IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA

WILLIAM ERNEST KUENZEL,	*	
	*	
Petitioner,	*	
	*	
v.	*	Case No. _____
	*	
STATE OF ALABAMA	*	(Related to Case No. CV-93-351)
	*	
Respondent.	*	
	*	

SUCCESSIVE PETITION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 32 OF THE ALABAMA RULES OF CRIMINAL PROCEDURE

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COMES NOW the Petitioner William Ernest Kuenzel ("Kuenzel" or "Petitioner"), currently on death row at Holman Correctional Facility, and hereby petitions this Honorable Court, pursuant to Rule 32.2(b)(1), 32.2(b)(2) and 32.1(e) of the Alabama Rules of Criminal Procedure, to vacate his conviction on the ground that the trial court was without jurisdiction to render judgment and because newly discovered material facts exist demonstrating that Kuenzel is factually innocent.

In support of his Rule 32 petition, Kuenzel submits the following:

INTRODUCTION

1. One rainy night in November 1987, a convenience store clerk in Sylacauga was killed by a single blast from a .16 gauge shotgun during an apparent robbery attempt. Kuenzel was convicted of the crime despite his adamant insistence of complete innocence. Twice, Kuenzel refused a generous plea deal on this basis. The prosecution's case rests upon Harvey Venn, a self-confessed accomplice who first denied, and then later admitted, participating in the crime. Despite a mountain of physical and testimonial evidence directly implicating Venn, the prosecution allowed Venn to testify against Kuenzel in return for the same deal Kuenzel repeatedly rejected. The evidence connecting Kuenzel to this crime is a house of cards built upon Venn's testimony and the testimony of a single eye witness.

2. This Court is empowered to grant the Petition because it is now clear that the Circuit Court lacked jurisdiction to convict Kuenzel, or even permit the prosecution to take this case to a jury. Ala. R. Crim P. 32.2(b)(1) authorizes the granting of a successive petition where the circuit court lacked jurisdiction, and Alabama Code § 12-21-222 is plainly jurisdictional, stating: "A conviction of felony *cannot be had* on the testimony of an accomplice unless ...." An unbroken line of cases from the Alabama Supreme Court confirm that evidence "which is

colorless and neutral insofar as the defendant's connection with the crime is concerned, is not sufficient corroboration to warrant submission of the case to the jury." See, e.g., Ex parte McCullough, 21 So. 3d 758, 761-62 (Ala. 2009) (citing cases). Thus, where a prosecution relies upon accomplice testimony, § 12-21-222 prohibits courts from exercising jurisdiction unless that testimony is adequately corroborated. There is no time limit for raising such claims.

3. Although this Petition raises two grounds for relief, the first—and, we contend, dispositive—question is, therefore, whether, in light of the previously undisclosed evidence, the prosecution can still satisfy its statutory burden to demonstrate that this Circuit Court possessed jurisdiction to convict. To be sure, if Venn's testimony is sufficiently corroborated, then jurisdiction lies and Kuenzel's 32.2(b)(1) claim fails; but if there is insufficient evidence corroborating Venn's testimony, jurisdiction "cannot be had" and the Petition must be granted.

4. Here, jurisdiction is lacking because evidence withheld by the State until 2010 reveals the linchpin of the prosecution's corroborating evidence—April Harris's alleged eyewitness identification testimony—to be a nullity. Harris supplied the essential non-accomplice evidence purporting to corroborate Kuenzel's involvement in satisfaction of Alabama Code § 12-21-222. At trial, Harris testified that she observed Venn and Kuenzel together at the store, close in time to the murder. But we now know that, when Harris testified before the grand jury about her alleged observation of two individuals at the store, she related that she "couldn't get any description," "couldn't really see a face", and "couldn't even tell him [the police investigator] what they had on."[1] While Harris stated that she *believed* she saw Venn and Kuenzel, Harris's grand jury testimony exposes her "belief" to be baseless speculation.

[1] See April Harris Grand Jury Testimony, Affidavit of David A. Kochman, dated September 17, 2013 ("Kochman Aff."), Exh. A.

5. Harris's grand jury testimony was inexcusably suppressed by the prosecution for over two decades, and was made available by the State only after it was shown to a lay witness, who courageously contacted Kuenzel's counsel and disclosed its existence.

6. Harris's importance to the prosecution's satisfaction of its burden to prove jurisdiction cannot reasonably be disputed, nor can it be overstated. Indeed, the Court of Criminal Appeals confirmed that Harris's testimony was the key ingredient enabling the prosecution to overcome § 12-21-222 when it decided this claim on direct appeal. See Kuenzel v. State, 577 So.2d 474, 514-15 (Ala. Crim. App. 1990). Specifically, the appellate court reasoned that Harris's trial testimony identifying Kuenzel with Venn, coupled with the "[o]ther witnesses [who] testified that Venn and an unidentified white male were at the store …, *while certainly not overwhelming*, was sufficient to corroborate Venn's testimony and to satisfy the requirements of § 12-21-222." Id. (emphasis supplied). The Court of Criminal Appeals explained that "[t]he credibility of the witnesses who supplied the corroboration of the accomplice's testimony was for the jury and not an appellate court." Id. at 515.

7. Without Harris, Venn's testimony alone serves as the single pillar underpinning the prosecution's entire case connecting Kuenzel to the commission of this crime, and Kuenzel's conviction must therefore be vacated. Applying the well-established "subtraction rule", which requires disregarding Venn's testimony and, now, Harris's identification, the State cannot meet the parameters of § 12-21-222 because the remaining evidence (i) is not "of a substantive character," (ii) is not "inconsistent with the innocence of the accused" and (iii) does not "do more than raise a suspicion of guilt." Williams v. State, 72 So. 3d 721, 723 (Ala. Crim. App. 2010) (quoting Ex parte Bullock, 770 So. 2d 1062, 1067 (Ala. 2000)). See also McCullough, 21 So. 3d at 761-64; Jackson v. State, 98 So. 3d 35 (Ala. Crim. App. 2012). Here, the remaining

evidence is of precisely the quality courts regularly find insufficient to satisfy the prosecution's jurisdictional burden under § 12-21-222: "it tends to connect [Kuenzel] with the offense only when given direction or interpreted by, and read in conjunction with the testimony of the accomplice [Venn]." Williams, 72 So.3d at 723 (internal citations omitted).

8. Second, Kuenzel's conviction must also be set aside because the evidence now demonstrates what would have been evident to any jury had the prosecution not withheld critical evidence, and had defense counsel performed even a cursory factual investigation: Kuenzel had nothing whatsoever to do with the murder of Linda Jean Offord; Venn eagerly framed Kuenzel to save himself from the death penalty and obtain release in 1997; in light of Venn's recently-revealed initial statements to the police, and his many false and inconsistent statements thereafter, no jury would credit Venn's testimony as to any disputed issue; the prosecution rushed to prosecute *someone* for this crime and improperly increased its ability to "win"; the prosecution failed to investigate obvious leads which did not point to Kuenzel and that might have led to the discovery of, among other things, the true identity of Venn's companion at the convenience store; and, Venn is almost certainly the true murderer. See Ala. R. Crim P. 32.2(b)(2); Affidavit of Robert M. Morgenthau, dated September 3, 2013 ("Morgenthau Aff.").

9. Petitioner is mindful that this Court receives and dutifully considers countless garden variety claims contained in hundreds of petitions seeking to set aside a conviction or sentence. Petitioner is also mindful that the vast majority of those defendants are guilty and, even if ineffectiveness exists or some evidence was withheld, the outcome of most cases would not have been different. It is just as easy to assume that, if Kuenzel's claims truly are as extraordinary as they appear, and his rights so blatantly violated as undersigned counsel believe, that *some* court along the way would have intervened to correct this injustice. The unfortunate

truth is that Kuenzel has spent over two decades before almost every court, at every level of our state and federal judicial systems, attempting to have his claims considered by someone on the merits. All of that time, energy and resources were devoted to litigating *procedural* issues raised by the State, *i.e.*, whether Kuenzel timely filed his initial Rule 32 petition or whether it was filed six months too late, and whether any exception permits Kuenzel to present his defaulted constitutional claims of guilt-phase trial error to any court. At no time during any proceedings did any post-conviction court reach the underlying merits of Kuenzel's claims, or even grant him subpoena power or an evidentiary hearing.

10. The primary reason why this Circuit Court is being asked to vacate a conviction from 1988 is because the prosecution withheld evidence and failed to give Kuenzel a full and fair opportunity to defend himself against capital murder charges. There are two independent mechanisms through which this Petition may appropriately be granted: on the basis of lack of corroboration of Venn's testimony, and on the basis that Kuenzel is factually innocent. The remedy to prevent this from happening in the future is to simply command prosecutors to abide their constitutional duties, and to not file charges based upon accomplice testimony unless independent evidence connects the defendant with the crime.

11. This Court's decision likely will determine Kuenzel's fate, life or death, as Kuenzel does not raise any challenges to his sentence. Kuenzel is 51 years-old and has been on death row for 25 years, always maintaining his innocence. The suppression of evidence in this capital case was an inexcusable subversion of justice. This Petition is Kuenzel's last chance to be released from prison and salvage what time remains in his life. If the State can locate some other evidence, it can re-prosecute. Kuenzel implores this Court to grant his request for relief.

UNDERLYING FACTS OF THE CRIME

The following is a summary of the evidence relevant to Kuenzel's claims in the Petition.

A. The Total Evidence Known Today Relevant to the Crime[2]

12. In the summer of 1987, William Kuenzel, 25, and Harvey Venn, 18, became friends at the textile factory in Goodwater, Alabama where they worked. (T.119-20[3]; Kochman Aff., Exh. N.) In September 1987, Venn moved into Kuenzel's nearby residence. (T.119-20; Kochman Aff., Exh. N.) In lieu of paying rent, Venn drove them to and from work. (T.120; Kochman Aff., Exh. N.) Kuenzel did not own a car. (T.120; Kochman Aff., Exh. N.)

13. On Monday, November 9, 1987, Venn and Kuenzel worked until 2:30 p.m., spent the afternoon driving around and were last seen together around 7:00 p.m. (T.125-32; 448-49; Ex parte Kuenzel, 577 So. 2d 531, 531-32 (Ala. 1991).)

14. Kuenzel consistently has maintained that Venn dropped him off at their shared residence in Goodwater by 8:00 p.m. (See, e.g., Kochman Aff., Exh N. See also T.566-68 (Kuenzel's alibi witness's trial testimony).)

15. Sometime after 8:00 p.m. that same evening, Venn visited two people: first, a friend named Chris Morris who lived in Fayetteville, and next, Crystal Floyd, his then 13 year-old girlfriend who lived with her parents in Hollins.* (Kochman Aff., Exhs. B, D, E, F, I and J.) Floyd recalls her interaction with Venn that evening, and describes why and how she knew that Venn was alone.* (Id., Exh. I and Exh. J, p.1.)

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[2] The new evidence, unknown to Kuenzel at trial and on direct appeal, an unheard by the trial jury, is denoted with an asterisk ("*").

[3] References to "T.__" correspond to pages from the six-volume transcript of proceedings in the Circuit Court of Talladega County, Criminal Division, Case No. CC 88-211.

16. Incidentally, Floyd related her encounter with Venn to at least the police, prosecutor and the grand jury.* (See id., Exhs. I and J.) Yet, Floyd did not testify at trial because she was not called by the prosecution, and her grand jury testimony was unknown to Kuenzel until post-conviction. (See Affidavit of William J. Willingham, dated February 12, 2007 ("Willingham Aff.").) The prosecution withheld all statements made by Floyd, and fee-capped defense counsel failed to conduct any investigation into Floyd, having relied upon the prosecution's professed compliance with its disclosure obligations after being "lulled into complacency" by statements from the then-District Attorney, Robert Rumsey ("Rumsey"). (Id.)

17. Venn next was observed by eight disinterested individuals nearly continuously between 10:00 and 11:05 p.m. at the convenience store. (See, e.g., T.459, 470, 479, 484 and 504.) Each of those independent witnesses uniformly testified they (i) saw Venn's car, (ii) saw and/or spoke with Venn and (iii) noticed that Venn was accompanied by a white male. Despite ample opportunity, not a single one of those witnesses identified Kuenzel as the white male they observed with Venn.

18. It is important to note that the identity of this individual is not a complete mystery. Unbeknownst to Kuenzel until 2010, when Venn first spoke with the police he told them on multiple occasions that the person seated next to him in his car outside the store was a "friend" named "David Pope," and that Pope was a "white male" Venn knew from school in "Millersville" when Venn was in 8th grade and Pope was in 6th grade.* (Kochman Aff., Exhs. B, C, D, E and F.) Venn provided the police with a detailed description of Pope, along with Pope's approximate age, relationship to Venn and likely residence.* (Id., Exhs. B, E and F.) Venn also confirmed he saw and spoke with a number of the witnesses who had seen him at the store. (Id., Exhs. B, C, D, E and F.) Yet, despite these valuable statements from Venn in the days

immediately following the crime, there is no record of the police conducting any investigation into Pope, no evidence of Pope's photograph being shown to any of the eight disinterested witnesses physically present at the store and who failed to identify Kuenzel, and no evidence whatsoever indicating how, if at all, Pope was excluded as Venn's companion.

19. Linda Jean Offord was 39-years old and a mother of three children. Her shift as the store clerk ended at 11:00 p.m. but she agreed to cover for a co-worker running late. At some point between 11:05 and 11:20 p.m., Ms. Offord was killed by a single round fired from a .16 gauge shotgun. Venn possessed a .16 gauge shotgun that evening, * (T.140; Kochman Aff., Exh. K), and Ms. Offord's blood was found splattered on the left leg of Venn's jeans. Kuenzel v. State, 577 So. 2d at 493.

20. The police questioned Venn twice on Wednesday, November 11th.* (Kochman Aff., Exhs. B, C, D.) It is believed that the police focused on Venn because his claim of being home by 10:00 p.m. was contradicted by statements from the eight disinterested witnesses who observed him at the store between 10:00 and 11:05 p.m.

21. In his first statements, Venn said that he had spent the day with Kuenzel. (Id., Exh. B.) At approximately 8:00 p.m., he traveled alone to the home of his friend, Chris Morris, to see about some concert tickets. (Id.) Morris was not home, so Venn "went by his friend's house to see if he was there." (Id.) Even though it was barely 48 hours later, Venn denied being able to remember this friend's name. (Id.) However, previously undisclosed police notes reveal that the officer taking Venn's statement observed that "his face got real flushed at the point when he's saying 'This guy wasn't home. Came on back towards Hollins.'"* (Id.) Venn's reluctance to name this "friend" could be explained by the fact that his girlfriend at the time, Crystal Floyd,

lived in Hollins with her parents, Floyd was only 13-years old, Floyd saw Venn that evening and Floyd knew Venn was alone. (Id., Exhs. I, J.)

22. Venn admitted to the police that he had visited the store Monday evening, but insisted he arrived home shortly after 10:00 p.m. and did not, therefore, commit the murder. (Id., Exh. B)

23. As for Kuenzel's whereabouts that Monday, Venn told the police: "He was in bed. Far as I can remember he was."* (Id.) In fact, Kuenzel's stepfather testified at trial that, sometime after 10:00 p.m., he observed Kuenzel asleep on a couch at the home he shared with Venn, 25 miles from the convenience store. (T.566-68.)

24. Later that Wednesday night, November 11th, the police executed a search warrant on Venn's residence. Venn was not home, but Kuenzel—Venn's roommate—granted the police permission to search the premises. The police recovered the pants Venn wore Monday evening. They were stained with Ms. Offord's blood.

25. When the police asked Venn about the stains, he first claimed it was "red paint" or "lead" from the textile factory (see, e.g., id.); at trial, Venn changed his story to testify—*again* falsely—that it was "squirrel blood." (T.165-66, 542-43.) It is an undisputed fact of record that the stains on Venn's pants are Ms. Offord's blood spatter — Rumsey conceded the point during his summation. (T.673.) Although Venn denied entering the store, there was no blood found anywhere outside the store, except on Venn's pants. (T.369-75.) Venn never has been able to explain how or why Ms. Offord's blood is present on his clothes.

B. Venn Changes His Story to Implicate Kuenzel

26. At 2:20 a.m. on Sunday, November 15th, after days of being held in state custody, interrogated without counsel, and, upon information and belief, threatened with a capital

prosecution, Venn "confessed." Venn conceded he was at the store during the murder, but now implicated Kuenzel as his companion and the triggerman. (Kochman Aff., Exh. G.)

27. Later that day, the police contacted Kuenzel and asked him to come in for questioning; he appeared voluntarily. The prosecutor presented Kuenzel with a choice: he could enter a guilty plea and testify against Venn in exchange for an eight to ten year sentence, or he could go to trial on capital murder charges, in which case the State would seek the death penalty. Proclaiming his innocence, Kuenzel rejected the plea deal. The prosecution then extended the same deal to Venn, and he accepted—Venn was released from prison in 1997. (Notably, on the eve of trial, the prosecution once again offered Kuenzel this arrangement and, as before, he refused. (See id., Exh. N; Willingham Aff.))

28. No physical evidence—neither fingerprints, blood, nor ballistics—connects Kuenzel to the crime.

29. None of the eight witnesses physically present at the store between 10:00 and 11:05 p.m. identified Kuenzel as Venn's "white male" companion, and David Pope cannot be excluded as this individual.

C. April Harris's Testimony and Ala. Code § 12-21-222

30. Excluding Venn's testimony, there never was, nor is there today, any evidence directly linking Kuenzel to the murder.[4] The strongest circumstantial evidence presented by the prosecution came from April Harris, a teenage passenger in a car driving by who testified that, for a split-second around "9:30 or 10:00", she saw Venn and Kuenzel together inside the store.

[4] See Rumsey Summation, T.682 ("I submit this case is not all circumstantial evidence. There is a lot of direct evidence. I submit that Harvey Vinn [sic] told you the best he could. He didn't remember everything that happened that night. Not in detail on the time frames. There is no question about that."); T.666 ("Harvey Vinn [sic] is not circumstantial evidence. Harvey Vinn [sic] is direct testimony.").

On this basis, the jury was able to infer that Venn largely was telling the truth about Kuenzel's involvement, that Kuenzel's alibi witness must be lying, and that Kuenzel must have been the unidentified white male who was observed, with Venn, by the eight witnesses present at the store.

31. There are a number of problems with Harris's supposed "corroboration". First, Harris's trial testimony contradicts Venn's testimony on certain meaningful points. For example, Harris testified that she observed Venn and Kuenzel at the store *before the time* that Venn claims he arrived at the store. Equally, if not more, damaging, Harris testified that she observed *both* Venn and Kuenzel inside the convenience store, but Venn adamantly denied ever entered the store that evening. Unfortunately, the immediately-preceding inconsistencies were not pointed out by Mr. Willingham during his cross-examination.

32. Nevertheless, it is possible that the jury, considering all the evidence, noted the conflicting testimony, and disregarded it; as the Court of Criminal Appeals held, "[t]he credibility of the witnesses who supplied the corroboration of the accomplice's testimony was for the jury and not an appellate court." Kuenzel v. State, 577 So. 2d at 515. But, even assuming the jury's considered rejection of the foregoing inconsistencies, we know for certain that the jury never accounted for Harris's grand jury testimony.

33. Harris's grand jury testimony reveals fatal defects in her alleged "corroboration" testimony at trial, it became available only recently, and it precludes any claim that Harris's testimony can be used to in any way satisfy Ala. Code § 12-21-222. Specifically, unbeknownst to Kuenzel and denied by the State until 2010, Harris told the grand jury just four months after the crime occurred that she "couldn't get any description."* (Kochman Aff., Exh. A.) Harris explained she "believed it was them [Venn and Kuenzel]," but that the basis of her "belief" was

having seen Venn's car parked outside the store and two people of similar height and with similar hair to that of Venn and Kuenzel.* (Id.) Yet, Harris could provide no further description of the individuals, flatly admitting before the grand jury that she "couldn't really see a face." (Id.)

34. As the Court of Criminal Appeals recognized, Harris's trial testimony was the essential link permitting satisfaction of Ala. Code § 12-21-222, and thereby the case validly proceeding to trial. See Kuenzel v. State, 577 So. 2d at 514-15. We now know that Harris's testimony is a nullity insofar as it purports to connect Kuenzel with Venn or the crime.

D. Discovery of Additional New Evidence Establishing Innocence

35. The evidentiary picture known today is vastly different than the one considered by the jury in 1988.

36. The new evidence was uncovered, first, by Kuenzel's *pro bono* post-conviction attorney. During his initial investigation in the mid-1990's, counsel recovered the shotgun that Venn testified he borrowed from a co-worker and possessed in his car on the night of the murder. (T.123.) It is a .16 gauge shotgun, the same gauge as the murder weapon. (Kochman Aff., Exh. K.)

37. But at trial, Venn testified that his borrowed shotgun was a .12 gauge. The prosecution never introduced Venn's shotgun into evidence, and Kuenzel's trial counsel never investigated Venn's weapon. Two of the three witnesses the defense presented—including Kuenzel's alibi, his step-father—testified that, one day before the murder, Kuenzel returned a .16 gauge shotgun that he had borrowed. Only Venn testified that Kuenzel returned his borrowed shotgun after the murder took place. But since the murder weapon was a .16 gauge, the jury *had to* find that *someone* possessed a .16 gauge. Even though Venn was impeached with his prior testimony that he did not know when or how Kuenzel's borrowed shotgun had been returned (see

T.170; Kochman Aff., Exh. G, p.11), given that Venn's shotgun was presented as a .12 gauge, jurors necessarily believed that Kuenzel's witnesses must be lying about Kuenzel returning his .16 gauge. Kuenzel's present ability to challenge this evidence where he could not at trial would be of critical importance. (See Rumsey Summation, T.677 ("[T]here is no other gun, other than a .16 gauge shotgun that killed that woman.").)

38. Additionally, although the prosecution did not present any motive to support why Kuenzel might want to rob a convenience store, we now know that Venn had been borrowing money from at least Kuenzel and his 13-year old girlfriend (Kochman Aff., Exh. I, N), and that Venn needed $500 to secure an attorney's appearance on his behalf at a drug hearing the following Monday, November 16, 1987. (Id., Exh. M.)

39. In February 2010, other new evidence was revealed by the prosecution when an Assistant Attorney General visited the home of Crystal Floyd. He carried with him a bag of documents that Floyd had never before seen, and that had not yet been disclosed to Kuenzel or any court in any proceeding. After the State's attorney left, Floyd contacted one of Kuenzel's counsel and informed him of this visit.

40. As a consequence of that interaction, the State subsequently produced numerous documents that had been withheld for almost a quarter century, including grand jury testimony from Harris, Floyd, and others, as wells as police interviews conducted with Venn shortly after the crime. In addition to describing David Pope as a possible alternative suspect, one of those statements reflected a police officer's observation of bruises on Venn's left eye and left arm, just two days after the murder. (Kochman Aff., Exh. B.) Kuenzel promptly retained Dr. James Gill, Deputy Chief Medical Examiner for the City of New York, to examine the autopsy record. Acknowledging the limitations of his examination and what could have been done at the time of

trial had Venn's initial statements been disclosed, Dr. Gill concluded to a reasonable degree of medical certainty that "the evidence is consistent with a factual scenario whereby Venn and Ms. Offord were involved in a physical altercation with one another shortly before Ms. Offord's death." (Id.)

41. There are two principal reasons why this evidence was not previously discovered and presented for the jury's consideration. First, the prosecution engaged in misconduct that was, at best, grossly negligent, and at worst, flagrant and tactical, including: the suppression of key evidence; provision of false testimony; fraudulent in-court representations concerning disclosure of Brady materials; and a remarkably uncritical police investigation. Underscoring the prosecution's misconduct pre-trial, there are now two pieces of evidence inexplicably missing from the Talladega County evidence locker: Venn's bloody pants and the shotgun the State alleges to be the murder weapon.

42. The second reason why Kuenzel failed to be acquitted at trial is the acknowledged failures of his inexperienced, overworked and statutorily fee-capped counsel. Mr. Willingham conducted virtually no factual investigation, leaving untouched the lowest-hanging of fruit during the 27.75 hours that he collectively devoted to witness interviews and discovery-related matters pertaining to both guilt and sentencing phases. (See generally Williangham Aff.) While not an excuse, Mr. Willingham was handling two capital cases simultaneously, the $1,000 reimbursable fee cap caused him to "limit [his] out-of-court time on each of these cases," and he felt "lulled into complacency" by Rumsey, who informed Mr. Willingham "that the prosecution's case was problematic." As Mr. Willingham candidly admits:

> In these circumstances, the 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 [Kuenzel's] innocence.

(Id.) Mr. Willingham also relied to his and Kuenzel's detriment on the prosecution's false claim that all Brady material had been produced, including Rumsey's specific representations that all statements given by Venn to the police had been turned over.

RELEVANT PROCEDURAL HISTORY

The following is a summary of the relevant procedural history of Kuenzel's trial and subsequent journey through state and federal post-conviction proceedings.

A. Trial and Direct Appeal

43. Following a day and half trial, on September 23, 1988, Kuenzel was convicted of capital murder in violation of Ala. Code § 13A-5-40(a)(2) in the Circuit Court of Talladega County.

44. Kuenzel's conviction and death sentence were upheld on direct appeal by the Alabama Supreme Court, and that decision was certified on March 28, 1991. On October 7, 1991, the United States Supreme Court's denial of Kuenzel's direct appeal was certified.

B. A Mistake in 1993 Causes Kuenzel To Procedurally Default All Of His Constitutional Claims In State Rule 32 Postconviction Proceedings

45. The statute of limitations applicable to the filing of Rule 32 petitions in the early-1990's provided for a two-year limitations period, accruing from the date judgment of the "Supreme Court" on direct appeal became final.

46. Kuenzel filed his Rule 32 petition within two years of the Supreme Court's denial becoming final; but he was mistaken as to which Supreme Court the statute referred. Specifically, Kuenzel filed his Rule 32 postconviction petition in the Circuit Court on October 4, 1993, within two years of the United States Supreme Court's October 7, 1991 judgment denying certiorari on direct appeal became final, but two years and six months after the Alabama Supreme Court denied relief on direct appeal.

47. Kuenzel was without legal counsel between October 1991 and August 1993. In fact, Kuenzel did not obtain assistance from *pro bono* counsel until late-summer 1993. That volunteer counsel filed the Rule 32 petition within, what counsel believed to be, the appropriate limitations period running from the Supreme Court's denial of certiorari. For twenty years, Kuenzel litigated the right to present his constitutional claims to any court. He was ultimately denied any opportunity to have the merits of his claims considered when, on May 28, 2013, the United States Supreme Court declined to intervene and disturb the state court procedural default by applying a narrow, equitable exception.

48. During the two-decades Kuenzel fought to have a day in court, he was never granted any subpoena power or an evidentiary hearing, and received only limited discovery for the first time in late-2010, after the State's bizarre unexplained disclosure to Crystal Floyd of evidence that the prosecution had long suppressed.

49. But for a procedural misstep resulting from Kuenzel's lack of representation six months before the time *pro bono* counsel intervened on his behalf, it cannot reasonably be disputed that Kuenzel's conviction would have been thrown out in Rule 32 proceedings. Had the prosecution complied with their disclosure obligations, this case never would have even made it to trial in the first instance.

C. Kuenzel's Continuous Efforts to Obtain Discovery And The State's False Representations Regarding Disclosure of All Exculpatory and/or Impeachment Evidence

50. At the time of trial and through the decades since, Kuenzel sought desperately to obtain the information known today that would establish both his innocence and the prosecution's failure to adequately corroborate Venn's accomplice testimony.

51. For example, prior to trial, on June 15, 1988, Mr. Willingham filed a motion for production and disclosure with the Circuit Court that included, among other things, a request for

any and all Brady material. On August 2, 1988, the trial court conducted a hearing at which Kuenzel's discovery requests were addressed. At that hearing, Rumsey generally agreed to comply with Kuenzel's discovery requests.[5] Yet, in response to the District Attorney's characterization of certain evidence in its possession as non-exculpatory, and therefore not required to be produced, Kuenzel's trial counsel requested an *in camera* review of any statements made by any witnesses for potential Brady material, with the State to provide all witness statements to Judge Sullivan:

> MR. WILLINGHAM: Judge, the only thing I would move for. Of course, Mr. Rumsey is turning over to us what he feels is exculpatory but we move it be ultimately the Court's decision as to what is exculpatory and what is not exculpatory. We would ask for any statements made by any witnesses be examined for exculpatory [Brady material], … [including] any statements that [the State] would have gotten from any witnesses that they would contend is work product. Of course, without seeing it, we wouldn't know. But we would ask the Court to examine those things in camera and ask that copies be made for the Court's file for any possible appellate review.

52. THE COURT: Okay.[6]

53. On the first day of trial, the State produced to Judge Sullivan what it claimed were all relevant witness statements (T.88-91), and Judge Sullivan later ruled that none of the materials provided by the State for *in camera* inspection contained exculpatory statements.

54. Significantly, none of the materials in the trial or appellate record include statements made to any agent of the State or the grand jury by, among others, April Harris or Crystal Floyd.

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[5] See Transcript of Hearing, dated August 2, 1988, at pp. 14-16 (MR. RUMSEY: "On the general discovery motion, … [m]ost of the things I don't think we have any objection about, except for [any statements made by Kuenzel to someone who is not] … an agent or employee of the State.").

[6] Transcript of Hearing, dated August 2, 1988, at pp. 22-23.

55. Later on at trial, Mr. Willingham asked Officer Dusty Zook, "Has anybody made available to you any information that would exculpate our client in this case?" (T.440.) Rumsey objected, representing that "I've given them [Kuenzel] the substance of the [exculpatory] statements." (T.441.) Kuenzel's counsel protested, arguing that Rumsey "has made available some information to her [Dusty Zook] that he will not make available to us, and we can't plead surprise with him not talking with us, your Honor." (T.441-42.) The Court sustained Rumsey's objection. (T.442-43.)

56. In state Rule 32 proceedings, Kuenzel filed two discovery motions generally seeking discovery, an evidentiary hearing and funding for expert and investigative assistance. The State did not oppose Kuenzel's discovery motions, yet the Circuit Court never addressed or ruled upon them. On three separate occasions in federal *habeas* proceedings, Kuenzel filed motions for discovery and/or an evidentiary hearing. As in the Rule 32 proceedings, the State did not oppose Kuenzel's discovery motions, but the district court never addressed or ruled upon them.

57. Kuenzel's discovery requests remained largely the same over the past three decades. They all sought basic information and materials regarding the underlying crime including, among other things, all records of any investigation conducted by the police, statements provided by any person or testifying witness in connection with the case, and the District Attorney's entire case file encompassing the investigation and prosecution of both Kuenzel and Venn for the crime.

58. Notably, Kuenzel's trial occurred prior to the Alabama Supreme Court's landmark decision in Ex parte Monk, 557 So. 2d 832 (Ala. 1989). Monk established broadened rights to discovery at trial in a capital case, recognizing that:

> The capital case is "sufficiently different" from other cases, because there is no other criminal case in which the crime is murder and the possible punishment is death or life imprisonment without parole … The hovering death penalty is the special circumstance justifying broader discovery in capital cases.

Id. at 836-37. Here, the District Attorney's false representations were taken at face value, and Kuenzel was denied the protections of Monk's holding that the death penalty justifies expanded discovery in capital cases.

D. The Instant Successive Rule 32 Petition

59. Kuenzel now timely files this Petition, pursuant to Rule 32.1(b) and (e) of the Alabama Rules of Criminal Procedure, for an adjudication that, based on the disclosure of previously unavailable and unknown evidence, (a) it is now clear that the prosecution failed to obtain corroborative evidence sufficient to vest the Circuit Court with jurisdiction to render judgment against Kuenzel, and (b) any jury, considering all the evidence known today, would acquit William Kuenzel on the basis that he is factually innocent.

THE GROUNDS FOR RELIEF

I. THE CIRCUIT COURT LACKED JURISDICTION TO CONVICT KUENZEL BECAUSE VENN'S TESTIMONY WAS INSUFFICIENTLY CORROBORATED IN VIOLATION OF ALABAMA CODE § 12-21-222

A. Alabama Code § 12-21-222

1. Alabama Code § 12-21-222 Is Jurisdictional

60. A court's subject-matter jurisdiction determines the types cases courts are empowered to hear. See Ex parte Seymour, 946 So. 2d 536, 538 (Ala. 2006) ("Subject-matter jurisdiction concerns a court's power to decide certain *types* of cases… [t]hat power is derived from the Alabama Constitution and the Alabama Code."); United States v. Colton, 535 U.S. 625, 630-31 (2002) ("[S]ubject-matter jurisdiction refers to a court's 'statutory or constitutional power' to adjudicate a case.") (internal citations omitted).

61. Because jurisdiction is subject to constitutional and statutory determination, this Court must look to both the Alabama State Constitution and the Alabama Code to determine whether jurisdictional requirements have been met; that is, whether statutory requirements for the imposition of a court's judgment are satisfied because, absent subject matter jurisdiction, a court's judgment is "null and void and of no force and effect." Woodham v. State, 178 So. 464, 466 (Ala. 1938).

62. One such jurisdictional requirement is codified by Alabama Code § 12-21-222, and it imposes a legislative mandate that a defendant may not be convicted on the uncorroborated testimony of an accomplice, stating:

> A conviction of felony *cannot be had* on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient.

Alabama Code § 12-21-222 (emphasis supplied).

63. The propriety of such a rule is obvious: "a guilty party, when offered immunity from prosecution, will point an accusing finger in any direction to avoid prosecution." See Reed v. State, 407 So. 2d 153, 158 (Ala. Crim. App. 1980), rev'd on other grounds, 407 So. 2d 162 (Ala. 1981) ("Our legislature recognized a fact which has never been recognized in federal law—that a guilty party, when offered immunity from prosecution, will point an accusing finger in any direction to avoid prosecution. The more serious the penalty, the more likely a false accusation will occur. Thus, our legislature, in order to protect the innocent and to preserve the presumption of innocence, has required additional evidence for a conviction in such cases via § 12-21-222.").

64. Alabama Code § 12-21-222 states that a conviction "cannot be had" absent sufficient corroboration; meaning, without the power to render judgment in the absence of such corroboration. Indeed, the Alabama Supreme Court has observed that "sufficient corroboration

of the accomplice's testimony [is necessary] to take the case to the jury." McCullough, 21 So. 3d at 761-62 (internal citations omitted).

65. The law is equally well-established that jurisdictional claims—like § 12-21-222—are "not precluded by the limitations period or by the rule against successive petitions." Jones v. State, 724 So. 2d 75, 76 (Ala. Cr. App. 1998). Where the trial court lacked jurisdiction to enter judgment because it was prohibited by statute, neither statutes of limitation nor the general prohibition on successive petitions applies. See Rules 32.1(b), 32.2 (b)(1). See also Beavers v. State, 935 So.2d 1195, 1198 (Ala. Crim. App. 2004) ("Jurisdictional claims are not precluded by the limitations period or by the rule against successive petitions.").

66. That is precisely the claim which Kuenzel makes here. Had the evidence known today not been hidden from the Court by the prosecution, Kuenzel would have submitted a pre-trial motion to dismiss on the basis of insufficient corroboration of Venn's testimony. There is no discretion to excuse compliance with § 12-21-222 and, therefore, the prosecution either could have attempted to collect sufficient evidence, or forego prosecuting Kuenzel in favor of pursuing the *true* killer or killers. This is not to suggest that Alabama Code § 12-21-222 imposes an unreasonably high burden. "Corroborative evidence need not *directly* connect the accused with the offense, but need only *tend* to do so." Pace v. State, 904 So. 2d 331, 347 (Ala. Crim. App. 2003) (citing cases). But, when the prosecution elects to proceed on the basis of accomplice testimony, the legislature prudently requires the prosecution to offer some other substantive evidence tending to link the defendant with the crime and, if it cannot, courts cannot send the case to a jury. See McCullough, 21 So. 3d at 762; Reed, 407 So. 2d at 158.

2. Courts Apply a "Subtraction Rule" to Evaluate Corroboration Under Alabama Code § 12-21-222

67. Alabama courts apply a "subtraction rule" to determine whether or not an accomplice's testimony is sufficiently corroborated. See McCullough, 21 So. 3d at 762. The Alabama Supreme Court has explained the rule as follows:

> There is a fine line drawn between [i] corroborative evidence which does no more than raise a suspicion of guilt and [ii] evidence of such a nature that it tends to connect the defendant with the commission of the offense. The procedure for determining on which side of this fine line the corroborative evidence falls has been characterized as a subtraction process.

Thompson v. State, 374 So. 2d 388, 389 (Ala. 1979) (internal citation omitted).

68. "The test … consists of eliminating the testimony given by the accomplice and examining the remaining evidence to determine if there is sufficient incriminating evidence tending to connect the defendant with the commission of the offense." Ware v. State, 409 So. 2d 886, 891 (Ala. Crim. App. 1981). See also Senn v. State, 344 So. 2d 192, 193 (Ala. 1977) (quoting Miller v. State, 290 Ala. 248 (Ala. 1973) (same)).

69. The benchmark standard for measuring the sufficiency of accomplice testimony corroboration has been well-defined by the jurisprudence of this State. According to the Alabama Supreme Court:

> Nonaccomplice evidence of the defendant's guilt, to be sufficient corroboration of the accomplice's testimony to take the case to the jury, must tend to connect the defendant with the crime or point to the defendant, as distinguished from another person, as the perpetrator of the crime. Nonaccomplice evidence which merely confirms the way and manner in which the crime was committed, but which is colorless and neutral insofar as the defendant's connection with the crime is concerned, is not sufficient corroboration to warrant submission of the case to the jury. …
>
> The evidence corroborating the accomplice's testimony can be purely circumstantial evidence. But, [i] it must be of a substantive character, [ii] must be inconsistent with the innocence of the accused, and [iii] must do more than raise a suspicion of guilt. …

> [T]he corroborative evidence may not depend for its weight and probative value on the testimony of the accomplice, and *it is insufficient if it tends to connect* [*the*] *accused with the offense only when given direction or interpreted by, and read in conjunction with the testimony of the accomplice*.
>
> [*E*]*vidence which merely raises a conjecture, surmise, speculation, or suspicion that* [*the*] *accused is the guilty person is not sufficiently corroborative of the testimony of an accomplice to warrant a conviction*.

Williams, 72 So. 3d at 722-23 (quoting McCullough, 21 So. 3d at 761-62 (internal citations omitted; emphasis in original).)

70. Courts of this State regularly refuse to shrink from their duty to vacate convictions for lack of jurisdiction where the prosecution fails to proffer evidence sufficient to implicate the defendant absent reference to the accomplice's testimony. For example, in Ex parte McCullough the testimony of the victim and of an investigating detective were held insufficient to corroborate the accomplice's testimony implicating the defendant and, accordingly, the Alabama Supreme Court reversed the judgment below and vacated the defendant's conviction for burglary. Id. at 763-64.

71. In McCullough, the victim testified that she observed two men entering her home. Yet, the victim could not describe those two men beyond generalized statements, such as "I think they were short" and "They had on jackets." Id. at 759, 762. The victim also speculated that the defendant "could easily have been" a man she saw earlier the day of the crime at a restaurant. Id. at 759. The detective testified regarding damages observed at the victim's home and the proximity of the house to the golf course, which the prosecution argued provided corroboration of the accomplice testimony as to where he and McCullough had parked at the time of the robbery. Id. at 760, 762.

72. In its analysis rejecting this evidence as insufficiently corroborative, the McCullough court noted that, while corroborating evidence "can be purely circumstantial

evidence," it still "'must be of a substantive character, must be inconsistent with the innocence of the accused, and must do more than raise a suspicion of guilt.'" Id. at 761 (quoting Sorrell v. State, 249 Ala. 292, 293 (1947)). After subtracting the accomplice's testimony, the court considered the detective's testimony and found that, far from connecting the defendant to the crime, it only "shows that a crime had been committed." McCullough, 21 So. 3d at 762. Similarly, far from providing any positive identification, the victim's testimony did "no more than identify the burglars as males, possibly black or possibly wearing ski masks, perhaps short, but perhaps not." Id.

73. Even testimony that more positively connects a defendant with the crime has been held insufficient under § 12-21-222 where it is not inconsistent with innocence, and does not raise a suspicion of guilt unless the accomplice's testimony is referenced. In another recent appellate court decision, Williams v. State, two accomplices implicated Williams in a murder arising out of an alleged scheme to rob someone driving through the area seeking to purchase marijuana. The prosecution proffered corroboration consisting of testimony from a witness passing through the neighborhood, who positively identified Williams as being amongst a group of men attempting to wave him down to sell him drugs that evening. In fact, it was undisputed that this witness observed Williams with that group of men. Soon thereafter, this witness heard a gunshot and, upon driving back through the neighborhood, this witness observed the victim's truck and several people standing near its door. Williams, 72 So. 3d at 722.

74. In Williams, the Court of Criminal Appeals held the evidence from this witness to be insufficiently corroborative of the accomplice's testimony because it did "no more than place Williams in the proximity of the crime" which "without more, does not 'raise a suspicion of [defendant's] guilt.'" Id. at 724. Reinforcing the non-frivolous burden imposed upon the

prosecution by § 12-21-222, the Court posited that, even if this witness had testified to seeing Williams standing with the accomplices, such testimony still would not satisfy the statute's corroboration requirement, explaining:

> [E]ven if we found, which we would not, that such testimony connected Williams to the murder, the evidence would still be insufficient corroboration of the accomplices' testimony *because this evidence would only connect Williams to the offense when given direction or interpretation by, and read in conjunction with, the testimony of the accomplices*.

Id. (emphasis supplied). Thus, where the allegedly corroborating evidence fails to connect the defendant to the crime absent reference to the accomplice's testimony, there is no corroboration and a conviction "cannot be had." Ala. Code § 12-21-222.

B. Previously Undisclosed Evidence Reveals That The Prosecution Lacked Sufficient Corroboration of Venn's Testimony And, Therefore, the Circuit Court Was Without Jurisdiction to Render Judgment

75. As a consequence of the State's failure to disclose material evidence, not until March 5, 2010 did Kuenzel possess the critical facts now known to exist which, as set forth below, establish that the Circuit Court lacked jurisdiction to convict Kuenzel.

76. The evidence at trial allegedly corroborating Venn's account of Kuenzel's involvement was upheld as minimally sufficient to satisfy the prosecution's statutory burden. See Kuenzel v. State, 577 So.2d at 514-15. April Harris's eyewitness identification supplied the linchpin of the appellate court's finding that the "testimony, while certainly not overwhelming, was sufficient to corroborate Venn's testimony and to satisfy the requirements of § 12-21-222." Id. In light of the evidence known today—including Harris's previously undisclosed grand jury testimony—it is now clear that nothing, apart from Venn's testimony, connects Kuenzel in any meaningful way with the crime. Accordingly, the Court lacked jurisdiction to render judgment, and Kuenzel's conviction must be set aside.

77. At trial, the State relied upon Venn's testimony to establish almost every piece of evidence connecting Kuenzel to the murder of Linda Jean Offord: Venn testified that Kuenzel was with him at all times after 8:00 p.m. on the night of November 9, 1987; Venn testified that Kuenzel conceived of the idea to rob the convenience store; Venn testified that he and Kuenzel "cased" the convenience store prior to the crime; Venn testified that, after Venn started driving to go visit a friend, Kuenzel convinced Venn to turn around because they would not have enough time to rob the store if they traveled to see this friend; Venn testified that Kuenzel went inside the convenience store alone to commit the robbery while Venn remained seated outside in his car; Venn testified that he heard a shot and saw the clerk fall backwards off of her stool; and, Venn testified that when Kuenzel returned to the vehicle, Kuenzel told Venn to "haul ass."

78. To corroborate Venn's testimony that Kuenzel was with Venn after 8:00 p.m. on the night of the murder, and that Kuenzel was with Venn at the convenience store, the prosecution presented the testimony of April Harris. Harris was familiar with both Venn and Kuenzel, and she testified before the jury, without qualification, that while seated in the passenger seat of a car driving by the store at approximately 9:30-10:00 p.m. on the night of the murder, she observed (i) Venn's car parked outside the store, and (ii) both Kuenzel and Venn inside the convenience store. (T.135-142); Ex parte Kuenzel, 577 So. 2d at 532-533.

79. Apart from Harris, no other evidence—direct or circumstantial—connects Kuenzel to the crime in a substantive way absent reference to Venn's testimony. See Williams, 72 So. 3d at 722-23. Testimony that Kuenzel and Venn were together earlier in the day is insufficient. See Anderson v. State, 44 Ala. App. 388, 391-92, 210 So. 2d 436 (Ala. Crim. App. 1968) (testimony that the defendant was with the accomplice prior to the time of the crime, but that fails to connect the defendant with the crime itself, is insufficient to satisfy § 12-21-222);

Steele v. State, 512 So. 2d 142 (Ala. Crim. App. 1987). Nor can Venn's testimony corroborate itself. (See Rumsey Summation, T.666 ("Harvey Vinn [sic] is not circumstantial evidence. Harvey Vinn [sic] is direct testimony."); T.682-87.) Without question, Harris was an *essential* witness for the prosecution.

80. To be sure, the Alabama Court of Criminal Appeals specifically explained Harris's importance to the prosecution's case in its response to Kuenzel's direct appeal claim that the State failed to sufficiently corroborate Venn's testimony. Applying the subtraction rule, the Court of Criminal Appeals denied Kuenzel's § 12-21-222 claim on the following basis:

> Excluding Venn's testimony, the evidence shows that the murder was committed shortly after 11:00 p.m. April Harris testified that she saw Venn's car at the store between 9:30 and 10:00 p.m. and that she saw both Venn and [Kuenzel] inside the store at that time. Other witnesses testified that Venn and an unidentified white male were at the store sitting in Venn's automobile around 10:00 or 10:30 p.m. In our opinion, this testimony, while certainly not overwhelming, was sufficient to corroborate Venn's testimony and to satisfy the requirements of § 12-21-222.

Kuenzel v. State, 577 So. 2d at 514-15.

81. Thus, the Court of Criminal Appeals held the corroborative evidence offered by the prosecution to be minimally sufficient because Harris's testimony provided the key ingredient to overcoming § 12-21-222. With Harris's testimony, it could reasonably be assumed that the "unidentified white male" observed with Venn by multiple witnesses was Kuenzel. Without Harris's testimony, there is no reason to suspect that this unidentified individual was Kuenzel. Confirming the great weight placed upon the jury's ability to consider Harris's testimony, the Alabama Court of Criminal Appeals concluded that:

> Here, there was sufficient corroboration of the testimony of the accomplice. The credibility of the witnesses who supplied the corroboration of the accomplice's testimony was for the jury and not an appellate court.

Id. at 515.

82. As Rumsey necessarily recognized, without Harris's testimony he lacked sufficient evidence to prosecute Kuenzel; and it is not overreach to conclude that the District Attorney's awareness of Harris's grand jury testimony, including the fatal impact it would have upon his ability to prosecute Kuenzel, motivated the intentional suppression of this evidence.

83. In light of the indispensable nature of Harris's eyewitness corroboration at trial, her testimony before the grand jury—revealed only through sheer luck in 201—is startling. During questioning before the grand jury, Harris stated that, "[b]etween ten and fifteen till eleven at the latest,"[7] she drove by the convenience store and observed "Harvey Venn's car parked at the side of the building." (Kochman Aff., Exh. A, p.2.) The following colloquy ensued:

> Q. Okay, and did you see anything else?
>
> A. No sir, not – I thought – I know that there were people in the store but I couldn't make them out for sure whether it was Harvey Venn and William Kuenzel or not.
>
> Q. Okay, do you remember me talking with you down there at Sylacauga Police Department?
>
> A. Yes, sir.
>
> Q. And do you remember telling me that's who it was inside there?
>
> A. Yes, sir.
>
> Q. Okay, and now you're saying you can't say that's who it was?
>
> A. ***I don't – under oath – I don't really want to say that is was them, but I feel sure I couldn't tell what they were wearing or give a description of them because we were going, driving by, but judging from the stature of the people that were in there I believe that it was them.***
>
> Q. Has anything happened to get you to change?

[7] Notably, the time frame testified to by Harris during her grand jury testimony places Venn's car at the crime scene much closer to the time of the murder than she testified at trial, where she stated that her observation occurred between 9:30-10:00.

A. No, sir.

(Id. at pp. 2-3. (emphasis supplied).)

84. Immediately following that exchange, Rumsey took over Harris's grand jury questioning from Dennis Surrett, his office's investigator. During Rumsey's subsequent questioning, Harris remained certain that she saw Venn's car at the store, but revealed that her "belief" she saw Kuenzel and Venn together inside the store was based upon bald speculation, devoid of any factual basis:

Q. Did you see anybody else in the store other than two white males?

A. No, sir.

Q. Did you see any other cars there?

A. No, sir.

Q. You know that to be Venn's car.

A. Yes, sir.

Q. It's your judgment that it was those two people?

A. Yes, sir.

Q. Venn, and Kuenzel? But you're just a little leary [sic] about saying –

A. For sure.

Q. That you're 100% positive?

A. Yes, sir. Because I couldn't identify the clothes and I couldn't tell for sure. You know, couldn't really see them enough to know that, you know, like I'm looking at you and would know who you are. I couldn't say that it was them, but the statue [sic] – the statue [sic] of them[.]

Q. Frame, size, height?

A. Their heights, yes, sir.

Q. Length of hair, color of hair?

A. Yes, sir.

Q. Facial Hair [sic]? Was the same?

A. ***I couldn't get any description. I couldn't really see a face***.

…Q. Are – your [sic] not – are you scared or anything?

A. No, sir.

Q. But you told Dennis [Surrett] back then that [ ] it was Kuenzel and Venn but now you just can't say that positively?

A. No, sir, not positively.

Q. Did you say it positively then?

A. I said that I believed that it was them.

Q. You still do?

A. I still – I believe that it was them, but I couldn't get a good desc – ***I couldn't even tell him what they had on***.

(Id. at pp. 3-5. (emphasis supplied).)

85. In short, Harris cannot corroborate Venn's testimony because she did not actually see anything beyond Venn's car and two white males. She could not recall what those individuals were wearing, "couldn't get any description" and "couldn't really see a face." (Id.) The prosecution team, and Rumsey specifically, lacked all basis to withhold this evidence from the defense, this Circuit Court or the jury adjudicating this capital murder case.

86. When Harris testified six months later during Kuenzel's trial, she purported to recollect without any equivocation her observation of both Kuenzel and Venn together inside the convenience store:

Q. In your judgment who did you see in that store?

A. Harvey and Kuenzel, Billy.

Q. Harvey Vinn [sic] and Billy Kuenzel.

A. Uh, huh. (affirmative response).

(T.494.)

87. Without knowledge of Harris's grand jury testimony, defense counsel lacked the ability to challenge Harris's judgment of what she claimed she saw that evening. The defense's cross-examination of Harris at trial was limited to exploring the fact that she placed Venn's vehicle on the side of the store, *away* from the gas pumps, contrary to the testimony of other witnesses who observed Venn at the store with another man they did not identify as Kuenzel. Moreover, during cross-examination, Harris strenuously re-affirmed her identification and resisted the defense's attempt to question her testimony:

> Q. Okay. Let me ask you this. What was the lighting out there at that store that night? Was it bright?
>
> A. Well, yes, sir.
>
> Q. It was quite bright out there. You could see pretty good?
>
> A. Yes, sir.
>
> Q. How long were they in your observation, if you could tell me, please maam [sic]?
>
> . . . A. It would have been seconds because we were moving.
>
> Q. Do you know at what rate of speed you were moving?
>
> A. Not more than 35 because we had to intersect with the light of traffic.
>
> Q. Somewhere around 35?
>
> A. If that fast.
>
> Q. *But you could clearly identify them with your vehicle moving*?
>
> A. *Yes, sir*.

(T.501-02 (emphasis supplied).)

88. Compounding the damage caused by the willful suppression of Harris's grand jury testimony, during summation, Rumsey leveraged his position by leaning heavily upon Harris's positive identification as corroboration of Venn's account:

> As to where the cars were parked and everything else, I'm not going to continue to go through that. But I'll tell you this. April Harris says she saw them in there. And April Harris ain't no surprise in coming up here. She has been around a long time. Ever since Day One in this case. And she says she saw Vinn [sic] and Kuenzel in there.

(Rumsey Summation, T.672.)

89. It is also illuminating to consider the Court of Criminal Appeals' finding that Rumsey improperly argued to the trial jury that "Harris has been a witness in this case since Day One, and she is on the subpoena list." Kuenzel v. State, 577 So. 2d at 492. Noting the blatant impropriety of this argument, the Court of Criminal Appeals stated that "there is nothing in the record to show that this list was ever introduced into evidence" and, thus, Rumsey's argument was improper because "there was no evidence before the jury that Harris was on the subpoena list or that she gave any statement to the police." Id. However, the appellate court concluded that "the present error [was not] so egregious or obvious as to 'seriously affect the fairness or integrity of the judicial proceedings.'" Id. (internal citation omitted).

90. Simply stated, in light of Harris's grand jury testimony, Harris could not have later testified to positively observing Kuenzel, Venn or, for that matter, any specific individual. And, absent Harris's corroboration, the other evidence presented by the prosecution does not even "raise a suspicion of guilt," which itself is plainly insufficient to satisfy § 12-21-222. See, e.g., Williams v. State, 72 So. 3d at 723; Jackson v. State, 98 So.3d at 39-42. Harris was the essential link as she alone provided evidence tending to connect Kuenzel to the crime. See id. at 40; Jackson v. State, 451 So. 2d 435, 437 (Ala. Crim. App. 1984) ("[A] fact or circumstance may tend to support the accomplice's version, thereby confirming his credibility, but in order to

provide sufficient corroboration of accomplice testimony, the evidence must connect the accused with the commission of the offense.").

91. At best, the prosecution offered accounts of rumored involvement, a notepad in Kuenzel's handwriting of what Venn initially told the police and innocuous statements lacking any independent probative value suggesting Kuenzel's commission of this murder "without the aid of any testimony from the accomplice." McCullough, 21 So. 3d at 762. See also id. at 762-64 (evidence that "does no more than 'raise a suspicion of guilt'" is insufficient to corroborate pursuant to § 12-21-222); Miles v. State, 476 So. 2d 1228, 1234-35 (Ala. Crim. App. 1985) ("The corroboration necessary to support the testimony of the accomplice must be of some fact tending to connect the accused with the crime. It must be substantive and inconsistent with the innocence of the accused."). Because the evidence was insufficient to corroborate Venn's testimony, the Circuit Court lacked the ability to submit the case to a jury because there was no jurisdiction pursuant to § 12-21-222. It follows that Kuenzel's conviction must be set aside.

II. PREVIOUSLY UNDISCLOSED EVIDENCE CONFIRMS KUENZEL'S FACTUAL INNOCENCE

92. This Court need only look to the mountain of evidence now known that *directly* connects Venn to the murder of Linda Jean Offord, and the paucity of evidence implicating Kuenzel, to be certain that Venn framed Kuenzel to save himself from the death penalty.

93. The wealth of evidence that now exists substantiating Kuenzel's claim of actual innocence, undermining Harris's corroboration and injecting further doubt into the credibility of Venn's accomplice testimony may provide grounds for relief in this Circuit Court

94. Alabama recognizes, in the administration of its own system, that "[c]onsistent with society's 'overriding concern with the justice of the finding of guilt', the courts, as well as the prosecution, must be vigilant to correct a mistake." Ex parte Ward, 89 So. 3d 720, 728 (Ala.

2011) (internal citations omitted). Unlike federal courts, Alabama embraces "[a] common-sense reading of Rule 32.1(e) … that requires a showing that the newly discovered facts go to the issues of the defendant's actual innocence (as opposed to a procedural violation not directly bearing on guilt or innocence)." Id. at 727 (emphasis added). The distinction drawn by the Ward court between facts demonstrating innocence and facts bearing upon a procedural claim is of central importance to this Court's assessment of the Petition. Nor are the facts supporting this Rule 32 petition merely cumulative to other facts that were known, and such facts do not merely amount to impeachment evidence.

95. Further, the facts supporting this Rule 32 petition were not known to Kuenzel at the time of trial or in time to file a post-trial motion pursuant to Rule 24 or at the time Kuenzel filed his initial Rule 32 proceeding—a petition that never was considered on the merits. Documents and statements produced for the first time in 2010 reveal, among other things, that Venn's initial statements to the police were consistent with Kuenzel's long-maintained claim of innocence, that Venn provided the police with a detailed description of the person with whom he was seen at the store, that Venn's girlfriend at the time—a 13-year old with no reason to lie—told the police and testified before the grand jury that she saw Venn alone shortly before Venn arrived at the convenience store, and that the police observed bruising on Venn's person consistent with injuries noted on Ms. Offord's body.

96. While Kuenzel anticipates the State will argue that Kuenzel should have filed this successive Rule 32 petition in or about August 2010, within six months of its disclosure in March 2010 of evidence the State had long suppressed, at the time Kuenzel actively was litigating claims in federal court and, if relief had been granted, there would have been no need for this proceeding. Moreover, the State can identify no prejudice because at no time did

Kuenzel delay in presenting his evidence, and Kuenzel had no control over when (or if) the State would eventually decide to produce evidence that Kuenzel always had been entitled to receive; evidence that plainly could not have been discovered earlier through the exercise of reasonable diligence because it was being suppressed by the State. If any party has been prejudiced by the delayed presentation of evidence, it is Kuenzel

97. Now that the newly discovered evidence has been revealed, Alabama accords a petitioner like Kuenzel one opportunity to persuade a circuit court that the totality of evidence demonstrates that he is, in fact, a wrongfully convicted inmate on death row. Because Kuenzel's constitutional claims summarily disposed of on a procedural default, this Petition is his last opportunity to correct this grave error.

98. Even if this Court is not yet persuaded of Kuenzel's factual innocence, dismissal is not the appropriate remedy at this stage. Ward and other binding jurisprudence advise that Kuenzel need not "establish that he was innocent of the murder", but rather that he is entitled to a hearing at which the question is whether, in light of the newly discovered evidence, "the result would probably have been different." Whether the evidence is sufficiently strong to "tend to destroy or obliterate the effect of the evidence upon which the verdict rests" is a question most appropriately resolved after an evidentiary hearing. Ex parte Ward, 89 So. 3d at 727. A pre-eminent issue at such hearing would be Venn's responses in light of the newly available information.

99. Accordingly, Kuenzel respectfully appeals to this Court to end his twenty-five year nightmare in our criminal justice system and vacate his conviction.

CONCLUSION

100. For all of the foregoing reasons, Kuenzel's conviction violates Alabama law because it was procured by and through the uncorroborated testimony of an admitted accomplice, and because evidence unavailable at trial demonstrates that Kuenzel is factually innocent.

PRAYER FOR RELIEF

101. For all of the foregoing reasons, and any other such reasons as may be made upon amendment of this Rule 32 petition, Kuenzel respectfully asks this Court to grant the Petition along with such other and further relief as this Court deems just, equitable and proper. If this Court believes there remain any disputed issues of fact, Kuenzel respectfully requests the opportunity to present evidence at an evidentiary hearing.

Dated: September 23, 2013

Respectfully submitted,

/s/ Lucas C. Montgomery__

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IN THE CIRCUIT COURT OF TALLADEGA COUNTY, ALABAMA

WILLIAM ERNEST KUENZEL,	*	
	*	
Petitioner,	*	
	*	
v.	*	Case No. _____
	*	
STATE OF ALABAMA	*	(Related to Case No. CV-93-351)
	*	
Respondent.	*	

ATTORNEY'S VERIFICATION UNDER OATH
SUBJECT TO PAINS AND PENALTY OF PERJURY

I affirm under penalty of perjury that the foregoing allegations contained in the Petition for Relief From Judgment are true and correct to the best of my knowledge, except to the extent allegations are made upon information and belief, and as to those allegations, I believe them to be true and correct to the best of my knowledge.

Dated: This 23rd day of September, 2013

/s/ Lucas C. Montgomery
Lucas C. Montgomery, Esq.

Subscribed to and sworn to before me this
23rd day of September, 2013

_____
Notary Public

My Commission expires on:

CERTIFICATE OF SERVICE

I hereby certify that on September 23 2013, I served a copy of the attached pleading by first-class mail, postage prepaid to:

J. Clayton Crenshaw, Esq.
Office of the Attorney General
500 Dexter Avenue
Montgomery, AL 36130-0152

/s/ Lucas C. Montgomery
Lucas C. Montgomery