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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**

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

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Petitioner, William Ernest Kuenzel ("Kuenzel"), by and through counsel, respectfully submits the foregoing reply in support of his motion, pursuant to Federal Rule of Civil Procedure 60(b)(1), (2), (3), and (6), for an opportunity to obtain, evaluate, and have considered all materials that are now known to exist in the State's files. That a mountain of such materials have never been seen by either Kuenzel or this Court is admitted. That the materials are relevant is incontestible. What more materials there are, and the implications they may have upon this Court's adjudication of Kuenzel's claims, can only be determined by and through discovery.

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## PRELIMINARY STATEMENT

Kuenzel would first like to take this opportunity to extend his sincere thanks to the Court for holding a status conference and affording him the opportunity to communicate verbally with this Court. After extensive written briefing over these past ten years, it meant a lot to Kuenzel that the Court took the time to speak with the parties on this case.

Kuenzel understands this Court's initial summary dismissals of his claims. Kuenzel's case closely tracked that of another *habeas* petitioner from Talladega County, Daniel Siebert, until Siebert's death on April 22, 2008. While their cases followed mostly in tandem throughout state and federal court post-conviction proceedings, Siebert's case always seemed to be prosecuted by the State just a step or two ahead of Kuenzel's case. But Kuenzel is everything that Siebert was not: a man who is likely innocent.

Kuenzel respectfully submits that the Likely Acquittal Gateway[1] should not be an impenetrable fortress. The necessity of ensuring that the Likely Acquittal Gateway remains an exacting standard is not challenged. Nor is the fact that this Court could and should summarily dismiss post-conviction claims of innocence that are clearly without any merit. But Kuenzel also submits that there must be a way for a *habeas* petitioner to meet the gateway standard 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. If the appropriate standard is

[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. Further, as previously discussed (see Kuenzel 60(b) 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.

intended to send a message that petitioners should not reflexively try to make hay about just any run-of-the-mill gateway claim, then this is the case to use.

Kuenzel presents the unique situation where the prosecution's case at trial was based almost exclusively on the lone accomplice's testimony, **AND** the evidence that the accomplice committed the murder alone is very compelling, **AND** the petitioner has come forward with strong evidence suggesting that the prosecution's case at trial was improperly handicapped. It truly will be the extraordinary case that can match Kuenzel's gateway claim of likely innocence. Here, the possibility that Venn acted alone is so logical, so persuasive, so supported by the evidence, that it can be classified as nothing less than self-evident reasonable doubt.

The only question that remains is why the State continues to resist at every turn.

## SUPPLEMENTAL STATEMENT OF RELEVANT FACTS

On March 26, 2010, this Court held a telephonic conference to discuss Kuenzel's 60(b) motion (the "March 26 Conference"). In attendance were Judge Putnam, counsel for Kuenzel – Messrs. Kochman, Glen, and Burgess – and counsel for the State – Mr. Crenshaw.

At the outset of the call, the Court asked Mr. Crenshaw why he required 60-days to file a response to Kuenzel's 60(b). Mr. Crenshaw offered three reasons. First, Mr. Crenshaw stated that he planned to offer an "evidentiary presentation," and needed some time to compile affidavits and other evidence. Second, Mr. Crenshaw stated that he needed some time to brief the reasons why April Harris's grand jury testimony did not warrant granting of the 60(b) motion. Third, in response to Mr. Kochman's request that the State produce the entire case file relating to the investigation and prosecution of both Kuenzel and Venn for the murder of Linda Jean Offord, Mr. Crenshaw stated that he also needed 60-days to respond in order to permit the State time to file a written opposition to turning over any information from the DA's files.

Mr. Kochman again requested that the State produce the prosecution's entire case file, arguing that the recently-disclosed documents create a reasonable inference that the State remains in possession of additional, relevant, yet unproduced materials.

Mr. Crenshaw responded, stating that certain of the affidavits he intended to introduce would seek to challenge the statements made by Crystal (Floyd) Moore. Mr. Crenshaw further stated that, apart from the two documents the State produced in March 2010, there are no other statements by Ms. Moore in the prosecution's files.

Responding to Mr. Crenshaw, the Court stated that while it was not reaching any judgment at this point, it found the State's disclosure, 22-years into this litigation, of something that arguably could be Brady material at the time of trial, "worrisome." Continuing, the Court stated that the State's failure to disclose these materials until now raises the question of what else may exist in the State's files.

Mr. Crenshaw unabashedly stated that he "only recently read the DA's file," and, in his view, there is nothing in there that is favorable or exculpatory. Mr. Crenshaw stated that he read April Harris's grand jury testimony, found it to be favorable to Kuenzel, and turned it over. But Mr. Crenshaw again reiterated that he would like to brief why there should be no discovery of the prosecution's files, and that the Court could make a determination based on that submission.

The Court then confirmed the dates on which the State and Kuenzel would file their respective briefs, and stated that if any substantial issue remained, the Court would determine how next to proceed. Following a question from Mr. Kochman regarding whether Kuenzel may respond to the State's evidentiary presentation by identifying additional discovery he would like to request, the Court responded in the affirmative, stating that the Court would like to see what

Kuenzel believes he needs to obtain to fully and fairly flesh out what is going on. Mr. Kochman confirmed that Kuenzel's response would include such requests.

Mr. Burgess next asked Mr. Crenshaw whether he could describe the substance and volume of the materials contained in the State's files regarding the investigation and prosecution of Kuenzel and Venn. In response to Mr. Burgess's question, Mr. Crenshaw re-affirmed that he would like the opportunity to brief that issue for the Court.

On Friday, May 14, 2010, the State filed its response to the 60(b) motion, and opposed Kuenzel's request for relief. The State's Response is 40-pages long, and the entirety of the State's argument addressing the reasons why it believes that the contents of the prosecution's files need not be produced can be found on page 39.

On Monday, May 17, 2010, the State filed a motion for discovery.

## ARGUMENT IN REPLY

### I. KUENZEL'S 60(b) MOTION SHOULD BE GRANTED

Kuenzel's moving papers squarely presented three arguments for why 60(b) relief should be granted: (1) twenty-two years after Mr. Kuenzel's trial, the State has now revealed six (6) documents to a lay witness that each have direct bearing upon Mr. Kuenzel's Likely Acquittal Gateway claim; (2) it can reasonably be inferred that, based upon the State's production of these documents, coupled with the State's concession during the March 26 Conference that additional materials exist, certain of the materials remaining in the State's exclusive possession will also have bearing upon Kuenzel's Likely Acquittal Gateway claim; and (3) this case should not proceed to the Eleventh Circuit without the benefit of knowing what materials reside in the State's 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 — an inquiry that necessarily requires a factual, cumulative evidence analysis.

For the reasons stated in Kuenzel's moving papers, and for the additional reasons set forth below, Kuenzel respectfully requests that his motion be granted. Neither the substance of the State's Response, nor their subsequent filing of a motion for discovery, suggest that any different outcome is warranted.

### A. The State's Response Fails to Refute the Basis for Kuenzel's 60(b) Motion: That The State's Failure to Disclose Materials Relevant to Kuenzel's Gateway Claim Has Resulted in a Defect in These *Habeas* Proceedings

Unwilling or unable to respond directly to the substance and purpose of Kuenzel's motion, the State instead attempts to change the conversation, dedicating almost the entirety of its 40-page response brief to an improper merits re-argument. See State's Response at pp. 1-39. The State's only discussion that even arguably responds to the question before the Court can be found on page 39, and, as to that discussion, it predominantly concerns a misstatement of the law regarding Kuenzel's entitlement to discovery. Id. at p. 39.[2]

Returning to the actual basis of Kuenzel's 60(b) request, the moving papers argue that the State's failure to disclose evidence that is highly relevant to the Likely Acquittal Gateway created a "defect in the integrity of the federal habeas proceedings." Turner v. Howerton, No. 06-16268, 2007 WL 3082138, at *3 (11th Cir. Oct. 23, 2007). See also Kuenzel 60(b) at pp. 7-13. The State fails to advance any legally relevant counter-position. Indeed, its response is most notable for what it does **not** argue:

- The State does not argue that there are no materials remaining in their files concerning Kuenzel's Likely Acquittal Gateway claim;

[2] Regarding entitlement to discovery, the State offers the illogical argument that Kuenzel may not obtain discovery unless "he has met a threshold showing of actual innocence." State's Response at p. 39. This argument is entirely circular, as the very purpose for Kuenzel seeking discovery from the State is to make a threshold showing of actual innocence; the same threshold showing the State claims Kuenzel must make to prove an entitlement to discovery. As discussed *infra*, the law is in accord that, to obtain discovery regarding his Likely Acquittal Gateway claim, Kuenzel need only **advance claims** that are neither "palpably incredible" nor "patently frivolous."

- The State does not argue that the materials being withheld have no relevance to this Court's disposition of Kuenzel's Likely Acquittal Gateway claim; and

- The State does not argue that the six documents the State self-selected from its files to produce, or the remaining documents in its files were previously disclosed; and

- Contrary to Mr. Crenshaw's repeated statements during the March 26 Conference, the State does not even attempt to construct an argument that it is justified in withholding these materials.

Accordingly, because it is now clear that neither Kuenzel nor this Court possessed the facts necessary to fully and fairly adjudicate Kuenzel's Likely Acquittal Gateway claim based upon a complete and accurate evidentiary record, the motion should be granted.

**B. Even Without Seeing What Else the State Possesses, the Newly-Disclosed Documents Contain Sufficient New Evidence to Warrant the Granting of Kuenzel's 60(b)**

Kuenzel has no way to identify with specificity which additional documents possessed exclusively by the State that will be beneficial to his gateway claim. Nevertheless, it is notable that four (4) of the documents produced by the State on their own provide sufficient justification to grant Kuenzel's 60(b).

1. April Harris's Grand Jury Testimony

At trial, Harris unequivocally testified that she observed both Kuenzel and Venn inside the convenience store while seated in the passenger seat of a car driving by at approximately 9:30-10:00 p.m. on the night of the murder. The defense's cross-examination of Harris explored the fact that she placed Venn's vehicle on the side of the store away from the gas pumps, which was contrary to the testimony of every other witness who also saw Venn and/or Venn's car at the store that evening.

April Harris was a critical witness for the prosecution at trial. Apart from Venn, she provides the **only** evidence that directly places Kuenzel with Venn during the disputed 3-hour

time frame of 8:00 p.m. to 11:00 p.m. In fact, the Alabama Court of Criminal Appeals specifically discussed Harris's importance in its response to Kuenzel's claim on direct appeal that the State lacked sufficient corroboration of Venn's testimony:

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

Kuenzel v. State, 577 So. 2d 474, 514-15 (Ala. Crim. App. 1990). Declining to reverse for failure to corroborate, the Alabama Court of Criminal Appeals explained its reasoning as follows:

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

Id. at 515.

In light of the significant weight placed upon Harris's eyewitness corroboration, Harris's grand jury testimony – evidence revealed for the first time 22 years after trial – is startling. During questioning before the grand jury, Harris stated that, "[b]etween ten and fifteen till eleven at the latest,"[3] she drove by the convenience store and observed "Harvey Venn's car parked at the side of the building." Harris Grand Jury at p. 2, Kochman Aff., Exh. G. The following colloquy ensued:

[3] Because the State repeatedly argues that witness credibility should be judged upon the accuracy of their testimony regarding the exact time frame during which certain events occurred, Kuenzel notes that Harris's grand jury testimony is at odds with her trial testimony wherein she stated that she drove by the store between 9:30-10:00 p.m.

Q. Okay, and did you see anything else?

A. No sir, not – I thought – I know that there were people in the store but I couldn't make them out for sure whether it was Harvey Venn and William Kuenzel or not.

Q. Okay, do you remember me talking with you down there at Sylacauga Police Department?

A. Yes, sir.

Q. And do you remember telling me that's who it was inside there?

A. Yes, sir.

Q. Okay, and now you're saying you can't say that's who it was?

A. **I don't – under oath – I don't really want to say that is was them, but I feel sure I couldn't tell what they were wearing or give a description of them because we were going, driving by, but judging from the stature of the people that were in there I believe that it was them.**

Q. Has anything happened to get you to change?

A. No, sir.

Id. at pp. 2-3. Immediately following that exchange, Robert Rumsey took over Harris's grand jury questioning from Dennis Surrett. During the subsequent questioning, Harris remained certain that she saw Venn's car at the store, but stated that her identification of Kuenzel and Venn inside the store was based solely upon her observation of the individuals' height and hair:

Q. Did you see anybody else in the store other than two white males?

A. No, sir.

Q. Did you see any other cars there?

A. No, sir.

Q. You know that to be Venn's car.

A. Yes, sir.

Q. It's your judgment that it was those two people?

A. Yes, sir.

Q. Venn, and Kuenzel? But you're just a little leary [sic] about saying –

A. For sure.

Q. That you're 100% positive?

A. Yes, sir. Because I couldn't identify the clothes and I couldn't tell for sure. You know, couldn't really see them enough to know that, you know, like I'm looking at you and would know who you are. I couldn't say that it was them, but the statue [sic] – the statue [sic] of them[.]

Q. Frame, size, height?

A. Their heights, yes, sir.

Q. Length of hair, color of hair?

A. Yes, sir.

Q. Facial Hair [sic]? Was the same?

A. **I couldn't get any description. I couldn't really see a face**.

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Q. Are – your [sic] not – are you scared or anything?

A. No, sir.

Q. But you told Dennis [Surrett] back then that [ ] it was Kuenzel and Venn but now you just can't say that positively?

A. No, sir, not positively.

Q. Did you say it positively then?

A. I said that I believed that it was them.

Q. You still do?

A. I still – I believe that it was them, but I couldn't get a good desc – **I couldn't even tell him what they had on**.

Id. at pp. 3-5.

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

Q. In your judgment who did you see in that store?

A. Harvey and Kuenzel, Billy.

Q. Harvey Vinn [sic] and Billy Kuenzel.

A. Uh, huh. (affirmative response).

Trial Transcript at p. 494. Moreover, on cross-examination, Harris resisted the defense's attempt to impeach her eye witness identification, and strenuously re-affirmed her testimony:

Q. Okay. Let me ask you this. What was the lighting out there at that store that night? Was it bright?

A. Well, yes, sir.

Q. It was quite bright out there. You could see pretty good?

A. Yes, sir.

Q. How long were they in your observation, if you could tell me, please maam?

...A. It would have been seconds because we were moving.

Q. Do you know at what rate of speed you were moving?

A. Not more than 35 because we had to intersect with the light of traffic.

Q. Somewhere around 35?

A. If that fast.

Q. But you could clearly identify them with your vehicle moving?

A. Yes, sir.

Trial Transcript at pp. 501-02.

To be sure, Harris's unwavering trial testimony was sufficiently critical to the prosecution's case that, in summation, Robert Rumsey offered the following statement:

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

Rumsey Summation, Trial Transcript at p. 672.

Simply stated, had Harris's grand jury testimony been produced and available for cross-examination, her positive identification of Kuenzel as being with Venn would not and could not have been seriously relied upon by the jury. Instead, based **solely** upon the evidence adduced at trial, the jury would have been left to weigh the evidence of Kuenzel's guilt – consisting of Venn's self-serving testimony and the gun testimony[4] – against the mountain of evidence that Venn murdered Linda Jean Offord and was framing Kuenzel, including, among other things: (1) Venn being positively identified at the murder scene by a multitude of witnesses who did not identify Kuenzel; (2) Venn's "disjointed and muddled" trial testimony (Opinion at p. 46), as well as Venn's prior inconsistent statement to the police that did not implicate Kuenzel; (3) Kuenzel's alibi witness; and, most damning (4) the victim's blood being splattered on Venn's clothes, a fact about which he lied at trial,[5] and the presence of which he was at a complete loss to explain.[6]

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[4] As this Court is well aware, in 1998, Kuenzel's investigation revealed that the shotgun Venn borrowed from Sam Gibbons was actually a .16 gauge shotgun, and not a .12 gauge shotgun.

[5] Venn testified at trial that the victim's blood was squirrel blood, a fact the State was forced to correct by conceding that it was not just any human blood, but the blood of Linda Jean Offord.

[6] Neither Venn nor the State can explain how or why Ms. Offord's blood is on Venn's clothing because Venn testifies that he never went inside the convenience store, and there was no blood found in or on Venn's car, Kuenzel's clothing, or on Kuenzel's step-father's shotgun which the State maintains was the murder weapon.

2. Crystal (Epperson) Ward's Police Statement and Grand Jury Testimony

Crystal Ward did not testify at trial, and the defense was not provided with any statements given by Ward to the prosecution. The recently-disclosed evidence provides two pieces of non-cumulative testimony that would have been helpful to the defense – supporting Kuenzel's claim that he was not with Venn after 8:00 p.m. on November 9, 1987 – and harmful to the prosecution's case at trial.[7]

First, Ward testified that she believes she saw someone sitting inside Venn's car when she and Harris drove by the convenience store. Epperson Police Statement at pp. 4-5, Kochman Aff., Exh. E; Epperson Grand Jury Testimony at p. 2, Kochman Aff., Exh. F. Of course, this testimony directly conflicts with that provided by the passenger in her car, April Harris, who testified that she observed both Venn and Kuenzel inside the convenience store. Moreover, this testimony also would support the conclusion that Venn was alone at the convenience store for a period of time, and then met up with another white male who was not Kuenzel — as Kuenzel's claim is that he was at home during this time, miles away, without means of transportation.

Second, on November 10, 1987, Ward made a notation in her calendar that she "Saw Harvey" relating to the night of November 9th. Epperson Police Statement at p. 5; Epperson Grand Jury at p. 3. Because Ward was familiar with both Venn and Kuenzel (Ward Police Statement at p. 1), evidence that she contemporaneously documented seeing Venn and/or Venn's car, but not Kuenzel – as did four (4) other trial witnesses – also would have bolstered Kuenzel's defense.[8]

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[7] Ward's testimony is cumulative in that she also would have contradicted Harris's testimony regarding where Venn's car was parked, and the time frame during which Harris made her observation.

[8] Because Harris was a passenger in Ward's car, and Ward made her observations from the same vantage point as Harris, Ward's testimony cannot be dismissed as cumulative of the other witnesses who testified that they saw Venn and/or Venn's car, but not Kuenzel.

3. Crystal (Floyd) Moore's Grand Jury Testimony

Like Ward, Crystal Moore also did not testify at trial, and the defense was not provided with any statements given by Moore to the prosecution, including the following:

> Q. Okay, back on November 9th, 1987, did Harvey come over to your house?
>
> A. Yes, sir.
>
> Q. Okay, was anybody with him?
>
> A. No, sir.
>
> Q. Okay, in your judgment what time was that, please ma'am?
>
> A. About – probably about 8:00 o'clock – about 8:00-8:30.

Floyd Grand Jury Testimony at p. 1, Kochman Aff, Exh. C. Moore further testified that, during this time, she lived in Hollins, which is located directly between Goodwater – where Venn and Kuenzel lived – and Sylacauga – where the convenience store is located. Id. at p. 2.

The significance of Moore's grand jury testimony is as follows. Kuenzel's story always has been that, after traveling with Venn to the Madex plant in Goodwater, Venn dropped him off at their shared residence also in Goodwater around 8:00 p.m. Moore's testimony before the grand jury was that she saw Venn, alone, after Kuenzel maintains he was dropped off at home by Venn. Coupling that testimony with the fact that Moore was **Venn's** girlfriend, that she was testifying about events that occurred only four-months prior, and that a 13-year old is unlikely to lie before a grand jury, had Moore been called to testify at trial, her statements would have significantly bolstered the defense and Kuenzel's alibi.

Additionally, because Moore's house in Hollins is located directly on the way from Goodwater to Sylacauga, any juror could reasonably have concluded that Venn stopped by her home on his way to Sylacauga after leaving Kuenzel off in Goodwater. While the timing of that

visit as stated in Moore's grand jury testimony is inconsistent with Moore's estimated timing set forth in her two affidavits produced in post-conviction (see Kochman Aff., Exhs. H, I), the critical substance of her testimony remains the same. That there now exists proof that, shortly after the murder, Moore told the State she saw Venn, alone, during the disputed time frame, is yet another piece of evidence that would have added to the defense, and subtracted from the prosecution.

Tellingly, the grand jury transcript does not reflect any follow-up questions by the State concerning Moore's testimony that she saw Venn, alone, after the time Kuenzel and Venn[9] maintain that Kuenzel was dropped off — testimony that bolsters Kuenzel's alibi witness, was offered only four (4) months after the murder, and directly conflicts with the prosecution's theory at trial.

In sum, based on what already is known about this case, it is clear that the most recent pieces of new evidence drastically continue to tilt the evidentiary landscape in favor of Kuenzel's likely innocence. Until the State makes a complete disclosure, it is difficult to imagine what further indica of innocence Kuenzel can show to demonstrate a mere entitlement to review of procedurally defaulted claims. For all these reasons, Kuenzel respectfully submits that the 60(b) motion be granted, and the further proceedings include a concurrent review of whether the confidence in the trial verdict is fatally undermined by constitutional violations.

## II. KUENZEL'S SUGGESTED APPROACH FOR HOW TO PROCEED

In the event the Court grants Kuenzel's 60(b) motion, and based on the discussion that occurred during the March 26 Conference, Kuenzel offers the following suggestions regarding how it might make sense for this case to proceed.

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[9] It is notable that Venn's first statement to the police was that he dropped Kuenzel off at their shared residence at approximately 8:00 p.m.

### A. Discovery of the State's Entire File Related to the Investigation and Prosecution of Venn and Kuenzel is Warranted

As an initial step, Kuenzel requests that the Court grant him discovery and disclosure of the prosecution's entire case file related to the investigation and prosecution of both Venn and Kuenzel for the murder of Linda Jean Offord.

Consistent with Kuenzel's counsel's statements during the March 26 Conference, Kuenzel submits that "good cause" for this requested discovery has been established by: (a) the new evidence presented by Kuenzel in these *habeas* proceedings; (b) the State's recent disclosure of certain self-selected documents that arguably constitute Brady materials 22 years post-trial; and (c) the State's admission during the March 26 Conference that it possesses additional materials it also has never produced.

The law is supportive of Kuenzel's request. It is well-settled that a petitioner need not prove his claims or defenses without discovery or an evidentiary hearing, provided only that the claims on which discovery is sought are not so "palpably incredible" or "patently frivolous" as to justify summary dismissal. Blackledge v. Allison, 431 U.S. 63, 76 (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"); Harris v. Nelson, 394 U.S. 286, 300 (1969) (discovery is warranted to permit a petitioner to explore facts supporting defenses to the State's claims of procedural default); Coleman v. Zant, 708 F.2d 541, 545 (11th Cir. 1983) (same).

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. Further, "[t]he newly presented evidence may … call into question the credibility of witnesses presented at trial." Id. at 330 ("[U]nder Jackson[v. Virginia], the assessment of the credibility of witnesses is generally beyond the scope of review. In contrast, under the gateway standard we describe today, the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial."). See also Giglio v. U.S., 405 U.S. 150, 154 (1972) ("Impeachment evidence, ... as well as exculpatory evidence, falls within the Brady rule.").[10] The Likely Acquittal Gateway inquiry asks the court to "assess 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) (finding even recantation evidence significant because the specific recantation evidence presented by petitioner not only "adds to the defense, but also deducts from the prosecution").

The Eleventh Circuit recently re-affirmed the principles of Brady v. Maryland that a defendant's due process rights are violated where the state – regardless of culpability – withholds evidence that is favorable to the accused. See Arnold v. Sect'y, Dep't of Corrections, 595 F.3d 1324 (11th Cir. 2010) (adopting in whole the opinion of Arnold v. McNeil, 622 F. Supp. 2d.

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[10] The State incorrectly contends that "impeachment evidence does not establish factual innocence" (State's Response at p. 29), and supports this inaccurate generalization with two cases, neither of which stand for applying that broad generalized proposition to all evidence in all cases. The Court in Clayton v. Gibson adjudicated a Herrera claim – not a Likely Acquittal Gateway claim which carries a different and lower standard of proof – and held only that the specific evidence presented by that petitioner "is merely impeaching evidence that would not cause a rational person to doubt Clayton's guilt." 199 F.3d 1162, 1180 (10th Cir. 1999). Moreover, the Court in Patterson v. Bartlett makes explicit that, in direct contradiction to the proposition for which it is cited by the State: "**[w]e are not holding that impeachment evidence is necessarily insufficient to support a Schlup claim of actual innocence. We are holding merely that the impeachment evidence that Patterson offers does not satisfy the requirements of Schlup**." 56 Fed. Appx. 762, 764 n.1 (9th Cir. 2002) (emphasis added).

1294 (M.D. Fla. 2009)). Indeed, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." Kyles v. Whitley, 514 U.S. 419, 437 (1995). See also Banks v. Dretke, 540 U.S. 668, 696 (2004) ("A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process."). This duty is based on the notion that "the prosecutor's role transcends that of an adversary: he is the representative not of an ordinary party to a controversy, but of a sovereignty … whose interest … in a criminal prosecution is not that is shall win a case, but that justice shall be done." U.S. v. Bagley, 473 U.S. 667, 675 n.6 (1985) (quoting Berger v. U.S., 295 U.S. 78, 88 (1935)).

Borrowing from Kuenzel's moving papers, it is respectfully submitted that a true and accurate picture of all plainly relevant facts should determine Kuenzel's fate. This complete picture should be available to this Court in determining his entitlement to pass through the Likely Acquittal Gateway, and whether the confidence in the trial verdict is fatally undermined by constitutional violations. This Court, and not the State, should decide what evidence is relevant and what is not relevant to these claims. By their actions, the State has deprived this Court of the opportunity to render a judgment based upon a full evidentiary record. Now that the State has revealed the existence of materials possessed in their files that ***they*** deemed 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 and the merits of his *habeas* petition.

After having spent over 22 years on death row for a crime he resolutely maintains he did not commit, and having never had any discovery in any post-conviction proceeding, Kuenzel respectfully requests that this Court grant him one opportunity to attempt to persuade this Court,

based on the complete evidentiary picture, that he is sufficiently "likely innocent" to warrant having the merits of his constitutional claims heard, and his petition granted. To accomplish this, and in light of the State's Response, additional discovery is needed.

**B. Additional Discovery Beyond the Prosecution File is Warranted**

During the March 26 Conference, counsel for Kuenzel inquired whether Kuenzel may identify and request additional discovery it believed necessary based upon the State's forthcoming "evidentiary presentation." The Court responded in the affirmative. For the below-stated reasons, Kuenzel submits that "good cause" exists for the following additional discovery.

1. Discovery Concerning the State's Obtainment and Possession of the .16 Gauge Shotgun from Sam Gibbons

On February 15, 2000, over (10) years ago, Kuenzel presented evidence that Sam Gibbons's shotgun – the shotgun Venn admittedly borrowed from Mr. Gibbons, and possessed in his car on the night of the murder – was not a .12 gauge, but was a .16 gauge. In 2002, Kuenzel offered the **direct** evidence of an affidavit from Carolyn Lewis-Gibbons, Mr. Gibbons's widow.[11] See Gibbons Aff. (Doc. 45-2). Mrs. Gibbons stated in sum and substance as follows:

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

Id.

[11] Mr. Gibbons passed away in 1991.

Kuenzel also offered the declaration of Carl M. Majeskey who stated in sum and substance as follows:

> He was retained by Mr. Dretzin in 1997; on or about May 5, 1998, Mr. Majeskey received a phone call from Mr. Dretzin informing Mr. Majeskey that he had found a .16 gauge shotgun that he thought might be the murder weapon in Mr. Kuenzel's case; on or about May 12, 1998, **Mr. Majeskey retrieved the shotgun sent to him by Mr. Dretzin**; and, **the shotgun Mr. Majeskey received was a .16 gauge Iver Johnson Champion top-break shotgun**.

Majeskey Aff. (Doc. 45-3). Kuenzel remains in possession of Mr. Gibbons's .16 gauge shotgun, and is readily willing to submit this item to the Court.

Not until May 14, 2010 did the State present "affidavits from Dennis Surrett and Lawden Yates to demonstrate that the evidence previously presented by Kuenzel implying that Venn actually had a .16 gauge shotgun, rather than a .12 gauge shotgun as he testified at Kuenzel's trial, lacks credibility." State's Response at pp. 11-12.

As discussed in Section III, *infra*, the affidavits of Messrs. Surrett and Yates offer nothing approaching a credibility attack upon Mrs. Gibbons's testimony, or Mr. Majeskey's ability to determine whether the shotgun is a .12 gauge or a .16 gauge. The State's "credibility attack" is all the more insulting – as it implicitly and necessarily suggests gross impropriety on the part of Kuenzel's prior, now deceased counsel – considering that the State has inexplicably lost ***both*** the gun they claim to be the murder weapon, and Venn's bloody pants. By its actions, the State has not only violated Kuenzel's rights,[12] but also has prejudiced Kuenzel by precluding him from now conducting any forensic tests on these two critical pieces of evidence.

That said, in light of the State's desire to inquire about the gun Venn testified he possessed at the time of the murder based solely upon an unattributed notation on a recently-

[12] 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").

disclosed witness list, Kuenzel respectfully requests that the Court grant him the following discovery:

*(a) Request for Admission*

> Admit that the shotgun Venn borrowed from Sam Gibbons was a .16 gauge shotgun.

*(b) Document Requests, Interrogatories, and Depositions*

If, and only if, the State's response to the foregoing Request for Admission is anything other than an unqualified admission:

Document Requests

To the extent such materials are not contained within the prosecution's entire case file related to the investigation and prosecution of both Venn and Kuenzel for the murder of Linda Jean Offord:

> Production of all documents and/or communications concerning or relating to the State's investigation of Sam Gibbons's shotgun.
>
> Production of all documents and/or communications concerning or relating to any communications by or between the State and Sam Gibbons.
>
> Production of all documents and communications concerning or relating to any standards, customs, practices, and/or procedures established, followed, or adhered to by the Sylacauga Police Department and/or the Talladega County District Attorney's Office that were in place between October 1987 and September 1988 concerning or relating to guns involved in an on-going investigation.
>
> Production of all documents and/or communications concerning or relating to any standards, customs, practices, and/or procedures established, followed, or adhered to by the Sylacauga Police Department and/or the Talladega County District Attorney's Office that were in place between October 1987 and September 1988 concerning or relating to when guns involved in an on-going investigation are to be obtained.
>
> Production of all documents and/or communications concerning or relating to any standards, customs, practices, and/or procedures established, followed, or adhered to by the Sylacauga Police Department and/or the Talladega County District Attorney's Office that were in place between October 1987 and September 1988 concerning or relating to the

person(s) authorized to handle and/or examine guns involved in an on-going investigation.

Production of all documents and/or communications concerning or relating to any standards, customs, practices, and/or procedures established, followed, or adhered to by the Sylacauga Police Department and/or the Talladega County District Attorney's Office that were in place between October 1987 and September 1988 concerning or relating to when guns involved in an on-going investigation are to be sent for testing of any kind.

Production of all documents and/or communications concerning or relating to Kuenzel's step-father's shotgun, a trial exhibit, after the close of Kuenzel's guilt phase trial in September 1988.

Production of all documents and/or communications concerning or relating to Venn's bloody pants, a trial exhibit, after the close of Kuenzel's guilt phase trial in September 1988.

Interrogatories

Identify all person(s) who spoke and/or communicated with Sam Gibbons and/or Carolyn Lewis-Gibbons concerning or relating to the investigation of Linda Jean Offord's murder.

Identify all person(s) who saw and/or handled Sam Gibbons's shotgun.

Identify the person or persons who determined that Sam Gibbons's shotgun was a .12 gauge.

Identify the person or persons who made the decision to not have Sam Gibbons's shotgun submitted for testing.

Identify the person or persons who returned Sam Gibbons's shotgun to him, including the date the shotgun was returned.

Identify all person(s) who saw and/or handled Kuenzel's step-father's shotgun, a trial exhibit, after the close of Kuenzel's guilt phase trial in September 1988.

Identify all person(s) who saw and/or handled Venn's bloody pants, a trial exhibit, after the close of Kuenzel's guilt phase trial in September 1988.

Depositions and/or an Evidentiary Hearing

Kuenzel respectfully seeks leave to conduct depositions of and/or examine at an evidentiary hearing all persons identified by the State in response to the foregoing interrogatories.

2. Discovery Concerning the Gaps in Moore's Grand Jury Transcript, and the Police Statement Allegedly Taken by Kenneth Brasher

Crystal Moore was 13-years old at the time of Linda Offord's murder. She recalls being questioned by the police, and she testified before the grand jury four months after the murder in a way that critically undermines the prosecution's theory of the case. Yet, she was not called to testify at trial, and neither of the documents that now have been produced by the State were disclosed to Kuenzel before March 2010.

Further, on November 26, 1997, Moore executed a declaration stating in sum and substance as follows:

> Late in the evening of November 9, 1987, she was visited by Venn; Venn was alone; he was high on drugs and/or alcohol, and was acting nervous and paranoid; the visit occurred at about 10:00 p.m.; her father, Jimmy Floyd, was upset because Venn had visited so late; the visit lasted about 10 minutes; about one week later, she was visited by a police officer and recounted this information to him.

On November 25, 2008, Moore executed another declaration, re-affirming the substance of her prior declaration, and providing additional details regarding her involvement in the State's investigation of Linda Offord murder. Of course, since the State had not yet produced her grand jury testimony, Moore was unable to use that document to refresh her recollection in preparing her 1997 and 2008 declarations concerning events that occurred over twenty years in the past when she was but a teenager.

On May 14, 2010, the State presented "affidavits from Clay Crenshaw, Kyle Clark, Robert Rumsey, Kenneth Brasher, and Kathy Jones to demonstrate that Crystal Moore's affidavits have no credibility." State's Response at p. 11.

As discussed in Section III, *infra*, the affidavits submitted by the State contain *praeteritio* and *ad hominem* attacks, unabashed hearsay, and invite the reader to draw conclusions that the affiants refuse to and/or cannot personally affirm. Moreover, none of the affidavits speak to the

critical piece of testimony Moore offered in 2008, 1997, and in her grand jury testimony in 1988: that she saw Venn, alone, after 8:00 p.m. on November 9, 1987. Simply stated, the State's "evidentiary presentation" concerning Ms. Moore is the proverbial "smoke screen," intentionally designed to camouflage and distract this Court from the heart of her testimony, and the fact that the State knew of, but failed to disclose Moore's defense-bolstering, prosecution-subtracting testimony to Kuenzel at trial.

Additionally, the documents produced by the State raise many unanswered questions. Among the questions raised is why Moore's grand jury transcript appears to be missing portions of her testimony. Specifically, all of the grand jury testimony in this case appears to have been tape recorded, and those tapes later were transcribed by Kathy Jones.[13] Curiously, the transcription of Moore's grand jury testimony notes two places where the "[t]estimony breaks and then picks back up." Floyd Grand Jury Testimony at p. 5. These breaks in testimony occur close to one another, do not identify the length of time for which the testimony broke, and the State's "evidentiary presentation" does not explain the reason for these testimony breaks. Equally important, although the transcript of Harris's grand jury testimony reflects the end of a tape and the start of a new one, it does not appear that the breaks in Moore's testimony resulted from a tape ending. Compare Floyd Grand Jury Testimony at p. 5 ("Testimony breaks and then picks back up."), with Harris Grand Jury Testimony at p. 4 ("Tape ends" and "Tape begins").

The purported police statement also raises a host of questions, most notably, when was it created: before or after Moore testified at the grand jury? Based on Kenneth Brasher's affidavit, the hand writing in the document is his own, but he has no recollection whatsoever of having

[13] See Affidavit of Kathy Jones, dated April 14, 2010.

interviewed Crystal Moore, and cannot even affirm that the "police statement" reflects contemporaneous notes of an interview he conducted with Ms. Moore.

That said, in light of the State's desire to attack the credibility of Moore's testimony that has remained in all material respects consistent for the past 22 years, Kuenzel respectfully requests that the Court grant him the following discovery:

*(a) Interrogatories*

> Identify all person(s) who spoke and/or communicated with Crystal Moore concerning or relating to the investigation of Linda Jean Offord's murder.
>
> Identify all person(s) who spoke and/or communicated with Sharon Floyd, Moore's mother, concerning or relating to the investigation of Linda Jean Offord's murder.
>
> Identify all person(s) who spoke and/or communicated with Jimmy Floyd, Moore's father, concerning or relating to the investigation of Linda Jean Offord's murder.
>
> Identify all person(s) who spoke and/or communicated with any of Moore's brothers concerning or relating to the investigation of Linda Jean Offord's murder.
>
> Identify the person or persons who operated the tape recorder during Moore's grand jury testimony.

*(b) Document Requests*

To the extent such materials are not contained within the prosecution's entire case file related to the investigation and prosecution of both Venn and Kuenzel for the murder of Linda Jean Offord:

> Production of all documents and/or communications concerning or relating to the State's investigation of Crystal (Floyd) Moore, Sharon Floyd, Jimmy Floyd, and/or any of Crystal Moore's brother concerning or relating to the investigation of Linda Jean Offord's murder.

*(c) Depositions and/or an Evidentiary Hearing*

> Kuenzel respectfully seeks leave to conduct depositions of and/or examine at an evidentiary hearing all persons identified by the State in response to the above interrogatories.

> Kuenzel respectfully seeks leave to conduct depositions of and/or examine at an evidentiary hearing Kenneth Brasher and Robert Rumsey concerning the substance of their affidavits.

3. Discovery Concerning Appendix A to the Surrett Aff.

In response to the 60(b) motion, the State offers an "evidentiary presentation." Accompanying the State's response is the affidavit of Dennis Surrett. Appendix A to that affidavit is a witness list prepared by the State purportedly documenting its communications with over fifty (50) individual witnesses, and the alleged substance of the statements they made to investigators. By and through the below discovery, Kuenzel requests an opportunity to review the underlying witness statements reflected in Appendix A, as they reasonably may contain additional helpful gateway materials. Based on the foregoing, and the additional "good cause" discussed in Section III, *infra*, Kuenzel respectfully requests that the Court grant him the following discovery:

*(a) Interrogatory*

> Identify all person(s) who spoke and/or communicated with the following individuals identified on Appendix A to the Surrett Aff. concerning the investigation of Linda Jean Offord's murder: Crystal Epperson; April Harris; Phillip Roberts; Jackie Castleberry; Tammy Allen; Terry Pearson; Wayne Culligan; Billy Templin; James D. Clement; Dan Lasser; Larry Pruitt; George Justice; Nora Lee Sullivan; Hope Chamberlain; Crystal Floyd; Harvey L. Venn; Jerry Thomas; Johnny Lambert; Roy James Seevers; Chris Morris; James F. Limbaugh; A. Lamar Miller; Sam Gibbons; Dorothy Hayes; Larry Parsons, Steven Dean Cotney; Ronald Dewey Hanner; Charles Edward Kelly; Mike Simmons; Tony Adams; and Steve Mitchell.
>
> For each person identified in response to the foregoing, please state the witness(es) on Appendix A with whom that identified person communicated.

*(b) Document Requests*

To the extent such materials are not contained within the prosecution's entire case file related to the investigation and prosecution of both Venn and Kuenzel for the murder of Linda Jean Offord:

> Production of all documents and/or communications concerning or relating to the investigation of Linda Jean Offord's murder conducted by the following individuals identified on Appendix A to the Surrett Aff.: Tommy Wallace; Mark Holmes; Kenneth Brasher; Dennis Surrett; Dusty Zook; Jimmy Nail; Wayne Murchison; and David Windsor.
>
> Production of all documents and/or communications concerning or relating to the State's investigation of the following individuals identified on Appendix A to the Surrett Aff. concerning or relating to the investigation of Linda Jean Offord's murder. Crystal Epperson; April Harris; Phillip Roberts; Jackie Castleberry; Tammy Allen; Terry Pearson; Wayne Culligan; Billy Templin; James D. Clement; Dan Lasser; Larry Pruitt; George Justice; Nora Lee Sullivan; Hope Chamberlain; Crystal Floyd; Harvey L. Venn; Jerry Thomas; Johnny Lambert; Roy James Seevers; Chris Morris; James F. Limbaugh; A. Lamar Miller; Sam Gibbons; Dorothy Hayes, Larry Parsons, Steven Dean Cotney; Ronald Dewey Hanner; Charles Edward Kelly; Mike Simmons; Tony Adams; and Steve Mitchell.
>
> *(c) Depositions and/or an Evidentiary Hearing*
>
> Kuenzel respectfully seeks leave to conduct depositions of and/or examine at an evidentiary hearing all persons identified by the State in response to the above interrogatories.
>
> Kuenzel respectfully seeks leave to conduct depositions of and/or examine at an evidentiary hearing Kenneth Brasher, Dennis Surrett, and Robert Rumsey concerning the substance of their affidavits, and their investigation into, and prosecution of, Kuenzel and Venn for the murder of Linda Jean Offord.

4. Discovery Concerning the State's Failure to Look Through the Prosecution Case File Until "Only Recently"

Kuenzel has spent over 22 years in prison being punished for a crime that he is highly unlikely to have committed. Over the past 17 years of post-conviction litigation, the core of Kuenzel's story has remained the same. In response to Kuenzel's arguments regarding April

Harris, Crystal Ward, and Crystal Moore, the State repeatedly advanced arguments challenging portions of their testimony while, at the same time, possessing documents that would have undermined such arguments. By their actions, the State has wasted both this Court's time, and Kuenzel's. As such, in lieu of any other discovery concerning or based upon the remainder of the State's "evidentiary proffer," Kuenzel respectfully makes the following one request:

*(a) Deposition and/or an Evidentiary Hearing*

> Kuenzel respectfully seeks leave to conduct the deposition of, and/or examine at an evidentiary hearing, the person most knowledgeable at the Alabama Capital Litigation Unit ("ACLU") concerning why, after Bill Kuenzel has spent over two decades arguing the same claims for relief, ACLU "only recently" looked at the DA's files and realized that it contains "helpful" materials.

**C. Allow the Parties to Brief for the Court Kuenzel's Entitlement to Pass Through the Likely Acquittal Gateway and Obtain *Habeas* Relief**

As discussed in Kuenzel's moving papers, the parties never have been asked to brief the issue of Kuenzel's entitlement to pass through the Likely Acquittal Gateway. Kuenzel's constitutional claims are inextricably intertwined with the facts and issues this Court will have to address in considering his gateway claim. Therefore, as a matter of judicial economy, and to expedite the resolution of Kuenzel's claims, Kuenzel requests that these two inquiries be combined. The State can claim **no prejudice** from proceeding in this manner. Following the completion of discovery, Kuenzel respectfully requests that the Court permit: (a) Kuenzel to submit a brief on his entitlement to pass through the Likely Acquittal Gateway and the merits of his Brady and Strickland claims; (b) the State an opportunity to submit a brief in opposition; (c) Kuenzel the opportunity to submit a brief in reply; and (d) oral argument.

## III. THE STATE'S RESPONSE IS PROCEDURALLY IMPROPER, AND SUBSTANTIVELY FAILS TO REFUTE THE SALIENT ISSUES PRESENTED BY KUENZEL'S NEW EVIDENCE

During its case in chief, the prosecution offered into evidence 17 latent fingerprints of value that were recovered from the convenience store. The prosecution also offered into evidence a rape kit, including anal and vaginal swabs taken from the victim. It was undisputed at the time, and remains undisputed, that not a single one of the 17 latent fingerprints match Kuenzel's fingerprints. It also was and is undisputed that Ms. Offord was not raped. Nevertheless, the prosecution paraded a multitude of witnesses before the jury to testify regarding collecting the fingerprints and swabs, attesting to the chain of evidence, describing the scientific testing conducted on that evidence, and ultimately offering the conclusion that not a shred of this evidence had any bearing upon Kuenzel's guilt.

The State's current "evidentiary presentation" has as much relevance to the issues at bar as the fingerprint evidence and rape kit have upon Kuenzel's guilt: NONE. Yet, they both share a common purpose; specifically, to distract from the salient evidence, confuse the issues, and make it appear as if the State's case against Kuenzel is based upon something other than Venn's fallacious, waffling, and self-serving testimony. Just as the fingerprint evidence and rape kit were designed to suggest to the trial jury that there was physical evidence directly connecting Kuenzel to the murder – which of course is not the case[14] – the State's evidentiary presentation to this Court is an improperly-submitted, elaborate ruse, that is specifically intended to distract from the undeniable reasonable doubt permeating every aspect of the prosecution's case.

[14] Although the Opinion includes as "other evidence of Kuenzel's involvement" a burned shotgun shell found in a trash basin at Kuenzel's and Venn's shared residence (Opinion at p. 48), this evidence does not in any way link Kuenzel to the murder. There is no evidence that this spent shell casing was the ammunition which caused Ms. Offord's death, or that the shell came from any specific .16 gauge shotgun. Thus, even assuming that the shell was fired from Kuenzel's step-father's shotgun, it was found at Kuenzel's house – not an obscure location – and could have been fired at any time. There is no reason to conclude that it is relevant physical evidence.

### A. The State's "Evidentiary Presentation" Discussing the "Merits" is Not Properly Submitted in Response to a 60(b) Motion

The case law of this Circuit is replete with *stare decisis* holding that it is improper for a party to argue the merits of an underlying judgment on a Rule 60(b) motion. See, e.g., Williams v. Chatham, 510 F.3d 1290, 1295 (11th Cir. 2007) (finding petitioner's Rule 60 motion a successive petition as defined in Gonzalez v. Crosby, 545 U.S. 524 (2005), as petitioner attempted to relitigate previous claims challenging the validity of his conviction); Turner v. Howerton, 2007 WL 3082138 at *4 (affirming denial of Rule 60(b) motion that raised new claims and sought to reargue the court's previous resolution of claims); Hughley v. United States, 2010 WL 1904953 (M.D. Ala. 2010) (finding petitioner's claim for allegedly erroneous application of a procedural bar a "new" claim within the meaning of Gonzalez where the court's review of the record showed that the claim had not previously been raised).

The Supreme Court has explained that its use of the term "on the merits" refers to a determination that there does or does not exist grounds entitling a petitioner to *habeas* relief. See Williams v. Chatham, 510 F.3d at 1294 (quoting Gonzalez, 545 U.S. at 532 n.4). While the vast majority of reported Rule 60(b) jurisprudence in the *habeas* context concern motions brought on by an inmate, the Supreme Court's interpretation of "on the merits" and its progeny do not establish a differing standard based upon the identify of a 60(b) movant. Instead, the case law assumes that just as a federal *habeas* prisoner may not through a Rule 60(b) motion "attack the legality of [his] conviction and sentence," Hughley, 2010 WL 1904953 at *2, the converse also is true, i.e., the prosecution is forbidden from arguing the merits *in favor* of the correctness of a decision denying *habeas* relief.

Here, the State explicitly concedes the impropriety of engaging in a merits discussion on a Rule 60(b) motion, yet devotes 39 pages of its 40-page response to doing just that. For this

reason it is puzzling why the State attacks Kuenzel for "fail[ing] to argue … that the newly discovered evidence establishes the merits of his gateway claim of factual innocence." State's Response at p. 24. Establishing the merits of his claim is not Kuenzel's burden on this motion, and is precisely the type of argument Gonzalez disallows. Nevertheless, the State attempts to cast Kuenzel's failure to argue the merits on this 60(b) as an admission by Kuenzel that authorizes the State to improperly re-argue "on the merits" in favor of the correctness of the Court's Opinion. In fact, the State's Response directly refers to the Court's analysis in the Opinion, and, using newly-submitted affidavit testimony, delves into a detailed discussion as to why it maintains that Kuenzel failed to establish a meritorious gateway claim. The State's re-argument improperly centers on the merits of the Court's Opinion, and does not address the clear defect their failure to disclose created in the underlying judgment.

Indeed, the State's Response is particularly bizarre given that there is no question Kuenzel does not possess all potentially relevant materials, and the affidavits and additional documents that the State offers as part of its "evidentiary presentation" only support Kuenzel's assertion of a defect in the underlying proceedings. Even if it were proper to argue substance on this motion (which, there is no question it is not) Kuenzel is ill-equipped to do so without full discovery that would thereby permit him to make his own "evidentiary presentation."

Kuenzel's motion is premised on the State's recent disclosure of materials – many of which constitute Brady materials – and the reasonable inference stemming therefrom that the State possesses additional, relevant evidence which has not been disclosed. That the State did not disclose these six documents prior to the Court's issuance of the Opinion, and continues to resist production of the additional documents it possesses, evidences a defect in these *habeas*

proceedings. Without disclosure of this evidence, any decision by this Court would be premature and based on a less than complete record.

For these reasons as well, the 60(b) should be granted, and the first 39-pages of the State's Response, including the seven (7) new affidavits accompanying that submission, are procedurally improper and should be stricken from the record.

### B. The State's Newly-Submitted Affidavits Are Nevertheless Irrelevant, as They Wholly Fail to Impeach the Salient Issues Presented by Kuenzel's New Evidence

Kuenzel now is in possession of some documents that the State self-selected for production from the prosecution's files. As such, Kuenzel is materially handicapped from fully responding to the substance of the State's evidentiary presentation with additional helpful materials that have not yet been produced from the prosecution's files. Having said that, and without the benefit of knowing what else the State possesses, Kuenzel is fortunate that the State offers hardly anything of relevant substance that plausibly or credibly attacks Kuenzel's new evidence. Leaving aside its impropriety, the State's attempt to present a full-throated refutation of Kuenzel's new evidence of innocence amounts to little more than a smoker's cough.

#### 1. Affidavits of Clay Crenshaw and Kyle Clark

On the afternoon of Monday, February 22, 2010, Assistant Attorney General J. Clayton Crenshaw and Kyle Clark showed up, unannounced, at the home of Crystal Moore. Mr. Crenshaw proceeded to show Ms. Moore documents that she never had seen before, and cross-examine her regarding the substance of those documents.

To be clear, the State's unannounced visit to Ms. Moore's home is **not** the issue with which Kuenzel takes exception. Rather, Kuenzel takes exception to the fact that, as the State readily admits, these affidavits are submitted for the exclusive purpose of trying to attack the

credibility of Ms. Moore based solely on Messrs. Crenshaw and Clark's recollection and perception of that cross-examination.

These two affidavits contain nothing but hearsay and personal opinion.[15] Worst yet, the affidavit of Clay Crenshaw contains outright *praeteritio* and *ad hominem* attacks. Despite the seductive appeal of responding to Mr. Crenshaw's affidavit in kind, Kuenzel refrains, instead focusing this reply on what actually matters: the defect the State created in these proceedings by its prior, and continued, failure to produce relevant, material evidence for over 22 years.

For the same reasons that it would be inappropriate and improper for Kuenzel's counsel to present to the Court, through affidavit testimony, the deeply troubling comments offered by Kenneth Brasher in the presence of Kuenzel's counsel and his investigator concerning Robert Rumsey, the entirety of the affidavits submitted by Kyle Clark and Assistant Attorney General J. Clayton Crenshaw are improper, irrelevant, and inappropriate. They have no probative value, and should be stricken from the record along with those portions of the State's Response discussing these affidavits.

2. Affidavit of Kathy Jones

Ms. Jones's affidavit also is offered to attack the credibility of Crystal Moore. It does nothing of the sort.

Jones simply attests to the fact that she accurately prepared transcripts of grand jury testimony based upon what she heard on audio tapes she was given. She was not present at Moore's grand jury, and does not attest to remembering what was on the audio tape of Moore's grand jury testimony. Moreover, as discussed in Section II(B)(2), *supra*, Jones cannot explain

[15] Because Mr. Crenshaw has interjected his personal opinion into this case in an attempt to demonstrate that Crystal Moore is unreliable, Kuenzel notes that Mr. Crenshaw has a well-documented bias against death row petitioners (see Kochman Aff. ¶ 12, and Exhs. A-D), and his subjective observations concerning Ms. Moore's credibility as support for his request that this case receive no further treatment should not be relied upon by the Court.

why twice on the audio tape the "[t]estimony breaks and then picks back up," how long the testimony breaks lasted, or what transpired during those two testimony breaks. As such, Jones's affidavit is of no probative value to the State's argument that Moore is not credible based on her recollection that she may have recalled making statements at the grand jury which are not contained in the grand jury transcript.

3. Affidavit of Robert Rumsey

The State next offers the affidavit of Robert Rumsey to attack Moore's credibility. Rumsey's sparse and carefully-worded affidavit contains a number of statements that are not in any way probative of Moore's credibility.

For example, Rumsey states that "I do not specifically recall whether I ever met Moore or not[.]" As such, Rumsey can neither refute nor corroborate Moore's statement that she met with him on two occasions. Significantly, all parties to this case know for a fact that Rumsey did meet Moore on at least one occasion: he examined her at the grand jury.

Additionally, Rumsey's statement that "it was [his] standard practice as a district attorney not to question witnesses" is intentionally vague. Even if Kuenzel were to present a number of witnesses to the Court to testify that Rumsey met with them in connection with a case investigation, Rumsey's slippery language would afford him the flexibility to claim that those instances were anomalous. Interestingly, although Kuenzel has not undertaken any sort of thorough review into this subject, a few minutes of legal research reveals at least one instance where Rumsey personally investigated and questioned a witness,[16] and another instance where Rumsey failed to produce material evidence to the defense before trial.[17]

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[16] See Peoples v. State, 565 So. 2d 1177, 1184 (Ala. Crim. App. 1990) ("Rumsey is, and was in 1983, the District Attorney for Talladega County, Alabama. He prosecuted Peoples for the Franklin murders. As part of his involvement in that case, Rumsey interviewed Gooden. His purpose in interviewing Gooden was to check Peoples's version of the events of July 6, 1983

In sum, Rumsey's affidavit is a non-event, offering nothing of probative value concerning the accuracy of Moore's testimony.

4. Affidavit of Kenneth Brasher

Kenneth Brasher's affidavit is similarly of no probative value. The only relevant statement that Brasher actually affirms is that he wrote down the words contained on the purported Floyd Police Statement. Yet, he flatly states that he does not recall interviewing Crystal Floyd. As such, neither he nor anyone else can provide any insight into when the purported police statement was taken, and/or whether it was written during a conversation with Moore or some time after — including the possibility that it was written after Moore testified before the grand jury.

Notably, if Moore provided this statement to Brasher prior to her grand jury testimony, it raises the question of why the State did not confront Moore with this document when she testified that she saw Venn, alone, between 8:00 and 8:30 p.m. on November 9th. The testimony Moore provided at the grand jury was directly in conflict with the prosecution's theory of the case, and it is a reasonable inference that, had this document been in existence, the State would have attempted to explore this discrepancy with Moore during her testimony.

Finally, because Brasher's affidavit is expressly offered by the State in an effort to attack the credibility of Crystal Moore – who was 13-years old at the time Brasher purportedly

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against Gooden's, in the hope of contradicting Peoples. … Rumsey continued to question Gooden, who ultimately admitted his involvement, and took Rumsey, Studdard, and others to the scene where the Franklins' bodies had been found.").

[17] See Henderson v. State, 583 So. 2d 276, 284-85 (Ala. Crim. App. 1990) (in a capital murder case, finding that Rumsey failed to disclose before trial "that the State's key witness [ ] testified against Jerry Paul Henderson in an effort to avoid prosecution herself" but holding that, even though "[t]here is no question that the appellant was entitled to this information," "such error did not seriously affect the fairness or integrity of the proceedings against the appellant" because Dennis Surrett confessed to the existence of a plea agreement during cross-examination).

interviewed her – it is important to note that Brasher's judgment as it relates to questioning juveniles has previously been questioned by the Alabama Court of Criminal Appeals.[18]

5. Affidavit of Dennis Surrett

The affidavit of Dennis Surrett is offered to prove that Sam Gibbons's shotgun is a .12 gauge, and not a .16 gauge shotgun. Surrett attaches to his affidavit a witness list that he attests he prepared at some point before Kuenzel's trial.

Surrett, however, does not affirmatively state that the Gibbons gun is a .12 gauge. Instead, Surrett states only that to which he can truthfully attest: that he prepared a witness list before trial, and wrote down by hand the names of the five witnesses listed on the last page of the witness list. Surrett does not profess to specifically recollect ever having seen Mr. Gibbons's shotgun, or spoken with anyone concerning Mr. Gibbons's shotgun. Instead, what Surrett states is that a notation on his witness list "indicates to [him] that either [he] or another police officer interviewed Sam Gibbons, [and], according to the note on the witness list, [Sam Gibbons] stated [to that officer] that he loaned Harvey Venn a .12 gauge shotgun." None of those statements refute the substance of Kuenzel's claim.

To be sure, even accepting Surrett's entire testimony as true and accurate, all it means is that the police improvidently relied upon Mr. Gibbons's incorrect belief – as he only used the gun once a year on New Year's – that the gun he owned was a .12 gauge, and not a .16 gauge, and that the police did not actually inspect the gun themselves to confirm the accuracy of Mr. Gibbons's belief. Moreover, based upon Surrett's statement that "if Venn's shotgun had been a

[18] See Eddings v. State, 443 So. 2d 1308, 1311 (Ala. Crim. App. 1983) (throwing out a robbery confession given to Kenneth Brasher and another officer as neither knowing nor intelligent because, "[i]n this case, it is clear from the record that the appellant [a school-age boy with an IQ of 49] could not understand his constitutional rights without adequate explanation. However, neither officer attempted to explain what they were reading to him even though they knew he was unable to read or write and was extremely nervous").

.16 gauge shotgun, it would have been sent" for testing, the only logical conclusion one can draw is that the police never looked at or inspected Sam Gibbons's shotgun.[19]

Finally, Kuenzel notes the fact that the witness list appended to the Surrett Aff. also contains new evidence, as it identifies additional witnesses that would have testified that they saw Venn and/or Venn's car at the murder scene, but did not see Kuenzel. Far from supporting the State's opposition to Kuenzel 60(b) motion, this document evidences the fact that almost everything the State has so far produced from its files contains materials which both Kuenzel and this Court should have been able to consider before a decision on Kuenzel's Likely Acquittal Gateway claim was entered.

6. Affidavit of Lawden Yates

Lawden Yates's affidavit also is offered to attack Kuenzel's argument that Sam Gibbons's shotgun is a .16 gauge, and not a .12 gauge as both Venn and the prosecution represented at trial. Yates's affidavit is of no probative value to this inquiry because he did not see, possess, or examine Mr. Gibbons's shotgun. Further, although Yates attacks Mr. Majeskey's conclusions based on the tests Majeskey conducted on Mr. Gibbons's shotgun, Yates does not go so far as to state that Majeskey is unqualified to determine that the gun retrieved from the Gibbons residence – the only shotgun Mr. Gibbons possessed during the relevant time period – is or is not a .16 gauge. As this Court correctly adjudged:

> [T]his was not a case that hinged on ballistic evidence linking a single bullet to a single gun. Rather, the evidence proved only that the victim was killed by No. 1 buckshot, most likely fired from a 16-gauge shotgun.

Opinion at p. 46. Simply put, it does not take an expert to determine that the Gibbons gun is a .16 gauge shotgun; it is stated on the gun itself.

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[19] If this is the State's defense as to why it did not know that the gun Venn borrowed from Mr. Gibbons was a .16 gauge, then the State may also have violated Kuenzel's constitutional rights by failing to properly investigate this case, and may be subject to civil liability under § 1983.

## CONCLUSION

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

(1) Permit Kuenzel discovery and disclosure of the prosecution's files, including, at a minimum, the District Attorney's entire case file related to the investigation and prosecution of Kuenzel and Venn for the murder of Linda Jean Offord;

(2) Permit Kuenzel the additional discovery and disclosure requested herein in response to the State's "evidentiary proffer";

(3) Within a short time frame following the completion of all discovery 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 and obtain *habeas* relief; (b) the State to submit a brief in opposition; (c) Kuenzel to submit a brief in reply; and (d) oral argument on whether the evidence meets the threshold requirements of the Likely Acquittal Gateway, and whether Kuenzel is entitled to *habeas* relief; 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: May 24, 2010
New York, New York

By: /s/ David A. Kochman

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**CERTIFICATE OF SERVICE**

I, David Kochman, hereby certify that on the 24th day of May 2010, I electronically filed the foregoing Reply in Further Support of Petitioner's Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(b), and accompanying Affidavit of David A. Kochman, 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*