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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 MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO FED. R. CIV. P. 60(b)

In light of new evidence revealed only a few days ago which demonstrates defects in the integrity of these *habeas* proceedings, Petitioner, William Ernest Kuenzel ("Kuenzel"), by and through counsel, respectfully moves this Court for an opportunity, pursuant to Federal Rule of Civil Procedure 60(b)(1), (2), (3), and (6), to obtain, evaluate, and have considered this new evidence and other evidence that is now known to exist in the State's files bearing direct relevance on the judgment denying and dismissing Kuenzel's first petition for a writ of *habeas corpus* (the "Petition") on procedural grounds, dated December 16, 2009. See Memorandum Opinion ("Opinion") (Doc. 115) and Order (Doc. 116).

PRELIMINARY STATEMENT

On December 16, 2009, this Court dismissed the Petition as procedurally defaulted, in part, on the basis that Kuenzel had not made a sufficient threshold showing of entitlement to pass through the Likely Acquittal Gateway.[1]

For this reason, Kuenzel was surprised to learn that, on the afternoon of Monday, February 22, 2010, Assistant Attorney General J. Clayton Crenshaw visited the residence of Crystal Anne (Floyd) Moore in Sylacauga, Alabama.[2] Mr. Crenshaw brought with him two bags containing documents that Ms. Moore believed to be relevant to this case.[3] Mr. Crenshaw showed certain of those documents to Ms. Moore, a lay witness, and inquired of Ms. Moore regarding the substance of those documents.[4]

Subsequent to that visit, and at the request of Kuenzel's counsel, Mr. Crenshaw produced six (6) documents containing statements and testimony offered by Ms. Moore, Crystal (Epperson) Ward, and April Harris.

None of the documents provided to Kuenzel's counsel by Mr. Crenshaw have ever been disclosed in this case.[5]

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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. Kuenzel does not assert a Herrera freestanding claim of factual innocence; rather, he claims that he has made a sufficient showing of compelling reasonable doubt sufficient to gain review of otherwise procedurally defaulted constitutional claims.

Further, as discussed herein, *infra*. at fn. 17, the parties **never** have been afforded the opportunity to brief for this Court the issue of Kuenzel's entitlement to pass through the Likely Acquittal Gateway.

2 See Affidavit of David A. Kochman, dated March 1, 2010 ("Kochman Aff.") ¶ 2.

3 Id.

4 Id.

5 Id. ¶¶ 8-9.

Among the documents selected for production by Mr. Crenshaw are statements and testimony from Ms. Moore – confirming that she saw Venn, alone, during the disputed time period of 8:00 p.m.-11:20 p.m. – and Ms. Ward – confirming that she and Ms. Harris only were able to identify Venn's vehicle parked outside the store – that are consistent with certain key testimony they offered years later.[6] The documents also contain statements from Ms. Harris that call into question her unequivocal eye-witness testimony at trial that, while driving by the convenience store on the night of November 9, 1987, she was able to positively identify both Venn and Mr. Kuenzel standing at the counter inside the store. As this Court knows, apart from Venn's testimony, Ms. Harris's testimony is the **only** other evidence directly connecting Kuenzel to the crime.

As this Court also is aware, for over twenty-two years, Kuenzel has steadfastly maintained his innocence of the crime for which he was convicted. Throughout post-conviction proceedings, Kuenzel persistently has sought discovery of prior witness statements and other Brady evidence that is exclusively in the State's possession relating to, among other things, prior statements of Ms. Moore, Ms. Ward, and Ms. Harris. Respondents have now self-selected certain evidence from its files, and provided Kuenzel with six (6) documents in their possession that each constitute materials the State was obligated to produce at trial.

Kuenzel respectfully submits that a true and accurate picture of all plainly relevant facts should determine his fate, and should have been available to this Court in its determination of Kuenzel's entitlement to pass through the Likely Acquittal Gateway. This Court, and not

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[6] Compare Kochman Aff., Exhs. B-F, with Declaration of Crystal Anne Floyd, dated November 26, 1997, attached to the Kochman Aff. as Exhibit H; Declaration of Crystal Anne (Floyd) Moore, dated November 25, 2008, attached to the Kochman Aff. as Exhibit I; Transcript of testimony offered by Crystal (Epperson) Ward on March 4, 1999, along with the accompanying declaration of Everson Thompson, attached to the Kochman Aff. as Exhibit J.

Respondents, should decide what is relevant and what is not relevant to Kuenzel's gateway claim. By their actions, Respondents have deprived this Court of the opportunity to render a judgment based upon a full evidentiary record. Now that Respondents have revealed the existence of materials possessed in their files that **they** believe to be sufficiently important to show to a lay witness, Kuenzel submits that both he and this Court should be given an opportunity to review, analyze, and debate the relevance of **all** the evidence possessed by the State in the context of the Likely Acquittal Gateway. The appropriate time to have this fully-informed conversation is prior to yet another Eleventh Circuit appeal that could result in Mr. Kuenzel being executed.

STATEMENT OF RELEVANT FACTS

In or about June 1988, Kuenzel's trial counsel filed a motion for production and disclosure that included, among other things, a request for any and all Brady material.[7] Kuenzel's trial counsel also filed a motion to compel disclosure of any agreement with co-defendants; to wit, Harvey Venn.[8]

On August 2, 1988, the trial court conducted a hearing at which Kuenzel's discovery requests were addressed. The District Attorney generally agreed to comply with Kuenzel's discovery requests.[9] Yet, in response to the District Attorney's characterization of certain evidence in its possession as non-exculpatory, and therefore not required to be produced,[10]

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7 A true and correct copy of the Motion for Production and Disclosure, dated on or about June 15, 1988, is attached to the Kochman Aff. as Exh. K.

8 A true and correct copy of the Motion to Compel Disclosure of Agreements with Codefendants is attached to the Kochman Aff. as Exh. L.

9 See Transcript of Hearing, dated August 2, 1988, at pp. 14-16 (MR. RUMSEY: "On the general discovery motion, … [m]ost of the things I don't think we have any objection about, except for [any statements made by Kuenzel to someone who is not] … an agent or employee of the State.").

10 Notably, Kuenzel's trial occurred prior to the Alabama Supreme Court's landmark decision in Ex parte Monk, 557 So. 2d 832 (Ala. 1989). Monk established broadened rights to discovery at trial in a capital case, recognizing that:

Kuenzel's trial counsel requested that the trial court conduct an *in camera* review of any statements made by any witnesses for potential Brady material, with the State to provide all witness statements to the trial court:

> MR. WILLINGHAM: Judge, the only thing I would move for. Of course, Mr. Rumsey is turning over to us what he feels is exculpatory but we move it be ultimately the Court's decision as to what is exculpatory and what is not exculpatory. We would ask for any statements made by any witnesses be examined for exculpatory [Brady material], … [including] any statements that [the State] would have gotten from any witnesses that they would contend is work product. Of course, without seeing it, we wouldn't know. But we would ask the Court to examine those things in camera and ask that copies be made for the Court's file for any possible appellate review.
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> THE COURT: Okay.[11]

On the first day of trial, the State produced to the trial judge what it claimed were all relevant witness statements,[12] and the Court later ruled that none of the statements provided by the State for *in camera* inspection contained exculpatory statements. Significantly, none of the materials in the trial or appellate record include statements made to any agent of the State by, among others, Crystal (Floyd) Moore, Crystal (Epperson) Ward, or April Harris.

In state post-conviction proceedings, Kuenzel filed two discovery motions shortly after the state trial court's reinstatement of Kuenzel's Rule 32 petition on May 6, 1996. Respondents did not oppose Kuenzel's discovery motions, yet the trial court never addressed or ruled upon them.

> The capital case is "sufficiently different" from other cases, because there is no other criminal case in which the crime is murder and the possible punishment is death or life imprisonment without parole … The hovering death penalty is the special circumstance justifying broader discovery in capital cases.

Id. at 836-37. Kuenzel did not receive the benefit of Monk's holding that the death penalty justifies expanded discovery in capital cases.

11 Transcript of Hearing, dated August 2, 1988, at pp. 22-23.

12 Trial Transcript at pp. 88-91.

On three separate occasions in federal *habeas* proceedings, Kuenzel filed motions for discovery and/or an evidentiary hearing. On September 16, 2002, Kuenzel filed a motion for leave to conduct discovery. (Doc. 52). Again, on May 7, 2004, Kuenzel filed motions for discovery, an evidentiary hearing, and funding for expert and investigative assistance. (Docs. 71-73). On October 31, 2007, Kuenzel filed a motion for a telephonic status conference attaching another motion for phased discovery and an evidentiary hearing, along with a proposed case management order. (Doc. 109). As in the state post-conviction court, Respondents did not oppose Kuenzel's discovery motions, and this Court never addressed or ruled upon them.

Kuenzel's discovery requests have remained largely the same over the past three decades. They all seek basic information and materials regarding the underlying crime including, among other things, all records of any investigation conducted by the police, statements provided by any person or testifying witness in connection with the case, and the District Attorney's entire case file encompassing the investigation and prosecution of both Kuenzel and Venn for the crime.[13]

Following this Court's Order, dated November 7, 2007 (Doc. 110), the parties briefed the implications of Allen v. Siebert upon the Eleventh Circuit's second remand. On December 16, 2009, this Court issued the Opinion which held, among other things, that Kuenzel was not entitled to have the merits of his constitutional claims reviewed because he had failed to make a threshold showing of entitlement to pass through the Likely Acquittal Gateway. Prior to this ruling, the Court did not request any briefing on this narrow, but important, issue.

In two decades of post-conviction litigation, no court has granted Kuenzel any discovery of **any** information or materials in Respondents' possession. Both Kuenzel and this Court have been forced to rely upon Respondents' trial representation that all materials relevant to Kuenzel's

[13] See, e.g., Motion for Leave to Conduct Phased Discovery and an Evidentiary Hearing, Doc. 109, Attachment #1 at pp. 7-14.

guilt or innocence were produced. As of March 5, 2010, both Kuenzel and this Court now know that additional materials relevant to Kuenzel's guilt or innocence do in fact exist in Respondents' files.

I. STANDARDS GOVERNING RELIEF PURSUANT TO FED. R. CIV. P. 60(b)(1), (2), AND (3)

With respect to Kuenzel's motion, Rule 60(b) provides that, "upon such terms as are just," a court may grant relief from "a final judgment, order, or proceeding" on the following grounds:

> (b)(1) – "mistake," "inadvertence," or "surprise";
>
> (b)(2) – "newly discovered evidence";
>
> (b)(3) – an opposing party's "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct" and/or
>
> b(6) – "any other reason justifying relief from the operation of the judgment."

Fed. R. Civ. P. 60(b).[14]

While relief under 60(b) is an extraordinary remedy, reserved for situations that present an extraordinary set of circumstances, such circumstances are present here.

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[14] Relief under Rule 60(b)(1) will be granted where a petitioner demonstrates "a justification so compelling that the court was 'required' to vacate its order." Rice v. Ford Motor Co., 88 F.3d 914, 919 (11th Cir. 1996). See also Parks v. McNeil, No. 4:07cv493-WS, 2008 WL 4916055 (N.D. Fla. Nov. 12, 2008) (granting Rule 60(b) relief where district court had improperly recharacterized petitioner's action as a *habeas* petition); In re Holmberg, No. 8:08-CV-656-T-27TBM, 2009 WL 1520027 (M.D. Fla. May 28, 2009) (granting Rule 60(b)(1) motion where petitioner had shown that the district court applied improper standard and petitioner had shown good reason for not timely responding to a complaint).

Relief will be granted under Rule 60(b)(2) when the defendant has met a five-part test, requiring that "(1) the evidence must be newly discovered since the trial; (2) due diligence on the part of the movant to discover the new evidence must be shown; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material; and (5) the evidence must be such that a new trial would probably produce a new result." Waddell v. Hendry County Sheriff's Office, 329 F.3d 1300, 1309 (11th Cir. 2003).

Relief under Rule 60(b)(3) requires a showing, by clear and convincing evidence, that "the conduct prevented them from fully presenting his case." Id.

Relief under 60(b) may be granted when the appellant "demonstrate[s] a justification so compelling that the court [is] required to vacate its order." Cavaliere v. Allstate Ins. Co., 996 F.2d 1111, 1115 (11th Cir. 1993) (denying vacatur because the claim at bar did not demonstrate the kind of "equitable factors" that warrant Rule 60(b) relief) (internal quotations omitted). "Rule 60(b) has vested the district courts with the power to vacate judgments whenever such action is appropriate to accomplish justice, [and] [m]otions under the rule are directed to the sound discretion of the district court." Griffin v. Swim-Tech Corp., 722 F.2d 677, 680 (11th Cir. 1984) (internal citations omitted).

Further, when considering a Rule 60(b) motion, courts are empowered to construe Rule 60(b)'s requirements liberally when reviewing a judgment which somehow "abridged the adversary process." See Solaroll Shade and Shutter Corp. v. Bio-Energy Sys., Inc., 803 F.2d 1130, 1132 (11th Cir. 1986) (citing Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 403 (5th Cir. 1981)).[15] In granting a 60(b) motion to vacate a default judgment, the Fifth Circuit observed the following:

> [The default judgment] was entered prior to the taking of any evidence; although evidence was adduced, the evidentiary proceeding was of uncertain scope and focus insofar as the substantive merits of the case are concerned; and it is clear from the record that the appellants did not in fact have an opportunity to present their side of the controversy.
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> Thus, regardless of the technical characterization of the judgment below, **it seems clear that the full merits of the cause were not examined**. Truncated proceedings of this sort are not favored, and Rule 60(b) will be liberally construed in favor of trial on the full merits of the case. Thus, unless it appears that no injustice was done by the judgment, the equities in such cases will militate strongly in favor of relief.

[15] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Id. (emphasis added). See also Menier v. U.S., 405 F.2d 245, 248 (5th Cir. 1968) (Rule 60(b) "is a grand reservoir of equitable power to do justice in a particular case").

It is well-settled that Rule 60(b) plays a specific and important role in the *habeas* context. See Gonzalez v. Crosby, 545 U.S. 524, 534 (2005). In the context of *habeas* proceedings, a Rule 60(b) motion is proper where it does not raise new claims, or seek review of the merits of the claims previously adjudicated. Id. As explained by the Eleventh Circuit, "when a Rule 60(b) motion attacks, not the substance of the federal court's resolution of a claim on the merits, **but some defect in the integrity of the federal habeas proceedings**, the motion should not be considered a second or successive habeas petition." Turner v. Howerton, No. 06-16268, 2007 WL 3082138, at *3 (11th Cir. Oct. 23 2007) (emphasis added). See also Gonzalez, 545 U.S. at 538 ("A motion that, like petitioner's, challenges only the District Court's failure to reach the merits does not warrant such treatment [as a successive petition], and can therefore be ruled upon by the District Court without precertification by the Court of Appeals pursuant to § 2244(b)(3).").[16]

II. RESPONDENTS' FAILURE TO PRODUCE EVIDENCE HAS RESULTED IN A DEFECT IN THE INTEGRITY OF THESE PROCEEDINGS

At its core, this motion presents the following question: whether this case should proceed to the Eleventh Circuit without the benefit of knowing what materials reside in Respondents'

[16] Kuenzel anticipates Respondents will argue that this motion constitutes a procedurally-improper request to file a successive *habeas* petition. Kuenzel respectfully submits that the Court should not countenance Respondents' anticipated position. The instant motion arises from, and exclusively concerns, the recent revelation that Respondents possess potentially relevant materials that this Court should have been able to consider before rendering its decision on the issue of Kuenzel's entitlement to pass through the Likely Acquittal Gateway — materials that Respondents have had in their possession, but was unknown and/or unavailable to Kuenzel. The Court's inability to consider this evidence because of Respondents' withholding resulted in a "defect in the integrity of the federal habeas proceedings." Turner, 2007 WL 3082138 at *3.

files, and the implications those materials may have had upon this Court's disposition of Kuenzel's entitlement to pass through the Likely Acquittal Gateway.

In an abbreviated proceeding,[17] this Court concluded that "Kuenzel's evidence does not persuade the court that no reasonable juror could have found the petitioner guilty beyond a reasonable doubt." Opinion at pp. 53-54.

By this motion, Kuenzel does **not** seek to challenge or re-argue that judgment *based upon the facts that were then before the court*. Instead, Kuenzel submits that this Court was precluding from rendering a fully-informed decision on Kuenzel's entitlement to pass through the Likely Acquittal Gateway based upon a complete and accurate evidentiary record.

It is now beyond dispute that Respondents possess additional evidence regarding facts relevant to this case from at or around the time of the crime, and/or between the time of the crime and the trial. Neither Kuenzel nor this Court have had access to any documents of State interviews with, or questioning of, among others, Ms. Moore, Ms. Ward, or Ms. Harris. Without the benefit of knowing what other information lies dormant in Respondents' files, Kuenzel cannot assert with absolute certainty that the additional materials possessed by Respondents also support his claims for entitlement to gateway relief from a procedural bar.[18] Yet, in the absence

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[17] The parties never have been expressly directed to brief the issue of Kuenzel's entitlement to pass through the Likely Acquittal Gateway. The Opinion and Order were brought on by this Court's request for briefing following a remand by the Eleventh Circuit, and the Supreme Court's subsequent decision in Allen v. Siebert, 552 U.S. 3, 128 S. Ct. 2, 169 L. Ed. 2d 329 (2007). (Doc. 110). Specifically, the Court's Order instructed the parties to brief the implications of Allen v. Siebert upon the Eleventh Circuit's second remand. Id. That Order made no mention of, or request for, briefing regarding the Likely Acquittal Gateway. For this reason, Kuenzel suggests that this Court may consider its judgment as having arisen from "abridged" proceedings, and, in the confines of the instant motion, act more liberally than courts might otherwise be inclined to. See, e.g., Seven Elves, 635 F.2d at 403.

[18] But see Blackledge v. Allison, 431 U.S. 63 (1977) (a petitioner need not prove his claims or defenses without discovery or an evidentiary hearing provided that the claim on which discovery is sought is not "palpably incredible" or "patently frivolous"); Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985) (same). See also Coleman v. Zant, 708 F.2d 541 (11th Cir. 1983) (discovery is

of full discovery, this Court cannot be assured of the contrary conclusion. At the present time, Respondents alone hold the keys to this information.

Kuenzel does not dispute that Respondents believe, in good faith, that the materials in their possession are irrelevant and unhelpful to Kuenzel's claim for entitlement to pass through the Likely Acquittal Gateway. With the utmost respect, however, Kuenzel submits that Respondents' opinion may conflict with the opinions of Kuenzel and this Court as to what is relevant and helpful to assessing Kuenzel's entitlement to pass through the Likely Acquittal Gateway.[19]

At a minimum, this Court now knows that Kuenzel's consistently asserted representations were both truthful and accurate regarding the existence in the State's files of materials and information relevant to his claims of innocence and constitutional violations. That such information likely will lead to the discovery of additional evidence relevant to evaluating Kuenzel's claim for entitlement to pass through the Likely Acquittal Gateway is another representation Kuenzel would like the opportunity to prove true.

Not surprisingly, the facts presented by this motion are a rarity in reported jurisprudence; e.g., the State reveals the existence of relevant information from material witnesses after having obtained a judgment finding that the petitioner's claims are procedurally defaulted, and where that decision rested, in part, on a finding that the petitioner did not meet the Likely Acquittal Gateway threshold. To date, Kuenzel has identified only one other case with a similar fact pattern. In Andazola v. Woodford, the district court granted a *habeas* petitioner's motion,

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warranted to permit a petitioner to explore facts supporting defenses to the State's claim of procedural default); Harris v. Nelson, 394 U.S. 286 (1969) (same).

[19] Kuenzel reminds the court that the State already has lost material evidence in this case, including the gun the State claims to be the murder weapon, as well as Venn's blood-splattered clothes. See California v. Trombetta, 467 U.S. 479, 488 (1984) (holding that the State has a duty to preserve evidence that "might be expected to play a significant role in the suspect's defense").

pursuant to Fed. R. Civ. P. 60(b)(6), to reopen its substantive denial of relief as to petitioner's Brady claim. No. C 07-6227 (PGH), 2009 WL 4572773 (N.D. Cal. Dec. 4, 2009). In its prior ruling on the merits of petitioner's Brady claim, the court did not reach the first or third prongs of the Brady analysis, "but instead concluded that Andazola failed to satisfy the second component because there was no real evidence that at the time of Andazola's trial, the state was aware of Officer Salgado's falsification of police reports." Id. at *1. In opposing *habeas* relief, Respondent initially remained silent on that component of the Brady analysis. In his motion for a certificate of appealability, Andazola suggested that "the court overlooked a request for an evidentiary hearing." Id. As a consequence, the court "issued an order construing Andazola's application in part as a motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6) and ordered additional briefing." Id. In its response to the court's order for additional briefing, Respondent "expressly concede[d] that the prosecutor's awareness or notice of Officer Salgado's misconduct is not an issue with respect to the Brady claim.[20] Id. Accordingly, the court reopened the case to re-adjudicate the petitioner's Brady claims. Id. at *2.

Here, the facts presented by the instant motion, and the nature of the consequences facing Kuenzel absent relief from the judgment, each compel the conclusion that similar action must be taken. Kuenzel's constitutional claims include the claim that, at trial, the State played prosecutor, judge, and jury with the evidence. The State's recent revelation of self-selected evidence that indisputably is relevant to this Court's decision on the Likely Acquittal Gateway provides strength and credibility to Kuenzel's claims that additional, relevant evidence must exist in the State's files. Absent this Court's action, and barring a reversal by the Eleventh

[20] See also Andazola, 2009 WL 4572773 at *1, n.1 ("Although it appears highly unlikely that the prosecutor in this case had personal knowledge or notice of Officer Salgado's prior crimes, Officer Salgado obviously did. Thus, if that evidence was material to the case as a whole, the prosecutor was obligated to disclose it prior to trial.")

Circuit, the State's determinations regarding the relevance and materiality of the evidence it possesses will go unchecked.

Kuenzel's case has been before this Court for over ten years. Undoubtedly, the court is well-versed in the facts, issues, and bases for Kuenzel's claimed innocence and constitutional violations. If the State's revelation causes this Court to question whether its determination that Kuenzel is not entitled to pass through the Likely Acquittal Gateway was based on anything less than a full, accurate, and fairly developed evidentiary record – and, thus, that Kuenzel should be put to death without ever having had the benefit of **any process** or merits review of his constitutional claims for relief by any court in post-conviction proceedings – the Rule 60(b) motion should be granted.

CONCLUSION

Based on the foregoing, and the attached Affidavit of David A. Kochman, Kuenzel respectfully requests that this Court take the following measures:

(1) Permit Kuenzel discovery and disclosure of the prosecution's files, including, at a minimum, the District Attorney's case file related to Kuenzel's and Venn's prosecution, Respondents' investigatory files, and the materials contained in the bags that the Assistant Attorney General brought to Ms. Moore's house;

(2) Within a short time frame (e.g., two weeks) following Kuenzel's actual receipt of the aforementioned documents and materials, permit Kuenzel the opportunity to file a motion requesting an evidentiary hearing to examine any witnesses who may have relevant information as revealed by and through Respondents' production;

(3) Within a short time frame following the completion of any discovery and/or evidentiary hearing granted by this Court, permit: (a) Kuenzel to submit a brief on the sole issue of Kuenzel's entitlement to pass through the Likely Acquittal Gateway, incorporating evidence

uncovered through the State's production and/or an evidentiary hearing; (b) the State to submit a brief in opposition; (c) Kuenzel to submit a brief in reply; and (d) oral argument on the sole issue of whether the evidence meets the threshold requirements of the Likely Acquittal Gateway; and

(4) Pending the court's ruling on (3) above, conditionally vacate and hold in abeyance the judgment denying and dismissing Kuenzel's first petition for a writ of *habeas corpus* on procedural grounds, dated December 16, 2009, along with the motion for a certificate of appealability (Doc. 119); and

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

Dated: March 10, 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
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 10th day of March 2010, I electronically filed the foregoing Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b) and Affidavit of David A. Kochman, along 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