

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

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

**STATE OF ALABAMA'S RESPONSE TO ORDER FOR BRIEFING**

This Court entered an order, see Doc. 110, requesting briefing in light of the Supreme Court's recent opinion in Allen v. Siebert, 128 S.Ct. 2 (Nov. 5, 2007). Specifically, this Court's order states that the "Respondents Commissioner and Attorney General may ... file any brief they may wish to offer on the question whether the court should, may, or can revisit the time bar defense in light of the recent Supreme Court decision." Doc. 110 at 3. The Respondents (hereinafter "the State") offers the following response to this Court's order.

**I. THIS COURT SHOULD NOT REVISIT THE TIME BAR DEFENSE**

This Court is obviously familiar with the procedural history of the State's time-bar defense, see Doc. 110 at 1-2, thus, it will not be repeated here. The direct answer to this Court's question is that this Court should not revisit the time bar defense in light of the Supreme Court's recent decision in Siebert. The very foundation of the Eleventh Circuit's opinion in Siebert III,<sup>1</sup> that Siebert's Rule 32 petition was "properly filed" because the state court rejected it on a nonjurisdictional ground, was rejected by the Supreme Court in Siebert. In particular, the Supreme Court in Siebert stated that "our holding in Pace[ v. DiGuglielmo, 544 U.S. 408 (2005)] turned not on the nature of the particular time limit relied upon by the state court, but rather on the fact that time limits generally establish 'conditions to filing' a petition for state postconviction relief." Siebert, 128 S.Ct. at 4. The Supreme Court in Siebert concluded its opinion with the plain language that an untimely state court postconviction petition is not "properly filed":

---

<sup>1</sup> In Kuenzel v. Allen, 488 F.3d 1341, 1343-44 (11th Cir. 2007), the Court relied upon Siebert v. Allen, 480 F.3d 1089 (11th Cir. 2007) (Siebert III), in ruling that the "district court [] erred in dismissing Kuenzel's petition as untimely under AEDPA."

"We therefore reiterate now what we held in Pace: When a postconviction petition is untimely under state law, that is the end of the matter for purposes of §2244(d)(2)." 544 U.S. at 414 (quoting Carey, 536 U.S. at 226). Because Siebert's petition for state postconviction relief was rejected as untimely by the Alabama courts, it was not "properly filed" under §2255(d)(2). Accordingly, he was not entitled to tolling of AEDPA's 1-year statute of limitations.

Siebert, 128 S.Ct. at 4. Thus, Kuenzel's untimely state post-conviction petition was not "properly filed." As a result, there can be no serious debate that Kuenzel's federal habeas petition was filed beyond the 1-year AEDPA statute of limitations.

On a somewhat related topic, this Court has previously rejected Kuenzel's arguments related to "equitable tolling." Specifically, this Court - in its order dismissing Kuenzel's untimely filed federal habeas petition - incorporated by reference its rejection of Kuenzel's "equitable tolling" contentions. See Doc. 93 at 9. In the order that was incorporated by reference, this Court rejected the following arguments: (1) Kuenzel is entitled to equitable tolling because he was unaware of the Rule 32 statute of limitations; (2) Kuenzel is entitled to equitable tolling

because he was without counsel from October 1991 until September 1993, the time in which the Rule 32 petition should have been filed in order to be timely; (3) Kuenzel is entitled to equitable tolling because he was attempting to exhaust his state court remedies. See Doc. 53 at 13-17. Hence, this Court should not allow Kuenzel to rehash his argument for equitable tolling.

## **II. KUENZEL'S CLAIM OF FACTUAL INNOCENCE OF CAPITAL MURDER**

The Eleventh Circuit in Kuenzel remanded the case for consideration of Kuenzel's argument that "actual innocence" serves as an exception to his federal habeas petition being procedurally defaulted. Kuenzel, 488 F.3d at 1343. In the State's view, there are two issues based on that portion of the Kuenzel opinion. First, pursuant to the Supreme Court's opinion in Siebert, it is clear that Kuenzel's federal habeas petition is untimely, and not procedurally defaulted. Thus, Kuenzel's argument that "actual innocence" should serve as an exception to his defaulted claims is irrelevant and need not be considered further. Second, the Eleventh Circuit noted, see Kuenzel, 488 F.3d at 1343 n.2, that it could not address Kuenzel's "actual innocence" argument regarding "equitable tolling" because the district court did

not grant a certificate of appealability on that issue. See Doc. 101 (district court's order granting a COA only on the Pace issue).<sup>2</sup> Because Kuenzel did not appeal the denial of the COA issue, that issue is foreclosed from further review. See United States v. Escobar-Urrego, 110 F.3d 1556, 1560 (11th Cir. 1997) ("Under the law-of-the-case doctrine, an issue decided at one stage of a case is binding at later stages of the same case.") Pursuant to Escobar-Urrego, lower court rulings that have not been challenged on a first appeal will not be disturbed in a subsequent appeal. See id. (explaining that "a legal decision made at one stage of the litigation, unchallenged in a subsequent appeal when the opportunity existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time"); see also United States v. Fiallo-Jacome, 874 F.2d

---

<sup>2</sup> Kuenzel filed a motion for certificate of appealability raising the issue that he was entitled to equitable tolling based on his showing of "actual innocence." See Doc. 99 at 4. However, this Court granted a COA on only one issue: "Did the holding and rationale of the United States Supreme Court's decision in Pace v. DiGuglielmo, \_\_\_ U.S. \_\_\_, 125 S.Ct. 1807 (2005), effectively overrule the earlier Eleventh Circuit decision in Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003), such that the finding by the Alabama state courts that Kuenzel's state Rule 32 petition was untimely filed under A.R.Crim.P. 32.2(c) precluded a finding that the petition was 'properly filed' for purposes of tolling the one-year federal habeas limitation under 28 U.S.C. § 2244(d)(2)?" Doc. 101 at 1-2. Kuenzel did not pursue further consideration of his request for COA on the equitable tolling issue.

1479, 1481-83 (11th Cir. 1989) (deciding that a defendant waives his right to raise in second appeal issues not raised in first appeal). Based on these cases, Kuenzel should not be allowed to further pursue his equitable tolling argument based on "actual innocence."

That being said, if this Court allows further proceedings regarding Kuenzel's "actual innocence" claim, the State has several suggestions. First, as argued in the State's Eleventh Circuit brief, see Exhibit A at 62-74, Kuenzel has not made a sufficient threshold showing of "actual innocence" to warrant further proceedings. Second, the State has begun an investigation and can present evidence that will undermine the credibility of some of the information presented by Kuenzel to support his "actual innocence" argument. If this Court decides to pursue this course, the State will most likely need 90 days to make an evidentiary presentation in the form of affidavits and documents.

**CONCLUSION**

For the foregoing reasons, the State respectfully requests that this Court rule that Kuenzel's federal habeas petition was untimely filed.

Respectfully submitted,

Troy King (KIN047)  
*Attorney General*

***s/ J. Clayton Crenshaw***  
J. Clayton Crenshaw (CRE007)  
*Assistant Attorney General*

**CERTIFICATE OF SERVICE**

I hereby certify that on November 27, 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: **David A. Kochman, Rick L. Burgess and Jeffrey E. Glen.**

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

ADDRESS OF COUNSEL:

Office of the Attorney General  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130  
Telephone: 334.242.7423  
Fax: 334.353.3637  
[jcrenshaw@ago.state.al.us](mailto:jcrenshaw@ago.state.al.us)