gave to the police on November 11th, which included the following testimony regarding what Venn did after dropping off Kuenzel:

> [I] got at Chris' [Morris] about 8:00 p.m. Chris wasn't home so I came on back. Went by his friend's house to see if he was there. I can't think of his name.

Kochman Aff., Exh. B. As an initial matter, it is difficult to believe that only two days after Venn went to visit someone at their house, he cannot recall that person's name. For this reason, Officer Zook's contemporaneous observations of Venn provide key insight into the possible identity of the unnamed individual that Venn visited after leaving Morris's house. At the time when Venn made the foregoing statement, Zook observed the following:

> His [Venn's] face got real flushed at the point when he's saying This guy wasn't home. Came on back towards Hollins.

Id. (emphasis in original). See also Kochman Aff., Exh. H (Venn said that he "Left [Morris's] and came back toward Hollins").

Based on this new evidence, it is a fair inference that Venn was embarrassed or at least concerned about disclosing to the police the identify of the person that he went to visit late on Monday night. In contrast, Venn had no problems providing the police with the names of Chris Morris and David Pope, and was adamant that he arrived at the convenience store alone. See Kochman Aff., Exh. B. Curiously, however, Venn was reluctant to identify this one individual to the police. Now, the only other evidence in this case regarding Venn's whereabouts between

the time that he left Morris's house and the time that he arrived at the convenience store comes from Crystal Floyd. Floyd always has maintained that Venn visited her alone on the night of November 9th. Accordingly, coupling the new evidence with Floyd's testimony, it reasonably can be inferred that Venn became bashful because of his concerns about what the police might think if he told them that, late at night, he went to visit a 13 year-old girl that he was dating.

Notably, Venn also told Zook that he "[c]ame on back towards Hollins" after leaving Morris's house. Id. Venn lived in Goodwater – which is where he said that he went – but Floyd lived in Hollins. Kuenzel admittedly cannot prove beyond the shadow of a doubt that Venn's off-handed statement that he headed back "towards Hollins" was a mental slip revealing the true location where he traveled to visit the unidentified individual, but it is telling at the very least. When coupled with Floyd's unchallenged and unbiased testimony that she saw Venn during the disputed time frame on November 9th, the new evidence creates a foundation upon which any juror could reasonably conclude that Venn did visit Floyd, and that Floyd was truthful when she testified that Venn was alone on that occasion.

This new evidence thereby provides the Court with a reasonable basis to conclude that, in the days immediately following the murder, Venn corroborated Floyd's testimony that Venn visited her that evening during the disputed time frame. Although Floyd had no reason to lie about Venn's seemingly innocuous visit that night, Zook's observations regarding Venn are consistent with a finding that Venn did, in fact, visit Floyd.

3. Officer Dusty Zook's Observations of Venn's Demeanor Two Days After the Murder Provide a Window Into His Mindset and Thinking

Detective Dennis Surrett observed that Kuenzel was in "[a]n excellent state of mind" two days after the murder on November 11th, and on November 15th six days after the murder. T.430.

It is now possible to contrast Kuenzel's state of mind, with the police's observations of Venn over this same time frame. See Kochman Aff., Exh. B.

During the police's questioning of Venn on November 11th, Officer Zook contemporaneously noted the following observations about Venn:

- When asked to repeat his story for the second time, Zook noted that Venn's "Voice is now wavering";
- Venn's eyes were "blood shot";
- Venn's voice became "shaky";
- Venn was "getting an attitude 'uh huh – yeah'" and said to Officer Kenneth Brasher "You know you could lose your job if your [sic] wrong, you know, man?";
- Venn was "picking, chewed at fingers," "fingernails."

Id.

At trial, Kuenzel lacked a foundation to question Zook regarding her observations of Venn's demeanor shortly after the murder. See T.218-236, 440-43. While Zook's observations might not independently constitute a basis upon which the jury would find the existence of reasonable doubt, they surely would have urged the jury toward that conclusion.

C. Conclusions Based Upon What Was Not Contained in the State's September Production

Equally important to what documents were included in the September Production are what documents were not included. By failing to produce any responsive documents on certain key points of evidence, the State necessarily has made some key concessions.

1. No Investigation of Sam Gibbons, or the Gibbons Gun

During cross-examination of Venn at trial, Rumsey made the following proclamation to the Circuit Court:

> We have given him [Kuenzel] **every** statement that Mr. Vinn [sic] made, the 11th [of November 1987], the 14th [of November 1987], and the 9th [of December 1987].

T.174 (emphasis added).

We now know Rumsey's assertion to be completely and utterly untrue. See Kochman Aff., Exh. B, E, F, and H.[4] We also know that this misrepresentation by the State was not an isolated incident. See Harris Grand Jury testimony, Kochman Aff., Exh. Q.[5]

Kuenzel notes the foregoing instances of prosecution misconduct because, for over a decade, Kuenzel has maintained that Venn's borrowed shotgun was a .16 gauge, and not a .12 gauge as the State presented at trial. In March 2010, the State attempted to impeach this fact through an isolated, fleeting and unattributed reference on Surrett's witness list. The Limited Discovery Order included four (4) broad categories of discovery specifically directed at production of any evidence concerning the police's investigation of the Gibbons gun and/or Sam Gibbons. In response to the Limited Discovery Order, the State did not produce a single

---

[4] Later on at trial, Kuenzel's counsel asked Officer Dusty Zook, "Has anybody made available to you any information that would exculpate our client in this case?" T.440. Rumsey objected, stating that "I've given them [Kuenzel] the substance of the [exculpatory] statements." T.441. Kuenzel's counsel protested, arguing that Rumsey "has made available some information to her [Dusty Zook] that he will not make available to us, and we can't plead surprise with him not talking with us, your Honor." T.441-42. The Court sustained Rumsey's objection. T.442-43.

[5] Enlightening when considered in the context of the State's failure to produce Harris's grand jury testimony is the Court of Criminal Appeals' finding 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." Kuenzel v. State, 577 So. 2d 474, 492 (Ala. Cr. App. 1990). Noting the impropriety of this argument, the Court of Criminal Appeals stated that "there is nothing in the record to show that this list was ever introduced into evidence" and, thus, Rumsey's argument was improper because "there was no evidence before the jury that Harris was on the subpoena list or that she gave any statement to the police." Id. 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).

document recording any investigation conducted into the Gibbons gun, or even so much as a conversation held with Mr. Gibbons.[6]

In the absence of any meaningful rebuttal evidence, it is now beyond dispute that the State falsely allowed the jury to believe that Venn was not in possession of a .16 gauge shotgun, and that Kuenzel was the only other person on November 9th who theoretically could have possessed a gun matching the gauge of the murder weapon. Given the nature of the evidence in question, it is extraordinarily unlikely that the State did not investigate the shotgun Venn borrowed from Sam Gibbons, and which he admittedly possessed during the crime. The Gibbons gun was a central piece of evidence, and there is no plausible explanation for why the State would not have looked at it. Indeed, Mrs. Gibbons affirmatively stated that the police did look at the gun. Kochman Aff., Exh. L.

Kuenzel has the Gibbons gun, and it is a .16 gauge. Thus, the most logical explanation for why this evidence did not come out at trial is that, after the State obtained this information, they decided to remain silent until Kuenzel's defense counsel learned about it through its own investigation. But Kuenzel's counsel never did learn the true gauge of the Gibbons gun. In light of the pittance Kuenzel's counsel was given to investigate this capital murder case, there was scant motivation for counsel to devote unpaid working hours to a matter that appeared to be a slam dunk acquittal.[7] As a result, Kuenzel's counsel did virtually nothing to investigate or prepare apart from acquiring a passing familiarity with the case details. Kochman Aff., Exh. T.

---

[6] As noted in Kuenzel's Reply, if the police did speak with Mr. Gibbons, and merely asked Mr. Gibbons to tell them what he thought was the gauge of his shotgun without examining the gun for themselves, it is quite possible that Mr. Gibbons inadvertently told the police that he owned a .12 gauge shotgun. Kochman Aff., Exh. A., p. 35-36. Mr. Gibbons was not a hunter, he only used the gun once a year on New Year's, and his wife has a strong dislike for guns. Kochman Aff., Exh. L.

[7] Of the three witnesses Kuenzel's trial counsel presented, it appears that Kuenzel's counsel intended to rely heavily upon Tony McElrath to tell the jury that he saw Venn shoot Ms. Offord.

Nevertheless, Kuenzel's counsel never should have been in the position to be ineffective by failing to investigate the Gibbons gun, and counsel's ineffectiveness should not and does not excuse a knowing and material Brady violation by the prosecution. Unquestionably, the true gauge of Venn's borrowed shotgun should have been investigated by the police and truthfully disclosed to Kuenzel. Venn was the only witness supporting this fulcrum fact. At bottom, the State had no factual basis to put a .16 gauge in Kuenzel's hands, and a .12 gauge in Venn's. The inaccuracy of that one fact critically alters the evidentiary landscape in the minds of the jury.

Finally, it must not be forgotten that all of the information revealed since March 2010 did not come to light by mere happenstance. The State knew of this evidence, and approached a lay witness with it before producing it to Kuenzel and/or this Court. Even accepting at face value the State's contention that they did not look at the prosecution file until "only recently," there is no excuse for why every attorney from the State involved in this case failed to look at the file during the two decades Mr. Kuenzel has been in post-conviction. Moreover, the State offers no indication that it would have ever disclosed the existence of these materials but for Ms. Floyd having contacted Kuenzel's counsel.

The point is this. The State's hiding of evidence, and use of false testimony at trial, precludes them from now wearing the "white hat" on any disputed issue before this Court.

2. No Investigation of David Pope

Two days after the murder, David Pope appeared to be the most critical suspect to investigate after Harvey Venn. Shortly after the murder, Venn repeatedly told the police that he was seated with Pope in his car, at the store, during the disputed time frame. Kochman Aff.,

---

See McElrath statements, Kochman Aff., Exh. R. Coupled with the ample evidence of Venn's guilt, Kuenzel's counsel was confident that an acquittal would result. See Kochman Aff., Exh. T. Yet, Mr. McElrath's examination proved devastating to Kuenzel, as Mr. McElrath testified that he saw Kuenzel shoot Ms. Offord at 3 p.m. in the afternoon. Even the State conceded that Mr. McElrath did not actually see the murder, and that he likely was cognitively impaired.

Exhs. B, G, and H. Venn gave the police a detailed description of Pope, including what he looked like and where he might be living. Id. Further, multiple witnesses independently verified that Venn was in his car in front of the store with another white male. Infra at pp. 21-22.[8]

In response to the Limited Discovery Order, the State did not produce a single document evidencing any conversation they had with David Pope, let alone any record that the State even attempted to locate David Pope. Having produced not a single document on Pope, the State necessarily admits that they conducted no investigation into this potentially critical witness.

The absence of this evidence is highly relevant to the 60(b) motion. As logical as it would have seemed for the police to investigate Pope, they did not do so. Accordingly, the finding that Kuenzel asks this Court to draw is simply what has been conceded by the State's failure to produce evidence: that the State undertook no investigation into Pope, the State concealed the potential importance of Pope from Kuenzel, and thus, the State cannot argue that Pope would not have verified Venn's original story.

Assuming, *arguendo*, that the police did indeed investigate Pope, then there would have been some record of it. Any such record, however, is now either lost or destroyed. Alternatively, it is possible that the police did speak with Pope, and he verified Venn's November 11th-13th version of the events. Again, any such supporting record of that evidence has been either lost or destroyed. Yet the reason why the police do not have any record of speaking with Pope is not the inquiry that Kuenzel is asking the Court to conduct. It is a constitutional violation standing alone that the State failed to pursue this crucial piece of evidence. Rather, the salient point is that, absent the ability to rule out anything that Pope did or

[8] Unfortunately, those witnesses could not get a clear view of the person with Venn because the window was fogged up. Phillip Roberts, T.484. Nonetheless, Venn provided the police with sufficient information about Pope that, had the police looked for him at the time, they likely would have been able to find him.

did not say, based on Venn's own testimony, this Court has a record upon which it can conclude that David Pope might have corroborated Venn's original version of the crime.

II. WHAT REALLY HAPPENED ON THE NIGHT OF NOVEMBER 9, 1987

It bears repeating that the question before this Court is whether enough reasonable doubt exists – either because Kuenzel proves likely factual innocence and/or proves the likelihood that Venn murdered Ms. Offord – such that the Court may examine the underlying constitutional violations that ravaged the fairness of Kuenzel's trial.

This Court has assessed the case against William Kuenzel and has, to date, found it sufficient to deny Mr. Kuenzel an opportunity to have the merits of his claims heard. On balance, and in light of the total evidence review required by Schlup and its progeny, we believe that it is important to, for the first time, present the full case against Venn. The following is the defense that Kuenzel *could have* put on at trial, with all the evidence now known, that would have been more than sufficient to create reasonable doubt in the mind of any juror.

****

On August 1, 1987, Harvey Venn was arrested on a felony drug charge. Kochman Aff., Exh. M. 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 – Hon. Fred Thompson of the firm Radney & Morris – 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 Radney & Morris, 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-$3000. Kochman Aff., Exh. N.

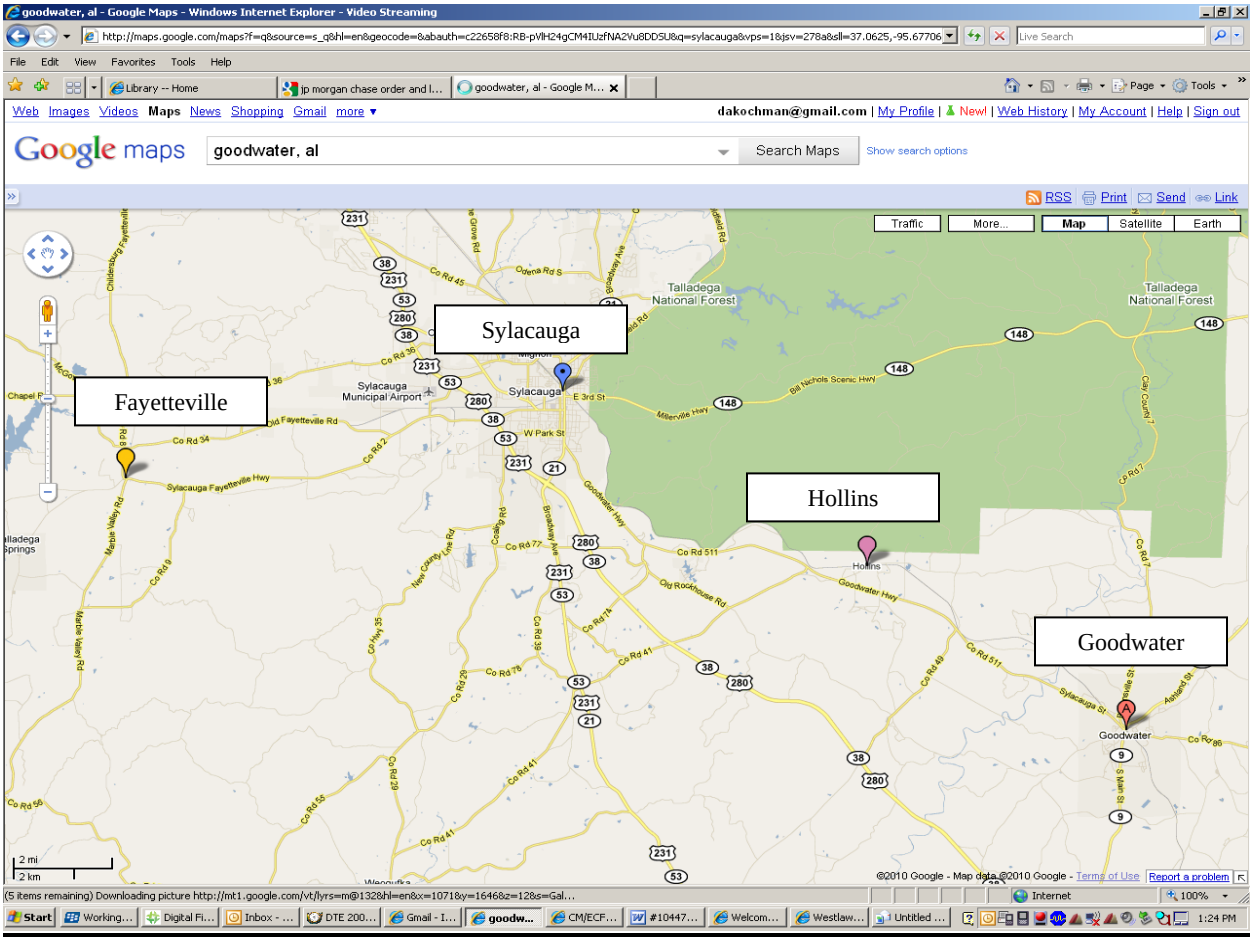
During this time, Venn was employed at the Madex Corporation textile factory outside of Goodwater. Id. At some point in September 1987, Venn mentioned to a co-worker, William Kuenzel, that he sought to move out of his grandfather's house. T.119-20. As Kuenzel and Venn were friends, Kuenzel offered to allow Venn to live at his house rent free, but with the understanding that Venn would contribute for common household expenses. Kochman Aff., Exh. N; T.119-20. Since Venn owned a car, while Kuenzel did not, having Venn as a roommate allowed Kuenzel to travel to and from work with Venn and return to his step-father the truck he had borrowed. Kochman Aff., Exh. N; T.120.

Despite the fact that Venn was working and not paying any rent, Venn constantly found himself in debt and without money. T.177. For example, Venn, who was 18 years old, already had borrowed $500 from Kuenzel (Kochman Aff., Exh. N), and regularly asked his girlfriend, a 13 year-old from Hollins named Crystal Anne Floyd, to share her allowance money with him. Kochman Aff., Exh. K. 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. Kochman Aff., Exh. N. As November 16th approached, Venn knew that he needed to come up with $500 to pay his attorney's 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; 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 (which he represented were "speed") to a co-worker named Johnny Lambert. T.125-32, 448-49; Ex parte Kuenzel, 577 So. 2d 531, 531-32 (Ala. 1991).

Having completed the transaction at Madex, Venn and Kuenzel returned to their shared residence, also in Goodwater, at some point before 8:00 p.m. Kochman Aff., Exh. N. Shortly thereafter, Venn went out again, mentioning to Kuenzel that he was going to see his friend Chris Morris who lived in Fayetteville. Kochman Aff., Exhs. B, F, G, H, and N.



Venn arrived at Morris's house in Fayetteville around 8:00 p.m., but Morris did not appear to be at home. Kochman Aff., Exhs. B, G, and H. Venn left Morris's house at approximately "8:35-8:40 p.m." (Kochman Aff., Exh. F), and headed "back toward Hollins" to

visit his girlfriend, Crystal Floyd, a distance of approximately 20 miles traveling on back-country roads. Kochman Aff., Exhs. B and H.

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." Kochman Aff., Exh. K, pp. 3-4. Floyd also observed that Venn was alone. Id. at p. 4. See also Kochman Aff., Exh. O, p. 1. Venn stayed at Floyd's house for approximately ten minutes. Kochman Aff., Exh. K.

Upon leaving Floyd's house, Venn drove back towards Sylacauga to Joe Bob's Crystal Palace convenience store, a distance of approximately 10 miles. Kochman Aff., Exhs. B, E, F, G, and H. 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. Kochman Aff., Exhs. B, G, and H. As Venn explained it, "He [David Pope] came around [the] bldg. I ain't pulled up [to the store] w/nobody … I was alone." Kochman Aff., Exh. B. See also Kochman Aff., Exh. H. Pope and Venn spoke together while seated inside of Venn's car. Kochman Aff., Exhs. B, G, and H. During this time, Venn recalls saying "hi" to Phillip Roberts. Kochman Aff., Exhs. B, E, F, G, and H. Venn also saw Wayne Culligan, and noticed that Culligan was with approximately three other people. Kochman Aff., Exhs. B, E, F, and G.

Entirely consistent with Venn's statements, ten (10) separate individuals who were at the convenience store that evening independently observed the following 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 a 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; Kochman Aff., Exh. P, 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; Kochman Aff., Exh. P, p. 7.

3. After refereeing a basketball game, **James Clement** arrived at the convenience store at 10:15 p.m. T.459; Kochman Aff., Exh. P, 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; Kochman Aff., Exh. P, 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. Kochman Aff., Exh. P, 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. Kochman Aff., Exh. P, 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. Kochman Aff., Exh. P, 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. Kochman Aff., Exh. Q, 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. Kochman Aff., Exh. W, p. 2.

10. **Dan Lasser** likely was the last customer inside the convenience store that evening before the murder took place. Kochman Aff., Exh. P, p. 7; T.504. 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. Kochman Aff., Exh. P, p. 7; T.504. "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 10 unbiased 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 10 witnesses were able to identify the person with whom Venn was speaking inside his car, Venn identified that individual as David Pope. Kochman Aff., Exhs. B, G, and H.[9]

With the urgent need to obtain $500 to pay his attorney's 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. Kochman Aff., Exh. I, pp. 6-7.

Venn first placed a paper sack over the rear license plate on his car. Kochman Aff., Exh. J, p. 13; T.140. Next, Venn made sure that no one was around before grabbing his borrowed .16 gauge shotgun and entering the convenience store to commit a robbery. T.140; Kochman Aff., Exh. L. 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." Kochman Aff., Exh. J, p. 12; T.181. Ms. Offord responded, "do you mean the money in the register," and Venn replied "Yeah." Kochman Aff., Exh. J, p. 12; T.181. Defiantly, Ms. Offord told Venn, "Well, you can't have it, go ahead and pull the trigger." Kochman Aff., Exh. J, p. 12; T.181. See also Ex parte Kuenzel, 577 So. 2d at 532-33.

An altercation ensued between Venn and Ms. Offord, and Venn was struck in the left eye and left arm. Kochman Aff., Exh. B; Gill Aff. ¶¶ 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

[9] Unfortunately, there is no evidence that the State showed these ten (10) witnesses a photograph of David Pope, or that the State conducted **any** investigation whatsoever into David Pope.

pierced lung left her gasping for air, Venn panicked. Id. He fled the store without taking a single dollar from the register.[10]

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

When Venn arrived at home, he found his roommate, William Kuenzel, asleep. Kochman Aff., Exh. B (Venn recalled that "He [Kuenzel] was in bed. Far as I can remember he was."). Indeed, Kuenzel's step-father had 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 succumbed to her injuries on the way to the emergency room. Ex parte Kuenzel, 577 So. 2d at 533. However, Ms. Offord gave the police two pieces of physical evidence that unquestionably would identify Venn as her killer. One, she physically resisted Venn's robbery attempt. Kochman Aff., Exh. B; Gill Aff. ¶¶ 8-15. That Ms. Offord's strikes were sufficiently powerful to mark her assailant is evident from the bruising observed two days later on Venn's left eye and left arm. Kochman Aff., Exh. B; Gill Aff. ¶¶ 8-15. Two, Ms. Offord's blood was transferred onto 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.

****

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

This is the story that Kuenzel could have presented to the jury with the evidence known today. When the Court reviews the theory 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 match up perfectly based on the total evidence before the Court. Templin and Roberts each testified that they thought that the person seated in Venn's car at the convenience store wore a mustache. See Phillip Roberts, T.484; Dale Templin, T.470. However, neither of them was at all certain of what they saw. Id. The facial inconsistency is that, in describing Pope, Venn stated that Pope did not wear a mustache, but Kuenzel did wear a mustache at the time. See Kochman Aff., Exh. B.

Having pointed out that potential inconsistency, it can easily be dismissed. In the same breath, Phillip Roberts also 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 the person as a male based solely upon seeing a shadow. Id. With the exception of this isolated pseudo-inconsistency, every aspect of the foregoing theory is perfectly harmonious with the record evidence.

Second, the only evidence for which Kuenzel's testimony is exclusively relied upon is to help make out Venn's motive; specifically, that Venn needed $500 to pay his attorney's retainer fee on November 16th, one week after the murder, and that Kuenzel was not enthusiastic about loaning Venn any more money. Apart from those two small points of testimony from Kuenzel, every aspect of the case against Venn is established through independent witnesses as well as direct physical evidence.

In sum, William Kuenzel should be put on the "path" to freedom. Not because he can prove his innocence to a degree of absolute certainty, but because he has proven Venn's guilt

beyond any reasonable doubt and, without Venn, the State cannot establish any material aspect of their case against Kuenzel. Under the circumstances and pursuant to Schlup, House, Singletary and other precedent, the total evidence permits this Court to inquire whether constitutional violations irreparably infected Kuenzel's trial. This case is one that should rise or fall on the merits of the underlying constitutional claims, and not on a procedural default. Kuenzel only seeks the path from this Court. He possesses the means to cross over himself.

III. THE 60(b) MOTION SHOULD BE GRANTED

Kuenzel's 60(b) motion should be granted if the total evidence – the materials in the March Production and September Production coupled with all the other evidence before the Court – would cause this Court to reconsider its findings in the Opinion. See Turner v. Howerton, No. 06-16268, 2007 WL 3082138, at *3 (11th Cir. Oct. 23, 2007).

A. The Court Should Reconsider Its Ruling That Kuenzel Was Not Diligent in Bringing Forward New Evidence

In the Opinion, this Court held that Kuenzel failed to demonstrate requisite "diligence in bringing forward his new evidence," under the standard set forth in Lucas v. Johnson, 132 F.3d 1069 (5th Cir. 1998). See Opinion at p. 53.[11] In light of the State's withholding of numerous documents relevant to Kuenzel's gateway claim until the months following the Opinion, along with the revelation that the State "only recently" reviewed its own files for the first time in the over twenty year duration of Kuenzel's post-conviction appeal, Kuenzel submits that he has satisfied any diligence requirement the Court may impose governing consideration of "new evidence."

[11] In Lucas, the Fifth Circuit found petitioner was not diligent because the new evidence he introduced on his gateway claim was "presented, or available to present, to the trial jury." Lucas, 132 F.3d at 1074. Here, the "new evidence" Kuenzel assembled was unable to be presented at trial due to, *inter alia*, the fact that the evidence largely was undiscoverable.

Since his conviction in 1988, Kuenzel has prodigiously gathered new evidence without the assistance of numerous documents to which he was entitled, and that would have expedited the presentation of this new evidence to the Court. Without court-ordered discovery, expert/investigative funding, or any subpoena power, Kuenzel's *pro bono* counsel amassed a significant quantity of evidence, found and interviewed relevant witnesses, and collected physical evidence.[12] While Kuenzel painstakingly assembled new evidence, the State shockingly failed to conduct even a cursory examination of the original prosecution file until earlier this year. Any delinquency in the timeliness of Kuenzel's presentation of his new evidence has been not due to his lack of diligence, but rather the inexcusable lack of production by the State that hindered Kuenzel's evidence collection efforts.

Moreover, unlike the petitioner in Lucas, none of Kuenzel's new evidence was in his possession at the time of trial.[13] As a result, none of the currently-presented new evidence was – or could have been – presented at trial. In fact, this is the first time in the course of Kuenzel's post-conviction journey that he has had the opportunity to share his theory of the case with any Court.[14] Kuenzel's state and federal post-conviction petitions have all been denied on procedural grounds, thereby barring him from the opportunity to put forward his new evidence or have it heard until now.

---

[12] Evidence of this diligence is ongoing. Shortly after the State's disclosure of State Prod. #15, Kochman Aff., Exh. B, Kuenzel's counsel noticed the injury evidence in Officer Zook's witness notes, promptly got in contact with a respected expert in performing autopsies, and linked Venn's observed injuries to those present on Ms. Offord at the time of her death. See Gill Aff. ¶¶ 8-15.

[13] See also Kuenzel 60(b), March 10, 2010, Doc. 121, pp. 4-5 (discussing Kuenzel's trial request for *in camera* examination of all potentially Brady materials, and the State's assurance that all such materials had been produced).

[14] See also Kuenzel's Motion for a Certificate of Appealability, dated Jan. 14, 2010, Doc. 119, pp. 26-28 (discussing Kuenzel's lack of any opportunity to present factual evidence).

The State, for its part, actively has resisted the discovery sought by Kuenzel. Not surprisingly, the State's active resistance continues to the present day.[15] The State also has tacitly resisted discovery, as evidenced by the recent production of documents of crucial importance to Kuenzel's gateway claim. These documents were languishing in the State's files, and would not have been brought to light but for Crystal Floyd's telephone call to Kuenzel's counsel. Any deficiency in bringing new evidence to the Court's attention in a more timely fashion is directly attributable to the State's withholding of relevant and material evidence.[16]

It is now clear from the substance of the information the State finally produced that, apart from its own independent relevance and significance, the recently-disclosed materials would have allowed Kuenzel to bring his new evidence to light sooner. Over the past two decades, Kuenzel's *pro bono* counsel and their agents have literally criss-crossed the Southeastern United States in a desperate search for the new evidence before this Court. For all the foregoing reasons, it is now clear that Kuenzel's efforts to bring to light new evidence regarding his factual innocence and Venn's guilt satisfies the standard of diligence relied upon by this Court.

This Court granted additional discovery to Kuenzel on August 6, 2010. In so doing, the Court expressed a belief "that there [was] good cause for limited discovery focused on whether the respondents (including the State of Alabama) possess additional information tending to raise doubts about the petitioner's guilt or that affirmatively supports a conclusion that he is innocent." Limited Discovery Order, Doc. 133, p. 4. Having afforded Kuenzel one opportunity to explore

---

15 Indeed, the State voiced strong opposition to Kuenzel's request to obtain autopsy photographs from the Alabama Department of Forensic Sciences; a request specifically provoked by the State's recent disclosure that Venn exhibited physical injuries two days after the murder.

16 As Kuenzel has previously pointed out, this fact militates in favor of a finding that Kuenzel's "new evidence" was diligently collected. See, e.g., Banks v. Dretke, 540 U.S. 668, 693 (2004) ("[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.").

the staggering omissions in the State's disclosure to Kuenzel over the tenure of his appeal, the Court may now be willing to find that no amount of legwork on Kuenzel's part could have more expediently revealed information that the State always has had the power to simply hand over.

B. The Court Should Reconsider Its Gateway Ruling Because The Total Evidence Makes Clear That Any Juror Would Likely Find Reasonable Doubt Such That Kuenzel Could Not Be Convicted

At issue is the amount of reasonable doubt needed for Kuenzel to obtain gateway relief, and whether his burden is met when the March Production and September Production are incorporated into the fact pattern.

In framing this issue for the Court, Kuenzel respectfully posits a hypothetical scenario for the Court's consideration. Kuenzel asks the Court to assume that every piece of evidence now known to exist, old and new, had been presented to the jury at trial … with one exception: the red spots on Venn's pants had not yet been identified as being Ms. Offord's blood. Next, assume that the new gateway evidence Kuenzel came forward with was a positive DNA match between the blood on Venn's pants and Ms. Offord. In this scenario, where Kuenzel presents scientific DNA evidence physically linking Venn to the murder, would the Court find Kuenzel sufficiently likely innocent to warrant granting gateway relief?

If so, Kuenzel respectfully submits that the Court's conclusion herein cannot be any different. The reason is that the Likely Acquittal Gateway does not turn on the order in which the evidence is adduced; rather, the inquiry turns on whether the total evidence, old and new, demonstrates the likely existence of undeniable reasonable doubt. It is a question of totality.

Here, Kuenzel always has had something better than DNA evidence. It never has been disputed, and is expressly conceded, that the blood on Venn's pants came from Ms. Offord. In addition to the other evidence before the Court, Kuenzel now presents medical evidence that the injuries sustained by Venn and Ms. Offord are consistent with Ms. Offord and Venn having recently been engaged in a physical altercation with one another. Gill Aff. ¶ 8. This medical evidence is, in turn, consistent with the record evidence that suggests an altercation may have occurred between Ms. Offord and her assailant. T.181; Kochman Aff., Exh. J. Consequently, if DNA evidence is sufficiently persuasive to permit passage through the gateway in the hypothetical above, the evidence now before this Court should be held equally sufficient to allow Kuenzel passage through the gateway.[17]

The evidence that is now known to exist, and that the Court did not have the benefit of when considering the Opinion is as follows:

> (i) both Venn and the victim show signs consistent with having recently been in an altercation with one another;
>
> (ii) there are no witnesses – apart from Venn – that can place Kuenzel with Venn between 8 p.m. and 11 p.m. on the night of the murder;
>
> (iii) shortly after the murder, Venn told the police that he was with David Pope at the convenience store, and gave the police a detailed description of Pope as well as his encounter with Pope;
>
> (iv) Venn's demeanor as observed by the police shortly after the murder is consistent with that of a guilty party;
>
> (v) the Court can now safely conclude that Venn visited Crystal Floyd during the disputed time frame, and that when Venn showed up at Floyd's house, he was alone; and

---

[17] Moreover, Kuenzel has been precluded from presenting any new scientific findings based on the blood evidence. As this Court noted in the Opinion, the State inexplicably has lost Venn's blood-stained pants and the gun presented as the murder weapon. Despite the unavailability of this evidence, Kuenzel presents a compelling narrative based upon newly-discovered evidence that Venn was the person that went into the convenience store and shot Ms. Offord.

> (vi) it has been confirmed that Venn independently possessed a .16 gauge shotgun in his car on the night of the murder and, therefore, the jury does not need to find that Kuenzel's shotgun was in Venn's car.[18]

When the new evidence revealed since March 2010 is folded into the known evidence – including the presence of Ms. Offord's blood on Venn's pants; the fact that ten (10) witnesses saw Venn and/or his car at the store within 10 minutes of the murder; and Venn's "disjointed" testimony – Kuenzel submits that the Court may be willing to reconsider its decision.

To further support Kuenzel's position, it is submitted that any reasonable juror would, and does, ask themselves certain questions based upon the record evidence. Foremost among the questions a juror might ask is whether to believe Venn's statements on November 11th and November 13th, or to believe the story Venn tells at 2:20 a.m. on November 15th. To demonstrate one reason why any juror would conclude that Venn's first statements to the police were more accurate and truthful than his revised version of events, Kuenzel offers the following question that any juror might also ask when considering the total evidence:

> If Kuenzel really was with Venn at the convenience store, why on November 11th and November 13th did Venn tell the police that he was with David Pope?

When Venn spoke with the police on November 11th and November 13th, he knew that he had been seen at the store shortly before the murder by at least five (5) individuals, and that those individuals could identify him. See Kochman Aff., Exhs. B, E, F, G, and H. At that time, Venn also knew that those individuals saw him with another person — a person whom Venn identified to the police as David Pope. Knowing that he was seen at the store with a companion, there was no way Venn could have known that these five (5) witnesses did not identify to the police the

---

[18] Additionally, Kuenzel presents a strong and credible motive for why Venn sought to commit the robbery. 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."). In contrast, the State offers no motive for why Kuenzel might have sought to rob the convenience store.

person he was with. It follows that if Venn would not have offered the police a specific description of David Pope if he truly was with Kuenzel at the store. Whether Venn was with Pope or Kuenzel is and always was irrelevant to Venn's original defense. What Venn would have done if he actually was with Kuenzel is to tell the police that he was with Kuenzel instead of telling the police that he was with David Pope.

The reason Venn was not lying when he told the police that he was with David Pope at the convenience store is because Venn selected his defense at the time of the murder. Venn was certain that no witnesses saw him enter the convenience store. T.140. As such, the story Venn sought to sell to the police was that he was not at the convenience store at any time after 10:00 p.m. on November 9th. See Kochman Aff., Exh. B (Venn: "I wasn't at Joe Bobs. Nobody seen me at 10:00. I was at home watching news"). Simply put, Venn's original defense was that he could not be convicted of the murder because he had left the store before 10:00 p.m. Yet, ten (10) witnesses dispute Venn's contention, each testifying that Venn and/or his car were at the store between 10:00 p.m. and 11:10 p.m. No one might have seen Venn go inside, but he miscalculated the number of people who saw him there shortly before and shortly after the murder.

Kuenzel anticipates that the State's response will likely be to argue that Kuenzel told Venn what to say on November 11th and November 13th. That argument would be as misguided as its continued prosecution of Kuenzel for this murder. Venn's original defense would in no way have been harmed even if he had told the police that Kuenzel was with him. Venn's original defense was that he had left the store at least one hour before the murder, and was at home watching the news by 10:00 p.m. Whether or not Kuenzel, Pope, or anyone else was with Venn is immaterial to this defense.

More important, if Kuenzel truly was the person seated in Venn's car, Kuenzel would have known that Venn was seen at the store by Roberts and Culligan, and that those witnesses might be able to identify him as being with Venn. Kuenzel and Venn each would have assumed that the police would speak with Roberts and Culligan, and each would have assumed that, if the police spoke with those witnesses, they might identify Kuenzel as Venn's companion. Thus, Kuenzel and Venn would have known that fabricating a story about the identity of Venn's companion would make them both susceptible to appearing wildly suspect.

In short, if it is assumed that Venn and Kuenzel collaborated on their story, there is no logical explanation for why Kuenzel would tell Venn to say that they were not together, nor for why Kuenzel would tell Venn to say that he was with another individual whom he specifically identified and described. Instead, any reasonable juror would conclude that Venn told the police that he was with David Pope because Venn really was with David Pope. The jury would then be free to credit the testimony of Glenn Kuenzel, who swore that Kuenzel was at his house sleeping at 10:30 p.m. The jury also could credit Venn's statement that when he got home, Kuenzel "was in bed." Kochman Aff., Exh. B.

If the Court rules the total evidence is insufficient to tip the scales in favor of reasonable doubt, then it will do so because the Court believes that a jury would find Venn to be a truthful and trustworthy accomplice witness on all material aspects of his testimony. In light of what is now known, Kuenzel is unable to accept that any juror would reach that conclusion.

C. The Underlying Constitutional Violations and Other Reasons Why Kuenzel Was Convicted At Trial

At this late stage of the case, Kuenzel respectfully offers that it may be appropriate to briefly focus on the reasons why Kuenzel was convicted. Two equally serious constitutional violations precluded the trial jury from hearing the story Kuenzel now presents to this Court.

With respect to his Brady claims, Kuenzel fully appreciates the gravity of his allegations. This Court correctly observed that "Petitioner's theory of innocence implies that the State of Alabama has actively or tacitly assisted Venn in framing him for the murder by hiding evidence of his innocence at the time of trial and for over two decades since." Limited Discovery Order, Doc. 133, p. 7. With a full appreciation of the Court's skepticism of his claims, twenty years after the crime, all the evidence – the .16 gauge Gibbons gun; Venn's hidden statements; Harris's grand jury testimony; Venn's bruises; Floyd's testimony – leads inescapably to that sad and unpalatable conclusion. Kuenzel wishes this was not so. Unfortunately, for justice to be served, some court may have to make that implicit or explicit finding. We ask this Court to consider doing so.

Kuenzel, however, does not lay blame exclusively at the State's feet. While the State played the most significant role in connection with Kuenzel's unjust conviction, to truly understand why Kuenzel was convicted requires looking beyond the State's malfeasance. Kuenzel is on death row today because a convergence of factors created a "perfect storm" that collectively led to his wrongful incarceration.

To begin with, Kuenzel's trial counsel was horrifically ineffective. His counsel failed to conduct any meaningful investigation of the case, and followed that up by failing to cross-examine witnesses on a number of obvious and material inconsistencies in their testimony and the evidence.[19] It is true that Kuenzel's counsel did not have the benefit of knowing all that we

[19] By way of example, one aspect of Harris's trial testimony was objectively verifiable as false, but Kuenzel's counsel failed to seize upon it; indeed, counsel did not even measure the true distance from which Harris testified making her positive eye-witness identification — it was double what she testified to. This failure was one of many factors enabling Harris to present as a more credible witness than she should have. It also goes without saying that Kuenzel's counsel should have investigated the Gibbons gun, and their failure to do so can be characterized as nothing less than Strickland-worthy ineffectiveness.

do today, but Kuenzel's attorneys' woeful ineffectiveness contributed to robbing him of a constitutionally fair trial.[20]

Apart from constitutional considerations, there were other factors working against Mr. Kuenzel at trial that complete the picture of why this unjust conviction occurred. For example, Rumsey was an exceptionally effective prosecutor that rarely, if ever, lost a capital case. Kochman Aff., Exh. U. In fact, an article investigating the death penalty in Talladega County during the time that Rumsey was District Attorney recounted the following story:

> Once, when a dispute arose over whether a defense attorney erred by skipping a closing argument, a judge cited Rumsey's persuasive powers as evidence the defense attorney acted soundly.
>
> "It is not an unusual tactical decision in Talladega County for attorneys to waive closing argument to prevent district attorney Rumsey from making a closing argument," the judge wrote.

Id.[21] By the time of Kuenzel's trial, Talladega County with Rumsey as its District Attorney had risen to become the epicenter of death penalty convictions in the country. See id.

Yet, even Rumsey was unable to "win" a fair conviction against Kuenzel with facts of this case. Fortunately for Rumsey, Kuenzel was poor and could not afford to hire an attorney that would be compensated for working any more than 50 hours preparing his case. From the outset, Kuenzel's lawyer was overmatched. When Rumsey stacked the deck in his favor by withholding key pieces of evidence, Kuenzel's conviction became a foregone conclusion.

---

[20] In defense of his trial counsel, Kuenzel notes that Mr. Willingham was financially constrained from doing any preparation or investigation beyond the bare minimum with a cap of 50 hours. See Kochman Aff., Exh. T. The State of Alabama's cap on fees for assigned counsel at the time has been a frequently-written about topic. See Kochman Aff., Exh. V. While Mr. Willingham should have done a great deal more for Mr. Kuenzel, it must be recognized that the State of Alabama gave him no reason to invest the time needed to adequately prepare for this trial, and if Mr. Willingham had done so of his own accord, he may have risked bankruptcy. See id.

[21] Significant in retrospect, the Criminal Court of Appeals chastised Rumsey for introducing immaterial and irrelevant evidence in an effort to try and make it appear as if physical evidence connected Kuenzel to this crime, but the Court ultimately found Rumsey's conduct to not be so prejudicial as to constitute reversible error. Kuenzel v. State, 577 So. 2d at 511-12.

In sum, the reason Bill Kuenzel is where he is today is because of all these factors, and their unfortunate convergence upon him. Just as one cannot answer the question of "why was Kuenzel convicted by a jury if he is not guilty" by pointing to one reason, the complete story of what truly happened on November 9, 1987 cannot be told through one piece of evidence.

This Court has been given the power and express authorization 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 who is likely innocent. If the Court rules that there is insufficient reasonable doubt, Kuenzel will have been ordered to die despite textbook Brady violations and ineffective assistance at trial that each fatally devastated his one opportunity to mount a defense.[22] Denying Kuenzel review of his constitutional claims would be nothing less than succumbing to form over substance. What counsel is asking for – begging for – is that this Court take heed of the injustice that has befallen William Ernest Kuenzel.

D. Unlike the State, Kuenzel Has Nothing to Hide

Bill Kuenzel should be set free. Regardless of what else is written herein, that is, and always has been, our underlying position. Kuenzel has done everything in his power to persuade this Court to reach the merits of his constitutional claims. The State, on the other hand, has used every argument in its considerable arsenal to avoid that result. The State has offered no apologies or excuses for the known Brady violations that would have remained undiscovered but for the courageous action of one lay witness.

As a final gesture to provide this Court with every assurance that his claims are meritorious and his cause just, Kuenzel has asked counsel to offer the Court a limited waiver of his attorney-client privilege. At this Court's request, Kuenzel will produce anything and

[22] See Kuenzel Reply, Doc. 127 at pp. 15-17 (discussing Brady standard), Kochman Aff., Exh. A; Strickland v. Washington, 466 U.S. 668 (1984).

everything contained in the file maintained by his counsel. Kuenzel also is willing to provide copies to the State of whatever materials the Court may request. Kuenzel has nothing to hide from as he had nothing to do with the crime for which the State of Alabama seeks to exact the ultimate price of his life. Kuenzel hopes that this gesture will serve as evidence of this fact.

CONCLUSION

Based on Kuenzel's moving papers and the foregoing, Kuenzel respectfully requests that this Court adopt the following measures:

(1) Vacate this Court's judgment denying and dismissing Kuenzel's first petition for a writ of *habeas corpus* on procedural grounds, dated December 16, 2009;

(2) Grant Kuenzel's request for passage through the Likely Acquittal Gateway;

(3) Grant Kuenzel's *habeas corpus* petition based upon the constitutional violations set forth herein and in the petition;

(4) Grant the State ninety (90) days to either prosecute Kuenzel for Linda Jean Offord's murder, or release him from custody; and

(5) Grant such other and further relief as this Court deems just and proper.

Dated: September 30, 2010
New York, New York

By: /s/ David A. Kochman

David A. Kochman (*pro hac vice*)
Reed Smith LLP
599 Lexington Avenue
New York, New York 10022
Tel: (212) 521-5400

Jeffrey E. Glen (*pro hac vice*)
Anderson Kill & Olick P.C.
1251 Avenue of the Americas
New York, New York 10020
Tel: (212) 278-1000

Rick Burgess
215 North 21st Street
Birmingham, AL 35203
Tel: (205) 328-6710

Co-Counsel for William Ernest Kuenzel

CERTIFICATE OF SERVICE

I, David Kochman, hereby certify that on the 30th day of September 2010, I electronically filed the foregoing Supplemental Evidentiary Response in Further Support of Petitioner's Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b), along with the accompanying Affidavits of David A. Kochman and James. R. Gill, together with all exhibits thereto, with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

_/s/ David A. Kochman____
David A. Kochman
Co-Counsel for Petitioner William E. Kuenzel