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

WILLIAM ERNEST KUENZEL,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1:00-cv-316-IPJ-TMP
	)	
RICHARD F. ALLEN, Commissioner of the Ala. Dept. of Corrections, and the ATTORNEY GENERAL OF THE STATE OF ALABAMA,	)	
	)	
Respondents.	)	

STATE'S RESPONSE TO KUENZEL'S RULE 60(b) MOTION

The State, through the Alabama Attorney General's Office, hereby responds to a motion filed pursuant to Fed. R. Civ. P. 60(b) on behalf of William Kuenzel, an Alabama death row inmate. For the following reasons, the State respectfully requests this Court to deny Kuenzel's motion.

I. INTRODUCTION AND BACKGROUND

Kuenzel alleges in his Rule 60(b) motion that "new evidence revealed only a few days ago" "demonstrates defects in the integrity of these habeas proceedings[.]" Doc. 121 at 1. According to Kuenzel, this new evidence comes from six documents, which contain statements or grand jury testimony by: Crystal Floyd Moore, Crystal Epperson Ward, and April Harris. Doc. 121 at 2. Of these three individuals, only Harris testified at Kuenzel's trial. Moore and Ward have

both given affidavits or statements that were submitted in some of Kuenzel's previous filings. Docs. 45, 119.

This section of the State's Response discusses the facts and background information relevant to the instant proceeding. Subsection A identifies Moore, Ward, and Harris and summarizes pertinent information from these individuals' previous affidavits or trial testimony. Subsection B summarizes the six documents Kuenzel references as the "new evidence." Finally subsection C summarizes the evidentiary materials submitted with this Response.

A. Summary Of Previous Affidavits Or Trial Testimony Given By Crystal Moore, Crystal Epperson, and April Harris

1. Crystal Moore's previous affidavits

Kuenzel has previously presented in these habeas proceedings two affidavits from Crystal Moore. As noted above, Moore did not testify at Kuenzel's trial.

Moore's first affidavit was signed in 1997.[1] See Doc. 45, Ex. 6. In this one-page affidavit, Moore stated that at the time of the crime she was thirteen years old and was dating Kuenzel's co-defendant, Harvey Venn. Id. According to her 1997 affidavit, shortly after the murder, Moore told police that on the night of the murder, Venn visited her at her parents' home for about 10 minutes at about 10:00 p.m., that Venn was alone, and that he was "high on drugs and/or alcohol" and was

[1] Although this document is entitled "Declaration of Crystal Anne Floyd," it was signed "Crystal Floyd Davis." See Doc. 45, Ex. 6.

"acting nervous and paranoid." Id. She further stated that Venn had also visited her earlier on the day of the murder, that Kuenzel was with Venn on that occasion, and that Venn and Kuenzel "appeared to be high on alcohol and/or drugs." Id.

Moore's second affidavit was signed in 2008. See Doc. 119, Ex. C. Moore's second affidavit did not contain any statement regarding why she was filing another affidavit. Moore repeated the portions of her previous affidavit that Venn visited her twice on the day of the murder, once accompanied by Kuenzel and then alone on the later visit. Id. Moore stated that Venn left his car door open during the evening visit, thus, she could clearly see in the lighted car that no one was with Venn. Id. She also stated that on several occasions soon after the crime, police officers visited her at home and questioned her. Id. In addition to being questioned by police officers, Moore stated that she was questioned by District Attorney Robert Rumsey in Sylacauga in "late November/early December 1987" and that her parents were not allowed to be present during the interview. Id. Moore claimed that she "specifically recall[ed] that Mr. Rumsey took notes in a black folder or notebook and that Mr. Rumsey tape recorded our conversation." Id. Moore stated that Rumsey questioned her again several weeks later and that her parents and paternal grandfather, who had accompanied her to the interview, were not allowed to watch the interview. Id. She claimed that Rumsey also took notes during this interview and that he tape recorded it. Id. Moore recalled that

during this second interview, she told Rumsey "that I never gave [Kuenzel] money, that I regularly gave [Venn] the little money that I had, and that [Venn] used the money I gave him to buy drugs." Id. Moore also stated that she frequently gave her allowance money to Venn. Id. She finally stated that in the fall of 1987, "Harvey was having problems and he needed money." Id.

2. Crystal Epperson Ward's previous statement

Kuenzel has not presented an affidavit from Ward; he has, however, presented an affidavit from Everson Thompson, a private investigator, who averred that he interviewed Ward in 1999. Along with Thompson's affidavit, Kuenzel submitted a transcript of a taped interview with Ward, but he conceded that the tape had been lost. This Court, in its memorandum opinion, described Thompson's affidavit and the transcript of the interview with Ward as follows:

> 5. The 2002 declaration of Everson Thompson, a private investigator. (Ex. 5 to Doc. #45). He states that he interviewed Crystal Epperson Ward in 1999, the driver of the vehicle in which Harris was riding when she saw Kuenzel inside the store. He states that he contacted Ward 12 years after the murder and asked her to drive by the crime scene in a manner similar to the way she had driven past on the night of the crime. He states that she told him that 'there is no way in hell that April [Harris] could have seen Harvey and Billy inside the store that night,' and that she believes Harris was lying. Attached to his declaration is a document he identifies as a transcript of the taped interview he conducted with Ward in 1999, although the tape has been lost and investigators have been unable to locate Ward since 1999.

Doc. 115 at 42. Ward did not testify at Kuenzel's trial.

3. April Harris's testimony at Kuenzel's trial

April Harris testified at Kuenzel's capital murder trial. See R. 489-504. Harris, a high school student at the time of the crime, was a passenger in a truck driven by Crystal Epperson Ward on the night of the murder.[2] R. 490. Harris and Ward drove around that night in Sylacauga and to another nearby community to visit Ward's boyfriend. R. 490. Harris said Ward drove by the convenience store several times that night, R. 491, and that the last time Ward drove by the convenience store, around 9:30-10:00 p.m., Harris saw Venn's car. R. 492. Harris also described Venn's car and pointed out on a diagram where the car was parked in relation to the convenience store. R. 493. Harris testified that she saw Venn and Kuenzel in the convenience store:

Q: Did you see anybody in the store?

A: Yes.

Q: Or in your judgment that you recognized?

A: Yes.

Q: Ma'am?

A: Yes, sir.

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

[2] In the trial transcript, Harris identified Ward by the name "Crystal Epperson." R. 490.

A: Harvey and Kuenzel, Billy.

Q: Harvey V[e]nn and Billy Kuenzel.

A: Uh, huh. (affirmative response)

Q: And in your best judgment this was between 9:30 and 10:00?

A: Yes, sir.

Q: Whereabouts were they in the store?

A: In front of the counter at the door.

R. 494. Harris testified that she was acquainted with Venn and Kuenzel and, thus, would be able to recognize them. R. 492.

B. Kuenzel's Newly Discovered Evidence

Kuenzel identifies the newly discovered evidence as "six documents containing statements and testimony offered by Ms. Moore, Crystal (Epperson) Ward, and April Harris." Doc. 121 at 2. Specifically, these documents are: (1) Floyd's 1987 witness statement, (2) Floyd's 1988 grand jury testimony, (3) Crystal Epperson Ward's witness statement, (4) Crystal Epperson Ward's grand jury testimony, (5) April Harris's witness statement, and (6) April Harris's grand jury testimony. These documents are discussed separately in the subsections below.

1. Officer Kenneth Brasher's notes from his interview with Crystal Floyd Moore

Shortly after the murder, Officer Kenneth Brasher, of the Sylacauga Police Department, interviewed Crystal Floyd Moore. Officer Brasher's notes from that interview are identified as one of the items of newly discovered evidence in Kuenzel's Rule 60(b) motion. See Ex. 1.[3]

In the interview, Moore stated that Venn arrived at her home at 6:15 on the evening of the crime and stayed until 6:30-6:45. Id. Moore also stated that when Venn left, he told her he was going to pick up Kuenzel at Kuenzel's mother's house so that "Billy could take his wife some child support money." Id. Moore also stated that Venn said that "if he got back in time around 9:00-9:30 he would come back buy [sic] here." Id. The notes indicate that Venn did not come back to Moore's house that night, but that his next visit occurred on Tuesday (the day after the murder) around 4:30 in the afternoon. Id.

2. Moore's grand jury testimony

Moore was called as a witness at the January 1988 Grand Jury session on March 9, 1988. Her testimony was tape recorded and transcribed; the seven-page transcript is attached to this response and labeled "Exhibit 2."

[3] Kenneth Brasher's affidavit stating that Ex. 1 (Moore's handwritten statement) is in his handwriting is attached to the State's response and labeled "Exhibit 9."

Moore testified that on November 9, 1987, the day of the crime, Venn came over to her house alone around 8:00-8:30 in the evening. Exhibit 2 at 1. Moore stated that Venn told her "he couldn't stay long cause he had to go pick up Billy and go take Billy's ex-wife some child support money." Id. She said that she lived in Hollins, which was about "15 miles" away from Sylacauga. Id. at 2.

Moore further testified that after the murder she visited Venn at the jail in Sylacauga and he told her the following concerning the crime:

> Okay, he told me they waited there until no cars were there and he – when no cars were there, they pulled up by the ice machine, right out beside the store. He said Billy jumped out, threw the gun on the counter and it went off. And he said that he did not know that – Harvey told me that he did not know the gun was loaded. He said when he put it in the back seat of the car it was not loaded. And he said how Billy loaded it, he did not know.

Id. Moore said that Venn told her he heard a "big boom" and saw the convenience store clerk falling back from the shotgun blast. Id. at 3. She also testified that Venn told her that he did not enter the store when Kuenzel shot the convenience store clerk.

Moore stated that Venn came over to her house at 8:00 the next morning. Id. at 3. On that visit, according to Moore, Venn was nervous and upset because the police "were trying to get him for killing that woman." Id. at 3. Moore said that she did not know the motive for the robbery, but she speculated that Venn and Kuenzel needed some money for "dope." Id. at 4.

Moore's testimony was inconsistent as to whether she spoke with Kuenzel following the crime. Moore testified that she had not talked to Kuenzel after the murder, id. at 4, but later testified that Kuenzel told her that he hoped Venn "don't open his mouth cause we hadn't did nothing," id. at 5.

3. Crystal Epperson Ward's December 9, 1987 statement

The transcript of Crystal Epperson Ward's tape recorded sworn statement of December 9, 1987, is attached to this response and labeled "Exhibit 3." In her statement, Ward says that she had met Venn and Kuenzel on several occasions. Ex. 3 at 1. Ward stated that she and her friend April Harris were driving around on November 9, 1987, and on several occasions that night, they passed by the convenience store where the murder took place. Id. at 2-4. According to Ward, the last time she and Harris drove by the convenience store was around 9:40-45 p.m, and at that time, she saw Venn's car parked by the store. Id. at 4. Ward stated that she believed she saw a person in Venn's car. Id. at 5.

4. Crystal Epperson Ward's grand jury testimony

The transcript of Ward's grand jury testimony is attached to the State's response and labeled "Exhibit 4." In her testimony, Ward stated that she and April Harris drove by the convenience store between 10:30-10:45, and that she saw

Venn's car parked in the parking lot of the store.[4] Ex. 4 at 1-2. Ward was not sure if someone was in the car, she stated it could have been a headrest. Id. at 2.

5. April Harris's December 9, 1987 statement

April Harris's sworn statement taken on December 9, 1987, is attached to this response and labeled "Exhibit 5." Harris stated that she was acquainted with Venn and Kuenzel. Ex. 5 at 1-2. She further stated that on the evening of November 9, 1987, she rode around with Crystal Ward. Id. According to Harris's statement, she and Ward left Ward's boyfriend's house around 9:00 p.m. and passed by the convenience store in Sylacauga around 9:30-10:00. Id. at 3. As they drove by the store, Harris noticed Venn's car. Id. In addition, Harris "saw Harvey and Kuenzel on the inside of the store at the front of the counter." Id. Harris was asked again if she was sure that she saw Kuenzel and Venn in the store, to which she responded "yes, sir." Id. at 4.

6. April Harris's grand jury testimony

A transcript of April Harris's testimony before the grand jury given on March 9, 1988, is attached to this response and labeled "Exhibit 6." Harris testified that she and Crystal Ward were driving around on the night of the murder and that they drove by the convenience store on several occasions. Harris stated that they

[4] Ward's testimony is inconsistent with the portion of her sworn witness statement claiming that she saw Venn's car parked in front of the convenience store at 9:40-45.

drove by the convenience store between 10:00-10:45 when she saw Venn's car parked in the convenience store parking lot. Ex. 6 at 2. When asked if she saw someone in the store, Harris waffled on whether she could absolutely identify Venn and Kuenzel as the individuals she saw inside the store. Id. at 2. Harris was reminded that in her sworn statement, she had identified Venn and Kuenzel as being inside the store. Id. at 2. She said that her lack of complete certainty was because she was testifying under oath. Id. at 2. (Of course, Harris's witness statement where she identified Kuenzel and Venn as being inside the convenience store was also given under oath.) Harris explained that she believed the men she saw in the store were Venn and Kuenzel, but she was not absolutely sure because she could not identify their clothing or see their faces. Id. at 3. Harris stated that it was her best judgment that it was Venn and Kuenzel. Id. at 5.

C. State's Evidentiary Presentation

The State presents several affidavits in response to the contentions made in Kuenzel's Fed. R. Civ. P. 60(b) motion. The evidentiary presentation falls into two categories. First, the State presents affidavits from Clay Crenshaw, Kyle Clark, Robert Rumsey, Kenneth Brasher, and Kathy Jones to demonstrate that Crystal Moore's affidavits have no credibility. Second, the State presents 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.

1. Affidavit Of Clay Crenshaw

Clay Crenshaw, undersigned counsel, recently interviewed Crystal Moore at her home on February 22, 2010. See Ex. 7. The undersigned was accompanied by Kyle Clark, a Special Agent with the Attorney General's Office. Ex. 7 at 1. The purpose of the interview was to ask Moore why her recent affidavits are inconsistent with her 1987 witness statement and her 1988 grand jury testimony. Id. at 1. Undersigned counsel carried one legal-size accordion file folder on the visit to Moore and not "two large bags" as Kuenzel alleges. Id. at 2.

"During the interview, Moore was shown her 1987 witness statement and her 1988 grand jury testimony and was asked questions regarding why they were inconsistent with her affidavits on several key points." Ex. 7 at 2. The undersigned observed that Moore behaved oddly during the interview. Id. Moore was very talkative, but "at some points she would ramble digressively." Id. The undersigned noted that "[a]t multiple points during our conversation, [Moore] stated that the grand jury transcript of her testimony was wrong and, in addition, that it did not include certain statements that she remembers making." Id.

Undersigned counsel also stated the following:

> Although I had never previously spoken with Moore, she volunteered several curious statements, apparently in an

> attempt to ingratiate herself to me. For example, Moore complained to me that Kuenzel's attorneys had pestered her over the years with their frequent visits and telephone calls. She also stated that they had recently videotaped an interview of her for some type of documentary and that she became angry when she saw them videotaping her house. Then, in perhaps her most erratic display of behavior, she expressed her opinion regarding David Kochman's sexuality, - opining that Mr. Kochman, counsel for Kuenzel, is, to use her term, "gay." That Moore stated these things to me and then called Kochman soon after I left her house makes her statements even more curious. I realize that these facts do not have any relevance to this litigation; I point them out only to demonstrate that Moore's behavior is somewhat bizarre and her credibility is suspect, to say the least.

Id. at 2-3.

2. Affidavit Of Kyle Clark

Kyle Clark, a Special Agent with the Alabama Attorney General's Office and a retired federal agent with the Department of the Treasury, participated with the undersigned in the interview of Crystal Floyd Moore at her home in Sylacauga. See Ex. 8 (Kyle Clark's affidavit). During this interview, Moore was shown her two affidavits (that were prepared by Kuenzel's present counsel), her 1987 witness statement, and her 1988 grand jury testimony. Moore was asked about the inconsistencies in those documents. In addition, Moore was questioned about her relationship with Harvey Venn, who she dated in 1987, when she was 13 years old.

Moore was first asked about a discrepancy in those various documents regarding when she saw Venn on the day of the crime. Ex. 8 at 2. Moore stated in her two affidavits that Venn came over to her house on two occasions on the day of the crime, the first time during the late afternoon and the second time at approximately 10:00 on the night of the crime. Ex. 8 at 2. In Moore's 1987 witness statement, however, she stated that Venn arrived at her parents' home at around 6:15 in the evening and stayed for 15-30 minutes. Id. at 2. Clark stated that Moore reviewed her witness statement and "she said that portion of her 1987 statement is incorrect." Id. Moore was then shown a transcript of her grand jury testimony where she testified that Venn visited her parents' home around 8:00-8:30 on the night of the crime. Id. Clark noted that "Moore responded by stating that she did not remember saying that during her grand jury testimony and she said that portion of the grand jury transcript is incorrect." Id. at 2-3.

During the interview, Moore stated that portions of her witness statement and grand jury testimony incorrectly state that when Venn left her parents' house he told her that he was picking up Kuenzel to drive him to his ex-wife's house so that Kuenzel could deliver a child support payment. Id. at 3. Moore asserted that "those portions of her 1987 statement and grand jury transcript were incorrect because she did not know at that time that Kuenzel had a child." Id.

During the interview, Moore stated that she visited Venn in jail on only one occasion and that he never responded to her questions about whether he participated in this crime. Id. After reviewing her grand jury testimony, in which she testified that Venn discussed his participation with her, Moore stated during the interview that those portions of her grand jury testimony were incorrect. Id. She also stated that the portions of her grand jury testimony indicating that she regularly visited Venn in jail were incorrect. Id.

During the interview, Moore said that she recalled giving grand jury testimony that did not appear in the transcript. Id. at 4. For example, she stated that she did testify to being Venn's girlfriend, as the grand jury transcript states, but she stated in our interview that she also testified that Venn was dating someone else. Id. Moore also stated during our interview that she recalls testifying that Venn used marijuana but that she also testified that Venn used other drugs, including cocaine and hash baked in formaldehyde. Id. at 4-5. Moore stated that she did not understand why that was not in the grand jury transcript. Id. at 5.

Moore said during the interview that her 2008 affidavit was correct in stating that Robert Rumsey, the District Attorney at the time of Kuenzel's trial, questioned her alone on two separate occasions and tape-recorded both interviews. Id. at 5. Moore also stated that over the years she has had frequent contact with lawyers and investigators representing Kuenzel. Id. She stated several times during our

interview that "Kuenzel was innocent and that Venn was guilty of shooting Ms. Offord." Id. "When pressed on why she believed that Kuenzel was innocent and Venn was guilty, she provided no specific factual information." Id. at 5-6. In response to a question from Clay Crenshaw, "Moore stated that she did not have a mental or medical condition that has affected her memory." Id. at 6.

3. Affidavit Of Kenneth Brasher

Kenneth Brasher was employed by the Sylacauga Police Department from 1972-2002 and retired as a Captain in 2002. See Ex. 9. Brasher helped to investigate this case in 1987-88 as a member of the Sylacauga Police Department. Id. at 1. Brasher was recently shown a page of handwritten notes from an interview of Crystal Floyd in 1987.[5] Id. Although Brasher did not specifically recall interviewing Floyd in 1987, he affirmed that the notes from the interview are in his handwriting. Id. at 1-2. Brasher further stated that when he interviewed a witness, "it was my standard practice to write down the information stated by the witness as accurately and completely as I could." Id. at 2.

4. Affidavit Of Kathy Jones

Kathy Jones has been employed by the Talladega County District Attorney's Office since January 1987. See Ex. 10 at 1. During her employment, she has had numerous responsibilities, "including transcribing audio tapes of witness

[5] Crystal Floyd's 1987 witness statement is attached as "Exhibit 1" to this response.

statements and grand jury testimony." Id. Jones described the steps she took to make sure that a transcript she prepared was accurate. Id. at 1-2. She explained that "[i]n transcribing witness statements or grand jury testimony, my goal was to write down as accurately as I could every word that was stated on an audio tape." Id. at 2. Jones stated that "[a]ny transcript that I prepared completely and accurately reflects what was on the audio tape." Id. In addition, she stated that "when the transcript was completed, I placed my initials 'KJ' at the right hand top corner of the first page of the original transcript." Id.

5. Affidavit of Robert Rumsey

Robert Rumsey was the District Attorney for Talladega County from 1978 to 1998, and was the District Attorney when the Kuenzel case was tried. See Ex. 13. Rumsey's affidavit states that he recently reviewed an affidavit of Crystal Floyd Moore "wherein she contends that she met with me alone on two occasions and that I asked her questions and tape recorded both interview sessions." Ex. 13. Rumsey's affidavit further states that, "[a]lthough I do not specifically recall whether I ever met with Moore or not, I can say that it was my standard practice as a district attorney not to question witnesses." Ex. 13. Rumsey also stated, "I can never recall questioning a witness by myself and tape recording the interrogation session." Ex. 13. Finally, Rumsey stated, "[a]ll of the allegations in Moore's affidavit that concern me are false." Ex. 13.

6. Affidavit Of Dennis Surrett

Dennis Surrett was working as an investigator in the Talladega County District Attorney's Office when this case was being prosecuted, and he was the lead investigator on this case. See Ex. 11 at 1. Surrett reviewed his testimony at Kuenzel's trial and it refreshed his memory that Lawden Yates, a firearms and tool mark expert with the Alabama Department of Forensic Sciences, informed him that the murder weapon was a .16 gauge shotgun. Ex. 11 at 1-2. In fact, Yates informed Surrett that "the wadding and packing removed from the victim's body came from a .16 gauge shotgun shell." Id. at 2. Surrett stated in his affidavit that if Venn had possession of a .16 gauge shotgun, "it would have been sent to the Department of Forensic Sciences." Ex. 11 at 2. Surrett affirmed, "[t]here is no question in my mind that if both shotguns had been a .16 gauge, they would have both been sent to the Department of Forensic Sciences to be analyzed." Id.

Surrett stated that he reviewed a witness list prepared at some point before Kuenzel's trial that shows Surrett had information that Venn had possession of a .12 gauge shotgun. Surrett's affidavit states as follows:

> I have reviewed a witness list that I prepared at some point before Kuenzel's trial. (The witness list contains four unnumbered pages and is attached to this affidavit and labeled "Appendix A.") Most of the writing on the witness list is typewritten; however, the last five witnesses listed on the last page are in my handwriting. The last witness is listed as follows: '56. Sam Gibbins – Tyson Foods – 354-2155 Sa – 2:30 p.m. Loaned Venn

> the 12 Ga Shotgun.' This indicates to me that either I or another police officer interviewed Sam Gibbons, who, according to the note on the witness list, stated that he loaned Harvey Venn a .12 gauge shotgun.

Ex. 10 at 2.

7. Lawden Yates

Lawden Yates, a firearms and tool marks expert with over 35 years' experience as a forensic scientist, submitted an affidavit based on his review of his trial testimony, his investigative report summarizing his findings, and his review of Carl Majesky's declaration. See Ex. 11. Yates retired from the Alabama Department of Forensic Sciences (ADFS) in 1997 after a 25 year career with the ADFS. Ex. 11 at 2. Yates is a member of numerous professional organizations including the Association of Firearms and Tool Mark Examiners (AFTE). Id. There are rigorous requirements for gaining entry into AFTE, including earning a college degree, a background in forensic sciences including experience in conducting firearm and tool mark identifications. Id. In addition, an individual has to be recommended for membership by other AFTE members and, after the previously mentioned requirements, be voted on by AFTE members. Id.[6] Yates recently was a consultant to the National Academy of Sciences, where he served

[6] Carl Majesky, who submitted an affidavit contending that he was an expert in firearms and tool mark examination, is not a member of AFTE. Ex. 11 at 3-4.

on a study committee that made recommendations on establishing a ballistics national database. Ex. 11 at 3.

Yates testified at trial that the burned shotgun shell (State's Exhibit 31), which was found in a trash barrel outside the house where Kuenzel and Venn lived, was fired out of the Harrington and Richardson .16 gauge single barrel shotgun that has been identified in this litigation as "Kuenzel's shotgun." Ex. 11 at 5. His affidavit states that "[i]n making the determination that Kuenzel's shotgun fired State's Exhibit 31, I test-fired several shotgun shells using Kuenzel's shotgun. I then used a comparison microscope to determine whether the test-fired shells matched State's Exhibit 31, the burned shotgun shell." Ex. 11 at 5. After examining State's Exhibit 31 and the test-fired shells, Yates concluded and testified at Kuenzel's trial that the burned shotgun shell submitted to Yates was fired out of Kuenzel's shotgun. Ex. 11 at 5-6, quoting R. 383-84. Yates noted that the method he used to make this determination "is the standard test for firearms and tool mark identification." Ex. 11 at 6. Yates also stated that the plastic wad and the packing material from the shotgun shell that were removed from the victim's body during the autopsy "were consistent with shells manufactured by Remington, the same brand as the shotgun shell (State's Exhibit 31)." Ex. 11 at 6-7.

Yates also commented on some of the findings that were made in Majesky's declaration. Yates's responses to Majesky's findings are set out as follows:

> 11. Several of the statements in Majesky's declaration regarding my conclusions and testimony are plainly incorrect. First, Majesky's statement that the microscope comparison test "is without any scientific legitimacy" is ridiculous. *Majesky's declaration, ¶ 7B; 7B(1)(c).* The microscope comparison test is the test to perform in making a firearm and tool mark identification. Second, Majesky's declaration is incorrect in stating that the results I derived were not reliable because the shotgun shell (State's Exhibit 31) found in the trash barrel had been burned. *Majesky's declaration, ¶7B(1)(c).* Even though the shell had been burned, the metal part of the shell did not sustain any significant damage and I was able to perform comparison tests to the test-fired shells. Third, Majesky's declaration wrongly states that I should have test-fired shells from "several different 16 gauge shotguns and then, by microscopic comparison, determine which of the test fired shells had markings most similar to those on the shell found in the rubbish." *Majesky's declaration, ¶7B(1)(c).* Majesky's statement is incorrect. My testimony was based on my conclusion that the test fired shells had sufficient corroborating detail to the markings made on State's Exhibit 31. Thus, there was no need to fire other shotguns for comparison purposes.
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> 12. Majesky's declaration also asserts that even if the shotgun shell found outside of Kuenzel's house was fired from Kuenzel's shotgun, "such evidence would have little if any probative value in establishing that Kuenzel's shotgun was the murder weapon" because, according to Majesky, "it doesn't tell us where or when the shell was fired or whether it was fired at the victim." *Majesky's declaration, ¶7B(1)(c).* My initial response is that it is not the job of a firearms examiner to determine whether a particular shotgun was the "murder weapon." The results

of the microscope comparison I performed allowed me to conclude that a particular shotgun shell (State's Exhibit 31) was fired out of a particular shotgun (State's Exhibit 33). Any inferences on whether the shotgun I examined is a "murder weapon" is more appropriately left to others, most notably the prosecutor. What's more, it is not the job of a firearm and tool marks examiner to determine where or when a shell was fired or whether it was fired at the victim, as Majesky's declaration erroneously asserts. To be frank, a competent firearms examiner could not and would not make such a statement.

13. Majesky asserts that if Venn's gun was the murder weapon, it was fired "unintentionally rather than deliberately." *Majesky's declaration, ¶7D(1).* Majesky bases this assertion on the following: (1) Venn testified that Kuenzel said the shooting was an accident; (2) the upward trajectory of the pellets from the shotgun; (3) Venn and Kuenzel had reportedly taken drugs and alcohol; (4) the shooting occurred as soon as the assailant entered the store; and (5) no money was taken from the store. *Id.* Majesky's opinion that Venn's gun was fired "unintentionally" is not based on any scientific foundation, but rather on speculation. No competent firearms examiner would reach the same conclusion as Majesky based on the items he listed in support.

14. Majesky also asserts that Venn's gun was fired accidentally because of the light amount of pressure pull on the gun and because the shooter was wearing gloves. *Majesky's declaration, ¶7D(3).* The assertion that the shooter was wearing gloves is pure speculation and deserves no further comment. A gun that has a light amount of pressure pull on the trigger does not necessarily indicate that anyone shooting such a gun fired it accidentally. The amount of pressure pull on a trigger is normally three to five pounds. Even if a gun has less pressure pull than normal, however, a person can intend to fire such a gun. Any assertion to the contrary is wrong and is unsupported by any scientific evidence.

> 15. Majesky's declaration asserts that he performed various tests on a shotgun that was submitted to him by Kuenzel's representatives. This shotgun, which is described as a .16 gauge Iver Johnson Champion shotgun, is referenced in Majesky's declaration as "Venn's shotgun." For consistency's sake, this affidavit will refer to the gun as "Venn's shotgun." Majesky's declaration implies that Venn's shotgun is the "murder weapon" on the basis of two assertions. First, Majesky states that when he fired Venn's shotgun at a target three feet away, the shotgun produced a hole "strikingly similar in size and shape to the entry wound in the victim's body." *Majeksy's declaration, ¶7B(2)(a)*. Even if this statement is true, no competent firearms examiner would conclude anything other than that Venn's shotgun produced a hole similar in size and shape to the entry wound in the victim's body. That being said, it should be noted that Majesky does not include the measurements of any test-fire or of the victim's wound. Second, Majesky asserts that the "pattern of filler material around the target hole was compatible with the pattern of filler material found around the entry wound, as described in the forensic reports and by the State's experts at trial." *Id.* Again, even if this statement is true, it means only that the pattern of filler material in the test-fire and in the victim's wound were similar. No other conclusions can be reached based on this fact. Majesky's assertion that Venn's shotgun is the murder weapon is not supported by any scientific evidence and is not a conclusion that a competent firearms examiner would make.

Ex. 11 at 7-10

II. KUENZEL'S RULE 60(b) MOTION SHOULD BE DENIED

Kuenzel's Fed. R. Civ. P. 60(b) motion should be denied because the newly discovered evidence included with Kuenzel's motion does not establish that his

gateway claim of factual innocence has merit. Moreover, Kuenzel's motion does not state any grounds upon which this Court can grant relief. Although Kuenzel's Fed. R. Civ. P. 60(b) motion cites to (b)(1)-(3), and (b)(6), it does not specifically assert how those subsections apply to this case. Doc. 121 at 7-9.

Kuenzel's motion recognizes the limited grounds that can be presented in a Rule 60(b) motion, conceding that such a motion "is proper where it does not raise new claims, or seek review of the merits of the claims previously adjudicated." Doc. 121 at 9. Of course, any attempt to raise in a Rule 60(b) motion "a new ground for relief," or "attack[] the federal court's previous resolution of a claim on the merits," would constitute a second or successive habeas petition. Gonzalez v. Crosby, 545 U.S. 524, 532, 125 S.Ct. 2641, 2648 (2005). Instead, Kuenzel alleges that newly discovered evidence establishes a defect in the integrity of the federal habeas proceedings. Doc. 121 at 9. Kuenzel fails to argue, however, that the newly discovered evidence establishes the merits of his gateway claim of factual innocence. It bears repeating that this Court's final judgment dismissed Kuenzel's habeas petition as untimely and rejected his gateway claim of factual innocence because it lacked merit. See Doc. 115.

This Court ruled in its final memorandum opinion that Kuenzel's federal habeas petition was "barred by the time limitation mandated in 28 U.S.C. § 2244(d). Doc. 115 at 1. It found that "because [Kuenzel's] state Rule 32 petition

was not timely filed, it was not 'properly filed' for purposes of statutory tolling under § 2244(d)(2) and thus, the instant petition is due to be dismissed as untimely filed as well." Doc. 115 at 15. In addition, this Court ruled that Kuenzel did not "demonstrate the requisite diligence to be entitled to equitable tolling of the limitation period." Doc. 115 at 16. This Court then evaluated and rejected Kuenzel's gateway claim of factual innocence. Doc. 115 at 18-53.

As this Court stated in its final memorandum opinion: "Entering the gateway provided by a claim of actual innocence was not designed to be an easy task, and the burden placed on the habeas petitioner is a heavy one." Doc. 115 at 23. A habeas petitioner "seeking to enter the actual innocence gateway must make a credible showing of innocence by providing the court with new reliable evidence." Doc. 115 at 24 (citations and quotation omitted). A sufficient showing of factual innocence "requires the petitioner to produce new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." Doc. 115 at 24, citing Melson v. Allen, 548 F.3d 993, 1002 (11th Cir. 2008), quoting Arthur v. Allen, 452 F.3d 1234, 1245 (11th Cir. 2006), quoting in turn Schlup v. Delo, 513 U.S. 298, 316, 115 S.Ct. 851, 867-68 (1995). "A petitioner meets the threshold requirement if he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Doc.

115 at 27, citing Schlup, 513 U.S. at 327. "It has been noted that actual innocence 'means factual innocence, not mere legal insufficiency.'" Doc. 115 at 28, quoting Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604 (1998). Put simply, "[a]ctual innocence means that the person convicted did not commit the crime." Doc. 115 at 28 (citation omitted). "Even if the court, as one reasonable factfinder, would vote to acquit, the court must step back and consider whether the petitoner's evidentiary showing most likely places a finding of guilt beyond a reasonable doubt outside of the range of potential conclusions that any reasonable juror would reach." Doc. 115 at 28-29, quoting Doe v. Menefee, 391 F.3d 147, 173 (2d Cir. 2004) (emphasis in original).

A. Kuenzel's New Evidence Does Not Establish That His Gateway Claim of Factual Innocence Has Merit

The new evidence that is attached to Kuenzel's Rule 60(b) motion fails to even come close to establishing a meritorious gateway claim of factual innocence. As previously stated, Kuenzel's new evidence comes from various witness statements and grand jury testimony by Crystal Floyd Moore, Crystal Epperson Ward, and April Harris. See Exs. 1–6. These exhibits are insufficient to raise any doubt about this Court's judgment dismissing Kuenzel's habeas petition.

The new evidence regarding Crystal Moore, (e.g., her 1987 witness statement and her grand jury testimony) is actually detrimental to Kuenzel because it is inconsistent with key allegations contained in her affidavits previously filed in

this Court. Moore's affidavits state, inter alia, that Venn came to see her alone about an hour before the murder and that he was "high on drugs and/or alcohol," and was "acting nervous and paranoid." Doc. 45, Ex. 6 (first affidavit); Doc. 119, Ex. B (second affidavit). Notably, Moore's 1987 witness statement is inconsistent with Moore's affidavits in that her witness statement indicates that Venn came over to her house around 6:15 in the afternoon and not at 10:00 as the affidavits state. See Ex. 1. Moore's grand jury testimony is inconsistent with both her 1987 witness statement and her affidavits – she testified before the grand jury that Venn came to her house at around 8:00-8:30 in the evening. Ex. 2 at 1. Moreover, unlike her affidavits, neither Moore's 1987 witness statement nor her grand jury testimony mentions anything about Kuenzel's state of mind. Ex. 1; Ex. 2 at 1. Perhaps most damaging, Moore's grand jury testimony contains the incriminating testimony that Venn told her that Kuenzel shot the convenience store clerk. Ex. 2 at 2-3.

The new evidence regarding Crystal Epperson Ward does not help Kuenzel either. Kuenzel has previously presented in this Court a transcript of an interview of a private investigator's interview with Ward.[7] In that transcript, Ward stated, inter alia, that she saw Venn's car parked at the convenience store around 10:45-

[7] As noted above, Kuenzel states that the audiotape of the interview has been lost. Doc. 45, Ex. 5.

11:00 on the evening that the crime occurred. Doc. 45, Ex. 5. Among the new evidence is a sworn statement from Ward, dated December 9, 1987, see Ex. 3, and a transcript of her grand jury testimony, dated March 9, 1988, see Ex. 4. In her witness statement, Ward said that she and Harris drove by the convenience store around 9:40-9:45 that evening and that she saw Venn's car parked by the store. Ex. 3 at 4. In her grand jury testimony, Ward stated that she and Harris drove by the convenience store between 10:30-10:45 and that she saw Venn's car parked by the store. Ex. 4 at 1-2. Neither Ward's sworn witness statement nor her grand jury testimony contain any information that proves Kuenzel's factual innocence. If anything, the transcript of Ward's taped statement is impeached by her sworn witness statement and grand jury testimony because her sworn statement and testimony state that she saw Venn's car at the convenience store at a different time than that stated in the transcript of her alleged taped statement. Moreover, Ward's testimony is not favorable to Kuenzel because all of her statements, including those contained in the "new evidence," indicate that she saw Venn's car parked at the convenience store close in time to the murder. Significantly, there was testimony presented at trial - found to be credible by the jury - that Venn and Kuenzel were driving around together on the night of the crime.

Finally, the new evidence concerning April Harris likewise fails to show Kuenzel's factual innocence. Harris testified at trial that she and Crystal Ward

drove by the convenience store around 9:30-10:00 on the night that the crime occurred and that she saw Venn's car parked in front of the store. R. 492-93. Harris also testified that she saw Venn and Kuenzel inside the store standing in front of the checkout counter. R. 494. During her grand jury testimony, however, Harris waffled as to whether she was certain that she could identify Venn and Kuenzel as being the individuals she saw inside the store. Ex. 6 at 2. After being reminded of her previous sworn witness statement wherein she stated that she saw Venn and Kuenzel inside the store, Harris testified that it was her best judgment that she saw Venn and Kuenzel inside the convenience store. Ex. 6 at 2, 5.

Harris's grand jury testimony does not establish Kuenzel's factual innocence, even though it could have been used to impeach her trial testimony. The new evidence presented by Kuenzel must establish "factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604 (1998). As this Court has held, impeachment evidence does not establish factual innocence. Doc. 115 at 45, 50, 50 n.30; see also Clayton v. Gibson, 199 F.3d 1162, 1180 (10th Cir. 1999) ("The evidence which he asserts as newly discovered evidence barely aids his case and is merely impeaching evidence that would not cause a rational person to doubt Clayton's guilt."); Patterson v. Bartlett, 56 Fed. Appx. 762, 763-64 (9th Cir. 2002) (denying an actual innocence claim because the habeas petitioner merely offered impeachment evidence attacking the

credibility of the victim and her mother). The new evidence relating to April Harris's grand jury testimony, therefore, does not establish Kuenzel's factual innocence.

In short, Kuenzel's new evidence simply does not establish his gateway claim of factual innocence. The new evidence relating to Crystal Moore is unfavorable to Kuenzel because those documents are inconsistent with key allegations contained in her affidavits. Similarly, the new evidence concerning Crystal Epperson Ward is somewhat inconsistent with Ward's taped statement. In addition, Ward's testimony is not favorable to Kuenzel because all of her statements indicate that she saw Venn's car parked at the convenience store close in time to when the murder occurred. Finally, although the new evidence relating to April Harris could have been used to impeach her trial testimony that the men she saw inside the convenience store were Venn and Kuenzel, it in no way establishes Kuenzel's factual innocence.

B. The State's Evidentiary Presentation Further Establishes That Kuenzel's Rule 60(b) Motion Should Be Denied

The State's evidentiary presentation that accompanies further demonstrates that Kuenzel's motion should be denied. This evidence reveals that Crystal Moore and her affidavits have no credibility and that Kuenzel's evidence concerning the two shotguns is meritless. Thus, the State's evidentiary presentation refutes Kuenzel's argument that this Court should vacate its judgment "to accomplish

justice." Doc. 121 at 8. This Court should deny Kuenzel's motion because the motion raises nothing that sheds doubt on this Court's previous ruling that Kuenzel failed to present sufficient evidence to demonstrate his factual innocence.

1. The State's Evidence Demonstrates That Crystal Moore Is Incredible

The State's evidentiary presentation demonstrates that Crystal Moore and her affidavits have no credibility. Kyle Clark, a Special Agent with the Alabama Attorney General's Office, along with undersigned counsel, interviewed Crystal Moore in her home on February 22, 2010. During the interview, Moore was shown her two affidavits, her 1987 witness statement, and her 1988 grand jury testimony, and asked about the inconsistencies in those documents.

Clark stated that Moore was first asked about a discrepancy in those documents regarding when she saw Venn on the day of the crime. Ex. 8 at 2. Moore's response was bizarre; she told Clark that she did not actually make the statements contained in her 1987 witness statement and grand jury transcript regarding when she saw Venn on the day of the crime. Ex. 8 at 2. Clark stated that Moore said other portions of her 1987 witness statement and 1988 grand jury testimony also contained statements that she did not actually make. For example, according to Clark, Moore denied saying that when Venn left her house, Venn told her that he was taking Kuenzel to deliver a child support payment to his ex-wife, as reflected in her 1987 witness statement and 1988 grand jury testimony. Ex. 8 at 2.

Moore also told Clark that she did not testify to the grand jury, even though the transcript shows otherwise, that Venn admitted to her that he and Kuenzel were participants in this crime. Ex. 8 at 2. Moore told Clark that she visited Venn in jail only one time even though her grand jury testimony indicates that she regularly visited Venn in jail. Ex. 8 at 3.

Perhaps even more bizarre than claiming that both her witness statement and grand jury testimony contain statements she did not really make, Moore also told Clark that she recalls making statements that were not reflected in those documents. Ex. 8 at 4. For example, Moore told Clark that she recalls testifying that she was dating Venn, but she claimed that she also testified that Venn was dating someone else. Ex. 8 at 4. Moore also told Clark that she recalled testifying that Venn used marijuana but that she also testified that Venn used other drugs including cocaine and hash baked in formaldehyde. Ex. 8 at 4-5.

The affidavits of Kenneth Brasher and Kathy Jones demonstrate that Moore's 1987 witness statement and grand jury transcript were, in fact, accurate. Kenneth Brasher, who retired as a Captain with the Sylacauga Police Department, stated in his affidavit that Moore's 1987 witness statement is in his handwriting. Ex. 9 at 1-2. Brasher stated that when he interviewed a witness, "it was my standard practice to write down the information stated by the witness as accurately and completely as I could." Ex. 9 at 2. Kathy Jones, who has been employed by

the Talladega County District Attorney's Office since January 1987, stated that among her numerous responsibilities were "transcribing audio tapes of witness statements and grand jury testimony." Ex. 10 at 1. Jones stated that "when the transcript was completed, I placed my initials 'KJ' at the right hand top corner of the first page of the original transcript." Id. Jones stated that "[i]n transcribing witness statements or grand jury testimony, my goal was to write down as accurately as I could every word that was stated on an audio tape." Id. at 2. She stated that "[a]ny transcript that I prepared completely and accurately reflects what was on the audio tape." Id.

The affidavits from Robert Rumsey and the undersigned further demonstrate the incredibility of Moore and her affidavits. Rumsey stated that it was his standard practice not to interrogate witnesses. Ex. 13. Rumsey further stated that, "I can never recall questioning a witness by myself and tape recording the interrogation session." Ex. 13. Rumsey concluded by stating that Moore's allegations concerning him were "false." Ex. 13. The undersigned counsel described his recent interview of Moore at her house on February 22, 20101. The undersigned noted that Moore strangely explained away inconsistencies between her affidavits and her witness statement and grand jury testimony by stating that "the grand jury transcript of her testimony was wrong and, in addition, that it did not include certain statements that she remembers making." Ex. 7 at 2.

2. The State's Evidentiary Presentation Demonstrates That Kuenzel's Assertions About The Shotguns Are Meritless

Kuenzel has previously filed affidavits that implied that Venn possessed a .16 gauge shotgun on the night of the crime, rather than a .12 gauge as Venn testified at trial. Doc. 115 at 40-41. This Court has previously ruled that Kuenzel's evidence regarding the shotguns did not establish a gateway claim of factual innocence. Doc. 115 at 44-47.

In addition, attached to the instant Response are two affidavits that address the contentions in Kuenzel's previously-filed affidavits regarding Venn's shotgun. Dennis Surrett, formerly an investigator with the Talladega County District Attorney's Office and the lead investigator in this case, recently prepared one of those affidavits. See Ex. 11. Surrett stated that if Venn had possessed a .16 gauge shotgun it would have been sent to the Department of Forensic Sciences to be analyzed. Ex. 11. Specifically, he stated:

> Although I don't fully remember all of the details about the shotguns, I can say that if Venn's shotgun had been a .16 gauge shotgun, it would have been sent to the Department of Forensic Sciences. My testimony at page 287 of the trial transcript indicates that Lawden Yates, with the Alabama Department of Forensic Sciences, had informed me that the wadding and packing removed from the victim's body came from a .16 gauge shotgun shell. I further testified that after receiving that information from Yates, I seized Kuenzel's .16 gauge shotgun. There is no question in my mind that if both shotguns had been a .16 gauge, they would have both been sent to the Department of Forensic Sciences to be analyzed.

Ex. 11. Thus, to the extent that Kuenzel argues that Venn actually had possession of a .16 gauge shotgun, his argument is meritless. As Yates's affidavit states, if Venn truly had a .16 gauge shotgun, that shotgun certainly would have been sent to the Department of Forensic Sciences to be analyzed. See Ex. 11.

Surrett's affidavit also references some of his notes that indicate that Venn had a .12 gauge shotgun. Surrett's affidavit states in relevant part:

> I have reviewed a witness list that I prepared at some point before Kuenzel's trial. (The witness list contains four unnumbered pages and is attached to this affidavit and labeled "Appendix A."). Most of the writing on the witness list is typewritten; however, the last five witnesses listed on the last page are in my handwriting. The last witness is listed as follows: "56. Sam Gibbins [sic] – Tyson Foods – 354-2155 Sa – 2:30 p.m. Loaned Venn the 12 Ga Shotgun." This indicates to me that either I or another police officer interviewed Sam Gibbons, who, according to the note on the witness list, stated that he loaned Harvey Venn a .12 gauge shotgun.

Ex. 11 at 2. Accordingly, this Court should not grant Kuenzel's motion and reopen the habeas proceedings based upon Kuenzel's suggestion that Venn actually possessed a .16 gauge shotgun, because this suggestion is demonstratively untrue.

The State also presents an affidavit from Lawden Yates, who testified at Kuenzel's trial as an expert in firearms and tool mark examinations. See Ex. 12. Yates, a firearms and tool marks expert who has over 35 years experience as a forensic scientist, submitted an affidavit based on his review of his trial testimony,

his investigative report summarizing his findings, and his review of Carl Majesky's declaration.[8] See Ex. 12.

Yates testified at trial that the burned shotgun shell (State's Exhibit 31), which was found in a trash barrel outside the house where Kuenzel and Venn lived, was fired out of the Harrington and Richardson .16 gauge single barrel shotgun that has been identified in this litigation as "Kuenzel's shotgun." Ex. 12 at 5. Yates made this determination by test firing shells out of Kuenzel's shotgun and comparing those shells to the burned shell. Ex. 12 at 5. Yates stated that the method he used to make this determination "is the standard test for firearms and tool mark identification." Ex. 11 at 6.

Yates stated that several of the statements in Majesky's declaration regarding his conclusions and testimony concerning the examination of the burned shotgun shell are "plainly incorrect." Doc. 12 at 7. Yates stated as follows:

> First, Majesky's statement that the microscope comparison test "is without any scientific legitimacy" is ridiculous. *Majesky's declaration, ¶ 7B; 7B(1)(c).* The microscope comparison test is the test to perform in making a firearm and tool mark identification. Second, Majesky's declaration is incorrect in stating that the results I derived were not reliable because the shotgun shell (State's Exhibit 31) found in the trash barrel had been burned. *Majesky's declaration, ¶7B(1)(c).* Even though the shell had been burned, the metal part of the

[8] This Court, in its memorandum opinion, stated that Carl Majesky was a "self-described firearms expert." Doc. 115 at 41. This Court also noted that "[n]o documentation supporting Majesky's credentials has been supplied to this court." Doc. 115 at 41 n.20.

> shell did not sustain any significant damage and I was able to perform comparison tests to the test-fired shells. Third, Majesky's declaration wrongly states that I should have test-fired shells from "several different 16 gauge shotguns and then, by microscopic comparison, determine which of the test fired shells had markings most similar to those on the shell found in the rubbish." *Majesky's declaration, ¶7B(1)(c).* Majesky's statement is incorrect. My testimony was based on my conclusion that the test fired shells had sufficient corroborating detail to the markings made on State's Exhibit 31. Thus, there was no need to fire other shotguns for comparison purposes.

Doc. 12 at 7. Yates's conclusion that the burned shotgun shell was fired out of Kuenzel's shotgun was based on the standard test in identifying tool marks. Id.

Yates also criticized Majesky's statement that if Venn's gun was the "murder weapon," it was fired "unintentionally." Doc. 12 at 8. Yates stated as follows:

> Majesky asserts that if Venn's gun was the murder weapon, it was fired "unintentionally rather than deliberately." *Majesky's declaration, ¶7D(1).* Majesky bases this assertion on the following: (1) Venn testified that Kuenzel said the shooting was an accident; (2) the upward trajectory of the pellets from the shotgun; (3) Venn and Kuenzel had reportedly taken drugs and alcohol; (4) the shooting occurred as soon as the assailant entered the store; and (5) no money was taken from the store. *Id.* Majesky's opinion that Venn's gun was fired "unintentionally" is not based on any scientific foundation, but rather on speculation. No competent firearms examiner would reach the same conclusion as Majesky based on the items he listed in support.

Doc. 12 at 8-9. Yates's statement speaks for itself. It clearly demonstrates that Majesky did not base his conclusions on scientific information.

Yates also commented on Majesky's conclusion that Venn's shotgun was the "murder weapon." Doc. 12 at 9-10. Yates's affidavit states the following:

> Majesky's declaration implies that Venn's shotgun is the "murder weapon" on the basis of two assertions. First, Majesky states that when he fired Venn's shotgun at a target three feet away, the shotgun produced a hole "strikingly similar in size and shape to the entry wound in the victim's body." *Majeksy's declaration, ¶7B(2)(a)*. Even if this statement is true, no competent firearms examiner would conclude anything other than that Venn's shotgun produced a hole similar in size and shape to the entry wound in the victim's body. That being said, it should be noted that Majesky does not include the measurements of any test-fire or of the victim's wound. Second, Majesky asserts that the "pattern of filler material around the target hole was compatible with the pattern of filler material found around the entry wound, as described in the forensic reports and by the State's experts at trial." *Id.* Again, even if this statement is true, it means only that the pattern of filler material in the test-fire and in the victim's wound were similar. No other conclusions can be reached based on this fact. Majesky's assertion that Venn's shotgun is the murder weapon is not supported by any scientific evidence and is not a conclusion that a competent firearms examiner would make.

Ex. 12 at 9-10

In conclusion, Kuenzel's allegation that Venn had a .16 gauge shotgun on the night of the crime is demonstrably untrue. In addition, the State's expert's

affidavit demonstrates that the conclusions reached by Carl Majesky were untrue and not based on scientific information.

C. Kuenzel's Request For Discovery Should Be Denied Because He Has Failed To Make A Threshold Showing Of Actual Innocence

As this Court stated in its memorandum opinion, "[t]he question is not whether petitioner was prejudiced at this trial because the jurors were unaware of the new evidence, but whether all the evidence, considered together, proves that Kuenzel is actually innocent of the murder of Linda Offord, so that no reasonable juror would vote to convict him." Doc. 115 at 53. This Court ruled that "Kuenzel's evidence does not persuade the court that no reasonable juror could have found the petitioner guilty beyond a reasonable doubt." Id. Since that ruling, Kuenzel has not presented any evidence that changes the equation. If anything, the evidence in these Rule 60(b) proceedings establishes that most of Kuenzel's key allegations are incredible or meritless.

The Eleventh Circuit has ruled that a habeas petitioner is entitled to discovery and an evidentiary hearing only if he has met a threshold showing of actual innocence. Melson v. Allen, 548 F.3d 993, 1004 (11th Cir. 2008); Sibley v. Culliver, 377 F.3d 1196, 1207 (11th Cir. 2004). As discussed above, Kuenzel has not even come close to making a threshold showing of factual innocence.

As this Court noted in its latest memorandum opinion, Kuenzel's habeas petition has been found time-barred by this Court on three occasions. Doc. 115 at

1. Kuenzel's latest attempt to cause more delay should be rejected. The State urges this Court to deny Kuenzel's request for discovery and an evidentiary hearing. It is time for this case to finally come to an end.

Respectfully submitted,

Troy King
Alabama Attorney General

s/ J. Clayton Crenshaw
J. Clayton Crenshaw
Assistant Attorney General

CERTIFICATE OF SERVICE

This is to certify that on the 14th day of May, 2010, a copy of the foregoing has been electronically filed with the Clerk of the Court using the CM/ECF system, which will electronically send a copy of the same to the following: **David A. Kochman, Jeffrey E. Glen, and Rick L. Burgess**.

s/ J. Clayton Crenshaw
J. Clayton Crenshaw
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