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U.S. DISTRICT COURT
N.D. OF ALABAMA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
EASTERN DIVISION

WILLIAM ERNEST KUENZEL,

Petitioner,

- against -

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

Respondents.

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

PETITIONER KUENZEL'S RESPONSE TO RESPONDENTS' BRIEF ON REVISITING THE TIME BAR DEFENSE TO TIMELINESS OF THE HABEAS PETITION

Petitioner, William Ernest Kuenzel ("Kuenzel"), by and through counsel, respectfully submits the following response to Respondents' brief on the question of whether the Court should, may, or can revisit the time bar defense in light of the Supreme Court decision in Allen v. Siebert, 128 S. Ct. 2, 2007 WL 3238767 (2007) ("Allen v. Siebert").

PROCEDURAL HISTORY RELEVANT TO THE TIME BAR DEFENSE

Kuenzel is an indigent death row prisoner of the State of Alabama who has asserted in his first petition for a writ of habeas corpus (the "Petition") certain grounds upon which his conviction and death sentence stand in violation of the United States Constitution.[1] From the outset, Kuenzel has maintained his complete innocence

[1] Kuenzel notes that the Petition has been amended twice and includes admissible, non-hearsay, non-recantation evidence from independent, uninterested witnesses. This "new evidence" both exculpates Kuenzel and fatally impeaches Respondents' only direct

of the crime charged and has continued to do so for the past twenty years. Yet, as a result of the unique procedural history of this case, Kuenzel has neither been able to present the merits of his non-frivolous constitutional claims nor obtain discovery in any post-conviction proceeding.

On October 4, 1993, Kuenzel filed his Rule 32 post-conviction petition in the Circuit Court of Talladega County Alabama ("Circuit Court"). In lieu of serving an answer, on November 8, 1993, Respondents moved to dismiss the petition as untimely. On October 6, 1994, the Circuit Court granted Respondents' motion and summarily dismissed Kuenzel's Rule 32 petition as time barred.

Immediately thereafter, Kuenzel moved the Circuit Court to set aside its October 6, 1994 order on the ground that Kuenzel's Rule 32 petition **was** timely filed under Alabama law. The parties fully briefed this state law issue and, on October 18, 1995, a full hearing was conducted on Kuenzel's motion.

After fully litigating the state time bar issue, on May 6, 1996, the Circuit Court granted Kuenzel's motion and restored his Rule 32 petition to the docket (the "May 6 Order"). See May 6 Order, Kuenzel v. State of Alabama, Case No.: 93-351 (Ala. Cir. Ct., Talladega County), attached as Exhibit A. The Court further directed Respondents to answer Kuenzel's Rule 32 petition.[2] The May 6 Order reads in its entirety:

> The Court sets aside its order of October 6, 1994 and orders this case restored to the docket. The Court further orders that the

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evidence against Kuenzel — the testimony of Harvey Venn, an admitted accomplice who himself is likely the victim's killer — while demonstrating gross constitutional violations.

[2] On June 5, 1996, Respondents filed its answer to Kuenzel's Rule 32 petition for relief from conviction and sentence.

> Respondent State of Alabama file an Answer to the allegations of the petition thirty (30) days from the date of this Order.

Id.

The May 6 Order restoring Kuenzel's Rule 32 petition to the docket is direct, complete and unqualified. It does not reserve for future litigation the only point that was at issue — the time bar defense. See id. Respondents did not attempt to appeal or set aside the May 6 Order. As such, the time bar issue was resolved. No one — neither the Circuit Court nor Respondents — gave any indication that the time bar defense remained a viable issue in the state case. From May 6, 1996 through February 16, 1999, therefore, Kuenzel reasonably assumed that his Rule 32 petition was "properly filed" and Kuenzel relied — ultimately to his detriment — on that assumption.

After Kuenzel's Rule 32 petition was restored to the docket, in June 1996, Respondents answered the Rule 32 petition and Kuenzel filed unopposed discovery motions. For years, the Circuit Court never acted on Kuenzel's discovery motions or held an evidentiary hearing. Respondents, like the Circuit Court, did nothing. Kuenzel, on the other hand, relying on the finality of the May 6 Order, diligently collected new exculapatory and impeachment evidence — with private funding and through the herculean efforts of Kuenzel's now-deceased prior *pro bono* counsel — to present at his Rule 32 hearing once it would be scheduled by the Circuit Court.[3]

Without seeking permission from the Circuit Court or giving any advance warning to Kuenzel, and without even addressing Kuenzel's pending discovery motions,

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[3] See Letter from Hon. William C. Sullivan to David Dretzin, dated October 17, 1994, attached as Exhibit B. ("should I grant your motion [to set aside the October 6, 1994 order dismissing Kuenzel's petition], you should be prepared to present and I will be prepared to hear the entire matter on its merits on the date I set your motion for hearing.").

on February 16, 1999, Respondents moved the Circuit Court to reinstate its October 6, 1994 Order dismissing Kuenzel's Rule 32 petition as untimely. See Respondent's Motion for Court to Reinstate Its October 6, 1994 Order Dismissing Petitioner's Petition For Relief From Conviction and Sentence, attached as Exhibit C. The motion did not so much as contain a return date. Just two days later, on February 18, 1999, without providing Kuenzel an opportunity to respond or setting a briefing schedule, the Circuit Court granted Respondents' motion and again dismissed Kuenzel's Rule 32 petition. See Order, Kuenzel v. State of Alabama, Case No.: 93-351 (Ala. Cir. Ct., Talladega County) (Feb. 18, 1999), attached as Exhibit D.

Since AEDPA now was in effect, Kuenzel filed his federal habeas corpus petition in this Court on February 7, 2000, within the statute of limitations mandating the filing of a federal habeas petition no more than one-year after his pending state court post-conviction application was ruled not "properly filed." 28 U.S.C. § 2244(d)(2).

RESPONSE

I. APPLICABILITY OF THE TIME BAR DEFENSE

A. This Court Need Not Revisit the Time Bar Defense Because Kuenzel's Petition Already Has Been Adjudicated as Timely

On June 13, 2007, the Eleventh Circuit ruled that Kuenzel's federal petition was not time barred[4] and that this Court should adjudicate the following: (i) whether Kuenzel is entitled to habeas relief on those federal claims in the Petition that the state court adjudicated on the merits and are not procedurally barred; and (ii) for those claims that are procedurally barred, whether Kuenzel can satisfy exceptions to the

[4] The Eleventh Circuit's decision in Kuenzel v. Allen, 488 F.3d 1341 (11th Cir. June 13, 2007) is referred to herein as "Kuenzel II".

procedural bar rule, including the "actual innocence" exception and the "cause-prejudice" exception. Kuenzel agrees with Respondents that this Court need not revisit the time bar defense and, therefore, the Eleventh Circuit's decision should stand as law of the case. See Doc. 111, State's Response to Re-raising the Time Bar Defense, at 2 ("this Court should not revisit the time bar defense in light of the Supreme Court's recent decision in Siebert.").

The Eleventh Circuit's decision in Kuenzel's favor should bind this Court for two reasons, both of which dictate the result that the Petition remain timely filed under AEDPA.

First, Respondents' failure to appeal Kuenzel II constitutes an acquiesence with the finding, for purposes of this Court's jurisdiction, that the Petition is not time-barred. The Eleventh Circuit's decision was issued on June 13, 2007. At that time, Respondents were well aware of the pending appeal in Allen v. Siebert because they were, in fact, the same parties seeking *certiorari* from the United States Supreme Court.[5] That Respondents freely elected to waive any further objection to the time bar defense also is evidenced by Respondents' specific citation to Kuenzel II in their petition

[5] On June 15, 2007, Respondents sought *certiorari* to the United States Supreme Court in Allen v. Siebert in order to test their claim that Pace requires dismissal of a federal habeas petition, filed after AEDPA's one-year limitations period, where a petitioner's state post-conviction petition is not "properly filed." Siebert presented this claim in a pure form while in Kuenzel, the analysis is complicated because: (1) Kuenzel's state petition had been ruled "properly filed" during the time Respondents claim AEDPA's one-year limitations period was running, (2) Kuenzel filed his federal habeas petition within one year of notice that Respondents were re-challenging the state court's ruling on timeliness, and (3) Kuenzel presents substantial actual innocence claims. See Sections I(C)(3) and II, *infra*. Faced with these significant, material distinctions between Siebert and Kuenzel, Repondents elected to present only Siebert, and not Kuenzel II, for Supreme Court review, and that tactic proved successful. Respondents cannot now undo their tactical choice, and in essence circumvent the thirty day time bar on seeking *certiorari*.

for *certiorari* in Allen v. Siebert, filed only two days after Kuenzel II was issued. See Petition for a Writ of Certiorari filed by the Alabama Attorney General, Allen v. Siebert, 2007 WL 1772131 (June 15, 2007) (the "Siebert Petition"), *11.

Despite this knowledge and the uncertainties regarding a grant of *cert* in Allen v. Siebert, Respondents elected not to seek to appeal the Eleventh Circuit's decision in Kuenzel II which would have preserved the time bar defense in this case. Leonard v. Dep't of Corrections, 232 Fed. Appx. 892, 893 n.1 (11th Cir. 2007) (Plaintiff's failure to raise denial of motion in appeal deemed waiver of issue); Rowe v. Schreiber, 139 F.3d 1381, 1381, n.1 (11th Cir. 1998) (issues not argued in brief are abandoned and not considered in appeal); Continental Technical Servs., Inc. v. Rockwell Int'l Corp., 927 F.2d 1198, 1199 (11th Cir. 1991) (stating that "[a]n argument not made is waived").

The Court should find that Respondents' failure to preserve the time bar defense through appeal constitutes a waiver and/or abandonment of Respondents' right to now reassert the time bar defense. As such, this Court should not revisit the time bar defense and, accordingly, the Petition should remain adjudicated as timely.

Additionally, Kuenzel II should stand unchanged because of the special and unique limitations on the retroactive application of newly announced rules that only come in to play in habeas proceedings. In Teague v. Lane, 489 U.S. 288 (1989), a plurality of the Supreme Court ruled that, with notable exceptions, a state prisoner may not seek to enforce a new, favorable rule of law in federal habeas proceedings if the new rule was announced after the petitioner's conviction became final. See also 28 U.S.C. § 2254(e)(2)(A)(i) (codifying the Teague rule).

We recognize that the Teague doctrine has not yet been applied when the "new rule" at issue is unfavorable to the petitioner and the State, not petitioner, is seeking retroactive application of the new rule. We submit that principles of fairness, justice and equity dictate that Teague's non-retroactivity principle cannot be used by the State as both a sword and shield. Applied equally, the Teague rule should prevent both habeas petitioners and state habeas respondents from taking retroactive advantage of new, favorable rules. See, e.g., Bell v. Baker, 954 F.2d 400, 405 (6th Cir. 1992) (Keith, C.J., dissenting) (it is "fundamentally unfair and [flies] in the face of reason" when retroactivity is denied in one case where application would have helped the petitioner and is granted in a successive case where it helped the state); McCleskey v. Zant, 499 U.S. 467, 522 (1991) (Marshall, J., dissenting) ("The Court's utter indifference to the injustice of retroactively applying its new, strict-liability standard to this habeas petitioner stands in marked contrast to this Court's eagerness to protect States from the unfair surprise of 'new rules' that enforce the constitutional rights of citizens charged with criminal wrongdoing."). As Justice Stevens noted in his dissenting opinion in Lockhart v. Fretwell, 506 U.S. 364 (1993):

> If, under Teague, a defendant may not take advantage of subsequent changes in the law when they are favorable to him, then there is no self-evident reason why a State should be able to take advantage of subsequent changes in the law when they are adverse to his interests . . . . A rule that generally precludes defendants from taking advantage of post-conviction changes in the law, but allows the State to do so, cannot be reconciled with this Court's duty to administer justice impartially.

Id. at 388-89.

This Court need not grapple with the unfairness of the current Teague rule by declining to revisit the time bar defense for one of the many reasons offered herein.

This Court should proceed, as directed by the Eleventh Circuit, to resolve on the merits Kuenzel's non-procedurally barred habeas claims and adjudicate application of the "actual innocence" exception to those claims which are procedurally barred.

B. If The Court Elects to Re-Visit the Time Bar Defense, This Court Should Find That Kuenzel's Petition Was Factually Timely

In the event that this Court elects to revisit the time bar defense, Kuenzel respectfully requests that the Court hold, pursuant to Allen v. Siebert, that the Petition was timely because it was filed within one year after the first notice that Respondents were re-raising the time bar defense.

The rule upheld in Allen v. Siebert is that a petitioner, whose state court post-conviction petition is challenged as untimely, cannot wait to file his federal petition until the state courts ultimately determine timeliness. Allen v. Siebert, 128 S.Ct. at 4-5 (holding that a habeas petition ruled untimely under state law is not properly filed under § 2244(d)(2)); Pace v. DiGuglielmo, 544 U.S. 408, 417 (2005) (time limits are "filing conditions" and a state court post-conviction petition must be ruled timely filed to entitle a petitioner to statutory tolling of AEDPA's time limitation). Under Allen v. Siebert, a petitioner must file his federal petition within one year of notice that the timeliness of his state petition is being actively challenged. Here, Kuenzel did just that.

Unlike Siebert, Kuenzel's petition was adjudicated timely, without challenge, until February 16, 1999. As stated by the State in the Siebert Petition, "The question [in Allen v. Siebert], therefore, is whether, *despite its lateness* — and, indeed, **despite the state courts' unambiguous adjudications of its lateness** — Siebert's Rule 32 petition was nonetheless 'properly filed' within the meaning of § 2244(d)(2)." Siebert Petition at *12 (emphasis added). Since Kuenzel's Rule 32 petition was

unambiguously adjudicated timely, for purposes of § 2244(d)(2), therefore, Kuenzel's one year time limitation to file his federal petition began to run no earlier than February 16, 1999.[6]

Allen v. Siebert and Kuenzel II comfortably co-exist because of this critical distinction: *notice of the time bar defense*. As the State of Alabama specifically discussed in the Siebert Petition, Siebert knew that the time bar defense was a live issue as of the second day of Siebert's state-court evidentiary hearing.[7] See Siebert Petition at *4.

> On the second day of the state-court evidentiary hearing, the State amended its answer and "requested for the first time that the petition [ ] be denied pursuant to Rule 32.2(c) because the two-year limitations period allowed for filing a Rule 32 petition had expired." … "Out of an abundance of caution, the circuit court continued to hear Siebert's arguments" on the merits. In doing so, however, the circuit court made clear that it was not suggesting that the State had waived the Rule 32.2(c) time bar. … Accordingly, the circuit court dismissed Siebert's Rule 32 petition as being "untimely filed …"

Id. (internal citations omitted). As the State noted, in allowing Siebert's evidentiary hearing to proceed, the circuit court cautioned Siebert that the time bar remained at issue. Id. Unlike Kuenzel's petition, Siebert's state post-conviction petition **never was adjudicated "properly filed" at any time**.

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6 Kuenzel notes that an extensive search on this issue reveals no case with a similar fact pattern to that presented here: a pre-AEDPA final conviction where the state post-conviction petition was ruled timely, without qualification or any challenge, and where the state subsequently re-raises the time bar defense at a later time whereby petitioner's reasonable, detrimental reliance would preclude federal review of his petition. As such, any relief granted to Kuenzel from the time bar would be of limited application to other habeas petitioners.

7 Notably, although Siebert is a confessed murderer, Kuenzel never has had any post-conviction discovery or an evidentiary hearing.

It is clear, therefore, that Siebert had actual notice that the timeliness of his state post-conviction petition always was at issue. On April 4, 1995, the State raised the time bar defense in Siebert. See Siebert v. State, 778 So. 2d 842, 846 (Ala. Ct. Crim. App. 1999). When AEDPA was enacted on April 24, 1996, no Alabama court had ruled that Siebert's petition was timely; as stated above, no Alabama court **ever** ruled that Siebert's petition was timely. It follows that Siebert should have known to file his federal habeas petition by April 24, 1997, within one year of AEDPA's effective date, April 24, 1996. See Allen v. Siebert, 128 S. Ct. at 3-5.

In stark contrast to Siebert, Kuenzel had no such notice. Kuenzel successfully moved the Circuit Court to vacate its October 6, 1994 Order dismissing his state petition as time barred. Borrowing Respondents' words from the Siebert Petition, the May 6 Order was an "unambiguous adjudication[ ]" of timeliness. Siebert Petition at *12. Kuenzel's Rule 32 petition was, therefore, "properly filed" and "pending" before the Circuit Court for the time period May 6, 1996 through February 18, 1999.

The May 6 Order reinstating Kuenzel's petition was not conditional. The State did not appeal, petition for mandamus relief, or move to reconsider the May 6 Order under any possibly applicable rule and, until February 16, 1999, the State never manifested any intention to re-assert the time bar defense.[8] See, e.g., Ala. R. Civ. P. 60(b) (allowing a party under certain circumstances to move for relief from judgment or

[8] It also was unclear that, procedurally, Respondents could have successfully re-asserted the time bar defense having already lost on that issue three years earlier. Although the Circuit Court ultimately allowed Respondents to again raise the time bar defense, absent a notice requirement for § 2244 purposes, Kuenzel cannot be charged with prophetic powers as to (1) how Respondents would re-litigate settled issues in this case, and (2) whether the Circuit Court would, or could, allow re-adjudication of already-settled issues.

order); Ala. R. App. P. 5 (appeal by permission for interlocutory orders under certain circumstances).

Kuenzel was first put on notice of the time bar defense's reemergence in the State's February 16, 1999 motion to reinstate the October 6, 1994 Order. See Exh. C. Unlike Siebert, one-year after AEDPA's effective date Kuenzel's Rule 32 petition stood unambiguously adjudicated **timely**. Accordingly, under the unique facts of this case, February 16, 1999 should be the critical date for purposes of determining when AEDPA's one-year limitations period began to run.[9]

In light of the argument for *certiorari* proffered in the Siebert Petition, we trust that Respondents will agree that this interpretation of Allen v. Siebert and Pace — that the time limitation of § 2244(d)(2) begins to run one year from the date on which a petitioner is on notice of a state's intent to first assert the time bar defense — is eminently fair and reasonable. Such a rule places no greater imposition upon the federal courts, ensures finality, prohibits dilatory conduct and promotes fairness in the collateral review process. Additionally, a notice requirement is consistent with Allen v. Siebert's holding that a state's raising of the time bar defense to a petitioner's state petition requires filing of petitioner's federal petition within one-year.

In fact, to interpret Allen v. Siebert as not requiring notice of the time bar defense would be both imprudent and impractical. On one hand, such a rule, conceivably, would allow state attorney generals whose statute of limitations are treated as affirmative defenses (like Alabama's) to wait to raise the time bar defense until after

[9] Despite an exhaustive review, Kuenzel also has not found any case in which a petitioner, litigating a "timely" state court petition, filed a prophylactic federal petition within one-year of AEDPA's effective date.

one year has passed from the time a petitioner files his state post-conviction petition. Allen v. Siebert, 128 S. Ct. at 4 ("The fact that **Alabama's Rule 32.2(c) is an affirmative defense** that can be waived (or is subject to equitable tolling) … ") (emphasis added). If a state court ultimately found a petitioner's state post-conviction petition untimely, absent a notice requirement, federal review automatically would be precluded. This is so because the relevant date for § 2244(d)(2) purposes would relate back to before the petitioner even had notice of the state's election to raise the time bar defense.

Similarly, without a notice rule, **every** petitioner would, as a matter of prophylactic practice, have to file a federal placeholder petition within one year of filing his state court post-conviction petition. Implicitly requiring every state petitioner to immediately file a federal petition would unduly burden the federal court system and waste valuable judicial resources. As such, a notice requirement is a necessary component of the Supreme Court's decisions in Allen v. Siebert and Pace.

Here, Kuenzel reacted swiftly and diligently, timely filing his federal petition on February 7, 2000, within one year of receiving notice that the State was again raising the time bar defense to his then-pending "timely" state petition. Kuenzel's federal habeas petition should, therefore, stand as timely.

C. If The Court Re-Visits the Time Bar Defense and Finds that Kuenzel's Petition Was Not Timely, Kuenzel is Entitled to Equitable Tolling

Respondents correctly state that this Court previously rejected three (3) arguments made by Kuenzel for entitlement to equitable tolling. See Doc. 111 at 3-4; Doc. 53 at 13-17. Kuenzel agrees with Respondents that these three points are not subject to reargument in this Court.

However, this Court never has squarely ruled upon the two arguments, discussed below, which Kuenzel previously presented for entitlement to equitable tolling. These two argument were repeatedly raised by Kuenzel, are wholly unique to Kuenzel's claim and each serves as an independent basis for finding equitable tolling of Kuenzel's petition. Accordingly, Kuenzel respectfully submits that, in the event the Court ultimately rejects Kuenzel's arguments above that his petition is timely, this Court should find equitable tolling applies based on the following two arguments.

1. This Court Need Only Review Kuenzel's Two Previously Un-Adjudicated Arguments For Equitable Tolling

Whether or not this Court should consider arguments previously presented but never ruled upon is discretionary. Shore v. Warden, 942 F.2d 1117, 1123 (7th Cir. 1991) (stating law of the case applies to habeas corpus proceedings, but is discretionary); Rosales-Garcia v. Holland, 322 F.3d 386, 398 n.11 (6th Cir. 2003) (law of the case is a prudential doctrine). As is clear from the State's brief, the two equitable tolling arguments presented here have never necessarily been decided. As such, law of the case does not apply to preclude these arguments. Quern v. Jordan, 440 U.S. 332, 348 n.18 ("The doctrine of law of the case comes into play only with respect to issues previously determined.") (internal citation omitted); Folan v. McDonough, 223 Fed. Appx. 881, 883 (11th Cir. 2007) (explaining that law of the case doctrine applies where issues were "explicitly decided, or decided by necessary implication").

Kuenzel has been litigating the time bar defense in this Court since 2000 and, from the outset, has raised these arguments on every occasion. Although this Court addressed the other arguments Kuenzel raised in response to the time bar defense, the Court never has directly addressed or explicitly ruled upon the arguments

in Section I(C)(2) and (3) of this Response. It is clear from Kuenzel II that the Eleventh Circuit values this Court's views on the issues Kuenzel presents. Kuenzel is entitled to, and he respectfully suggests the Eleventh Circuit expects, this Court's examination and explication of its views on those arguments whose merits this Court never has reached in its previous opinions.

2. Extraordinary Circumstances Relieve Kuenzel From The Time Bar

Even if Kuenzel's federal habeas petition is ultimately adjudicated to be untimely, he is nevertheless entitled to equitable tolling of AEDPA's one-year statute of limitations pursuant to the extraordinary circumstances doctrine.

Equitable tolling is appropriate where a petitioner demonstrates "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005); see also Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000) (equitable tolling permitted "'when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.'") (quoting Sandvik v. United States, 177 F.3d 1269, 1271 (11th Cir. 1999) (per curiam)).

That Kuenzel has been diligently asserting his rights while maintaining his innocence for twenty years cannot be disputed. Despite this diligence, reasonable detrimental reliance was the **only** reason Kuenzel did not file his federal habeas petition within one year of AEPDA's promulgation. As previously discussed in Section I(B), Kuenzel was ruled timely filed by the Circuit Court from May 6, 1996 through February 18, 1999. Without prior notice or indication that timeliness was still at issue, the Circuit Court suddenly reversed its position and found Kuenzel's Rule 32 petition untimely. See Exh. D. Kuenzel does not claim that he was deliberately misled towards a late

filing. Rather, Kuenzel's claim is that he reasonably relied on a final, unappealed order from the Circuit Court decreeing his petition as timely. Understandably, until February 16, 1999, Kuenzel considered the time bar defense a settled issue.

That Kuenzel reasonably relied on conduct of the Respondents and the Circuit Court in believing his petition to be timely filed, thereby detrimentally sitting on rights that he would otherwise have pursued, warrants granting Kuenzel the benefit of equitable tolling. This Circuit recognizes that state or court action may be the basis for a showing of extraordinary circumstances. See, e.g., Spottsville v. Terry, 476 F.3d 1241 (11th Cir. 2007) (finding equitable tolling warranted where *pro se* defendant's application was untimely as a direct result of misleading filing instructions from the court); Lawrence v. Florida, 421 F.3d 1221, 1226 (11th Cir. 2005) (State's conduct that prevents timely filing may be an exceptional circumstance warranting equitable tolling); Knight v. Schofield, 292 F.3d 709 (11th Cir. 2002) (granting equitable tolling where court clerk failed to inform petitioner of final disposition of the state application).

Moreover, courts have held in a broad variety of contexts that detrimental reliance on a singular course of conduct which precludes another party from asserting or preserving its rights warrants equitable tolling. See, e.g., Miller v. Marsh, 766 F.2d 490, 493 (11th Cir. 1985) (plaintiff's Title VII suit found timely under equitable tolling principles "as she was 'lulled' into pursuing other channels at the expense of her federal court remedy by the officials involved" who advised her to pursue routes through the GAO and EEOC as means of keeping her back pay claim alive); Martinez v. Orr, 738 F.2d 1107, 1112 (10th Cir. 1984) (concluding that plaintiff's understandable misinterpretation of notice from EEOC constituted circumstances of being "misled and

lulled into inaction" warranting equitable tolling); Hentosh v. Herman M. Finch University of Health Sciences, 167 F.3d 1170, 1174 (7th Cir. 1999) (stating that equitable tolling "'often focuses on the plaintiff's excusable ignorance of the limitations period'" and "does not turn on any effort by the defendant to prevent the plaintiff from filing suit") (internal citations omitted).

Based on the Circuit Court's action in ruling Kuenzel's state post-conviction petition timely and the State's inaction, evidenced by its failure to challenge the May 6 Order until after AEDPA's one-year limitations period had passed, Kuenzel was effectively "lulled" into sitting on rights that he has otherwise diligently pursued. This is not a case of procedural default where the petitioner should be blamed and precluded from any federal review because he failed to preserve his rights. Denying Kuenzel the benefit of equitable tolling and, therefore, any federal review, would be an overly harsh result. As such, the unique circumstances of this case warrant equitable tolling of the one-year filing deadline.

3. Alternatively, Kuenzel Can Make a Sufficient Showing of "Actual Innocence" To Require Relief From The Time Bar

Alternatively, in light of Kuenzel's continuous, non-frivolous claim of actual innocence, equitable tolling should be granted in order to prevent a miscarriage of justice. While this Circuit has not yet definitively read an actual innocence exception into § 2244(d), it has operated on the assumption that such an exception exists. See Wyzykowski v. Dep't of Corr., 226 F.3d 1213, 1218 (11th Cir. 2000) (stating that a factual determination of innocence must be reached before the constitutional issue is reached); Sibley v. Culliver, 377 F.3d 1196, 1205 (11th Cir. 2004) (declining to decide the merits of the issue because petitioner failed to make an actual innocence showing).

Reading an "actual innocence" exception into the procedural default of time bar is entirely consistent with Supreme Court rulings that procedural default rules should not constitute an absolute bar to federal habeas review. Murray v. Carrier, 477 U.S. 478, 496 (1986) ("where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default"). In Murray, the Court affirmed that principles of finality and comity must yield to the societal interest of correcting a wrongful incarceration. Murray, 477 U.S. at 495 (citing Engle v. Isaac, 456 U.S. 107, 135 (1982)).

Moreover, the Supreme Court re-affirmed these principles in its recent holding in House v. Bell, where the petitioner's procedural default was excused in light of a requisite showing of actual innocence. House v. Bell, 126 S.Ct. 2064, 2068 (2006) ("In certain exceptional cases involving a compelling claim of actual innocence . . . the state procedural default rule is not a bar to a federal habeas corpus petition.") (citing Schlup v. Delo, 513 U.S. 298, 319-322 (1995)).

Since a sufficient showing of "actual innocence" excuses a bar to federal review based on state procedural default, such a showing encompasses excusing a bar to federal review based on the procedural default of time bar. While many procedural defaults implicate a state's interest both in finality and comity, whether or not a statute of limitations is applied by a federal court has no impact on granting comity to state court procedures. As such, applying the "actual innocence" exception to § 2244(d) is a lesser interference with state interests than that applied in House v. Bell. To prevent a

miscarriage of justice, implicit within a statutory time bar must, therefore, exist an "actual innocence" exception.

Futhermore, Respondents incorrectly assert that Kuenzel waived the right to further review of his "actual innocence" argument for equitable tolling because he did not appeal this Court's **granting** of his motion for a certificate of appealability ("COA"). Doc. 111 at 5.[10] Kuenzel's motion for a COA delineated four (4) grounds of requested review and this Court fully granted Kuenzel's motion for a COA. Doc. 99, Kuenzel's Motion for COA, dated March 27, 2006; Doc. 101, Order, Kuenzel v. Campbell, 1:00-CV-316 (April 3, 2006) ("Consequently, the petitioner's motion for a certificate of appealability is GRANTED, …"). As such, it is unclear what action Kuenzel failed to take.

That the Pace question was specifically certified while the equitable tolling issue was not constitutes neither a final judgment that can be appealed, nor a bar on

[10] Curiously, the State's Brief cites two irrelevant cases arising from federal criminal drug prosecutions in support of its argument for rendering Kuenzel's equitable tolling argument foreclosed. The scenarios at issue in these cases are far removed from Kuenzel's situation. The cases are neither habeas nor death penalty cases and do not involve the issuance or appeal of a COA. In U.S. v. Fiallo-Jacome, the defendant was charged with possession of cocaine. He subsequently was sentenced to twenty-eight years of imprisonment and twice appealed the judgment and his sentencing. The court held that the defendant had waived his right to raise an issue on a second appeal that he had not raised in his first appeal. U.S. v. Fiallo-Jacome, 874 F.2d 1479, 1481-81 (11th Cir. 1989). That is not the situation here, where this is Kuenzel's first federal appeal and all issues for review were raised in Kuenzel's motion for a COA. In U.S. v. Escobar-Urrego, the petitioner requested the court modify his sentence after a retroactive amendment was made to the Sentencing Guidelines. The court held that the amount of usable quantity of cocaine, which was the basis for Escobar-Urrego's sentence, already had been litigated and the defendant had not challenged that determination on direct appeal. U.S. v. Escobar-Urrego, 110 F.3d 1556 (11th Cir. 1997). Again, Kuenzel's COA was not denied and, therefore, there was nothing for him to appeal or waive.

the Eleventh Circuit's ability to hear any of the four issues Kuenzel raised.[11] In fact, the Eleventh Circuit exercised its discretion to do just that when it adjudicated Kuenzel's claim for entitlement to relief pursuant to the "actual innocence" exception and ruled that, although it had authority to address this argument, the District Court was the proper forum to do so in the first instance. Kuenzel II, 488 F.3d at 1343. The Eleventh Circuit stated:

> Although actual innocence in the present context is not a pure factual determination, we still owe the district court some deference. … And the district court seemingly has not exercised its discretion. We decline to appropriate to ourselves the district court's discretionary authority in this matter.

Id. (internal citations omitted)[12]

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[11] While the Eleventh Circuit has stated that review is limited to issues in the COA, the reported cases addressing this issue are those in which the petition was partially granted and partially denied by a district court. See Hodges v. Attorney General, 2007 WL 3307014, at *4 (11th Cir. 2007) (scope of review restricted where order granted motion on two grounds and denied it as to two grounds); Cruz v. United States, 188 Fed.Appx. 908, 910 n.1 (11th Cir. 2006) (court would not hear issue not in COA that was raised for the first time in petitioner's appellate reply brief); Abrams v. United States, 194 Fed.Appx. 718, 721 (11th Cir. 2006) (where COA was unclear on its face but "unequivocally reference[d]" an issue from petitioner's motion for COA court found that the COA included that argument) (citing Murray v. United States, 145 F.3d 1249, 1251 (11th Cir. 1998)); Jones v. United States, 224 F.3d 1251, 1254-55 (11th Cir. 2000) (rules do not cover the situation where the district court has partially denied a COA). That is not Kuenzel's situation. In its order granting the COA, the court did not deny any one of the four requested grounds for review and, as such, Kuenzel believed them all properly before the Eleventh Circuit.

Moreover, AEDPA merely establishes a floor for appellate review with the requirement that the district court specify the issues which satisfy the "substantial showing of the denial of a constitutional right" language from subsection (2). See 28 U.S.C. § 2253(c)(1). Facially, the requirement neither reads as a limitation on nor a ceiling for review, but rather as a gateway to appellate consideration. See Fed. R. App. Pro. 22(b)(1) ("the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue") (emphasis added); 11th Cir. R. 22-1(b) (same).

[12] In fact, the Eleventh Circuit called for "the district court's express acknowledgment" of Kuenzel's actual innocence claim, stating that it could not dispose of this case without addressing Kuenzel's continual assertion of innocence "and we are uncomfortable with

Kuenzel should be given a full and fair opportunity to present his non-frivolous claim of "actual innocence" to excuse the time bar and obtain federal review. A wrongful incarceration is an injustice that should know no time bar.

II. KUENZEL'S CLAIMS OF "ACTUAL INNOCENCE" ARE SUBSTANTIAL AND WELL-SUPPORTED, NEITHER "PALPABLY INCREDIBLE" NOR "PATENTLY FRIVOLOUS"

Kuenzel's claim is simple and straightforward. He had nothing to do with the murder and was at home — sleeping — when the crime occurred. Kuenzel has a solid alibi and no physical evidence or eye witness testimony places Kuenzel at the scene around the time of the crime.

The State's case rests on the inherently unreliable and self-serving testimony of the man who is, in all likelihood, the actual killer – Harvey Venn ("Venn"). Unlike with Kuenzel, there is overwhelming direct trial evidence inculpating Venn: (1) Venn admits being complicit in the murder; (2) multiple eye witnesses identified Venn as being at the murder scene around the time of the crime, but did not identify Kuenzel as being with Venn; and (3) the victim's blood was inexplicably splattered on Venn's pants, a fact about which Venn lied even at trial. Regarding the blood evidence inculpating Venn, it also is significant that the victim's blood was not found on any other exhibit presented at trial; the blood was not found on the gun the State alleges was the murder weapon, in or on the "getaway" car or anywhere on the clothes Kuenzel wore that evening.

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ruling on this argument when the district court has made no findings or conclusions and has not even mentioned the argument." Kuenzel II, 488 F.3d at 1343, n.3.

Kuenzel maintained his innocence of any part in this crime and refused a plea in return for testifying against Venn. Moreover, Kuenzel already has presented evidence that the State knowingly withheld critical evidence demonstrating Kuenzel's innocence and Venn's guilt. For instance, the State withheld the statements of Crystal Floyd who saw Venn alone one hour before the murder, heavily inebriated, agitated and only 10 miles from the crime scene.[13] Ms. Floyd states that she communicated this exact information to both the investigating officers and the district attorney, Robert Rumsey, on multiple occassions. Despite the State's knowledge of Ms. Floyd's testimony, her statements never were disclosed to Kuenzel's trial counsel.

At trial, the State also knowingly allowed Venn to perjuriously testify that, at the time of the murder, he was not in possession of a .16 gauge shotgun, the precise shotgun gauge of the murder weapon. Instead, the State allowed Venn to testify that the shotgun in his possession only was a .12 gauge. In reality, Venn's shotgun was a .16 gauge; a fact known to the police who neither disclosed this to defense counsel nor conducted any tests on Venn's .16 gauge shotgun. If the jury had known that in order to inculpate Kuenzel in the crime, and escape the death penalty himself, Venn had lied about the gauge of his shotgun, Venn's uncorroborated and contradictory testimony that Kuenzel's borrowed shotgun was returned only after the murder — testimony contradicted by two defense witnesses at trial — would have lost all credibility.

Weighing the total evidence now available — Venn's bald allegations versus overwhelming contradictory and impeaching evidence coupled with a mountain of evidence inculpating Venn — it is more likely than not that no reasonable juror would

[13] At this time, Kuenzel, who was Venn's roommate, was at his home over 25 miles from the crime scene and without any means of transportation.

have found Kuenzel guilty beyond a reasonable doubt. See Kuenzel's Reply Brief, Appeal No. 06-11986-P (11th Cir. Sept. 15, 2006) ("Kuenzel Reply Brief"), attached as Exh. E.[14]

While approximately half of the State's Eleventh Circuit Brief [see Doc. 111, Exh. A] is taken up by a "Statement of the Case," that section is largely a misleading and distorted summary of the record evidence against Kuenzel at trial. Repeatedly, the State asserts claims that are either unsupported by the facts cited within the State's Appellate Brief,[15] or a false summary of the record evidence.[16]

In reality, Exhibit A to the State's Brief as well as the trial evidence demonstrate only that Offord was murdered by **someone** using a .16 gauge shotgun. Absent Venn's testimony, no evidence connects Kuenzel to either a .16 gauge shotgun or the crime scene. Even considering the meager evidence upon which Kuenzel was convicted, the State's unconnected and largely irrelevant shreds of evidence are either (1) in direct contradiction to the evidence now available, or (2) not fairly countered by contradictory evidence which was then available to the prosecution, but never disclosed to Kuenzel's counsel during trial, on direct appeal or in post-conviction proceedings.

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[14] The Kuenzel Reply Brief fully explains, with citations, Kuenzel's claim of entitlement to relief from any procedural default pursuant to the "actual innocence" exception.

[15] The State wrongly asserts that "several other witnesses corroborated Venn's testimony about his and Kuenzel's third visit to the convenience store around 10:00-10:30 p.m" and that "Diane Mason corroborated Venn's testimony that Kuenzel covered the license plate with a paper sack." Doc. 111, Exh. A at 15, 18. The subsequent evidence presented flatly fails to substantiate the State's claims.

[16] In its brief to the Eleventh Circuit, the State asserts that "Kuenzel's counsel were effective in impeaching Venn." Doc. 111, Exh. A at 21. Yet Kuenzel's trial counsel was not told that Venn's shotgun actually was a .16 gauge, not a .12 gauge. Nor was Kuenzel's counsel given the statements of Crystal Floyd, April Harris, Crystal Epperson Ward, Sam Gibbons, and many others whose testimony would accurately have impeached Venn.

For twenty years, Kuenzel has maintained his innocence. The new evidence discussed above and discussed in the Kuenzel Reply Brief is evidence collected by Kuenzel's post-conviction counsel without any Court ordered discovery or funding for investigative assistance. We expect that discovery in this Court will reveal an even fuller picture of constitutional violations resulting in Kuenzel's unjust conviction. In light of the objectively material flaws in Kuenzel's prosecution, we implore this Court to reach the merits of Kuenzel's claims.

III. PROPOSALS FOR REVISITING AND ADDRESSING THE TIME BAR DEFENSE

A. This Court Should Find Kuenzel's Petition Factually Timely or Timely Pursuant to Equitable Tolling Principles

For any of the above-stated reasons, we respectfully request that this Court find Kuenzel's petition as not time barred. If the Court decides to so rule, Kuenzel requests that this Court proceed by adjudicating Kuenzel's non-procedurally barred claims on the merits and adjudicating Kuenzel's entitlement to relief from the procedural bar through a requisite showing of "actual innocence." In order to properly address these arguments, and for the reasons stated in Section III(B) below, Kuenzel requests that the Court order discovery and an evidentiary hearing consistent with Kuenzel's previously submitted request. See also Kuenzel's Motion for Phased Discovery and an Evidentiary Hearing, Doc. 109, Attachment 1.

B. Alternatively, The Court Should Adjudicate Kuenzel's Claim of Entitlement To The "Actual Innocence" Exception Which Requires the Granting of Discovery and an Evidentiary Hearing

As discussed in Kuenzel's Reply Brief, based on all the evidence, new and old, in addition to the evidence Kuenzel anticipates obtaining through discovery, no reasonable juror would find Kuenzel guilty beyond a reasonable doubt for the murder of

Linda Offord. Accordingly, Kuenzel requests that the Court provide him with an opportunity to prove his entitlement to relief from the time bar though a requisite showing of "actual innocence."

While this Court has not yet asked the parties to fully brief the applicable standard of review to evaluate an "actual innocence" claim as an exception to the time bar defense, we note here that the appropriate standard should be no greater than that affirmed by the Supreme Court in House to excuse a procedural bar. In House, the Court explained that "prisoners asserting innocence as a gateway to 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.'" House, 126 S.Ct. at 2077-78 (quoting Schlup, 513 U.S. at 327). Since a time bar implicates a lesser state interest than that implicated by a procedural bar, a lower standard may be appropriate when considering the "actual innocence" exception to a time bar. Regardless, Kuenzel still can satisfy House's hightened threshold showing.

Concomitantly, it is important to note that House emphasized three points with regard to adjudicating the "actual innocence" exception and that these evaluative factors require the granting of the discovery requested by Kuenzel and an evidentiary hearing. First, in adjudicating the "actual innocence" exception, a reviewing court must assess the likely impact of **all** the evidence, old and new, and make a probabilistic determination of the total evidence's likely impact on reasonable jurors. House, 126 S.Ct. at 2077 ("Schlup makes plain that the habeas court must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it

would necessarily be admitted under 'rules of admissibility that would govern at trial.'") (quoting Schlup, 513 U.S. at 327-28).

Second, the Court explained that "the Schlup standard does not require absolute certainty about the petitioner's guilt or innocence. … [rather] [a] petitioner's burden at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt …" House, 126 S.Ct. at 2077.

Lastly, this inquiry "requires the federal court to assess how reasonable jurors would react to the **overall, newly supplemented record**. … includ[ing] consideration of 'the credibility of the witnesses presented at trial.'" Id. at 2078 (emphasis added) (quoting Schlup, 513 U.S. at 330 ("under the gateway standard … the newly presented evidence may indeed call into question the credibility of the witnesses presented at trial. In such case, the habeas court may have to make some credibility assessments.")).

It is well-settled that a petitioner need not prove his claims or defenses without discovery or an evidentiary hearing, provided only that the claim on which discovery is sought is not so "palpably incredible" or "patently frivolous" as to justify summary dismissal. Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985); Blackledge v. Allison, 431 U.S. 63 (1977).

Accordingly, if Kuenzel's factual allegations give the court reason to believe that, if the facts are fully developed, Kuenzel may be able to demonstrate to a reasonable juror by a preponderance that he is actually innocent and, therefore, entitled to relief, the court has a duty to grant discovery. Harris v. Nelson, 394 U.S. 286, 300

(1969). This applies equally to the use of discovery to support defenses to the State's claims of procedural default. Coleman v. Zant, 708 F.2d 541 (11th Cir. 1983).

Here, discovery would likely uncover: (1) Venn's potential motives to commit the robbery/murder; (2) additional evidence impeaching Venn's already-false testimony against Kuenzel; (3) Venn's borrowed shotgun as the likely murder weapon; and (4) additional exculpatory and/or impeachment evidence including statements made to the police by Harvey Venn, Chris Morris, Crystal Floyd, April Harris, Sam Gibbons, any many others.

Kuenzel's constitutional claims (e.g. gross prosecutorial misconduct and ineffective assistance of counsel) and his defenses to the State's time bar defense (e.g. "actual innocence") are not so palpably incredible or patently frivolous as to justify summary dismissal. Respondents already have "begun an investigation" into new evidence they allege "will undermine the credibility of **some** of the information presented by Kuenzel to support his 'actual innocence' argument." Doc. 111 at 6. It follows, therefore, that discovery and an evidentiary hearing should be granted because, at a minimum, Kuenzel is entitled to an opportunity to further develop the facts that support these claims and defenses.

If, as Respondents suggested, this Court decides to pursue this course, Kuenzel respectfully requests that his Motion for Phased Discovery and an Evidentiary Hearing be granted.[17] See Doc. 109, Attachment 1. Further, Kuenzel requests an opportunity to present documents, affidavits and live testimony at an evidentiary hearing. Kuenzel never has had this opportunity. His claims, if proven, will

[17] The Court and the parties could agree upon mutually convenient dates consistent with the schedule offerred by Kuenzel.

demonstrate that he has been wrongfully incarcerated on death row for over twenty years. For the reasons stated herein, we respectfully request that this Court finally afford Kuenzel a substantive review of his claims.

Dated: December 14, 2007
New York, N.Y.

By: /s/ David A. Kochman

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CERTIFICATE OF SERVICE

I, David Kochman, hereby certify that on the 14th day of December, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: J. Clayton Crenshaw.

/s/ David A. Kochman
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