IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO. 10-10283

ORAL ARGUMENT REQUESTED

WILLIAM ERNEST KUENZEL,

Petitioner-Appellant,

v.

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

Respondents-Appellees.

Appeal from a Final Order Dismissing First Petition for a Writ of *Habeas Corpus* by the United States District Court for the Northern District of Alabama, Case No. CV-00-316-E (IPJ)(TMP)

PETITIONER-APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

It is evident that Kuenzel and Respondents are having two very different conversations. This Reply endeavors to rise above the din.

On this appeal, Kuenzel properly discusses why the total evidence – including evidence that should have been disclosed, investigated and otherwise presented at trial – demonstrates the existence of reasonable doubt precluding conviction. Respondents, on the other hand, myopically focus on the narrow question of whether Kuenzel can *affirmatively* demonstrate *actual* innocence. This impenetrable fortress to merits-review of procedurally defaulted claims was not sanctioned by the Supreme Court; indeed, Schlup expressly rejects this standard.

Kuenzel indisputably must demonstrate "factual" innocence – as opposed to "legal" innocence – but he need not make this showing in the limited manner required by the District Court and Respondents.[1] Instead, Kuenzel's sufficiently onerous burden is to demonstrate that the evidence of guilt is unlikely to extinguish reasonable doubt from any properly-instructed juror's mind in light of the newly-supplemented record.

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[1] See, e.g., R3.115 p.46 ("Thus, even assuming that Venn's gun also was a .16-gauge, this does not prove that [Venn] was the shooter or that Kuenzel was not, nor does it prove that Kuenzel was not involved in the robbery-murder of Linda Offord."); Id. pp.48-50 (concluding that Crystal Floyd's testimony "falls far short of demonstrating factual innocence … [because] Floyd's statement does nothing more than call into question Venn's credibility, and possibly provide support for a Brady claim. It does not provide evidence that Kuenzel is factually innocent").

Applying the proper standard is essential precisely because the Schlup Gateway merely is a path to review of otherwise procedurally defaulted constitutional claims; it is not a substantive ground for relief. Unquestionably the Schlup Gateway is accessible only in the most extraordinary of cases, but to remain a meaningful access to prevent a "miscarriage of justice," it is necessary to look beyond affirmative actual innocence to the particular facts, circumstances, context and nature of the constitutional violations present in each case.

All parties acknowledge the validity of Kuenzel's Strickland and Brady claims — indeed, not a single word of Respondents' over-sized brief seeks to challenge the meritorious nature of these constitutional claims, and even the District Court allows that these claims probably are viable.

Moreover, Respondents' guilt-phase case is exceptionally weak. Excluding Venn's testimony, all Respondents can establish is that: (i) Kuenzel was with Venn at the Madex plant around 7:00 p.m. and sold diet pills to Johnny Lambert; and (ii) a burned shotgun shell in a trash can outside of Venn's and Kuenzel's residence was fired from Kuenzel's stepfather's .16 gauge shotgun at some point in time. Every other piece of "corroborating" evidence merely confirms *Venn's* involvement, and does not implicate Kuenzel absent Venn's testimony.

This is a reply brief; Kuenzel will not re-itemize the mountain of evidence implicating Venn. It is sufficiently telling to note that virtually every piece of new

evidence located, obtained and presented since 1988 – including the substantial evidence withheld by the prosecution and revealed by Respondents just last year – points to both Kuenzel's lack of involvement and Venn's guilt.

Here, the existence of reasonable doubt is made plain by Kuenzel's evidentiary narrative that he "would have presented to the jury but for the violations of his constitutional rights." See Appellant's Brief pp.27-35. To be sure, despite its careful attention to correct any factual misstatement contained in Appellant's Brief, Respondents do not and cannot challenge Kuenzel's assertion that "every aspect of the foregoing defense is perfectly harmonious with the record evidence." Id. p.35.[2]

At its core, Respondents' argument rationalizing the sufficiency of the evidence to convict improvidently seeks shelter behind a jury conviction obtained through an unconstitutional judicial proceeding. To believe Venn's testimony – as Respondents advocate – necessitates logistical gymnastics and a willing suspension of disbelief generally reserved for Hollywood movies. Fairly considering the entire evidence now before this Court, any juror would acquit based on the

[2] Respondents rightly correct Kuenzel's challenge to the District Court's statement that one of Venn's previously undisclosed police statements (R.136-2) contains a notation that Venn went hunting with a .12 gauge shotgun. Respondents' Brief p.54 n.12. Undersigned counsel apologies for this error. Kuenzel is grateful, however, for Respondents' assiduous fact-checking of Appellant's Brief and resulting confirmation that its failure to correct any factual statement contained therein was not inadvertent oversight.

existence of reasonable doubt. Accordingly, Kuenzel is entitled to a new trial; *not* because of his likely innocence, but because undisputed constitutional violations fatally infected his original trial.

ARGUMENT IN REPLY

I. KUENZEL IS ENTITLED TO BENEFIT FROM STATUTORY OR EQUITABLE TOLLING BETWEEN THE 1996 ORDER AND FEBRUARY 18, 1999

Resolving the first two issues specified in the COA boils down to a discrete inquiry: what is the significance of the 1996 Order?

Kuenzel maintains that the 1996 Order constitutes *either* a state court adjudication of timeliness which thereby renders Kuenzel's Rule 32 petition "properly filed" under § 2254(d) from May 6, 1996 until February 18, 1999, *or* "extraordinary circumstances" justifying equitable tolling of Kuenzel's time to file his federal *habeas* petition until February 7, 2000.

Respondents contend that neither the 1996 Order nor its failure to appeal, petition for mandamus relief, or move to reconsider the 1996 Order have any significance whatsoever. See Respondents' Brief pp.45-49. Surely this cannot be so. Similarly unavailing is Respondents' attempt to discredit Kuenzel's factual distinguishment of Allen v. Siebert, 552 U.S. 3 (2007) — that, unlike Kuenzel, at the time AEDPA went into effect no court ever had or would rule Siebert's Rule 32 petition timely. Notably, Respondents do not challenge undersigned counsel's

statement that this is the only case in the United States where a federal court concluded that the one-year limitation period under AEDPA was running at a time when a state court had considered the issue of timeliness, and treated the petitioner's post-conviction petition as "timely." See Appellant's Brief pp.39-44.

Respondents' position also illustrates why denying Kuenzel the benefit of at least equitable tolling under these circumstances would be both imprudent and impractical. For example, if the Circuit Court's 1999 Order re-dismissing Kuenzel's Rule 32 petition relates back to the original date of filing for purposes of § 2244(d)(2), every state attorney general whose statute of limitation is treated as an affirmative defense (like Alabama's) conceivably could wait to raise the time bar until one year after the time a petitioner initially filed his state post-conviction petition. If the state court ultimately held that petitioner's state post-conviction petition untimely, federal review automatically would be foreclosed 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. This procedural trap that no post-conviction litigant could avoid is unfair and nonsensical.

Under the rule Respondents advocate, every post-conviction petitioner must, as a matter of prophylactic practice, file a federal placeholder petition within one year of filing his/her state court post-conviction petition to protect against the

possibility that a state attorney general might, at some time in the future, successfully interpose a timeliness defense. Implicitly requiring every state post-conviction petitioner to immediately file a federal *habeas* petition would unduly burden the federal court system and waste limited judicial resources. In light of this case's singular facts, Kuenzel submits that the Petition is not time barred.

II. THE TOTAL EVIDENCE KNOWN TODAY DEMONSTRATES THE PROBABLE EXISTENCE OF REASONABLE DOUBT[3]

A. Kuenzel's Evidence Is "New Evidence"

This Court has not yet decided the appropriate standard for consideration of "new evidence." In keeping with this Circuit's decisions as well as those issued by Sister Circuits, Kuenzel urges this Court to adopt the standard recently articulated in *dicta* by the Third Circuit in Houck v. Stickman, 625 F.3d 88, 94 (3d Cir. 2010),

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[3] Respondents urge that the District Court's "findings that [Kuenzel] has not established that all reasonable jurors would find him actually innocent, are reviewed for clear error." Respondents' Brief p.44. Respondents are incorrect. The law is well-settled that dismissals of *habeas* petitions on grounds of procedural default are mixed questions of law and fact subject to *de novo* review on appeal. See Appellant' Brief p.39 (citing cases). Indeed, the underlying purpose of deferential "clear error" review is inapplicable here because the District Court took no live testimony, but rather adjudged witness credibility and reliability solely upon the same documents and affidavit testimony now before this Court. See U.S. v. Hogan, 986 F.2d 1364, 1372 (11th Cir. 1993) ("A federal appellate court conducting a review for clear error is required to give 'due regard' to the trial court's opportunity to assess the credibility of witnesses.") (citing Amadeo v. Zant, 486 U.S. 214, 223 (1988)). Moreover, even assuming, *arguendo*, that "clear error" review applies to the District Court's "findings of fact" – which it does not – a review of the entire record makes plain that "a mistake has been committed" by the District Court. Hogan, 986 F.2d at 1372. See also Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (stating that even where there is some evidence to support it, a finding is clearly erroneous if "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed").

cert. denied, Houck v. Lockett, No. 10-9264, 2011 WL 742656 (May 2, 2011). See Appellant's Brief pp.63-65. Respondents' Brief does not squarely take any position on this issue. As explained below, the Houck standard best comports with prevailing notions of fairness underlying evidence admissibility and the Schlup Gateway.

1. The Third Circuit's "New Evidence" Standard Properly Accounts For Meritorious Underlying Constitutional Violations

This case exemplifies the possibility of achieving a proper balance between legal constructs and fundamental notions of equity. All of Kuenzel's evidence existed at the time of trial, but was not presented to the Circuit Court because of Brady and Strickland violations. Since the improperly omitted evidence is the same evidence establishing Kuenzel's constitutional violations, it cannot fairly be excluded from an examination directed at preventing a miscarriage of justice.

(i) *The Brady Violations*

Respondents' Brady violations generally were not of the overt variety, but this fact does not render them any less devastating or subversive to the constitutionality of Kuenzel's trial. By selectively withholding, in part and in whole, certain key pieces of evidence that Kuenzel was entitled to investigate and introduce at trial, Respondents both deprived him of the ability to present a meaningful defense to the trial jury, and precluded that jury from rendering a

judgment based upon the true evidentiary picture. When the missing evidentiary items are incorporated into the total evidence, reasonable and indeed serious doubt is beyond debate. In this regard, Respondents' actions fall squarely within the type of conduct disapproved of in Kyles v. Whitley, 514 U.S. 419 (1995).

Here, just as in Kyles, "damage to the prosecution's case would not have been confined to evidence of the eyewitnesses," but would have extended to "the thoroughness and even the good faith of the investigation." Kyles, 514 U.S. at 445. Indeed, "disclosure of the suppressed evidence to competent counsel . . . would have revealed a remarkably uncritical attitude on the part of the police." Id. at 441, 445.

Notably, Kuenzel presents a more compelling case than Kyles because, as Justice Scalia noted in dissent, there still remained four eyewitnesses whose testimony was not impugned. Id. at 475. In this case, however, Venn's testimony implicating Kuenzel stands naked against an avalanche of counterveiling evidence. Thus, as in Kyles, "confidence that the verdict would have been unaffected cannot survive[.]" Id. at 454

Correspondingly, it is inappropriate for Respondents to seek shelter behind a jury verdict that incontestably was secured upon a materially incomplete and fundamentally inaccurate set of facts. No matter how it is reached, the conclusion that Respondents' suppressions denied Kuenzel "a meaningful opportunity to

present a complete defense" cannot be avoided. California v. Trombetta, 467 U.S. 479, 485 (1984). Given the volume and significance of the relevant evidence the trial jury did not hear, its flawed adjudication is not worthy of confidence and cannot be brandished as a sword against Kuenzel. Nor can the previously undisclosed evidence; and it cannot be excluded from the Schlup Gateway analysis. See also Finley v. Johnson, 243 F.3d 215, 221-22 (5th Cir. 2001) (Hill, J. sitting by designation) (omitting discussion of "diligence" in holding that petitioner "has made out a sufficient showing of 'actual innocence' to satisfy the fundamental miscarriage of justice exception for his procedurally defaulted Brady claim").

(ii) *The Strickland Violations*

This case also presents a compelling example of the inadequacy of Alabama's indigent defense system in the late-1980's. The District Court tacitly (and correctly) acknowledged the meritorious nature of Kuenzel's Strickland claims, observing that trial counsel simply "failed to pursue" evidence in preparation for trial, but concluded that "[e]vidence of ineffective assistance, however, is not evidence of actual innocence." R3.115 p.52 n.33. Given the defense presented at trial, it is clear that no competent counsel would have failed to investigate, *inter alia*, Mr. Gibbons and the gauge of his shotgun, April Harris, David Pope, Crystal Floyd, Venn's motive to commit the crime, and whether an altercation occurred between Venn and Offord. See R3.45-14 ("[T]he evidence

that was readily available to me seemed sufficient to win the case, and so, given all of the other constraints under which I was working, I did not pursue investigative leads that might have led me to much more persuasive evidence of innocence.").

Although not an excuse for ineffectiveness, Kuenzel's appointed counsel was financially disincentivized from doing any preparation or investigation beyond the bare minimum. Id. See also R3.136-22. Pursuant to Alabama law at the time, counsel's compensation was limited to "$20.00 per hour for [his] out-of-court time on [Kuenzel's] case, with a ceiling of $1,000.00 for [preparation and investigation of Kuenzel's] case." R3.45-14. As a result, counsel devoted a total of 27.75 hours – including *both* guilt and sentencing phase – to conducting factual investigations, speaking with Kuenzel and witnesses, and working on discovery-related matters. Id. As Judge Johnson herself observed:

> Even those lawyers fully competent to represent criminal defendants are restricted in the quality of their representation by the often inadequate compensation paid to assigned counsel.
>
> . . . Thus, inadequate compensation seems to have a greater effect on the defendant's chance to have his case reviewed than on the quality of the defense at trial.

J.C.C., J.R.D., I.P.J., *The Echoes of Gideon and Reverberations of Argersinger*, 25 Ala. L. Rev. 229, 241-42, 264 (1972-1973). See also Simmons v. State Public Defender, 791 N.W.2d 69, 88 (Iowa 2010) (collecting cases and holding that "[a]

hard-fee cap of $1,500 simply cannot provide adequate compensation in many cases").

As a result of his poverty, Kuenzel lacked counsel who would be compensated for preparing the defense necessary to satisfy Strickland in *this* case. In Judge Johnson's view: "No one can seriously deny the importance of this constitutional guarantee, nor can one refute the proposition that the financial ability of the individual defendant should bear no relationship to the scope of this fundamental constitutional right." *Echoes of Gideon*, 25 Ala. L. Rev. at 230. Now that these inadequacies have been revealed, the undiscovered evidence should not again be excluded from the total evidence analysis.

2. The Weakness Of The Guilt Evidence Also Emphasizes The Importance Of Considering Kuenzel's "New Evidence"

In Holmes v. South Carolina, 547 U.S. 319 (2006), the Supreme Court addressed "whether a criminal defendant's federal constitutional rights are violated by an evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict." Id. at 321. Relevant to this case, Holmes stresses that when examining the admissibility of excluded evidence, "the critical inquiry concerns the strength of the prosecution's case." Id. at 329.[4]

[4] Indeed, the Supreme Court recently re-affirmed the importance of examining the strength or weakness of the prosecution's case. See Harrington v. Richter, 131 S. Ct. 770, 793

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Discussing South Carolina's evidentiary rule, the Supreme Court in Holmes explained that, "[i]f the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues." Id.

"The South Carolina Supreme Court responded [to defendant's evidence questioning the reliability of prosecution evidence] that these challenges did not entirely 'eviscerate' the forensic evidence and that the defense challenges went to the weight and not to the admissibility of that evidence." Id.

Reversing the decision below, the Supreme Court held that:

> [T]he true strength of the prosecution's proof cannot be assessed without considering challenges to the reliability of the prosecution's evidence. Just because the prosecution's evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case.
>
> . . . The rule applied in this case is no more logical than its converse would be, *i.e.*, a rule barring the prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing, evidence that, if believed, strongly supports a verdict of not guilty. In the present case, for example, petitioner proffered evidence that, if believed, squarely proved that White, not petitioner, was the perpetrator.

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(Jan. 19, 2011) (Ginsburg, J. concurring) (reversing grant of *habeas* relief on Strickland claim, in part, because "[t]he strong force of the prosecution's case [] was not significantly reduced by the affidavits offered in support of Richter's habeas petition").

> It would make no sense, however, to hold that this proffer precluded the prosecution from introducing its evidence, including the forensic evidence that, if credited, provided strong proof of petitioner's guilt."

Id. at 330. Here, Kuenzel's new evidence serves an analogous purpose to the evidence improperly excluded in Holmes, and must be considered "new evidence" because it directly undercuts the exceptionally weak evidence of guilt relied upon by Respondents.

B. Kuenzel's New Evidence Is Reliable And, When Coupled With The Trial Evidence, Likely Places A Finding Of Reasonable Doubt Beyond Question

Kuenzel's new evidence is a multi-pronged attack striking at the heart of Respondents' case. Respondents do not challenge Kuenzel's explicit contention that, in the narrative the jury should have heard to demonstrate reasonable doubt, every single sentence finds support in the record. Appellant's Brief p.35.

Side-stepping its inability to substantively refute Kuenzel's defense, Respondents instead maintain that any juror would disregard this proffer and believe Venn's testimony — while ignoring the many material points on which his testimony cannot be reconciled with the record. As discussed above, the trial jury's findings cannot be brandished as a credible indicator of what that same jury would do if presented with the true set of facts known today. The reason Respondents avoid directly confronting this issue is simple: armed with the total evidence before this Court, no juror acting reasonably could convict Kuenzel.

Additionally, Respondents' "evidentiary proffer" is pure sophistry; it challenges Kuenzel's new evidence with as much credible force as the rape kit and 17 latent fingerprints introduced at trial. While purporting to constitute a lethal assault upon Kuenzel's evidence indicating innocence and establishing reasonable doubt, even a cursory examination reveals its failure to meaningfully impeach the substantive facts presented by the new evidence. See R3.127 pp.31-36.

1. The Fact That Venn's Shotgun Also Was A .16 Gauge Stands Apart In Its Significance

By far the most important new evidence adduced since trial is the fact that the shotgun Venn borrowed from Mr. Gibbons and admittedly possessed in his car at the time of the murder was a .16 gauge and not a .12 gauge. In light of Respondents' arguments, there are two questions this Court must resolve: (1) did Venn possess a .12 gauge or a .16 gauge shotgun; and (2) if a jury likely would believe that Venn possessed a .16 gauge shotgun, how much does that fact buttress the existence of reasonable doubt?

As to the first inquiry, a jury would now weigh the following evidence. Respondents argue that the shotgun Venn borrowed from Mr. Gibbons was a .12 gauge. In support of its position, Respondents offer Venn's two statements to the police that he went hunting with a .12 gauge shotgun the day before the murder (R.136-2, 9), Venn's trial testimony that the shotgun he borrowed from Mr. Gibbons was a .12 gauge (T.123), and a handwritten note on a police witness

statement – without any underlying attribution or other documentary support whatsoever in the record – stating that Mr. Gibbons "Loaned Venn the 12 Ga Shotgun." R3.125-11.[5]

Kuenzel argues, on the other hand, that the shotgun Venn borrowed from Mr. Gibbons was a .16 gauge. In support of his position, Kuenzel offers the undisputed fact that Venn borrowed a shotgun from Mr. Gibbons and that Venn possessed this same shotgun in his car on the night of the murder. Kuenzel next points to Mrs. Gibbons's statement that the *only* shotgun she knew her late-husband ever to own was the same shotgun that she provided to Kuenzel's counsel. Finally, Kuenzel relies upon the fact that the shotgun his counsel received from Mrs. Gibbons is a .16 gauge Iver Johnson Champion top-break shotgun.[6]

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[5] Significantly, Surrett does not and cannot affirmatively state that Mr. Gibbons's shotgun was a .12 gauge. Indeed, even accepting Surrett's entire testimony as true and accurate, all it means is that the police improvidently relied upon Mr. Gibbons's incorrect belief – as he was not a hunter and only used the shotgun once a year on New Year's – that the weapon he owned was a .12 gauge, and not a .16 gauge, and that the police did not actually inspect the shotgun themselves to confirm the accuracy of Mr. Gibbons's belief. To be sure, the Limited Discovery Order contained four (4) categories specifically directing production by Respondents of any evidence concerning the police's investigation of Mr. Gibbons and/or his shotgun. In response, not a single document recording any investigation or even a conversation held with Mr. Gibbons was produced. Thus, ruling out knowing impropriety, the evidence before this Court leads inescapably to the conclusion that the police negligently relied upon Mr. Gibbons's incorrect belief that his shotgun was a .12 gauge.

[6] Both the District Court and Respondents characterize Mrs. Gibbons's testimony as hearsay. Mrs. Gibbons's testimony is hearsay only insofar as she states that her late-husband told her the police took the shotgun for examination, and later returned it to him. Now that Respondents concede the police investigated the shotgun, Kuenzel no longer needs to rely upon this lone item of hearsay testimony.

Fairly weighing the evidence before it, Kuenzel submits that it is not just likely, but certain, that any reasonable juror would conclude Venn possessed Mr. Gibbons's .16 gauge shotgun at the time of the murder.

Having made this determination, the jury would turn to the second inquiry: whether the fact that Venn independently possessed the same gauge shotgun as the murder weapon makes it more likely than not that he killed Ms. Offord. The District Court flatly concluded that "[t]here is no reason to believe that, if faced with testimony that the shotgun Venn borrowed had been a 16-gauge instead of a 12-gauge, the jury would have found the substance of his testimony to be incredible." R3.115 p.46. This conclusion represents a fundamental misapprehension of this fact's significance in the context of this case.

Disabusing the jury of the false notion that Kuenzel's borrowed shotgun was the only .16 gauge shotgun available to commit the murder creates an inexorable domino effect. It first eliminates the necessity of concluding that Kuenzel's shotgun was the murder weapon. It then allows the jury to credit the testimony of Glenn Kuenzel and Hope Chamberlain – a witness who the District Court recognizes "was not related to Kuenzel, and had no motive to lie" (R3.115 p.52) – that Kuenzel returned his stepfather's shotgun prior to the murder. Finally, once Glenn Kuenzel is not necessarily lying about when Kuenzel returned the shotgun,

the jury is free to credit his alibi testimony that Kuenzel was at home, asleep, shortly before the murder without means of transportation.

Whether or not Venn possessed a .16 gauge shotgun is a fulcrum fact, and Kuenzel's ability to challenge this evidence where he could not at trial – whether because of Brady or Strickland violations – irrevocably sways the evidentiary landscape in favor of reasonable doubt.

2. Harris Cannot Provide A Credible Eyewitness Identification

Harris's grand jury testimony unquestionably undermines the substance of her trial testimony and diminishes its factual credibility. Respondents seek to down-play its import, characterizing her grand jury testimony as mere waffling. See Respondents' Brief p.58. That is a gross understatement.

A fair reading of Harris's grand jury testimony reveals that she "waffles" only because the District Attorney pressed her to say that she *thought* she identified both Venn and Kuenzel inside the convenience store. Indeed, Harris plainly explained that her "positive identification" was based upon seeing two individuals with similar height and hair color to Venn and Kuenzel. In her own words: "I couldn't get any description. I couldn't really see a face." R3.121-8 p.3. The trial

jury never heard this prior testimony which directly undercuts the credibility of her "identification," and it was not disclosed to Kuenzel until just last year.[7]

3. Floyd's Testimony Is Consistent With The Record Evidence, And Respondents' Credibility Attacks Are Irrelevant and Inappropriate

In 1988, 1997 and 2008, Floyd stated that Venn came to her house on November 9th, alone, during the disputed time frame. Even acknowledging Floyd's inability to accurately recollect the precise time of Venn's visit that evening, the fact remains that the substance of her testimony never has credibly been challenged, Floyd is an independent witness with no motive to lie for Kuenzel, Respondents hid Floyd's grand jury testimony from any review until just last year, and Floyd's testimony comfortably co-exists with the record evidence.

Unable to substantively challenge her testimony, Respondents resort to leveling a barrage of character assassination attacks, none of which has any merit.

First, Respondents argue that Floyd's testimony is not credible because she recalls making statements before the grand jury which are not contained in the grand jury transcript. Respondents' Brief pp.34, 36. This attack is not supported by Jones's affidavit because Jones cannot explain the reason for the "testimony breaks" in the grand jury transcript, how long the testimony breaks lasted, or what

[7] Epperson, the driver of the vehicle in which Harris rode, also provided helpful testimony to the police and the grand jury, and that testimony similarly remained undisclosed until last year. R3.121-5, 6.

transpired during those two testimony breaks. Compare Floyd Grand Jury Testimony at p. 5 ("Testimony breaks and then picks back up."), with Harris Grand Jury Testimony at p. 4 ("Tape ends" and "Tape begins").

Second, Floyd's testimony is not discredited by Rumsey's slippery and carefully-worded affidavit because even Rumsey allows that "I do not specifically recall whether I ever met Moore or not" (R3.125-13) — a remarkable statement given that Rumsey examined her at the grand jury.

Third, Brasher's purported "interview notes" (R3.121-3) – an undated document that Brasher does not recall making and that was first produced just last year (R3.125-9) – raises more questions than it answers. Most notable among these is why, if Floyd told him prior to March 1988 that she saw Venn on November 9th at 6:15 p.m., the prosecution did not confront Floyd with this statement when she testified before the grand jury that she saw Venn, alone, between 8:00 and 8:30 p.m.? Floyd's grand jury testimony directly contradicted the prosecution's theory of the case, and the purported Brasher "interview notes" arguably support it. Accordingly, it is a reasonable inference that, had this document been in existence, Rumsey would have attempted to explore it with Floyd at the grand jury.[8]

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[8] Because the purported "interview notes" are undated and Brasher has no recollection of interviewing Floyd, Respondents' claim that this document was created "several days

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Fourth, Respondents contend that Floyd's "credibility is suspect, to say the least" because she contacted undersigned counsel to inform him of Respondents' counsel's in-home cross-examination and revelation of previously undisclosed documents. See R3.125-7. Specifically, Respondents advanced the following argument in their brief to the District Court, quoting Mr. Crenshaw's affidavit:

> Then, in perhaps her most erratic display of behavior, [Floyd] expressed her opinion regarding David Kochman's sexuality, - opining that Mr. Kochman, counsel for Kuenzel, is, to use her term, "gay." That she stated these things to me and then called Kochman soon after I left her house makes her statements even more curious.

Id.; R3.125 pp.12-13. The only credibility questions raised by this absurd argument go to Mr. Crenshaw himself.

Finally, the most odious attack lodged against Floyd is Respondents' implication that her testimony has been coerced by Kuenzel's counsel. Respondents' Brief p.35. Respondents (correctly) note that, since 1997, Floyd has had frequent contact with Kuenzel's defense team and she believes Kuenzel to be innocent. Id. Far from demonstrating any "taint," Floyd's commitment to

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after the murder" is baseless speculation. See Respondents' Brief p.56. To be clear, it is *Respondents' reliance* upon the "interview notes" to challenge Floyd's credibility and the foregoing substantial questions surrounding this undated document that compel Kuenzel to note the equally reasonable – if not more logical – inference that, because Floyd was a problematic witness for the prosecution, her grand jury testimony was hidden and the "interview notes" were created *ex post facto*, manufactured by the prosecution to challenge Floyd in the event Kuenzel presented her testimony.

ensuring her testimony is heard – as evidenced by her willingness to meet with counsel and provide witness statements over many years – should be commended. Floyd has no motivation to fabricate testimony for Kuenzel about what she saw when she was 13-years old and dating Venn.

Significantly, absent Floyd's courageous act, neither Kuenzel nor this Court would know about the grand jury testimony of Harris, Epperson, and Floyd, or the four previously undisclosed Venn statements. Given Floyd's grand jury testimony in 1988, Respondents' characterization of Floyd's dedication to the truth as evidencing bias smacks of both hypocrisy and desperation. Moreover, Respondents' contention that no juror could believe Floyd is belied by the simple fact that Respondents withheld her grand jury testimony from trial counsel and for over two decades since.

At bottom, the District Court lacked sufficient record support to find "incredible" Floyd's testimony that she saw Venn alone during the disputed frame. Floyd states that:

> I am certain that Harvey was alone on this occasion because I had an unobstructed view of Harvey from my porch where I was standing. I specifically recall where Harvey parked his car. Also, I specifically recall that Harvey's car door was left open and so the light inside the car remained on. As it already was dark outside, I clearly saw that no one else was with Harvey during this second visit.

R3.136-11 p.2. Floyd recalls Venn's visit that evening in particular because her father was upset that Venn visited their house so late – understandable given her age and the age of her boyfriend – and because, earlier that same day, she and Venn had an argument during which Venn "threw [her] grandmother's ring [she] had given to him under the front porch of [her] house." Id. pp.1-2. *This* is the substantive testimony that Respondents cannot challenge.

4. The Four Previously Undisclosed Venn Statements Contain Critical Information Supporting Acquittal

Respondents contend "that defense counsel had copies of Venn's statements and used them to impeach Venn's testimony." Respondents' Brief p.12 n.4. Yet, Respondents carefully avoid denying that four statements (R3.136-2, 5, 6, 8) given by Venn to the police shortly after the murder but before Venn implicated Kuenzel never were disclosed. Respondents' Brief p.12 n.4.

What Respondents instead urge is that a summary of Venn's exculpatory statements produced to counsel – a document entitled "Substance of interview of Harvey Venn on Nov. 11, 1987" (R3.136-7) – included every relevant piece of information contained in the four previously undisclosed statements. This simply is not true. R3.136-7 critically omitted the following information:

- That Pope was an "[o]ld friend [Venn] use[d] to go to school with" (R3.136-2);
- That Venn knew Pope from school in Millerville when Venn was in 8th grade and Pope was in 6th grade (R3.136-2);

- Venn's statement that "I ain't pulled up [to the store] w/nobody. That's wrong – I was alone" (R3.136-2);

- Venn's statement that Kuenzel "was in bed. Far as I can remember he was." (R3.136-2);

- That Venn repeated the same story on several occasions (R3.136-5, 6, 8);

- Officer Zook's observation that Venn's "face got real flushed at the point when he's saying This guy wasn't home. Came on back towards Hollins" (R3.136-2) — evidence that Kuenzel could have used during Zook's cross-examination to support Floyd's testimony that Venn visited her after traveling to meet Chris Morris;

- Zook's observations that it appeared "like [Venn] had a black eye (left)" and that Venn's "left arm looks bruised" (R3.136-2)[9] — evidence that Dr. Gill used to further connect Venn to the crime scene and also establish a credible explanation for the presence of Ms. Offord's blood on Venn's clothing;

- Contrasting Surrett's observation that Kuenzel was in "[a]n excellent sate of mind" days after the murder (T.430), Zook's general observations of Venn's demeanor during his initial police interview, including that Venn's "Voice is now wavering," Venn's eyes were "blood shot," Venn's voice became "shaky," Venn was "getting an attitude 'uh huh – yeah,'" Venn was "picking, chewed at fingers," and that Venn threatened Brasher with "You know you could lose your job if your [sic] wrong, you know, man?" (R3.136-2).

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[9] Because Zook separately references bruises on Venn's eye and arm we know that Zook was not referring to Kuenzel in her notes. To be sure, Zook could not have been referring to Kuenzel because the officer that interviewed Kuenzel that same night did not note the presence of any bruises on him. See R3.136-19.

Rumsey said he provided Kuenzel with "every statement" from Venn, but the summary produced by the police omitted key details that would have aided constitutionally competent counsel.

5. Unlike Kuenzel, Venn Possessed A Motive

Kuenzel offers undisputed evidence of Venn's motive to rob the convenience store. See Appellant's Brief pp.26, 59. Indeed, without Venn, we would not even know that a robbery was the original purpose of the crime as no money was taken from the register. Respondents have no answer to this evidence and thus ignore it completely.

6. Venn's Testimony Is Uncorroborated, Self-Interested And Entirely Untrustworthy

Finally, Kuenzel argues that Venn's self-interested and thoroughly-impeached testimony shifting blame onto Kuenzel is untrustworthy, and would necessarily have appeared so to the trial jury with all the evidence known today. Respondents' "evidence corroborating Venn's testimony" (Respondents' Brief pp.13-17) establishes nothing more than the location of the offense, the *quo modo* of how it was committed, and that Venn knows every detail about the offense — which is understandable because Venn murdered Linda Offord.[10]

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[10] Notably, even Respondents' alleged "corroborating evidence" cannot avoid conflicting with Venn's testimony. See Respondents' Brief p.13-14. For example, Venn claims that he and Kuenzel left the convenience store for a period of time after 10:00 p.m. and returned a "little bit before 11:00." Id. pp.8-9. Yet testimony from the same independent

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Given Respondents' near total reliance upon Venn's testimony to convict Kuenzel despite the overwhelming evidence of Venn's guilt – most notably the presence of Ms. Offord's blood on Venn's clothing and nowhere else – any juror evaluating the old and new evidence likely would fail to convict Kuenzel based upon the quality and quantity of evidence supporting the existence of reasonable doubt.

7. The Evidence Notably Absent From Respondents' Productions Also Supports Likely Acquittal

The evidence not contained within Respondents' "evidentiary proffer" or its response to the Limited Discovery Order speaks volumes. First, there is no evidence apart from Surrett's fleeting notation on a witness list that the police interviewed Sam Gibbons or examined his shotgun.

Second, the police did not conduct *any* investigation into David Pope, the most obvious witness to investigate after Venn. Despite the police's possession of a detailed description of Pope, including what he looked like and where he might be living, the record is wholly devoid of any indication that the police investigated whether or not Pope was, in fact, Venn's companion at the store – as Venn

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witnesses purportedly "corroborating" Venn's story clearly establishes that Venn was at the store at all times between 10:15 p.m. and 11:10 p.m., seated in a car with a white male whom no one identified as Kuenzel. See Appellant's Brief pp.30-32

repeatedly asserted in his first statements to the police – and how or why Pope was excluded as a viable suspect.

Third, Respondents' "evidentiary proffer" does not include any statement from Harvey Venn. Kuenzel, for his part, never has attempted to contact Venn. The reason is self-evident. Kuenzel's Schlup Gateway claim is predicated upon the argument that Venn offered perjurious and self-serving testimony at trial. Given Venn's protection from re-prosecution, even if Venn now provided a full recantation, Kuenzel could not credibly claim that any statement Venn offers is trustworthy.

Respondents, however, are in a wholly different position. In light of the fact that Venn is Respondents' "star witness," the absence of a supplemental affidavit from Venn submitted in these proceedings is telling. This conspicuous absence is made all the more glaring in light of Respondents' recent procurement of new affidavits from the former-District Attorney, the District Attorney's investigator, a former-Detective in the Sylacauga police department, the State's firearm's expert at trial, and the stenographer that transcribed grand jury testimony in 1988, all confirm Respondents' conscious decision not to place any further reliance upon Venn's word.

C. Neither Party Can Wear The "White Hat" Before This Court, But On Balance, The Equities Favor Kuenzel

Without question, both sides have engaged in impropriety during the tenure of this case. But the parties' respective levels of impropriety are not in the balance presented by Respondents.

With respect to Kuenzel, Respondents' characterization of Kuenzel's mother's post-trial actions and testimony as perjurious is entirely accurate. Undersigned counsel said it at oral argument in February 2007, and it will not be denied herein: Kuenzel's mother committed perjury in a misguided and desperate attempt to correct her son's fundamentally unjust conviction. Kuenzel condemns, in the strongest terms possible, his mother's indefensible subornation of perjury.

On the other hand, Respondents' characterization of Kuenzel's affidavit as "fraudulent" is valid only if one ascribes to the belief that "the louder you shout, the more meaningful your argument." Respondents' argument attacks a straw man in a thinly-veiled effort to cast Kuenzel as a liar. To be clear, Kuenzel cannot prove that he had a "one night stand" on November 9th with a blond, married female. If it was Lisa Sims, the fact that a married woman would not admit to an extra-marital affair in open court is not inconceivable; if not her, Kuenzel's inability to locate a woman that he bedded casually still is not, of itself, evidence of

fraudulent testimony.[11] The relevant point is that Kuenzel's word is the only proof he had sexual relations with a woman after Venn dropped him off at home. Thus – unlike Venn – Kuenzel does not in any way urge this Court to rely upon his bald testimony to support his claim of reasonable doubt.[12]

Notably, Kuenzel openly acknowledges his mother's subornation of perjury, while Respondents fail to even mention its numerous acts of malfeasance. For over two decades, Respondents withheld material grand jury testimony provided by Harris, Epperson and Floyd, as well as four police statements from Venn that do not implicate Kuenzel. Respondents heavily leveraged the incorrect gauge of Venn's shotgun to secure a conviction, and yet cannot produce a single document evidencing their investigation and/or the exclusion of Venn's shotgun as the murder weapon. Respondents also failed to conduct *any* investigation of David Pope or even so much as show the other witnesses at the store a photograph of Pope, despite the fact that not a single witness at the store that evening identified Kuenzel as Venn's companion.

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[11] As discussed herein, counsel's factual investigation at the time was wholly incomplete and ineffective.

[12] Kuenzel's only falsehood is contained in his initial statement to the police that Venn arrived home "Right @ 10 or 5 after Monday." R3.136-19. But the context in which that subsequently-qualified statement was made is critical, and mitigates the impermissibility of what Kuenzel thought was a "white lie." See R3.136 ¶ 22.

Additionally, Respondents showed previously undisclosed documents to a lay witness before providing them to Kuenzel or the federal courts, and offer no indication that these documents would ever have been disclosed but for Floyd's courageous act of contacting undersigned counsel. Finally, Respondents conveniently lost two critical pieces of evidence – Venn's blood-stained pants and the shotgun alleged to be the murder weapon – precluding Kuenzel from conducting any scientific testing on these items.

Neither party stands before this Court with clean hands, but Respondents' efforts to don the "white hat" is blatant hypocrisy. Moreover, Respondents' claim that Kuenzel has not consistently proclaimed his innocence is a callous and erroneous cheap-shot at a man that has spent 23-years on death row shouting his innocence to any court that would listen; especially given that Respondents are the same party consistently claiming in state and federal court that Kuenzel lacks a forum in which to proclaim his innocence.

Kuenzel addresses this argument last because its only relevance to the salient discussion herein goes to sway in a close call. If there is a question about which party should be given the benefit of the doubt, Kuenzel respectfully submits that it should go to the party that offered the District Court its attorney-client privilege, agreeing without limitation to "produce anything and everything contained in the file maintained by his counsel." R3.135 pp.36-37.

CONCLUSION

There is one point on which all parties are in agreement: "It is time for this case to finally come to an end." R3.125 p.40. Kuenzel, a 48-year old man who is likely innocent and whose conviction was secured through an unconstitutional trial, must either be re-tried in a fair proceeding, or set free and given a chance to salvage what time remains of his life. After 23-years of incarceration, Kuenzel should be granted one chance at a fair trial to determine his fate.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, David A. Kochman, hereby certify, relying on the word count provided by Microsoft Word, that the foregoing Petitioner-Appellant's Reply Brief contains 6,995 words.

/s/ David A. Kochman
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CERTIFICATE OF SERVICE

I, David Kochman, hereby certify that on the 6th day of May 2011, I served a copy of the foregoing Petitioner-Appellant's Brief and Record Excerpts upon the attorneys for Respondents-Appellees by delivering the same to UPS Overnight Mail, postage prepaid, addressed as follows:

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