IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA

WILLIAM ERNEST KUENZEL,	*	
	*	
Petitioner,	*	
	*	
v.	*	Case No. _____
	*	
STATE OF ALABAMA	*	(Related to Case No. CV-95-361)
	*	
Respondent.	*	
	*	

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BRIAN YORK
CIRCUIT CLERK

AFFIDAVIT OF ROBERT M. MORGENTHAU IN SUPPORT OF PETITIONER KUENZEL'S SUCCESSIVE PETITION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 32 OF THE ALABAMA RULES OF CRIMINAL PROCEDURE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK

I, Robert M. Morgenthau, hereby swear the following to be true and correct to the best of my knowledge under penalties of perjury:

1. I submit this 10-page affidavit in support of William E. Kuenzel's Successive Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure.

Professional Qualifications

2. I was born in 1919 and trace my roots through my grandmother who was born in Montgomery, Alabama. I volunteered for the U. S. Navy V7 program in June of 1941 and spent my 2lst birthday aboard the USS Wyoming in Guantanamo Bay, Cuba. I graduated from Amherst College in 1941 and then graduated from the midshipman program as an Ensign in September of 1941. I served for four and half years, attaining the final rank of Lieutenant Commander. I was the Executive Officer and Navigator for both the USS Lansdale DD426,

which was sunk in the Mediterranean, and the USS Harry F. Bauer DM26, which received the Presidential Unit of Citation for service in Iwo Jima and Okinawa. Upon returning from service, I obtained my law degree from Yale Law School in 1948.

3. I was an associate and then a partner at the firm of Patterson, Belknap & Webb engaging in the general practice of law. I was appointed by President John F. Kennedy in 1961 to serve as the United States Attorney for the Southern District of New York, a position I maintained until 1970.

4. After returning to private practice, I was elected to the Office of the District Attorney for New York County in 1974. I continued to serve as the District Attorney for New York County until 2009. During my 35-year tenure in that office, I oversaw approximately 3,500,000 million criminal prosecutions, including thousands of murder cases. Measured by crime statistics, my time in office as District Attorney was incredibly successful: by 2009, there were 90.4 percent fewer murders in New York County than there were when I took office.

5. I am now of counsel at the law firm Wachtell, Lipton, Rosen & Katz in New York, New York.

6. I have devoted my legal career to serving in the public interest, actively working to vindicate the rights of crime victims while also ensuring that the full panoply of constitutional protections are afforded to those accused of crimes. My career reflects a devotion to fairness and justice; in 2009, I received the Senator Paul H. Douglas Award for Ethics in Government from the University of Illinois and, in 2011, I was honored to receive the New York State Bar Association's highest honor, the Gold Medal, noting my "tremendous success" and "unsurpassed professionalism." More recently, I received the Medal of Honor from the International Association of Prosecutors and I have been selected as one of sixteen attorneys to receive the

Lifetime Achievement Award in commemoration of the 125th anniversary of the New York Law Journal.

7. I also have had direct experience confronting situations where I obtained a conviction that, years later, appeared to have been incorrect. Most notable among those situations is what transpired in the Central Park jogger case.

8. In 1990, five young teenagers were prosecuted by my Office for the rape and brutal beating of a female jogger in Central Park. At the time we prosecuted those cases, I was certain of their guilt beyond a reasonable doubt. Among other evidence of guilt, those defendants were seen in Central Park that evening not far from where the victim's body was found, and four of the five defendants confessed to the attack that night, each implicating the others. The fifth defendant made verbal admissions but refused to sign a confession, yet his participation was confirmed by each of the other four defendants. As was customary at the time, the police used the full spectrum of interrogation tactics available when questioning these juvenile witnesses in the presence of their parents or guardians, including ruses. Because no DNA evidence directly linked the defendants to the crime, the confessions were the principal evidence relied upon by my office. The defendants were each convicted and all convictions were affirmed on appeal.

9. However, twelve years later a man named Matias Reyes told the Inspector General of the New York City Department of Corrections that he was, in fact, the actual and sole perpetrator. The Inspector General then passed this information to my office. Reyes was serving a life sentence for other crimes but had not, at that point, been associated with the Central Park jogger case. Upon closer inspection of Reyes's account and the evidence in the case, I became disturbed that our office may inadvertently have prosecuted the wrong individuals. Of my own

accord, I ordered that a DNA test be performed. The results of the test positively identified Reyes as the sole contributor of the semen found in and on the victim to a factor of one in 6,000,000,000 people. Following a months-long investigation, I determined that the new evidence came within the New York statute governing newly discovered evidence.

10. Yet, there was a procedural problem. My Office was time barred from moving to set aside the verdict, so I contacted defense counsel and advised them to make a motion to set aside the verdict. The motion was made. In support of the motion, I submitted an Affirmation offering my opinions of the defendants' confessions based upon a fresh look, testifying as follows:

> A comparison of the statements reveals troubling discrepancies. ... The accounts given by the five defendants differed from one another on the specific details of virtually every major aspect of the crime—who initiated the attack, who knocked the victim down, who undressed her, who struck her, who held her, who raped her, what weapons were used in the course of the assault, and when in the sequence of events the attack took place. ... In many other respects the defendants' statements were not corroborated by, consistent with, or explanatory of objective, independent evidence. And some of what they said was simply contrary to established fact.

I thereby recommended to the Court that the convictions be vacated, opining that, had the newly discovered evidence been available during the original trials, it likely would have caused the juries to question the veracity and reliability of the defendants' confessions. The court promptly set aside the verdict convicting the "Central Park Five".

11. Given my many years of experience with criminal law, I submit that I am qualified to give an opinion as an expert on proper prosecutorial procedures, including compliance with constitutional and ethical precepts, the possibility that a wrongful conviction has been had, the effect that new evidence likely would have on the minds of jurors reviewing the total evidentiary record subsquently available, and the likelihood that an individual is guilty based upon an impartial review of the total evidentiary record subsequently available.

My Review of the Record in this Case

12. Mr. Kuenzel's attorneys have offered me complete and unfettered access to anything and everything in the case file maintained by their offices, including trial records and records from state post-conviction proceedings and federal *habeas* proceedings.

13. In the course of my review of the record, I have considered the trial testimony, the evidence presented by the prosecution at trial and the testimony presented by Mr. Kuenzel at trial. I also have reviewed the multiple documents that were not available to the trial jury, including evidence withheld from the defense by the prosecution—such as grand jury testimony of April Harris, trial counsel's affidavit and statements made by Harvey Venn to the police officers who questioned Venn in the days immediately following the murder in 1987—and evidence that was uncovered and collected by Mr. Kuenzel's postconviction counsel. Although much of this previously undiscovered evidence "existed" at the time of trial, it was either not turned over to defense counsel by the prosecuting attorneys, or not investigated by defense counsel. Finally, I have considered what evidence is *not* in the record, including the absence of any physical evidence connecting Mr. Kuenzel to the crime, the post-trial loss of physical evidence directly connecting Venn to the crime, and the lack of any records documenting how or why the prosecution team failed to investigate obvious leads suggesting alternative suspects, and concluded that such alternative suspects were not likely to be Venn's accomplice at the convenience store.

14. I submitted an *amicus curiae* brief to the United States Supreme Court on behalf of Mr. Kuenzel, along with Gil Garcetti, the former District Attorney of Los Angeles County, and E. Michael McCann the former District Attorney of Milwaukee County. My central involvement with that briefing allowed me to become intimately familiar with the proceedings in this matter.

Expert Conclusions

15. In the first instance, I want to make clear that my intention is not to supplant the Court's role in evaluating Mr. Kuenzel's claims; rather, I submit this Affidavit to assist the Court in its consideration of Mr. Kuenzel's petition because my experiences afford me a unique vantage point from which to offer the assessment set forth herein.

16. Based on my review of the record in this case, I am convinced to a reasonable degree of prosecutorial certainty that there is little to no doubt that Mr. Kuenzel is factually innocence of having any involvement in the murder of Linda Offord. I am further convinced to a reasonable degree of prosecutorial certainty that there is no doubt that Mr. Kuenzel did not receive a constitutionally permissible trial. Finally, I am convinced to a reasonable degree of prosecutorial certainty that the facts known today but unknown to the trial jury are non-cumulative, do not amount to mere impeachment evidence and, had they been known at the time of trial, Mr. Kuenzel would have been acquitted, both because the prosecution could not have proven guilt beyond a reasonable doubt and because Mr. Kuenzel would almost certainly appear innocent. It is my opinion that Mr. Kuenzel is, indeed, factually innocent and deserving of a new trial. My opinion is based on, among other things, the factors discussed below.

17. First, it is clear that evidence critical to the determination of Mr. Kuenzel's innocence and the reliability of the prosecution's case was withheld from the defense, both before and during Mr. Kuenzel's original trial. At trial, only two witnesses put Mr. Kuenzel anywhere near the scene of the crime that evening. The prosecution's key witness was Mr. Kuenzel's roommate, Harvey Venn. Venn was an admitted accomplice who pled guilty and testified, in exchange for a 10 year sentence, that Mr. Kuenzel went into the store alone and killed the clerk. But in 2010, almost 22 years after trial, the State turned over records of police interviews with Venn in the days following the crime that had never before been produced.

Those interview notes reveal that Venn initially described to the police an interaction he had at the store that night with a white male named David Pope, and that Venn provided a detailed description of what Pope looked like, how he knew Pope and that he was seated in his car with Pope outside the convenience store. Eight disinterested witnesses who were physically present at the store observed Venn seated in his car with a "white male," and none of them identified Mr. Kuenzel as the person they observed accompanying Venn. Yet, neither the police nor the prosecutors conducted any investigation into David Pope, and there is no record of how Pope was excluded as a witness. Those interview notes also reveal that Venn initially told the police Kuenzel was not with him that evening, but was instead asleep at their shared residence miles away. The prosecution denied Mr. Kuenzel's trial lawyer access to this potentially exculpatory evidence and, therefore, deprived the defense of a fair opportunity to promptly investigate Pope and confront Venn with these statements at trial.

18. Second, the new evidence also undermines the only other evidence, apart from Venn's testimony, that Mr. Kuenzel was with Venn that night. April Harris testified at trial that she saw Mr. Kuenzel and Venn inside the store for a split-second as she drove by at approximately 9:45 p.m. Ms. Harris's testimony was critical to the prosecution's case because Alabama law requires independent corroboration of accomplice testimony. *See* Ala. Code § 12-21-222. However, the prosecution failed to disclose Ms. Harris's grand jury testimony until 2010, wherein she stated, also under oath, that she "couldn't get any description" and "couldn't really see a face." Defense counsel was thereby unable to confront Ms. Harris with her prior inconsistent statement when, at trial, she testified confidently that she positively identified Mr. Kuenzel and Venn as the persons she observed inside the convenience store. At the time of trial, Ms. Harris was a teenager. Based upon a review of the transcript of Ms. Harris's statement to

the police, grand jury transcript and trial testimony, it is my opinion that the prosecution team coerced Ms. Harris to corroborate Venn's testimony in order to satisfy Ala. Code § 12-21-222 even though she was, by her own earlier admission, unable to do so.

19. Third, there is no other evidence which suggests that Mr. Kuenzel was at the convenience store on the night of the murder. Only the testimony of Mr. Venn and Ms. Harris placed Mr. Kuenzel at the scene of the crime and, as detailed above, that testimony is severely undermined by the new evidence. Moreover, the record shows that an additional eight witnesses saw Venn at the convenience store before the murder, but not one of the eight identified Mr. Kuenzel as his companion, and Mr. Kuenzel has an alibi witness.

20. Fourth, there is no physical evidence linking Mr. Kuenzel to the crime, and the physical evidence points directly to Venn's involvement. Among other things, the blood of Ms. Offord was splattered on the pants worn by Venn that night. Venn was clearly worried about the implications of this fact because he denied that the stains were human blood on two occasions, including at trial. Yet the prosecutor conceded this fact before the jury, acknowledging that he believed the forensic expert who testified the blood on Venn's pants was mostly likely the victim's blood. The newly discovered physical evidence also reveals that, contrary to Venn's testimony at trial, Venn possessed a .16 gauge shotgun on the night of the murder, the same gauge weapon as was used to commit the murder. I am informed that both of the foregoing pieces of evidence have gone missing from the County evidence locker.

21. Fifth, absent strong independent corroboration, there is little reason to suspect that Venn's testimony implicating Mr. Kuenzel is reliable. There is substantial direct evidence of Venn's involvement in this crime. Venn has told multiple different versions of what transpired that evening, and he lied to the trial jury regarding central facts, including most notably the blood

on his pants. Additionally, portions of the story he tells are irreconcilable with the testimony of other, disinterested witnesses. For example, Venn testified that he never actually entered the convenience store at any time, and yet Ms. Harris testified that she observed Venn inside the convenience store. Venn also testified that he drove away from the convenience store shortly after 10:00 p.m. and returned just before 11:00 p.m., and yet multiple witnesses testified seeing and/or speaking with Venn, outside the convenience store, at various times between 10:00 p.m. and 11:00 p.m. Given Venn's strong incentive to deflect blame from himself, it is unsurprising that Venn would implicate someone else in exchange for avoiding a death sentence. There simply is no reason to place much, if any weight in Venn's words when evidence corroborating Venn's implication of Mr. Kuenzel is otherwise absent.

22. Based on my experience as a prosecutor and the millions of cases I have overseen, it is my belief that, upon a review of the evidence known today, Venn is falsely framing Mr. Kuenzel, Mr. Kuenzel is factually innocent of the murder of Ms. Offord, and any jury would almost certainly acquit Mr. Kuenzel if he were re-tried today.

23. If a new trial were held today and Venn's testimony excluded—as required by Ala. Code § 12-21-222—the jury would be left to consider the following facts: (1) no witness observed Mr. Kuenzel at the convenience store on the night of the murder; (2) there is no physical evidence connecting Mr. Kuenzel to this crime; (3) Mr. Kuenzel has an alibi witness as to his whereabouts, shortly before the murder and many miles away without means of transportation; (4) Venn had a motive to commit the crime while the prosecution offered no motive for Mr. Kuenzel; (5) Venn was observed at the convenience store by multiple witnesses with a while male who was not identified by any of those witnesses as Mr. Kuenzel; (6) Venn identified his white male companion to the police as David Pope, describing him in detail, and

the police apparently failed to conduct any investigation of Pope; (7) Venn's 13-year old girlfriend saw Venn shortly before the murder, and observed that he was both under the influence of drugs and/or alcohol, and was alone, i.e., without Mr. Kuenzel; (8) Venn told multiple stories to the police and trial jury; (9) the shotgun Venn admitted that he possessed on the evening of the murder was a .16 gauge, the same gauge shotgun as the murder weapon, and not a .12 gauge shotgun, as Venn falsely represented to the trial jury; and, most damning (10) Venn has the victim's blood on his clothes, cannot explain how it got there, and falsely stated, first, that it was red paint from the textile factory where he worked, and later at trial, that it was squirrel blood. I believe that any juror would also be troubled by the prosecution's unexplained loss, post-trial, of the pants Venn wore on the night of the murder containing the victim's blood and the shotgun the prosecution claimed to be the murder weapon.

24. It is my opinion that this case presents a deeply troubling example of an injustice that has not yet been corrected. Having dedicated over 40 years of my life to prosecuting crimes, I possess a continuing interest in maintaining and preserving the integrity of prosecutors' offices across the country as well as public confidence in our criminal justice system.

25. The death penalty is final and irreversible. I believe that justice cannot be served here without an opportunity for Mr. Kuenzel to demonstrate his innocence. It is my opinion, that I reach with a reasonable degree of prosecutorial certainty, that Mr. Kuenzel is factually innocent of this murder.

Date: September 3, 2013
New York, New York

Robert M. Morgenthau

Sworn to before me this
3rd day of September, 2013

Notary Public

PATRICIA H. CIBULKA
Notary Public, State of New York
No. 01CI4647805
Qualified in Westchester County
Certificate Filed in New York County
Commission Expires November 30, 2013