No. 10-10283-P

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WILLIAM ERNEST KUENZEL,

Petitioner-Appellant,

v.

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

Respondents-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama (1:00-cv-00316-IPJ-TMP)

BRIEF OF RESPONDENTS-APPELLEES

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April 18, 2011

No. 10-10283-P

William Ernest Kuenzel v. Kim T. Thomas, et al

CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel for Respondents-Appellees hereby certifies that the following persons have or may have an interest in the outcome of this case:

1. Burgess, Rick – Kuenzel's counsel;
2. Crenshaw, J. Clayton – Assistant Alabama Attorney General;
3. Giddens, Steve – Talladega County District Attorney;
4. Glen, Jeffrey E. – Kuenzel's counsel;
5. Johnson, Hon. Inge P. – Unites States District Judge;
6. Kochman, David A. – Kuenzel's counsel;
7. Kuenzel, William Ernest – Petitioner-Appellant;
8. Neiman, John C. Jr. – Alabama Solicitor General;
9. Offord, Linda – Capital Murder Victim;
10. Putnam, Hon. Michael T. – United States Magistrate Judge;
11. Strange, Hon. Luther – Alabama Attorney General;

12. Thomas, Kim T. – Commissioner, Alabama Department of Corrections;

13. Venn, Harvey – Kuenzel's Co-Defendant.

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

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is appropriate because this appeal involves a habeas corpus proceeding in which the district court dismissed Kuenzel's habeas petition as untimely. In addition, the district court rejected Kuenzel's claim of actual innocence because it was based on evidence that was neither "new" nor "reliable."

CERTIFICATE OF TYPE SIZE AND STYLE

The size and style of type used in this brief is fourteen (14) point Times New Roman.

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STATEMENT OF JURISDICTION

On December 16, 2009, the district court entered its memorandum opinion and final order dismissing William Kuenzel's petition for writ of habeas corpus, finding that the petition was time barred under 28 U.S.C. § 2244(d) and that Kuenzel had shown neither equitable tolling nor actual innocence as a way to avoid the time bar. Doc. 115. On December 16, 2009, the district court entered its order denying Kuenzel's Rule 60(b) motion. Doc. 142. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 and 2253 because the appeal is from a final order in a 28 U.S.C. § 2254 habeas corpus proceeding.

STATEMENT OF THE ISSUES

1. Is Kuenzel entitled to statutory tolling even though his state post-conviction petition was not "properly filed," thus he cannot benefit in any way from the tolling provision set forth in 28 U.S.C. § 2244(d) (2)?

2. Is Kuenzel entitled to equitable tolling even though he was on notice in 1993 that his state post-conviction petition was untimely but yet he continued to litigate this claim until after the AEDPA limitations period expired?

3. Did the district court correctly rule that Kuenzel did not prove actual innocence because his evidence was neither new nor reliable?

STATEMENT OF THE CASE

A. The Course Of The Proceedings And The Disposition Below

This case is back before this Court for the third time. On February 15, 2000, Kuenzel filed a federal habeas petition challenging his state court capital murder conviction and resulting death sentence. See Doc. 5. On three separate occasions (in 2002, 2006, and 2010), the federal district court has found that Kuenzel's habeas petition was time barred because it was filed outside the AEDPA statute of limitations. See 28 U.S.C. 2244(d)(1).

In September 2002, the district court granted the State's motion to dismiss and held that Kuenzel's habeas petition was time barred. See Docs. 53, 54. This Court reversed that decision and vacated the judgment in light of Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003), resulting in this case being restored to the district court's docket. See Kuenzel v. Campbell, 85 Fed. Appx. 726 (Table) (11th Cir. 2003).

On May 11, 2005, the State filed a renewed motion to dismiss Kuenzel's petition as untimely based on the Supreme Court's opinion in Pace v. DiGuglielmo, 544 U.S. 408, 125 S.Ct. 1807 (2005). See Doc. 83. In Pace, the Supreme Court held that an untimely state post-conviction petition was not "properly filed" within the meaning of AEDPA's statutory tolling provision. The district court determined that the intervening authority of Pace effectively

overruled this Court's first Siebert decision, see Siebert, 334 F.3d 1018. It therefore concluded that Kuenzel's habeas petition was barred pursuant to 28 U.S.C. § 2244(d) because his untimely filed state post-conviction petition had no tolling effect. See Docs. 93, 94. This Court, relying on Siebert v. Allen, 480 F.3d 1089, 1090 (11th Cir. 2007), vacated the district court's decision and remanded for further proceedings, including the resolution of Kuenzel's assertion that he is actually innocent. Kuenzel v. Allen, 488 F.3d 1341 (11th Cir. 2007).

This case, now back before the district court for the third time, was again held to be untimely under section 2244(d). See Docs. 115, 116. Specifically, the district court followed the Supreme Court's opinion in Allen v. Siebert, 552 U.S. 3, 128 S.Ct. 2 (2007), which reversed this Court's opinion in Siebert, 480 F.3d 1089. Doc. 115 at 8-16. Kuenzel does not challenge this portion of the district court's ruling on appeal.

After finding that Kuenzel's petition was time barred, the district court then went on to address Kuenzel's actual innocence claim, in accordance with this Court's instructions. See Doc. 115 at 22 (noting that this Court "specifically instructed this court to address the petitioner's actual innocence claim, although it did so in the context of an exception to a procedural default, not a time bar") (footnote omitted). The district court addressed Kuenzel's claims that he is

"actually innocent" of capital murder and that he is "actually innocent" of the death penalty. It summarized these issues as follows:

> Kuenzel asserts that he is 'actually innocent' of the murder for which he was convicted, and argues that he was at home sleeping when the murder occurred. He further argues that he is 'actually innocent' of the death penalty in that his attorney failed to present sufficient evidence of mitigating factors at the penalty phase of his trial.

Doc. 115 at 17. Because Kuenzel does not challenge the district court's holding of the penalty phase "actual innocence" issue, this brief omits any further reference to that issue.

The district court rejected Kuenzel's claim of actual innocence. Doc. 115 at 16-53. It evaluated each item of "new" evidence offered by Kuenzel against the backdrop of the evidence presented at trial in determining that Kuenzel did not demonstrate he is actually innocent. Doc. 115 at 41-54. The court found that most of Kuenzel's "new" evidence is nothing more than hearsay or attacks on the credibility of witnesses, "which is insufficient to support a showing of actual innocence." Doc. 115 at 53. It further held none of Kuenzel's evidence is newly discovered, "and it does not constitute 'credible' or 'reliable' evidence that would result in no reasonable juror finding that Kuenzel was guilty of the capital crime for which he was convicted." Doc. 115 at 53.

Kuenzel then filed a motion pursuant to Fed. R. Civ. P. 60(b) alleging that evidence discovered after the district court issued its memorandum opinion called into question the district court's ruling that Kuenzel did not establish actual innocence. Doc. 121. The court denied Kuenzel's motion, holding that "the court did not make a mistake by finding that petitioner failed to show 'actual innocence' for purposes of avoiding the § 2244(d) time bar." Doc. 142 at 35. The court determined that to the extent that Kuenzel's evidence was "new," it was not reliable. Doc. 142 at 33. Moreover, Kuenzel presented no evidence "directly suggesting that petitioner was not involved in the shooting." Doc. 142 at 33.

B. Evidence Presented During The Guilt Phase Of Kuenzel's Trial

Because the principal argument Kuenzel has raised deals with his claim of actual innocence, it is critical for present purposes to fully recite the evidence that was before the district court. As explained below, the evidence was hardly the one-sided presentation that Kuenzel sets forth in his opening brief. Indeed, the jury considered and rejected Kuenzel's theory that Venn was in fact the triggerman. Substantial, critical evidence not mentioned in Kuenzel's brief provided ample basis for that conclusion. And the "new" evidence Kuenzel has brought forth is not truly "new," and it is not reliable evidence that Kuenzel is innocent.

1. Harvey Venn's testimony

The State's key witness at the guilt phase of the trial was Harvey Venn, Kuenzel's co-defendant. The gist of Venn's testimony was that he drove Kuenzel to Joe Bob's convenience store in Sylacauga, where Kuenzel exited the car and murdered the clerk during a robbery. In exchange for his truthful testimony, Venn pleaded guilty to murder and received a sentence of life imprisonment. R. 171-72.[1] The key aspects of Venn's testimony were corroborated by the testimony of other witnesses and by physical evidence.

Harvey Venn and Billy Kuenzel were welders at Madex, a factory located in Goodwater. R. 116-17. At the time of the murder, Venn was 18 years old and Kuenzel was 25. R. 116-17. Venn had been employed at Madex for two years, Kuenzel for approximately one year. R. 117-18. About a month and a half or two months before the murder, they moved into a house three miles from the Madex plant. R. 119-20. Venn owned a 1984 Buick Regal that was a "champagne" color. R. 120. Kuenzel rode to work with Venn because they worked on the first shift together and because Kuenzel did not own a car. R. 120-21.

On November 9, 1987, the day Linda Offord was murdered, Venn and Kuenzel went to work around 6:30 in the morning. R. 121-22. Kuenzel left work

[1] "R" refers to pages in the transcript of the 1988 trial. "C" refers to pages of the clerk's record for the 1988 trial. "PCR" refers to the clerk's record of the Rule 32 proceedings. "PR" refers to the transcript of a hearing held to determine whether Kuenzel's Rule 32 petition was timely. In accordance with the district court's scheduling order, all of these materials were attached to the State's Habeas Corpus Checklist, which is Doc. 27 in the record below.

early that day and borrowed Venn's car. R. 122. Venn worked his full shift, until approximately 2:30 p.m. R. 122. Kuenzel came back to Madex and picked up Venn. R. 122. They drove to their residence, changed clothes, showered, and drank some beer. R. 124. They left their house around 3:30 in the afternoon. R. 125.

After separating briefly, Venn picked up Kuenzel at Kuenzel's parents' house between 4:30 and 5:00 in the afternoon. R. 127. They drove to Sylacauga and stopped at a Burger King to eat. R. 128. They then went to Joe Bob's convenience store for the first time that day around 5:00 or 5:30 and used the bathroom, which was located outside the store, before leaving. R. 130.

While they were in Sylacauga, Kuenzel and Venn purchased some over-the-counter diet pills at a drug store. R. 131. They drove to Madex (the factory where they worked), arriving between 7:00 and 7:30 that evening. There Kuenzel sold some of the diet pills to Johnny Lambert, an employee at Madex. R. 132. They left and drove back to Sylacauga, arriving around 8:00 that evening. R. 133.

Kuenzel and Venn then returned to Joe Bob's convenience store a second time. R. 133. This time they bought cigarettes and again used the bathroom. R. 133-34. Venn recalled that Kuenzel went into the store to buy the cigarettes. R. 134. They rode around for a while but eventually parked in a parking lot and watched cars drive by. R. 134. While parked, around 9:00-9:15 that evening,

Kuenzel first brought up the subject of robbing the convenience store. R. 134. Kuenzel told Venn they could pick up some easy money at the store. R. 135. Kuenzel said he would go inside the store "and scare the lady out of the money and g[e]t in the car and leave." R. 135.

In the backseat of the car, Kuenzel and Venn had two shotguns and a .32 caliber pistol. R. 135-36. Venn "had a .12 gauge that [he] borrowed from a guy at work." R. 123. Kuenzel had a .16 gauge that "he borrowed from his parents … about three or four days" earlier. R. 123.

About an hour after discussing the robbery, Venn wanted to drive to a friend's house in a nearby city, but Kuenzel said they did not have time if they were going to rob the convenience store. R. 136. Venn agreed and turned the car around and drove back into town. R. 136. They drove to the store for the third time around 10:00-10:30, and parked in front of the outdoor bathrooms, waiting for the customers in the store to leave. R. 136-37. While parked, Venn saw Phillip Roberts come out of the store, and, around the same time, saw Wayne Culligan drive up and park next to Venn's car.[2] R. 136-37. Venn knew Culligan from working with him at Madex. R. 138.

Kuenzel and Venn then left Joe Bob's convenience store, apparently because some customers were still present. R. 138. They "made a circle around town and

[2] Culligan's name is spelled "Culliger" at pages 137-38 of the transcript.

come back." R. 138. They returned to Joe Bob's a "little bit before 11:00." R. 139. There were still a few customers in the store when they pulled up. R. 139. Venn did not know any of the customers. R. 139. Venn parked the car by the "icebox" located in front of the building. R. 140.

When the customers left the store, Kuenzel covered up the license plate with a paper sack. R. 140. Kuenzel got back in the car and instructed Venn to park by the door of the store. R. 141. Kuenzel covered his face with an orange ski mask and exited the car, holding the 16-gauge shotgun down by his leg. R. 141-42.

Kuenzel went into Joe Bob's. R. 142. After "a few seconds," Venn heard a gunshot. R. 142. Venn testified that from the time Kuenzel went into the store to the time of the shotgun blast was "probably about ten seconds." R. 142. Through the window of the store, Venn saw the store clerk thrown back from the shotgun blast. R. 142.

Kuenzel got back in the car with the 16-gauge shotgun and instructed Venn to "haul ass." R. 142. Kuenzel told Venn that he did not mean to shoot the store clerk and that he did not take any money. R. 142. While driving home, Kuenzel pulled his pistol from underneath the seat and said, "What happens to one can happen to another." R. 144.

When Kuenzel and Venn arrived at their residence, they brought into the house the shotguns, shotgun shells, the pistol, and the ski mask. R. 144. Venn

asked Kuenzel about the crime and Kuenzel responded that "it was a shame she had to get killed over some money that wasn't even hers to begin with." R. 145. Kuenzel told Venn that he had put the shotgun on the counter and told the store clerk to give him the money. R. 181 She asked, "Do you mean the money in the register?" R. 181. Kuenzel responded in the affirmative and the clerk said, "Well, you can't have it. Go ahead and pull the trigger." R. 181. Kuenzel told Venn that he shot the clerk and ran out because it was an accident. R. 181.

The next day, Venn and Kuenzel went to work around 6:00 the next morning. R. 147. They both worked a full shift until 2:30 p.m. and returned home. R. 147. When they had taken the 16-gauge shotgun into the house the previous night, it still had the spent shell in it. R. 147. Kuenzel eventually took the spent shell out of the shotgun, put it in a paper sack, and put it in a 55 gallon drum in front of the house in which they often burned trash. R. 147. They burned trash in the drum after depositing the spent shell in it. R. 148.

Two days after the murder, on Wednesday, November 11, 1987, Venn received a call from someone in the Sylacauga Police Department asking him to come and answer some questions. R. 149. While still at work, Venn told Kuenzel about receiving the call from the police. R. 149. Kuenzel instructed Venn to tell the police that, on the night of the murder, Venn went to his friend Chris's house in Fayetteville "and was drinking a little bit." R. 149. Kuenzel also told Venn to say

that, on the way home around 9:00 in the evening, he stopped at Joe Bob's and used the bathroom. R. 149.

Venn drove from work to the police station and then returned home. R. 150. Kuenzel questioned Venn about what he told the police, and as Venn talked, Kuenzel wrote the information down on a pad of paper. R. 151. The police ultimately seized Kuenzel's notepad, and it was introduced into evidence at Kuenzel's trial. R. 151.

The day after Venn was questioned, Thursday, November 12, 1987, Kuenzel took the 16-gauge shotgun back to his parents' house. R. 153. Venn said that Kuenzel's mother and "a couple of those girls and boys that stayed over there" were present when he returned the shotgun. R. 153. Venn stated that the 12-gauge shotgun, which was in his possession, remained at his and Kuenzel's residence. R. 153.

At trial, Kuenzel's defense counsel used Venn's three statements to impeach Venn's trial testimony.[3] R. 159-180, 540-557. Venn admitted that in his first statement he falsely claimed that he was at Chris Morris's house on the night of the crime. R. 165, 67, 542-44. Venn also admitted that in his second statement he

[3] Venn's first "statement" consisted of handwritten notes made by the police during several interviews that they had with Venn (in Kuenzel's presence) on November 11, 1987, two days after the murder. R. 27, 178, 540-41; Doc. 136, Ex. 2, Ex. 5, Ex. 6, Ex. 7, and Ex. 8. Venn's second statement was taken on November 14-15, 1987, Doc. 136, Ex. 9, and his third statement was taken on December 9, 1987. R. 25, 178; Doc. 136, Ex. 10. Venn's second and third statements were audiotaped and subsequently transcribed. Id.

falsely said that he and Kuenzel stopped by Joe Bob's convenience store only twice on the night of the crime, and that the first time they stopped there was at 10:30 p.m. R. 168-69, 546-48. Defense counsel elicited that Venn could not remember how many times he and Kuenzel stopped by Joe Bob's on the night of the crime. R. 169. Venn admitted that in his first statement he falsely stated that he saw David Pope that night at Joe Bob's convenience store.[4] R. 165-66. Venn first testified that the blood on his pants was "squirrel blood," R. 166, and then he stated he did not know what the reddish stain was or how it got on his pants. R. 542, 545, 555. Defense counsel confronted Venn with one of his statements to the police, in which he said, inconsistent with this trial testimony, that he was not with Kuenzel when Kuenzel returned the shotgun to his parents' house. R. 170. Defense counsel's questions emphasized Venn's testimony that he did not go into Joe Bob's at all on November 9, R. 548, which was inconsistent with April Harris's testimony that she saw him in the store. Venn stated that he was testifying

[4] Venn's cross examination shows that defense counsel had copies of Venn's statements and used them to impeach Venn's testimony. Venn first talked to the police two days after the murder, Nov. 11, 1987, and the participating police officers made handwritten notes of these conversations. Doc. 135, Ex. 2, 5, 6, 7, and 8. Venn testified that the statement he gave in these notes was false and he was impeached on this admission. R. 165-166. Venn specifically testified that his assertion that he saw David Pope that night was false. R. 166-67. Despite this testimony, Kuenzel alleges that Venn's statements were "previously undisclosed." Blue Br. at 24. Even though Venn testified he did not see David Pope the night of the murder and that his statement asserting that he did see Pope was false, Kuenzel asserts he would have presented evidence that David Pope was the person seen in the car with Venn that night. Bue Br. at 58. Kuenzel does not assert how he would have presented that evidence and he has never presented any evidence such as an affidavit from David. Pope. Moreover, none of the people who saw Venn at Joe Bob's that night testified that they saw David Pope at the store.

in exchange for pleading guilty to an offense less than capital murder and that he expected to be eligible for parole in "seven to ten years." R. 172.[5]

2. The prosecution's evidence corroborating Venn's testimony

Venn's testimony was corroborated by the testimony of other witnesses and by the physical evidence.

First, several witnesses corroborated Venn's testimony about Venn's and Kuenzel's third visit to Joe Bob's convenience store around 10:00-10:30 p.m. Wayne Culligan, who worked with Venn at Madex, had just played in a basketball game in Sylacauga and stopped at Joe Bob's the night of November 9, 1987, parking by a 1983 or 1984 Cutlass. R. 477. Even though Culligan could not identify the person sitting in the driver's seat of that car, he could say that the person was a white male. R. 478-79. He could see a person in the passenger side of the car but could not tell if it was a man or woman. R. 479-80. In addition, Dale Templin, who was riding with Culligan, testified that the basketball game had ended around 9:45 p.m. R. 466. Templin also testified that he saw a parked car at the convenience store with two people in it. R. 470.

Phillip Roberts went to Joe Bob's around 10:30-10:45 that evening with two other people. R. 481. Roberts saw Venn standing by the ice machine and they

[5] Despite the fact that defense counsel used all of Venn's statements in impeaching Venn's testimony, Kuenzel still alleges that Venn's statements were "undisclosed." Blue Br. at 12. Defense counsel's cross examination makes clear that he had all of Venn's statements. Moreover, the prosecutor stated, "[w]e have given him [defense counsel] every statement that Mr. Venn made, the 11th, the 14th, and the 9th." R. 174.

talked for "about three minutes" about Roberts's brother. R. 482-83. Roberts could see a person with a mustache in the passenger side of Venn's car but couldn't see who it was because the window was foggy. R. 484.

James Clement, one of the officials at the basketball game where Templin and Culligan were participants, stopped by the convenience store after the game around 9:50-10:00 that evening. R. 453-54. He saw two people in a parked car and later identified Venn from a photographic lineup as the person sitting in the driver's seat of that car. R. 458.

April Harris, who was acquainted with Venn and Kuenzel, was a passenger in a car that drove by Joe Bob's around 9:30-10:00 that evening. R. 492. The car in which she was riding was traveling slowly because they were approaching an intersection. R. 501. Harris saw Venn's car in the parking lot and also noticed that Venn and Kuenzel were in the convenience store in front of the checkout counter. R. 494.

Second, two witnesses corroborated Venn's testimony regarding when Kuenzel shot Linda Offord, the convenience store clerk. Daniel Lasser testified that he went to Joe Bob's convenience store around 11:00 that evening. R. 505. He noticed a parked car and thought he saw somebody in the parked vehicle, but he was uncertain because the windows were foggy and it was raining. R. 506.

Loretta Graves was scheduled to work the third shift at Joe Bob's convenience store. R. 187. When Graves arrived for her shift at 11:20 p.m., she found Linda Offord on the floor. R. 188. Graves said that Offord was still alive and gasping for air and that "there was blood everywhere." R. 188.

Third, Dianne Mason corroborated Venn's testimony that Kuenzel covered the license plate with a paper sack. Mason, who drove by Joe Bob's convenience store sometime between 11:10 and 11:15, R. 517, saw a car with its license plate partially covered. R. 515. She said that the car was either a Regal or Cutlass. R. 521.

Fourth, Johnny Lambert corroborated Venn's testimony about Kuenzel selling diet pills to Lambert at the Madex facility. Lambert testified that he worked the second shift at Madex on November 9 and that he saw Venn and Kuenzel at the plant early that evening. R. 447. Lambert and Kuenzel went into the bathroom where he gave Kuenzel $20 in exchange for the diet pills. R. 449-50.

Fifth, Detective Kenneth Brasher of the Sylacauga Police Department corroborated Venn's testimony that Kuenzel burned the spent shotgun shell in the 55-gallon drum near his house. When Detective Brasher searched Venn and Kuenzel's residence on November 16, 1987, he emptied the 55 gallon drum located in the front yard of the residence and found a spent 16-gauge shotgun shell. R. 346.

Sixth, physical evidence corroborated Venn's testimony that Kuenzel shot Linda Offord with the 16-gauge shotgun he borrowed from his father. Lawden Yates, a firearms expert with the Alabama Department of Forensic Sciences, examined the shotgun pellets that came from the victim's body and concluded that they came from a 16-gauge shotgun shell. R. 380. Yates also concluded that the wadding of the shell indicated that it had been fired from a 16-gauge shotgun. R. 393. Using a comparison microscope, Yates determined that the shotgun shell found in the 55-gallon drum at Kuenzel's and Venn's house had been fired out of the 16-gauge shotgun seized from Kuenzel's parents' house. R. 382-84.

Seventh, the police were able to corroborate Venn's testimony that Kuenzel wrote on a notepad what Venn had told the police. After executing a search on the residence of Venn and Kuenzel on November 11, 1987, Detective Brasher left but then returned to retrieve a notepad that had been left by another detective. R. 434. Brasher was invited into the house and noticed Kuenzel writing on his own notepad. R. 435. The police later seized this notepad on November 14, 1987, and confirmed that it contained notes regarding Venn's first statement.

Eighth, physical evidence corroborated Venn's testimony that Kuenzel murdered Linda Offord by shooting her with the shotgun that he laid on the counter. Dr. Joseph Embry, a forensic pathologist with the Alabama Department of Forensic Sciences, testified that Offord sustained a shotgun wound to the right

chest and a broken leg from being blown back by the blast. R. 323, 331. Dr. Embry stated that the exit wounds were three to six inches higher than the entrance wound, indicating that the shotgun blast traveled in an upward direction. R. 323, 339. When Offord was shot, she was standing on a 4-6 inch platform behind the store's counter, which was approximately three and a half feet high. R. 305-06. These facts support Venn's testimony that Kuenzel laid his shotgun on the counter and pointed it upward when he shot Offord.

3. Evidence Presented By Kuenzel At Guilt Phase Of Trial

Kuenzel's father, Glenn Kuenzel ("Glenn"), testified that at about the same time the murder was taking place, he looked through the window of Kuenzel's home and saw Kuenzel asleep on the couch. Glenn testified that on the afternoon of November 9, he told Kuenzel that he would fix the toilet in Kuenzel's home later that day. R. 564. According to Glenn, he left his house at 10:15 p.m. and arrived at Kuenzel's home around 10:30 p.m to fix the toilet. R. 566, 568. Glenn normally woke up around 4:45 a.m. to go to work, and being out that late was very unusual for him. R. 566. Glenn testified that after arriving at Kuenzel's house, he knocked on the door but no one answered. R. 567. Glenn walked to a window and looked in and saw his son lying on the couch asleep. R. 568. Glenn said that he decided to drive home and not wake Kuenzel. R. 569. Glenn explained, "Well, he was asleep, and I didn't know if he had to work the next day or not." R. 569.

Glenn identified State's Exhibit 16 at his 16-gauge shotgun and acknowledged that his son had borrowed it, but he claimed that the gun had been returned on November 9, the day of the crime. R. 570-71. Glenn claimed that on the afternoon of November 9, he saw the shotgun leaning against the freezer and a kitchen cabinet in his own home. R. 571.

Kuenzel next presented Anthony McElrath; Kuenzel presumably expected McElrath to testify that he saw Venn commit the murder at 3:00 in the afternoon. R. 578-79. McElrath had previously told Kuenzel's defense counsel that he saw Venn commit the murder. R. 578-80. At trial, however, when asked who shot the woman in the store McElrath pointed to Kuenzel and stated "he did it." R. 578-79.

Hope Chamberlain, a Kuenzel family friend, testified that while visiting the Kuenzels on November 8, 1987, the day before the crime, she saw Kuenzel and Venn come into the house and that Venn brought a gun into the house and left it there. R. 588-89.

Kuenzel did not testify at the guilt phase of his trial.

C. Evidence Presented During The Penalty Phase Of Kuenzel's Trial

At the penalty phase, defense counsel presented the testimony of four witnesses: Barbara Kuenzel, Kuenzel's mother; Faye Welch, Kuenzel's ex-wife; Don Weathington, a licensed counselor; and Kuenzel.

Barbara Kuenzel testified that her son had no history of committing violent crimes, but that he had been convicted of "petty stuff." R. 725. She said that, because Kuenzel's father had been in the Army and served in Vietnam, they had to move around quite a bit and that Kuenzel basically grew up without a father. R. 728.

Faye Welch, Kuenzel's ex-wife, said that she and Kuenzel had a child together, that Kuenzel was a good father, and that their son needed his father. R. 737-39.

Kuenzel also testified about his son and the fact that he grew up without a father. R. 753. Kuenzel said that "the six months right before I got this charge" he had been an alcoholic and that, for the past two to three years, he had been addicted to Valium. R. 755. Kuenzel requested that the jury sentence him to life without parole so that he could be a father to his son. R. 755.

Don Weathington, a licensed counselor, testified that by age 14, Kuenzel was heavily into drugs. R. 742. Weathington opined that Kuenzel was anxious, depressed, and had some episodes that indicated a dissociative disorder. R. 746. Weathington said that Kuenzel disclaimed any knowledge of the crime because he drank a large quantity of alcohol and remembered being "awakened by his father at some point." R. 744.[6] Finally, Weathington testified that Kuenzel was in the

[6] Obviously, this testimony is inconsistent with Glenn Kuenzel's testimony that he saw Kuenzel asleep through a window and did not wake him. R. 567-69.

average to low average range of intelligence and that he saw no need for further psychological testing. R. 750.

While cross-examining Barbara Kuenzel, the prosecutor asked questions about her attempt to pay an inmate named Orrie Goggins money to testify that he was with Venn when the murder occurred and that Kuenzel wasn't present. R. 729-30. During their rebuttal case, the State presented the testimony of Orrie Goggins, who said that Kuenzel and his mother offered him money to say that he was with Venn when the murder occurred. R. 779. Barbara Kuenzel sent Goggins some newspaper articles about the convenience store murder so that he would be more informed regarding what to say. R. 780-81. When Goggins, Kuenzel, and Venn were in court one day, Kuenzel pointed out Venn to Goggins so that Goggins would be able to identify Venn. R. 781. Goggins said that he spoke with Barbara Kuenzel by telephone on numerous occasions and that she sent him money. R. 782. Goggins permitted the police to tape one of his phone conversations with Kuenzel's mother. R. 782.

The prosecutor also presented the testimony from two of Kuenzel's co-workers in rebuttal. One of the workers stated that at 6:15 on the morning after the murder, Kuenzel told him that Joe Bob's convenience store had been robbed and the store clerk had been shot. R. 764. Kuenzel said that no money had been taken during the robbery. R. 764. That same day, Kuenzel boasted to another co-worker

that he would not get caught if he killed somebody. R. 772. Kuenzel stated to his co-worker that "If you're going to kill somebody, you shoot them with a shotgun. You don't kill them with a pistol or rifle. They will trace the bullet back to you." R. 772. "And then [Kuenzel] says, 'Just like that girl over in Sylacauga, They don't have a clue to who did that, and they won't." R. 772.

D. Evidence Presented At The Motion For A New Trial

Soon after the trial, Kuenzel wrote a letter to Judge Sullivan requesting that his defense counsel, William Willingham and Steve Adcock, be replaced. C. 94. Judge Sullivan granted Kuenzel's request and appointed R.D. Pitts to represent him on appeal. C. 95. Pitts filed a motion for new trial, C. 103-04, which was set for a hearing. At the hearing, Pitts presented evidence in an effort to establish that Kuenzel had an alibi and that he could not have committed the crime.

Darlene Peoples, a friend of the Kuenzel family who was 15 years old, testified that she had a conversation with her cousin, Lisa Sims, the previous week. R. 6-35.[7] During this conversation, Peoples claimed that Sims said she knew Kuenzel and that she "was with him that night," meaning the night of the murder. R. 6-35.

Kuenzel testified that, on November 9, 1987, Laurie Bonner visited him at

[7] The transcript of the hearing on the motion for a new trial is contained in Volume Six of the trial transcript. This volume of the transcript begins its numeration at page one rather than sequentially numbering its pages with the rest of the transcript. This brief will cite this portion of the record as "R. 6-__."

his residence and stayed until mid-afternoon. R. 6-18. Kuenzel said that Lisa Sims came over between 7:30 and 8:00 that evening 9. R. 6-19. Kuenzel claimed that he and Sims had sex and that Sims left while he was asleep. R. 6-20. Kuenzel said that Sims had a mole or birthmark on one of her thighs. R. 6-23. Kuenzel's mother testified that she had hired a private investigator to ascertain the identity of Lisa Sims. R. 6-26.

Defense counsel then called Lisa Sims as a witness. Sims, who was 22 years old, had been married for six years. R. 6-29–6-30. Although Sims did not remember what she was doing on November 9, 1987, she testified that she did not know Kuenzel and had never seen him before in her life. R. 6-30–6-33. Sims further testified that she did not have a mole or birthmark on her right or left thigh. R. 6-55.

At a subsequent hearing, the prosecution established that members of the Kuenzel family had persuaded Darlene Peoples to say that Lisa Sims told her that Sims was with Kuenzel on the night of the murder. R. 6-43–6-69. At the second hearing, Darlene recanted her previous testimony. R. 6-43–6-69.

Judge Sullivan subsequently entered a written order denying Kuenzel's request for a new trial. C. 120-122.

Soon thereafter, Kuenzel filed a grievance with the Alabama State Bar contending that his counsel had engaged in various kinds of malfeasance. C. 125-

26. Kuenzel alleged that his counsel was ineffective for not getting a court order to allow the court to view Lisa Sims's thigh to determine whether she had a birthmark. C. 125-26. Kuenzel also stated that he had instructed his counsel to raise claims of ineffective assistance of counsel in the motion for new trial. C. 125-26. In response to the grievance, Judge Sullivan ordered that Kuenzel be represented by a new attorney on direct appeal. C. 123-24.

E. Direct Appeal Proceedings

The Alabama Court of Criminal Appeals affirmed Kuenzel's capital murder conviction and death sentence. Kuenzel v. State, 577 So. 2d 474 (Ala. Crim. App. 1990. The Alabama Supreme Court affirmed, Ex parte Kuenzel, 577 So. 2d 531 (Ala. 1991), and the United States Supreme Court denied certiorari. Kuenzel v. Alabama, 502 U.S. 886, 112 S.Ct. 242 (1991).

F. State Post-Conviction (Rule 32) Proceedings

On October 4, 1993, Kuenzel filed his petition for relief from conviction and sentence in the Talladega County Circuit Court. PCR. 10. Kuenzel's Rule 32 petition did not allege that Kuenzel is factually innocent or contain any evidentiary presentation, such as affidavits, that would tend to support such a claim. On November 9, 1993, the State filed a motion to dismiss Kuenzel's Rule 32 petition because it was untimely pursuant to Rule 32.2(c) of the Alabama Rules of Criminal Procedure. PCR. 80-86. After receiving briefs, on October 6, 1999, the circuit

court entered an order summarily dismissing Kuenzel's Rule 32 petition as being outside the limitations period of Rule 32.2(c), Ala. R. Crim. P. PCR. 100-103.

On October 27, 1994, Kuenzel filed a motion and supporting memorandum requesting that the circuit court set aside its order of summary dismissal. PCR. 110, 113. On October 18, 1995, a hearing was conducted on the motion. PR. 1-55. On May 6, 1996, the circuit court set aside its October 6, 1994 order which had dismissed the Rule 32 petition as time barred. PCR. 170. The court restored the case to its docket and ordered the State to file an answer to Kuenzel's Rule 32 petition. PCR. 170.

On June 5, 1996, the State filed a supplemental answer, which retained its argument that Kuenzel's Rule 32 petition was filed beyond the Rule 32.2(c) limitation period. PCR. 178-199. Specifically, the State asserted:

> The State has previously answered the petition by moving that the petition be dismissed as untimely filed within the applicable statute of limitations pursuant to Rule 32.2(c), Alabama Rule of Criminal Procedure. The State maintains its assertion that this petition is due to be dismissed as untimely filed. Alternatively, and in response to this Court's order of May 6, 1996, the State files this Supplemental Answer.

PCR. 178. The State, therefore, consistently pleaded that Kuenzel's Rule 32 petition was time barred even when ordered to answer the Rule 32 petition.

After several years of inactivity, on February 16, 1999, the State filed a motion for the circuit court to reinstate its October 6, 1994 order dismissing

Kuenzel's petition as untimely. PCR. 226-32. On February 18, 1999, the circuit court reinstated its October 6, 1994 order denying Kuenzel's petition because it was filed outside the two-year limitation period. PCR. 235-37. Kuenzel filed a motion asking the circuit court to set aside its February 18, 1999 order. PCR. 246-48. The circuit court denied Kuenzel's motion. PCR. 274.

On collateral appeal, the Alabama Court of Criminal Appeals affirmed the circuit court's order of dismissal.[8] That opinion decided the case on the basis of the Rule 32.2(c) limitation period and, thus, did not address the merits of any of the claims raised in the Rule 32 petition.

G. Federal District Court Proceedings

1. Memorandum opinion

Kuenzel did not file this federal habeas action until May 15, 2000 – more than 9 years after his state-court conviction became final. As noted above, this district court has dismissed the claim on statute of limitations grounds several times before. The district court's previous dismissals were reversed by this Court based on jurisprudence later abrogated by the Supreme Court.

On December 16, 2009, the district court entered its memorandum opinion and final order dismissing Kuenzel's petition for writ of habeas corpus, finding that the petition was time barred under the one year limitation of 28 U.S.C. § 2244(d)

[8] The Court of Criminal Appeal's memorandum opinion is unpublished. It is included with the state court record accompanying this brief and can be found at Tab #R-71 in the tabbed state court record.

and that Kuenzel had shown neither equitable tolling nor actual innocence as a way to avoid the time bar. Docs. 115, 116. Regarding the time bar, the district court held: "The intervening authority of Allen v. Siebert[, 552 U.S. 3, 5-7, 128 S.Ct. 2 (2007)], therefore, requires the court to return – for the third time – to its original conclusion that the habeas petition in this action is time barred under § 2244(d) and that the state post-conviction petition rejected by the state courts as untimely filed was not 'properly filed' for purposes of tolling the AEDPA one-year limitation." Doc. 115 at 14. Regarding Kuenzel's claim of actual innocence, the district court held that "none of the evidence is 'new' evidence, and it does not constitute 'credible' or 'reliable' evidence that would result in no reasonable juror finding that Kuenzel was guilty of the capital crime for which he was convicted." Doc. 115 at 53.

The district court analyzed the fourteen exhibits that Kuenzel attached to his "Supplement To Petitioner's Second Amended Petition" in its opinion rejecting Kuenzel's actual innocence claim. Doc. 115 at 41-54 (citing Doc. 45). The court noted that "some of the evidence must simply be disregarded as irrelevant because, even if new and reliable, it does not address the core issue of actual innocence." Doc. 115 at 44. The evidence that the district court considered fell into the following four categories: (1) Kuenzel's allegations that he had an alibi; (2) Kuenzel's allegations that some of Venn's testimony could have been impeached;

(3) Kuenzel's allegations that he returned his father's 16-gauge shotgun the day before the murder, and (4) Kuenzel's allegations that April Harris's testimony that she saw Kuenzel and Venn inside Joe Bob's convenience store around an hour to and hour and a half before the murder could have been impeached. The district court held that Kuenzel's evidence was not "new" nor was it probative of actual innocence. Because most of the district court's memorandum opinion dealt with Kuenzel's claim of actual innocence, a summary of this evidence is set forth in the subsequent paragraphs of this section.

a. Kuenzel's allegations that he had an alibi

Kuenzel presented three affidavits for the apparent purpose of establishing that he was at his house on the night of the murder. Indeed, Kuenzel's affidavit repeated his fraudulent claim (which was presented and refuted at the hearing on his motion for a new trial) that he had sex with Lisa Sims around the same time that the murder occurred. Doc. 45, Ex. 8, p. 7. In addition, for the first time in any proceeding, Kuenzel claimed that Venn awakened him around midnight and told him to say, if anyone asked, that Venn had come home around 10:00-10:30 p.m. Id. The district court found that "petitioner's own account of what happened the night of the crime, or during the trial, cannot be deemed 'new evidence' because petitioner knew at trial where he was the night of the crime and chose not to take the stand and offer that evidence." Doc. 115 at 50.

Kuenzel also offered affidavits from his siblings, Glenda Kuenzel Bean and Kenneth Kuenzel, that their father, Glenn Kuenzel, left sometime between 7:00 and 9:00 on the night of the murder to fix Kuenzel's toilet. Doc. 45, Ex. 11; Doc. 45 Ex. 13. The district court noted that such evidence is not evidence of actual innocence; rather, it is evidence that attempts to bolster Glenn Kuenzel's testimony that he saw Kuenzel asleep on the couch on the night of the murder. Doc. 115 at 51 n. 32. But, as the district court emphasized, Glenn Kuenzel's testimony was found to be "incredible" by the jury. Doc. 115 at 51.

b. Kuenzel's allegations that some of Venn's testimony could have been impeached

Kuenzel offered several exhibits for the purpose of establishing that Venn, contrary to his testimony at trial that he had a 12-gauge shotgun on the night of the murder, instead was in possession of a 16-gauge shotgun. Carolyn Lewis Gibbons stated that several weeks before the murder, Harvey Venn borrowed a shotgun from her husband, Sam Gibbons. Doc. 45, Ex. 2. Gibbons stated that, after the murder, her husband (who is deceased) informed her that the police had examined the gun and determined that it was not the "murder weapon." Doc. 45, Ex. 2. Carl Majesky, "a self-described firearms expert," Doc. 115 at 41, examined the shotgun provided by Carolyn Gibbons – purportedly the gun borrowed by Venn – and found that it was a 16-gauge shotgun, not a 12-gauge shotgun as Venn testified at trial. Doc. 45, Ex. 3. The district court found that "[t]he new evidence does not

refute Venn's testimony, which the jury clearly believed, that Kuenzel took one of the two shotguns out of the car, went into the convenience store to rob it, then shot and killed Linda Offord." Doc. 115 at 45.

The district court also addressed Majesky's contention "as to whether the gun could have been fired unintentionally[.]" Doc. 115 at 46-47. The court noted that Venn himself testified that Kuenzel told him the shooting was accidental, which the jury found incredible, as indicated by their verdict finding Kuenzel guilty of capital murder. Doc. 115 at 47.

Kuenzel also offered the 1997 affidavit of Crystal Floyd, Venn's girlfriend at the time of the crime, who stated that Venn came over to her house at 10:00 p.m. on the night of the murder, that he was alone, that he was "very high on drugs and/or alcohol," and that he "was acting nervous and paranoid." Doc. 45, Ex. 6. The district court held that Floyd's affidavit did not establish that Kuenzel is actually innocent and that it is incredible. Doc. 115 at 48-49. In particular, the district court stated: "[g]iven all of the evidence that Venn was at the convenience store from around 10:00 p.m. until after 10:30 p.m., with another male, the court cannot find that Crystal Floyd's testimony that Venn was alone at her house for about 10 minutes at around 10:00 p.m. would have been credible to a reasonable juror." Doc. 115 at 49.

c. Kuenzel's allegations that he returned his father's 16-gauge shotgun the day before the murder

Kuenzel offered several affidavits in an effort to demonstrate that he returned his father's 16-gauge shotgun the day before the murder. Kuenzel's affidavit stated that he returned the shotgun to his father's house the day before the murder and that the following people were present when he did so: his mother, his two cousins, Dora and Nora, and Hope Chamberlain, a family friend. Doc. 45, Ex. 8, pp. 6-7. Glenda Kuenzel Bean stated that she was present when Kuenzel returned the shotgun along with the people mentioned in Kuenzel's affidavit. Doc. 45, Ex. 11, p. 2. Kuenzel's affidavit is therefore inconsistent with Glenda's because it does not state that Glenda was present when Kuenzel returned the shotgun. Kenneth Kuenzel stated that he saw the shotgun in the kitchen of the Kuenzel's house at some point the weekend before the murder. Doc. 45, Ex. 12, p. 2.

The district court found that this evidence is not "new" because Kuenzel presumably had knowledge of these witnesses and could have presented their testimony at his trial. Doc. 115 at 52. In addition, the jury was presented with Kuenzel's claim that he had returned the shotgun prior to the night of the murder because Hope Chamberlain testified to this at trial. Doc. 115 at 52. The district court, therefore, held that none of these affidavits constitute newly discovered evidence establishing that Kuenzel is actually innocent. Doc. 115 at 52.

d. Kuenzel's allegations to impeach the testimony of April Harris

Exhibits 4 and 5, see Doc. 45, are attempts to impeach the testimony of April Harris, who testified that she was a passenger in a car that drove by the convenience store around 9:30-10:00 on the night of the murder and that she saw Venn and Kuenzel in the convenience store in front of the checkout counter. R. 492-94. Both affidavits were offered by individuals who drove by Joe Bob's convenience store in 1999 and 2001, many years after the events witnesses by April Harris in 1987. The district court held that Exhibits 4 and 5 do not contain "new" evidence or evidence of actual innocence. Doc. 115 at 46-47.

2. Kuenzel's Rule 60(b) motion

Kuenzel filed a motion pursuant to Rule 60(b) (1), (2), (3), and (6) of the Federal Rules of Civil Procedure asking the district court to vacate the dismissal of his habeas petition. See Doc. 121. Kuenzel alleged 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. Kuenzel identified the alleged newly discovered evidence, which was provided to Kuenzel by counsel for the State, as follows:

(1) an unsigned and undated investigative statement taken from Crystal Floyd (Moore) presumably soon after the murder occurred at Joe Bob's convenience store, Doc. 121, Ex. 3;

(2) a transcript of the testimony of Crystal Floyd (Moore) before the grand jury that charged Kuenzel with capital murder, Doc. 121, Ex. 4;

(3) a transcript of a statement taken from Crystal Epperson (Ward) by police on December 9, 1987, Doc. 121, Ex. 5;

(4) a transcript of the testimony of Crystal Epperson (Ward) before the grand jury that charged Kuenzel with capital murder, Doc. 121, Ex. 6;

(5) a transcript of a statement taken from April Harris by police on December 9, 1987, Doc. 121, Ex. 7: and

(6) a transcript of April Harris's testimony before the grand jury that charged Kuenzel with capital murder, Doc. 121, Ex. 8.

Kuenzel contended that this alleged newly discovered evidence would have bolstered his claim of actual innocence, and, therefore, the State's failure to produce it was misconduct that affected the integrity of the habeas proceedings. Doc. 121.

The State filed a brief opposing Kuenzel's Rule 60(b) motion as well as an evidentiary presentation including affidavits from Kyle Clark, a Special Agent with the Alabama Attorney General's Office who assisted undersigned counsel in interviewing Crystal Floyd (Moore) in her home on February 22, 2010; Kenneth Brasher, the police detective who took the statement of Crystal Floyd (Moore) in 1987; Kathy Jones, an employee with the Talladega County District Attorney's Office who discussed the procedures she used to maintain accuracy in her transcription of grand jury testimony in 1987-1988; Dennis Surrett, the lead investigator in this case; Lawden Yates, the ballistics and tool mark expert

examiner who analyzed evidence in this case in 1987; Robert Rumsey, the prosecutor in this case; and undersigned counsel, who interviewed Crystal Floyd (Moore) in her home on February 22, 2010. Doc. 125. The State's evidentiary presentation fell generally into two categories. First, the State demonstrated that Crystal Floyd's two affidavits, which were filed in federal district court in 1997 and 2008, were not credible. Second, it demonstrated that the evidence presented by Kuenzel in federal district court implying that Venn had a 16-gauge shotgun on the night of the crime, rather than a 12-gauge shotgun as Venn testified at Kuenzel's trial, was not credible.

Special Agent Kyle Clark and undersigned counsel interviewed Crystal Floyd at her residence on February 22, 2010, to ask her questions regarding why her two affidavits were inconsistent with her 1987 witness statement and her 1988 grand jury testimony on several key points. Doc. 125, Ex. 7, 8. Crystal Floyd was asked about discrepancies in those documents regarding when she saw Venn on the day of the crime. Doc. 125, Ex. 8 at 2. In her two affidavits, Floyd stated 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 that night. Doc. 45, Ex. 6 (first affidavit); Doc. 121, Ex. 10 (second affidavit). Floyd also averred that when Venn visited her at 10:00, he was alone and "very high on drugs and/or alchol" and that he was "acting nervous and paranoid." Doc. 45, Ex.

6. In Floyd'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. Doc. 121, Ex. 3. Special Agent Clark stated in his affidavit that Floyd reviewed her witness statement and "she said that portion of her 1987 statement is incorrect." Doc. 125, Ex. 8 at 2. Floyd was then shown a transcript of her grand jury testimony, in which she claimed that Venn visited her parents' home around 8:00-8:30 on the night of the crime. Doc. 125, Ex. 8 at 2 (Special Agent Clark's affidavit).[9] Clark noted that "Floyd 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." Doc. 125, Ex. 8 at 2-3.

During the interview with Special Agent Clark, Floyd stated that she visited Venn in jail on only one occasion and that he never responded to her questions about whether he participated in the murder of Ms. Offord. Id. After reviewing her grand jury testimony, in which she testified that Venn told her Kuenzel went into Joe Bob's and killed the convenience store clerk, Floyd told Special Agent Clark that those portions of her grand jury testimony were incorrect. Id. at 3-4. She further stated that the portions of her grand jury testimony indicating that she regularly visited Venn in jail were incorrect. Id.

[9] Crystal Floyd's grand jury testimony is attached to Special Agent Clark's affidavit as "Exhibit D." Doc. 125, Ex. 8.

Floyd told Special Agent Clark 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. Doc. 125, Ex. 8 at 5. Floyd admitted that over the years she has had frequent contact with lawyers and investigators representing Kuenzel. Id. She stated several times during the 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. Undersigned counsel's affidavit noted that "[a]t multiple points during our conversation, Floyd 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." Doc. 125, Ex. 7 at 2.

The State presented several other affidavits to demonstrate that Crystal Floyd's affidavits were not credible. Kenneth Brasher, a detective with the Sylacauga Police Department at the time this crime occurred, stated that he recognized the handwriting of notes of an interview with Crystal Floyd as his own. Doc. 125, Ex. 9. According to those notes, Floyd told Detective Brasher that on November 9, 1987, the day of the crime, Venn came over to her house around 6:15 p.m. Id.

Kathy Jones, an employee of the Talladega County District Attorney's Office since January 1987, stated that one of her numerous responsibilities included "transcribing audio tapes of witness statements and grand jury testimony." Doc. 125, Ex. 10. Jones stated that "[a]ny transcript that I prepared completely and accurately reflects what was on the audio tape." Id.

Robert Rumsey, the District Attorney for Talladega County between 1978 and 1998, prosecuted this case. Doc. 125, Ex. 13. Rumsey stated, contrary to the allegations made by Crystal Floyd in her 2008 affidavit, "I can never recall questioning a witness by myself and tape recording the interrogation session." Doc. 125, Ex. 13. Finally, Rumsey stated, "[a]ll of the allegations in Crystal Floyd's affidavit that concern me are false." Ex. 13.

The State's evidentiary presentation also included affidavits from Dennis Surrett and Lawden Yates refuting Kuenzel's evidence implying that Venn was in possession of a 16-gauge shotgun, rather than a 12-gauge as Venn testified. 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. Doc. 125, Ex. 11 at 1. Surrett recently 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. Doc. 125, 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." Doc. 125, 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 also 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.

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 Doc. 125, Ex. 11. Yates described the process he used in determining that the burned shotgun shell submitted to Yates was fired out of Kuenzel's shotgun. Doc. 125, Ex. 11 at 5-6 (quoting R. 383-84). In addition, Yates specifically stated that the numerous findings made by Carl Majesky were based on speculation. Doc. 125, Ex. 11.

In his reply to the State's filing, Kuenzel included an affidavit from Dr. James Gill, a pathologist employed by the City of New York. Dr. Gill, based on his review of autopsy notes and of handwritten police notes, reached the

conclusion that the victim and Venn had a physical altercation "with one another." Doc. 137 at 3.

The district court noted that Kuenzel's motion was filed pursuant to Rule 60(b) (1), (2), (3), and (6). The district court rejected Kuenzel's motion as it pertained to Rule 60(b)(2), (b)(3), and (b)(6), noting that its decision on those grounds did not require extensive analysis. Doc. 142 at 6-9. The court stated that the "mistake" provision of Rule 60(b)(1) required the most analysis, explaining that "to the extent a 'mistake' by the court in applying the time bar precluded consideration of the merits of petitioner's claims, relief from the time-bar dismissal would be available under Rule 60(b)(1)." Doc. 142 at 9. The district court framed the key issue as follows: "whether a 'legal mistake' in the court's previous analysis of petitioner's actual innocence caused the court to find that [Kuenzel] has not proven 'actual innocence' as a gateway for consideration of the merits of his substantive habeas claims." Doc. 142 at 10. Therefore, the court examined "the newest evidence petitioner has offered against the backdrop of the trial evidence, as well as the evidence he presented prior to the dismissal of the habeas petition, to address the question whether the court mistakenly concluded that petitioner had now shown his 'actual innocence.'" Id.

The district court began its analysis by summarizing the evidence presented at trial. Doc. 142 at 11-18. It then evaluated Kuenzel's "new" evidence of actual

innocence. Doc. 142 at 19-30. The court found that none of Kuenzel's evidence "can be described as directly probative of the petitioner's innocence" but rather, it is evidence that attempts only to impeach Venn's credibility. Doc. 142 at 19.

The court first analyzed Kuenzel's evidence concerning the shotgun in Venn's possession on the night of the murder. Doc. 142 at 19-23. As noted above, Kuenzel presented affidavits from Carolyn Lewis Gibbons, the widow of Sam Gibbons, and Carl Majesky, a self-described firearms expert, in support of his claim that Venn possessed a 16-gauge shotgun rather than a 12-gauge as Venn testified. Doc. 142 at 19-20 (citing Doc. 45, Ex. 2 (Gibbons's affidavit); Doc. 45, Ex. 3 (Majesky's affidavit)). The court held that Kuenzel's evidence does not establish that Venn possessed a 16-gauge shotgun on the night of the murder. Doc. 142 at 20-21. Gibbons's affidavit states that her husband told her that the police inspected and ruled out his gun being the murder weapon, presumably because it was not a 16-gauge shotgun. Id. Moreover, Gibbons's affidavit does not speak to the possibilities that Venn borrowed a shotgun from someone else. Id. Furthermore, Dennis Surrett, the lead investigator, stated in his affidavit that "he wrote a note on a trial witness list in which he annotated that Gibbons would testify to lending a 12-gauge shotgun to Venn." Doc. 142 at 20-21 (emphasis in original). The court held that "[t]hese facts collectively undermine the otherwise unsupported speculation that Venn not only possessed a 16-gauge shotgun, but

used it himself to kill Linda Offord." Doc. 142 at 21. Finally, the court held that none of this evidence is really "new" because all of the facts concerning the gun were known at the time of the trial and defense counsel "could have made it an issue if it was actually significant." Doc. 142 at 21.

The court then addressed Kuenzel's evidence from his sister that she saw Kuenzel return the borrowed 16-gauge shotgun the day before the shooting. Doc. 142 at 22 (citing Doc. 45, Ex. 11). The court noted that similar testimony was presented at trial and "clearly rejected by the jury." Doc. 142 at 22. Thus, this evidence is not "new," nor is there any reason to believe that it would have changed the outcome of the trial. Id.

The district court concluded, "the evidence now offered by petitioner with respect to whether Venn possessed a 16-gauge shotgun or whether the Kuenzel shotgun had been returned to petitioner's stepfather before the robbery do not support a finding that petitioner is actually innocent of the robbery and killing." Doc. 142 at 22. Furthermore, "the evidence is cumulative of trial evidence and does nothing more than raise impeachment issues concerning Venn's testimony." Id.

The court next evaluated Kuenzel's "new" evidence regarding April Harris's trial testimony that she and Crystal Epperson rode by Joe Bob's between 9:30 and 10:00 p.m. the night of the murder and that she saw Venn's car and also saw Venn

and Kuenzel standing inside the door of the store. Doc. 142 at 23. Kuenzel offered declarations from private investigators Luther Brannon, Doc. 45, Ex. 4, and Everson Thompson, Doc. 45, Ex. 5, to the effect that neither Brannon nor Crystal Epperson believe it was possible for April Harris to see and identify anyone inside the store that night. Brannon's affidavit describes his own trip to Joe Bob's and what he observed as he drove by at night. Thompson's affidavit contains an unsworn and unsigned transcript of a 1997 interview with Crystal Epperson, in which she expressed the opinion that Harris could not have identified anyone inside the store. The district court held that this evidence is not "new, and it merely raises a question about the weight to be accorded April Harris's testimony; it does not prove her testimony to be false or perjurious." Doc. 142 at 23.

The court stated that "more critical to this fact question is April Harris's grand jury testimony, one of the documents recently produced by the respondents, in which she indicated a great deal more equivocation about what she had seen." Doc. 142 at 24. Unlike her trial testimony, in which she unequivocally identified Venn and Kuenzel as being in the store, Harris's grand jury testimony was that she "believed she had seen Venn and petitioner in the store, but could not be sure." Doc. 142 at 24 (citing Doc. 136, Ex. 17). The court held that the grand jury testimony could only have been used to diminish the weight given Harris's trial

testimony, "and her equivocation certainly is not enough to prove that petitioner, in fact, was not at the store with Venn." Doc. 142 at 24.

The court next evaluated the two affidavits of Crystal Floyd, the first presented by Kuenzel in 1997 and the second in 2008. Doc. 142 at 24 (citing Doc. 45, Ex. 6; Doc. 136, Ex. 11). In determining whether those affidavits tended to prove Kuenzel's actual innocence, the court also considered Floyd's witness statement, Doc. 125, Ex. 1, and her 1987 grand jury testimony. Doc. 125, Ex. 2. The court held that "Crystal Floyd's testimony is not believable or trustworthy." Doc. 142 at 25. It explained "[s]he has told three different versions of the events that evening: (1) Venn and petitioner visited her at sunset, and then Venn came alone at 10:00 p.m.; (2) Venn alone visited at 6:15 to 6:45; and (3) Venn visited alone at 8:00 to 8:30 p.m.." Id. The court ultimately concluded that "Floyd's testimony simply is not sufficiently trustworthy to raise any questions about Venn's description of the events that night." Id.

The court also evaluated the affidavit Dr. Gill, the New York Deputy Chief Medical Examiner. Doc. 142 at 25-29. Dr. Gill read the autopsy notes, which stated that the victim had "blue marks" on one of her fingers, and police notes, which stated that it looked like Venn had a black eye and that his left arm looked bruised. Doc. 142 at 26. "From this information alone, Dr. Gill expressed the opinion that the injuries seen on both the victim and Venn were consistent with the

two of them having a physical altercation 'with one another.'" Doc. 142 at 26. Based on Dr. Gill's opinion, Kuenzel alleged that Venn went into the store and murdered Ms. Offord and that the victim struck Venn resisting the robbery attempt. Id. After thoroughly evaluating this claim, the district court concluded that it is based on "utter and unsustainable speculation." Doc. 142 at 28. Furthermore, the court concluded that Dr. Gill's opinion would not be admissible under "Daubert's gatekeeping function." Doc. 142 at 29.

In the final portion of the court's memorandum opinion, it conducted a "cumulative assessment of the new evidence." Doc. 142 at 30. The court found that the separate pieces of the new evidence "suffers from serious flaws" and that their cumulative impact on Venn's credibility is "only slight." Doc. 142 at 31. The court held that none of the new evidence "positively and affirmatively points to the innocence of the petitioner." Doc. 142 at 31 (footnote omitted).

The court concluded that to the extent Kuenzel offered new evidence, "there are serious questions whether the evidence is 'reliable.'" Doc. 142 at 33. It noted that the actual innocence question "become[s] whether it is more likely true than not true that no reasonable juror could believe Venn's account of the shooting, because if a reasonable juror can believe Venn's story, that alone is enough to convict the petitioner and reject his actual innocence claim." Doc. 142 at 33-34 (emphasis in original). The court held that a reasonable juror could find Venn's

testimony believable, therefore, the court "did not make a mistake by finding that petitioner failed to show 'actual innocence' for purposes of avoiding the § 2244(d) time bar." Doc. 142 at 35.

H. Standard Of Review

This Court reviews de novo a district court's dismissal of a federal habeas petition, including the determination that a petition is time-barred under § 2244(d). See Arthur v. Allen, 452 F.3d 1234, 1243 (11th Cir. 2006). A district court's factual findings, such as its findings that a petitioner has not established that all reasonable jurors would find him actually innocent, are reviewed for clear error. Id.

SUMMARY OF THE ARGUMENT

The district court correctly held that Kuenzel's habeas petition was time barred. Kuenzel argues that he is entitled to statutory or equitable tolling of the limitations period. Under the authority of Allen v. Siebert, 552 U.S. 3, 128 S.Ct. 2 (2007), Kuenzel is not entitled to statutory tolling because his state post-conviction petition was untimely and, thus not "properly filed." Moreover, the district court correctly rejected Kuenzel's alternative, equitable tolling argument. Kuenzel was not prevented by "extraordinary circumstances" from timely filing his federal habeas petition. Nor did he demonstrate due diligence to make a timely filing.

Because Kuenzel's petition is untimely and no tolling doctrine applies, Kuenzel is forced to allege that this Court can still review it because he can show that no reasonable juror would find him guilty. The district court correctly held that Kuenzel's evidence of actual innocence is neither "new" nor "reliable" and, consequently, does not the Schlup standard.

ARGUMENT

I. KUENZEL IS NOT ENTITLED TO STATUTORY OR EQUITABLE TOLLING

The district court correctly held that Kuenzel's habeas petition was time-barred pursuant to 28 U.S.C. § 2244(d). Doc. 115 at 1-15. Kuenzel filed his petition far more than one year after the U.S. Supreme Court denied certiorari in this case on direct review. Accordingly, to get around § 2244(d)'s time bar, Kuenzel would have to establish some sort of tolling. The district court correctly held that Kuenzel was not entitled to statutory tolling pursuant to § 2244(d)(2) because his state post-conviction petition, rejected by the state courts as untimely, was not "properly filed." Doc. 115 at 10-16 (citing Pace v. DiGuglielmo, 544 U.S. 408, 125 S.Ct. 1807 (2005) and Allen v. Siebert, 552 U.S. 3, 128 S.Ct. 2 (2007)). Kuenzel does not challenge this portion of the district court's ruling on appeal.

Instead, Kuenzel tries to invoke two other tolling theories. He alleges, in a twist from his initial statutory tolling argument, that he is entitled to statutory tolling from May 6, 1996 until February 18, 1999, because he was actively

challenging the timeliness of his state post-conviction petition (during that time period) and that he is entitled to tolling until the state court holds that the petition is untimely. Blue Br. at 39-42. In addition, Kuenzel argues that he is entitled to equitable tolling because he relied on the Rule 32 trial court's 1996 order reinstating his Rule 32 petition after initially dismissing it as untimely. Blue Br. at 43-44.

A. Kuenzel Is Not Entitled To Statutory Tolling Because His State Post-Conviction Petition Was Not "Properly Filed," Thus, He Is Not Entitled To Tolling

Kuenzel's statutory tolling claim is meritless. Kuenzel's argument is based on a misreading of Allen v. Siebert, 552 U.S. 3, 128 S.Ct. 2 (2007). Kuenzel relies on Siebert for the proposition that a prospective habeas petitioner must seek federal habeas review "within one year of notice that the timeliness of his state petition is being actively challenged." Blue Br. at 40. Thus, according to Kuenzel, his AEDPA limitation period was subject to statutory tolling for the entire time his Rule 32 petition was pending in the Talladega County Circuit Court (which in this case amounts to approximately three years), up to, and including, February 18, 1999, when the circuit court entered its final dismissing Kuenzel's Rule 32 petition as time barred. Id. But Kuenzel's position cannot be reconciled with Siebert. Contrary to Kuenzel's argument, in Siebert, the Supreme Court held that a habeas petitioner is entitled to no statutory tolling if the state courts rejected his state post-

conviction petition for untimeliness. Siebert, 552 U.S. at 7, 128 S.Ct. at 4. Because Kuenzel did not have a "properly filed" petition for post-conviction relief pending in the State courts between May 6, 1996 and February 18, 1999, he cannot benefit from the tolling provision set forth in 28 U.S.C. § 2244(d) (2). See id.

Kuenzel fares no better in his attempt to distinguish the procedural facts of Siebert from this case. Blue Br. at 40-41. Kuenzel alleges that Siebert was on notice throughout the "entire period that Siebert's Rule 32 petition was pending in state court" that the timeliness of his state post-conviction petition was in question. Blue Br. at 41. Kuenzel's statement is incorrect. In Siebert, the State did not assert the state post-conviction limitations period defense in its initial answer or in its answer to the amended petition. Siebert v. Campbell, 334 F.3d 1018, 1020-21 (11th Cir. 2003). Rather, the State asserted the limitations period defense for the first time on the second day of the evidentiary hearing, some three years after Siebert first filed his state post-conviction petition. Id. Despite the State's assertion of this defense, the state post-conviction court conducted four more days of evidentiary hearing and ultimately ruled on the merits of Siebert's claims, in addition to holding Siebert's petition untimely. Id. at 1026. Thus, Kuenzel's attempt to distinguish Siebert is unsuccessful.

In sum, Kuenzel's statutory tolling argument is meritless.

B. Kuenzel's Stubborn Insistence On Litigating An Untimely Rule 32 Petition Did Not Prevent Him From Timely Filing A Federal Habeas Petition; Thus, The Federal District Court Properly Held That He Is Not Entitled To Equitable Tolling

Moreover, the district court correctly rejected Kuenzel's alternative, equitable tolling argument. He claims that he is entitled to equitable tolling because the state court did not ultimately find that his Rule 32 petition was untimely until long after the one-year AEDPA limitation period had expired. Doc. 115 at 15-16 (incorporating Doc. 53 at 13-17). That argument will not work. Kuenzel was not prevented by "extraordinary circumstances" from timely filing his federal habeas petition. Nor did he demonstrate due diligence to make a timely filing. Rather, Kuenzel chose not to make a protective filing in federal court even though he had numerous reasons to believe that his Rule 32 petition might be dismissed as untimely and thus might not be considered "properly filed." See Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999) (holding that mere attorney error does not justify equitable tolling). First, he knew of this possibility at least as early as November 8, 1993, when the State filed its motion to dismiss. Second. as the district court found, he had actual notice in October of 1994, when the state circuit court initially dismissed his Rule 32 petition as untimely. See Doc. 53 at 16-17. "A petitioner exercising the diligence required would have filed his federal habeas action within the one-year period out of caution, even if he

continued to contest the timeliness issue in the state courts." Doc. 53 at 17.[10] Kuenzel's insistence on litigating a time-barred Rule 32 petition should not be rewarded with the "extraordinary remedy" of equitable tolling. See Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000) ("Equitable tolling is an extraordinary remedy which is typically applied sparingly.")

Thus, neither statutory nor equitable tolling made Kuenzel's petition timely. Simply put, Kuenzel could have filed by April 23, 1997, what he managed to file on February 7, 2000.

II. THE DISTRICT COURT CORRECTLY FOUND THAT KUENZEL FAILED TO PRESENT SUFFICIENT EVIDENCE OF ACTUAL INNOCENCE THAT WOULD ALLOW CONSIDERATION OF HIS TIME BARRED PETITION OR HIS PROCEDURALLY BARRED CLAIMS

Because his petition is untimely and no tolling doctrine applies, Kuenzel is forced to allege that this Court can still review it because he can show that no reasonable juror would find him guilty. Even if this were a ground for excusing the untimeliness of his petition, and it is not, Kuenzel has not satisfied his burden of establishing actual innocence. Kuenzel bases his claim on the declarations that he presented to the district court for the first time in any court. In dismissing Kuenzel's petition as untimely, the federal district court correctly held that

[10] Indeeed, Kuenzel filed a federal habeas place-holder petition on February 7, 2000, while his state post-conviction appeal was still pending in the Alabama Court of Criminal Appeals. See Docs 1, 5.

Kuenzel failed to present new and reliable evidence of actual innocence.[11] That same logic shows that even if Kuenzel's petition were untimely under one of his tolling theories, he would not be able to invoke the "actual innocence" exception to excuse is procedural default.

A. The District Court Correctly Held That Kuenzel's Evidence Is Neither "New" Nor "Reliable" And, Consequently, Does Not Meet The Schlup Standard

The Supreme Court has held that prisoners asserting innocence as a "gateway" to procedurally defaulted claims must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Schlup v. Delo, 513 U.S. 298, 327, 115 S.Ct. 851, 867 (1995). Because a Schlup claim involves evidence the jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record. Id. A petitioner must support his actual innocence claim "with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical

[11] Although the district court found that United States v. Montano, 398 F.3d 1276 (11th Cir. 2005) was binding precedent that an "actual innocence" exception applies to time barred petitions pursuant to § 2244(d), it also noted that this Court has more recently held that no such exception exists. Doc. 115 at 22 n.10 (collecting cases). In Wyzykowski v. Department of Corrections, 226 F.3d 1213, 1216-17 (11th Cir. 2000), this Court held that § 2244(d)'s one year limitation period was not an unconstitutional suspension of the writ of habeas corpus. This Court also held that, in a situation like that presented here, where the limitation period has expired and the petitioner is claiming actual innocence, a court must first consider whether the petitioner can demonstrate actual innocence. Id., 226 F.3d at 1218; Arthur v. Allen, 452 F.3d 1234, 1244 (11th Cir. 2006) (same); Sibley v. Culliver, 377 F.3d 1196, 1205 (11th Cir. 2004) (same). If a petitioner cannot make such a showing, as is the situation here, then the court can dismiss the petition and avoid the "troubling and difficult constitutional question," that would be presented if a petitioner demonstrated actual innocence and filed an untimely habeas petition. Wyzykowski, 226 F.3d at 1218. Regardless, even in that circumstance, there would be no constitutional problem, and a showing of actual innocence would not excuse a petitioner's untimely filing.

physical evidence – that was not presented at trial." Id., 513 U.S. at 324, 115 S.Ct. at 865. A petitioner meets the "threshold showing of innocence" justifying "a review of the merits of the constitutional claims" if the new evidence raises "sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial." Id., 513 U.S. at 317, 115 S.Ct. at 862. This Court has held that under the Schlup standard, a petitioner must show that "a constitutional violation has probably resulted in the conviction of one who is actually innocent. Sibley, 377 F.3d at 125. As the district court stated, "[a] petitioner meets the threshold requirement if he persuades the 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, 115 S.Ct. at 867). "Consequently, the burden that Kuenzel must meet in order to prevail is to establish by 'new, reliable evidence' that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Doc. 115 at 28.

It is not enough for a petitioner in Kuenzel's shoes just to "cast considerable doubt on his guilt." House v. Bell, 547 U.S.518, 555, 126 S.Ct. 2064, 2087 (2006). "The meaning of actual innocence … does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty. Schlup, 513 U.S. at 329,

115 S.Ct. at 868. The Supreme Court has addressed what it takes to meet this extraordinarily high standard. In House, for example, the petitioner met the threshold based on substantial evidence pointing to a different suspect, coupled with new, reliable DNA and forensic evidence undermining the central proof of semen and blood. House, 547 U.S. at 554, 126 S.Ct. at 2086. Even then, the Supreme Court noted the "issue [wa]s close" as to whether the petitioner met the Schlup standard of proof. Id.

In comparison, "[Kuenzel's] case does not involve the introduction of new evidence that positively and affirmatively points to the innocence of the petitioner." Doc. 142 at 31. As the district court held, "[t]here is no new DNA evidence, or forensic evidence, or even highly credible testimony, purporting to show that the petitioner did not commit the murder as Venn said he did." Doc. 142 at 31. The district court held that "[v]irtually all of the 'new' evidence offered by petitioner is itself so flawed the court is unable to say that it necessarily devastates Venn's credibility." Id. The "scientific evidence" presented by Kuenzel in the form of expert opinions from Carl Majesky and Dr. Gill was correctly held unreliable. Doc. 142 at 33. Indeed, the district court concluded, "there is no new evidence directly suggesting that petitioner was not involved in the shooting." Doc. 142 at 33.

In the next sections, the State will address the specific categories of evidence that Kuenzel presented in the district court, and explain why none is adequate to invoke the "actual innocence" exception. The district court's findings on this front were correct and they certainly did not amount to clear error. .

B. Kuenzel's Evidence Regarding Venn's Shotgun Is Not "New" And The Expert Testimony He Presented Is Not "Reliable"

The district court correctly held that Kuenzel's evidence concerning Venn's shotgun did not establish that Kuenzel is actually innocent. Doc. 115 at 44-45; Doc. 142 at 19-23. The court found that Carolyn Gibbons's affidavit "was little more than a hearsay account of what Gibbons was told by her husband." Doc. 115 at 44. Even if one were to assume that Gibbons's statements were true, however, her affidavit would not show that Kuenzel is factually innocent. Carolyn Gibbons stated that her husband told her that he was interviewed by the police, who looked at the gun and ruled it out as the murder weapon. Doc. 142 at 19. Dennis Surrett's affidavit stated that if Venn were in possession of a 16-gauge shotgun (as was Kuenzel) then Venn's gun would have been seized and analyzed by the Alabama Department of Forensic Sciences. Specifically, Surrett, the lead investigator, 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.

Doc. 125, Doc. 11, p. 3. Moreover, Surrett's handwriting is on a witness list indicating that Sam Gibbons, if called as a witness, would testify that he "[l]oaned Venn the 12 Ga Shotgun." Id.[12] Thus, there is no reliable evidence that Venn was in possession of a 16-gauge shotgun on the night of Ms. Offord's murder.

The district court found that "Mrs. Gibbons's evidence that Venn borrowed a 16-gauge shotgun from her husband Sam is so vague, disjointed, and contradicted by other evidence that the court gives it little weight." Doc. 142 at 31. Carolyn Gibbons stated that she was not sure if her husband used the gun other than to shoot it annually on New Year's Eve. Doc. 45, Ex. 2. After her husband died in 1991, Mrs. Gibbons removed the shotgun from the house and placed it in a van parked in the yard that was used for storage. Id. Mrs. Gibbons's affidavit does not state if the shotgun was ever removed from the van or replaced with a different gun or whether the shotgun was the same one that was formerly in the house. Id.

[12] Kuenzel alleges that the district court erroneously stated that Venn, in one of his statements, hunted squirrels the day before the murder with a 12-gauge shotgun. Blue Br. at 54 n. 29 (citing Doc. 136, Ex. 2). The court was correct. Doc. 136, Ex. 2 is the handwritten notes of several police officers written while questioning Venn on November 11, 1987. They contain the following notation on page 5: "Killed 3 squirrels w/ 12 ga."

After analyzing all of the evidence, the district court found that "[w]hether, in fact, Venn possessed a 16-gauge shotgun is questionable." Doc. 142 at 20.

The district court also discounted the affidavit of Carl Majesky, a "self-described firearms expert" who submitted no documentation of his credentials. Doc. 115 at 41. Majesky "testified that Gibbons's 16-gauge shotgun could have been the murder weapon, but stated no new factual findings supporting his conclusion, which amounts to nothing more than speculation." Doc. 142 at 19. The district court held that Majesky's affidavit is not "reliable" evidence tending to show that Kuenzel is actually innocent. Doc. 115 at 45, Doc. 142 at 19.

The district court further noted that the evidence concerning the shotgun is not "new." Doc. 142 at 21. "Sam Gibbons was alive at the time of petitioner's trial, and he could have been subpoenaed to produce his gun for examination if there were a genuine concern that it was a 16-gauge involved in the crime." Id. Defense counsel had Venn's statements, which indicated that Venn said he had a 12-gauge shotgun and "they could have made it an issue if it was actually significant." Id.

Kuenzel, therefore, failed to satisfy the "new facts" element of his actual innocence Schlup argument, and he has failed to establish that a miscarriage of justice would occur if this procedurally defaulted claim were considered.

C. The Federal District Court Correctly Held That Crystal Floyd's Affidavits Have No Credibility

The district court also correctly found that Crystal Floyd's affidavits could not change the analysis here. Kuenzel submitted two affidavits from Crystal Floyd, Venn's 13 year old girlfriend at the time of the murder. In her 1997 affidavit, Floyd stated that Venn came over to her house at 10:00 p.m. on the night of the murder, that he was alone, that he was "very high on drugs and/or alchol," and that he "was acting nervous and paranoid." Doc. 45, Ex. 6. In her 2008 affidavit, Floyd added a little more detail but stuck to her previous story regarding when Venn visited her on the night of the murder. Doc. 136, Ex. 11. Kuenzel presented these affidavits in an attempt to demonstrate that Venn was alone soon before the murder happened and that he was agitated. (Crystal Floyd did not testify at Kuenzel's trial.)

In response to Floyd's affidavits, the State offered notes of a police interview with Crystal Floyd done several days after the murder, Doc. 125, Ex. 1, as well as her 1987 grand jury testimony. Doc. 125, Ex. 2. The police interview notes indicate that Floyd told police that Venn visited her alone around 6:15 to 6:45 on the evening of the murder, and that she did not see him again until the next day. In her grand jury testimony, however, Floyd stated that the visit took place around 8:00 to 8:30 that night, and that Venn was alone. Doc. 125, Ex. 2, p. 1. She also testified before the grand jury that, while visiting Venn in jail, Venn told

her how he and Kuenzel robbed the store and how Kuenzel killed the convenience store clerk. Id. at p. 2.

Based on this evidence, the district court correctly held that "Crystal Floyd's testimony is not believable or trustworthy." Doc. 142 at 25. The court found that Floyd has told three different versions of the events that evening and that "[h]er testimony raises no real credibility question, except as to her own." Id. In response, Kuenzel alleges that Floyd's testimony regarding when she saw Venn may be unreliable, but "the substance of her testimony" had not been challenged. Blue Br. at 56-57. Kuenzel does not specifically state the "substance" of Floyd's testimony. Floyd's affidavits were offered to show that Venn, and not Kuenzel committed the murder. Floyd's affidavits state that Venn was alone at a point soon before the murder, he was intoxicated, and acting nervous. That is the substance of her testimony and the district court has ruled that her testimony has no credibility.

The court correctly held that "Floyd's testimony simply is not sufficiently trustworthy to raise any questions about Venn's description of the events that night." Doc. 142 at 25.

D. The District Court Held That April Harris's Grand Jury Testimony Could Only Have Been Used To Impeach Her Trial Testimony And It Does Not Prove Kuenzel's Actual Innocence

The new evidence concerning April Harris likewise fails to show Kuenzel's factual innocence. At trial, Harris testified that she and Crystal Epperson drove by

the convenience store between 9:30 and 10:00 on the night of the crime 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 the individuals she saw inside the store. Doc. 121, Ex. 8 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. Doc. 121, Ex. 8 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. Kuenzel's new evidence must establish "factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623, 118 S.Ct. 1604 (1998). As the district court correctly observed, 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) (unpublished opinion)

(denying an actual innocence claim because the habeas petitioner merely offered impeachment evidence attacking the credibility of the victim and her mother).

The district court held that Harris's grand jury testimony "goes only to the weight to be accorded her testimony, and her equivocation certainly is not enough to prove that petitioner, in fact, was not at the store with Venn." Doc. 142 at 24. The new evidence relating to April Harris's grand jury testimony, therefore, does not establish Kuenzel's factual innocence.

E. The District Court Held That Dr. Gill's Affidavit Is Based On Speculation And Does Not Meet The Daubert Standard For Admissibility

The court also appropriately evaluated the affidavit of Dr. Gill, the New York Deputy Chief Medical Examiner. Doc. 142 at 25-29. Dr. Gill read the autopsy notes, which stated that the victim had "blue marks" on one of her fingers, and police notes, which stated that it looked like Venn had a black eye and that his left arm looked bruised. Doc. 142 at 26.[13] "From this information alone, Dr. Gill expressed the opinion that the injuries seen on both the victim and Venn were consistent with the two of them having a physical altercation 'with one another.'" Doc. 142 at 26. Based on Dr. Gill's opinion, Kuenzel alleged that Venn went into the store and murdered Ms. Offord and that the victim struck Venn while resisting

[13] The handwritten police notes state, "looks like he had a black eye (left)." Doc 136, Ex. 2, p.2. But this statement is found next to the name of "Billy Kensell [sic]," thus, it is unclear whether the writer was stating that it looked like Venn or Kuenzel had a black eye.

the robbery attempt. Id. After thoroughly evaluating this claim, the district court concluded that it is based on "utter and unsustainable speculation." Doc. 142 at 28. Furthermore, the court concluded that Dr. Gill's opinion would not be admissible under "Daubert's gatekeeping function." Doc. 142 at 29.

The district court held that it "is not persuaded that Dr. Gill's opinion makes it more likely than not that no reasonable juror would believe Venn and find [Kuenzel] guilty beyond a reasonable doubt." Doc. 142 at 29. That holding hardly amounts to clear error.

F. Kuenzel, In His Previous Attempts To Establish Actual Innocence, Has Attempted to Suborn Perjury And Has Presented Conflicting Evidence

More than anything else, Kuenzel himself, through his own conduct in this litigation, has made it impossible for any court to conclude that he can get through the Schlup gateway. In reviewing Kuenzel's claim, a court should consider that Kuenzel has made several previous efforts to blame this murder on others, but those efforts have failed in dramatic fashion. Moreover, in his attempts to establish his actual innocence, Kuenzel has presented inconsistent evidence.

Most critically, in his quest to obtain habeas relief by any means possible, Kuenzel fabricated a highly offensive and implausible story about an innocent bystander, Lisa Sims. At the motion for a new trial hearing, Kuenzel testified that, on November 9, 1987, Lisa Sims came over between 7:30 and 8:00 that evening.

R. 6-19.[14] Kuenzel claimed that he and Sims had sex and that Sims left while he was asleep. R. 6-20. Kuenzel said that Sims had a distinctive more or birthmark on one of her thighs. R. 6-23. Defense counsel, at Kuenzel's direction, then called Lisa Sims as a witness. Although Sims did not remember what she was doing on November 9, 1987, she testified that she did not know Kuenzel and had never seen him before in her life. R. 6-30–6-33. Sims further testified that she did not have a mole or birthmark on her right or left thigh. R. 6-55.

During the federal court proceedings, Kuenzel presented an affidavit repeating his fraudulent claim that he had sex with Lisa Sims around the same time that the murder occurred. Doc. 45, Ex. 8, p. 7. In addition, for the first time in any proceeding, Kuenzel claimed that Venn awakened him around midnight on the night of the murder and told him to say, if anyone asked, that Venn had come home around 10:00-10:30 that night. Id.

Moreover, it appears that Kuenzel himself was not the only one willing to fabricate stories in an attempt to sway a court. During Kuenzel's penalty phase, the prosecutor presented evidence that Kuenzel's mother, Barbara Kuenzel, paid money to an inmate named Orrie Goggins to testify that he was with Venn when the murder occurred and that Kuenzel was not present. R. 729-30. Goggins

[14] The transcript of the hearing on the motion for a new trial is contained in Volume Six of the trial transcript. This volume of the transcript begins its numeration at page one rather than sequentially numbering its pages with the rest of the transcript. This brief will cite this portion of the record as "R. 6-__."

testified that when he, Kuenzel, and Venn were in court one day, Kuenzel pointed out Venn to Goggins so that Goggins would be able to identify Venn. R. 781.

Kuenzel's father, Glenn Kuenzel, testified at the guilt phase that at about the same time the murder was taking place, he went to Kuenzel's house to fix the toilet. R. 564. Glenn claimed that, upon looking through the window, he saw that Kuenzel was asleep, and he decided to drive home and not wake Kuenzel. R. 569. Don Weathington, who performed a mental health evaluation on Kuenzel, testified that Kuenzel told him that he had no knowledge of the crime because he drank a large quantity of alcohol and remembered being "awakened by his father at some point." R. 744. Clearly, those stories are inconsistent with each other.

Kuenzel's affidavit also states that he returned his father's shotgun the day before the murder and names the individuals who were present but did not mention his sister, Glenda Kuenzel. Doc. 115 at 52. But Glenda Kuenzel's affidavit states that she was present when Kuenzel returned the shotgun. Id.

Although Kuenzel states that he has consistently proclaimed his innocence, Blue Br. at 2, that is not, in fact, the case. The district court noted that Kuenzel "concedes that he could have testified at the guilt phase of his trial, but took the advice of counsel and declined to do so." Doc. 115 at 50. The district court also noted that Kuenzel testified at the penalty phase and disclaimed knowledge that his mother paid Orrie Goggins to lie, but Kuenzel did not disclaim any involvement in

the murder or proclaim his innocence. Doc. 142 at 17. Kuenzel did not proclaim his innocence at any point during the Rule 32 proceedings either. Indeed, the first time that Kuenzel proclaimed his innocence under oath is in his affidavit filed in the federal district court.

In assessing all of the evidence that Kuenzel has presented, it is clear that he has not established actual innocence.

G. Conclusion

Kuenzel has failed to come forward with any new reliable evidence proving his innocence. See Schlup, 513 U.S. at 324, 115 S.Ct. at 865. Hence, Kuenzel cannot come close to showing that, considering all the evidence, "it is more likely than not that no reasonable juror would have convicted him." Schlup, 513 U.S. at 327-28, 115 S.ct. 868. As such, Kuenzel has failed to make any cognizable showing of actual innocence in this case. Therefore, Kuenzel has failed to meet his burden and his petition was properly dismissed because it is untimely and no legally valid exception applies. Moreover, even if one of the tolling rules rendered his petition timely, his failure to satisfy Schlup would mean that his claims are procedurally barred.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 16,219 words, including all "headings, footnotes, and quotations," and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of April, 2011, I electronically uploaded a copy of this brief to the Eleventh Circuit and additionally served copies of the brief on each attorney for plaintiff-appellant, by placing them in the United States mail, first class, postage prepaid, addressed as follows:

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