IN THE SUPREME COURT OF ALABAMA

NO. 1891805

EX PARTE WILLIAM ERNEST KUENZEL

In re: State of Alabama,

Petitioner,

v.

William Ernest Kuenzel,

Respondent.

RESPONDENT WILLIAM E. KUENZEL'S OPPOSITION TO THE STATE'S MOTION FOR AN EXECUTION ORDER

Lucas C. Montgomery
Stringer Montgomery & Montgomery
138 East Street N
Talladega, AL 35160
Tel: (256) 362-3154

G. Douglas Jones
Jones & Hawley, P.C.
2001 Park Place North,
Suite 830
Birmingham, AL 35203
Tel: (205) 490-2290

David A. Kochman
(pro hac vice)
National Concessions Group, Inc.
1058 Delaware Street
Denver, Colorado 80204
Tel: (720) 726-6522

Jeffrey E. Glen
Rene F. Hertzog
(pro hac vice)
Anderson Kill P.C.
1251 Avenue of the Americas
New York, New York 10020
Tel: (212) 278-1000

Counsel for Petitioner-Appellant William Ernest Kuenzel

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The State's request for an order of execution is wildly premature. Pending before the Criminal Court of Appeals is Kuenzel's appeal from the summary denial of his successive Rule 32 petition. That appeal raises two questions:

1. Whether Alabama Code § 12-21-222 is, as it reads, a constitutionally-prescribed jurisdictional prerequisite to prosecution. In brief, April Harris is the sole linchpin supporting the State's obligation to corroborate Harvey Venn's accomplice testimony. Harris's sworn testimony before a grand jury provided four months after the crime is as credible, if not more so, than her later trial testimony. Had Harris's grand jury testimony been disclosed, stating that she did not and could not identify any particular individual, the State lacked any other evidence at trial sufficient to satisfy the corroboration requirement of § 12-21-222. Here, the evidence withheld by the State demonstrates a complete lack of corroboration to Venn's accomplice testimony, not merely that the remaining evidence is insufficient — a key distinction.

This issue of first impression is layered against the backdrop of a case where there are proven Brady and

Strickland violations, and yet those constitutional claims cannot serve as independent bases for reversal because of procedural default.

2. Whether sufficient doubt exists about Kuenzel's guilt such that he should be afforded one opportunity to prove his factual innocence *on the merits*. The "actual innocence" as an exception to a state court procedural default question considered by the federal courts is materially different than the factual innocence question before the Court of Criminal Appeals; among other things, notions of federalism, comity, and respect for state court proceedings are no longer an issue. The federal courts held only that Kuenzel did not meet an equitable exception gateway established by Schlup v. Delo, 513 U.S. 298 (1995); the federal courts made no determination on the merits of a factual innocence claim, allowed no opportunity for discovery or an evidentiary hearing, and did not issue any ruling on factual innocence under Alabama state law. Indeed, no court ever has considered and ruled on the merits of Kuenzel's claims at any point in post-conviction—a fact the State openly acknowledges. See State's Brief at 27, 29. Moreover, the State adopted the position before

the Court of Criminal Appeals that an adjudication by a federal court on gateway "actual innocence" would not bind the Alabama courts.

It must be remembered that the State elected to withhold evidence at trial and for decades thereafter, even while Kuenzel's case navigated through the post-conviction process. This is the very first time that the Alabama state courts have had available certain central items of evidence that paint a more complete picture of what happened on November 9, 1987, and why. The evidence — consisting of sworn witness testimony and new physical evidence — tells a compelling narrative that, if believed, necessitates reversal of Kuenzel's conviction on grounds of lack of jurisdiction, unreliability and possible innocence, or both. We submit that those questions must be given one opportunity for exploration and evaluation.

Underscoring Kuenzel's complete lack of access to the court system in post-conviction is the fact that he stands alone; counsel is unaware of another capital case involving a compelling claim of innocence and incontestable constitutional error where the litigant failed to receive any opportunity for post-conviction merits consideration.

The foregoing issues are *sub judice*. See Kuenzel v. State, CR-13-0899 (Ala. Crim. App.). In the only reported decision that counsel has located that deals with litigation over the setting of an execution date, this Court refused to issue a warrant when there was a pending appeal in the Court of Criminal Appeals. See Arthur v. State, 71 So. 3d 733, 738 (Ala. Crim. App. 2010). Kuenzel anticipates an appeal to this Court by whichever party fails to prevail before the Court of Criminal Appeals. In light of all these factors, the State's dismissive treatment of Kuenzel's current appeal is unwarranted, and its request for an order of execution should be denied as premature.

FACTS OF THE CRIME

One rainy night in November 1987, a Sylacauga, Alabama convenience store clerk was killed during an apparent robbery attempt. William Kuenzel was convicted of the crime, despite his adamant insistence of complete innocence. Twice, Kuenzel refused a generous plea deal for this reason. The prosecution's case rests upon Harvey Venn, a self-confessed accomplice who first denied, and then later admitted, participating in the crime. Venn

testified against Kuenzel in return for the same deal Kuenzel repeatedly rejected. Venn's testimony and a questionable eye witness are all that link Kuenzel to this crime. In contrast, a mountain of physical and testimonial evidence directly implicates Venn.

The new evidence and old evidence collectively cripple an extraordinarily weak prosecution case that relies upon the jury's willingness to believe Venn's inconsistent, conflicting, uncorroborated and self-serving testimony deflecting blame from himself.

The Total Evidence Known Today

In the summer of 1987, William Kuenzel, 25, and Harvey Venn, 18, became friends at the textile factory in Goodwater, Alabama where they worked. In September 1987, Venn moved into Kuenzel's nearby residence. In lieu of paying rent, Venn drove them to and from work. Kuenzel did not own a car.

On Monday, November 9, 1987, Venn and Kuenzel worked until 2:30 p.m., and were last seen together around 7:00 p.m.

Sometime after 8:00 p.m. that same evening, Venn visited the home of Crystal Floyd, his 13-year old

girlfriend.*[1] (R.385-86.[2]) Floyd recalls their interaction that evening, and describes why and how she knew that Venn was alone.* (R.386.) She related this encounter to the police, prosecutor and the grand jury.* (R.386-87.) Yet, Floyd did not testify at trial, and the foregoing information was unknown to Kuenzel until post-conviction because none of it was disclosed by the prosecution, or investigated by defense counsel.

Venn next was observed by eight disinterested individuals nearly continuously between 10:00 and 11:05 p.m. at the convenience store. Each of those independent witnesses uniformly implicated Venn: each testified they saw Venn's car, saw or spoke with Venn, and many noticed that Venn was accompanied by a white male. None of those witnesses identified Kuenzel as the white male with Venn.

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[1] Evidence known today but unheard by the trial jury—either because it was withheld by the prosecution or because of Kuenzel's trial attorney failed to conduct any pre-trial investigation—is denoted with an asterisk ("*").

[2] References to "R.__" correspond to the three-volume Record on Appeal in the pending appeal, Kuenzel v. State, CR-13-0899 (Ala. Crim. App.).

At some point between 11:05 and 11:20 p.m. Linda Jean Offord, the store clerk, was killed by a single round fired from a .16 gauge shotgun.

Venn possessed a .16 gauge shotgun* that evening. (R.157-60.)[3] Most damning, Ms. Offord's blood was found splattered on the "left thigh area of Venn's blue jeans leg of his jeans." Kuenzel v. State, 577 So. 2d 474, 493 (Ala. Crim. App. 1990). Underscoring Venn's guilt and motivation to direct blame away from himself, Ms. Offord's blood was not found anywhere outside of the convenience store except on Venn's pants, (T.369-75.[4]), Venn falsely testified that he never entered the convenience store, (T.141, 542, 548), and Venn falsely claimed that the red splatter was squirrel blood when it is accepted fact that it is Ms. Offord's blood. (T.165-66, 542-43.)

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[3] At trial, the prosecution allowed Venn to testify falsely that his shotgun was a .12-gauge. Venn's shotgun was not introduced into evidence. Post-conviction counsel tracked down Venn's shotgun in 1997 and it is now beyond challenge that Venn's shotgun matched the gauge of the murder weapon.

[4] References to "T.__" correspond to the six-volume trial transcript of proceedings from 1988 held in the Circuit Court of Talladega County, Criminal Division, Case No. CC 88-211.

On Wednesday, November 11th, the police questioned Venn. In his first statements, Venn said that, at 8:00 p.m., he traveled to the home of his friend, Chris Morris. Morris was not home, so Venn "went by his friend's house to see if he was there." Venn could not remember this friend's name. (R.96-98.) Venn admitted visiting the store Monday evening, but insisted he arrived home shortly after 10:00 p.m. and did not, therefore, commit the murder. (R.96-100.) Venn confirmed he saw and spoke with a number of the witnesses who had seen him there, and identified a white male named David Pope as his companion. Venn provided the police with a detailed description of Pope, along with Pope's approximate age, relationship to Venn and likely residence.* (R.97-99.)

As for Kuenzel's whereabouts that Monday, Venn told the police: "He was in bed. Far as I can remember he was."* (R.100.) 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.

The police focused on Venn because his claim of being home by 10:00 p.m. was contradicted by the reports of the

eight disinterested witnesses who observed him at the store between 10:00 and 11:05 p.m. After executing a search warrant on Venn's and Kuenzel's residence later that Wednesday night, the police recovered the pants Venn wore Monday evening that were stained with Ms. Offord's blood.

When the police asked Venn about the stains, he first claimed it was "red paint" or "lead" from the textile factory (R.97-99); later, at trial, Venn testified—again falsely—that it was "squirrel blood." (T.165-66, 542-43.) There was no blood found anywhere outside the store, except on Venn's pants. (T.369-75.) This blood evidence was, and remains, an undisputed fact of record: the prosecution's own serological expert concluded the stains were human blood matching the victim, and the prosecutor conceded the point during closing argument. (T.661-87.)

At 2:20 a.m. on Sunday, November 15th, after days of being held in state custody, being interrogated without counsel, and threatened with a capital prosecution, Venn "confessed." He admitted that he had been at the store, but now implicated Kuenzel as his companion and the triggerman.

Later that Sunday, the police asked Kuenzel 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 1998. (Notably, on the eve of trial, the prosecution once again offered Kuenzel this arrangement and, as before, he refused. (R.78.))

No physical evidence—neither fingerprints, blood, nor ballistics—connects Kuenzel to the crime, and the thin circumstantial evidence of Kuenzel's guilt is, at best, highly speculative. See Kuenzel v. Allen, 880 F. Supp. 2d 1162, 1165 (N.D. Ala. Dec. 16, 2009) (herein, "Kuenzel 2009 Opinion") ("There was no physical evidence linking Kuenzel to the crime scene. The only blood found was on Venn's left pants leg, and it was the same type as the victim's.")

Apart from Venn, there were eight witnesses physically present at the store between 10:00 and 11:05 p.m. Not a single one identified Kuenzel as Venn's companion.

Only one person — April Harris, a teenage passenger in a car driving by — testified at trial that, for a split-second, she saw both Venn and Kuenzel inside the store. Although Venn testified he never entered the store, and Harris contradicted Venn, her testimony was critical to the prosecution's case because Ala. Code § 12-21-222 requires independent corroboration of accomplice testimony. Harris resisted defense efforts to impeach her identification.

Unbeknownst to Kuenzel, Harris's testimony before the grand jury was that she "believed it was them," but that she "couldn't get any description" and "couldn't really see a face."* (R.91-93.) Harris further acknowledged that her "belief" she saw Venn and Kuenzel was based upon observing Venn's car parked outside the store and two people of similar height, with similar hair.* (R.92.) Kuenzel could not cross-examine Harris with these prior statements because the grand jury transcript was not produced until 2010 — 22 years post-trial.

Discovery of New Evidence

The new evidence was uncovered, first, by Kuenzel's *pro bono* post-conviction attorney. During his initial investigation, he recovered the shotgun that Venn testified he borrowed from a co-worker and possessed in his car on the night of the murder. It is a .16 gauge, the same gauge shotgun as the murder weapon.

At trial, Venn testified that his borrowed shotgun was a *.12 gauge*, and "the prosecutor clearly argued that the Kuenzel [.16 gauge] shotgun was the murder weapon." (Kuenzel 2009 Opinion, at 1189; R.363) 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 the .16 gauge shotgun he had borrowed. But the jury had to find *someone* involved who possessed a .16 gauge. Given that Venn's shotgun was presented as a .12 gauge, jurors necessarily believed that Kuenzel's witnesses were lying. Kuenzel's present ability to challenge this evidence where he could not at trial would be of critical importance.

Other new evidence counsel located includes (i) a possible financial motive for Venn to have sought to commit this robbery, (ii) a statement from Crystal Epperson, the driver of the vehicle in which Harris was a passenger, that both she and Harris told the police shortly after the murder that all they saw was Venn's car parked outside the store, and (iii) a statement from Crystal Floyd, Venn's then-girlfriend, regarding Venn's late-night visit to her home on the night of the murder. Floyd, Harris and Epperson were listed on the State's witness list, but *none* of their prior statements—including their grand jury testimonies—were revealed by the prosecution until 2010, under the following circumstances.

In February 2010, just two months after the district court dismissed, for the third time, Kuenzel's petition on the basis of procedural default, 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 in any proceeding. After the State's attorney left, Floyd contacted Kuenzel's counsel to inform him of this visit.

Following Floyd's phone call and a 60(b) motion, the district court ordered limited discovery, and the State produced 20 previously undisclosed documents, including grand jury testimony from Harris, Floyd and Epperson, and police interviews conducted with Venn shortly after the crime.[5] What additional materials the State alone possesses is unknown.

In addition to undermining Harris's trial testimony and eliminating its ability to satisfy the State's accomplice corroboration requirement, this new evidence also would raise different, direct challenges to critical aspects of Venn's testimony, and could explain certain notable gaps in Venn's memory. For example, Venn initially told the police that he visited "a friend" after leaving Chris Morris's house, but could not remember the person's name. (R.97.) Floyd's recollection of Venn's visit that evening could identify this previously-unnamed individual and, given Floyd's age, could explain Venn's reluctance to name this "friend." Previously undisclosed police notes reflect that

[5] The disclosure of these statements directly contradicts the prosecutor's in-court proclamation that: "We have given [Kuenzel] every statement that Mr. Vinn [sic] made." (T.174.)

Venn's "face got real flushed at the point when he's saying 'This guy wasn't home. Came on back towards Hollins,'" which is where Floyd lived with her parents. (Id.)

Other previously undisclosed police notes of interviews conducted of Venn shortly after the crime describe David Pope as a possible alternative suspect. There is no evidence as to how or why Pope was eliminated as a witness. Moreover, one of those statements documented a police officer's observation of bruises on Venn's left eye and left arm, just two days after the murder. (R.96, 100.) 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 investigated had this information been produced pre-trial, Dr. Gill nevertheless 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." (R.188.)

The reasons this evidence was not previously discovered and presented are twofold. One reason is that Kuenzel's

inexperienced and fee-capped counsel failed to conduct virtually any factual inquiry, leaving untouched the lowest-hanging of fruit during the 27.75 hours *in total* he devoted to witness interviews and discovery-related matters on *both* the guilt and sentencing phases. (R.76-83.) Trial counsel forthrightly explains that he was "lulled into complacency" by a powerful, impossible-to-beat prosecutor, and begs for some court to correct this injustice. The second is that the police and prosecutor, Robert Rumsey, failed to perform their duties as required by the Constitution.

Post-Trial Materials Offered As Purported "Other" Evidence

Kuenzel has made the bold claim that there is no meaningful evidence (a) demonstrating his involvement, much less his guilt, or (b) corroborating Venn' story of his involvement — and, thus, if the case were on trial today, a court would be required to dismiss for failure of corroboration. In this case, unlike so many others, the claim is valid.

The State's seven-page factual recitation, aptly entitled "Harvey Venn's testimony", makes clear that every fact inculpating Kuenzel's involvement in the crime is

established through Venn. See State's Brief at 5-12. Although the State purports to offer "evidence corroborating Venn's testimony", see id. at 12-17, a review of the substance contained within those paragraphs reveals that it does nothing of the sort. The State's case is Harvey Venn, plain and simple.

Regarding witness testimony (identified as points 1 through 4, id. at 12-15), apart from April Harris, every witness simply confirms (a) Venn's testimony as to his own involvement in the crime, (b) that Venn was with *someone*, and (c) that not a single witness (except Harris) identified Kuenzel as Venn's companion.

The State further claims, in various forms (see points 5, 6, and 8), that "physical evidence corroborated Venn's testimony that Kuenzel shot Linda Offord with the 16-gauge shotgun he borrowed from his father." State's Brief at 15, 16-17. This statement is, at best, intentionally misleading; at worst, it is demonstrably false, and has been recognized as false by the courts. See, e.g., Kuenzel 2009 Opinion, at 1165 ("There was no physical evidence linking Kuenzel to the crime scene. The only blood found was on Venn's left pants leg, and it was the same type as

the victim's.") The district court recognized that "The forensic evidence at the crime scene pointed to the use of a 16-gauge shotgun, not any *particular* 16-gauge shotgun." Kuenzel 2009 Opinion, at 1165 (emphasis in original). Later, the district court observed that "The expert was not able to say [ ] when or under what circumstances the burnt shell had been fired." Kuenzel v. Allen, 880 F.Supp.2d 1205, 1215 (N.D. Ala. Jan. 12, 2011). To be sure, none of 17 latent fingerprints of value recovered from the crime scene, nor any physical swabs taken from the victim's body, connect Kuenzel to the crime.[6]

Finally, the State leans heavily on three facts which occurred *after* Kuenzel's conviction to purportedly corroborate Venn's self-serving, erratic, and wildly inconsistent accomplice testimony: (1) that Kuenzel's unsophisticated mother, distraught with grief after her son's conviction and desperate to correct a perceived injustice, bribed an inmate to testify that he was the person with Venn when the murder occurred (State's Brief at

[6] The notepad "evidence" (point 7, State's Brief at 16) is of limited, if any, probative value, and in any event does not connect Kuenzel to the crime and certainly does not satisfy § 12-21-222.

19-21); (2) that hearsay statements Kuenzel allegedly made concerning the difficulty of connecting shotgun pellets to any particular weapon evidences a guilty conscience (id. at 21); and (3) Kuenzel's claim that he had a one-night stand on the evening in question with a woman he met the previous Saturday night was unable to be proven during the motion for a new trial. (Id. at 22-24). Even granting full regard to these facts, they are relevant *only if* Kuenzel's guilt is presupposed; on the other hand, these facts are of low or no probative value if, as Kuenzel has claimed since Day One, he is innocent of any involvement in this crime.

Post-Conviction Proceedings

Kuenzel has been actively litigating in post-conviction since 1993, and yet he has never received any opportunity to conduct meaningful discovery, examine witnesses at an evidentiary hearing, or have any claims considered on the merits.

How much confidence can there be when, as the State acknowledges, the state post-conviction (Rule 32) court "decided the case on the basis of the Rule 32.2(c) limitation period and, thus, did not address the merits of any of the claims raised in the Rule 32 petition." State's

Brief at 27. Or when the federal courts likewise failed to reach the merits, finding Kuenzel "had not overcome the procedural bar to the review of the merits of his federal habeas petition." Id. at 29.

That Kuenzel has been repeatedly denied the most basic of process must, we urge, factor into the analysis of whether and to what extent the trial proceedings are a reliable, credible predictor of responsibility for this crime.

ARGUMENT IN REPLY

I. THE STATE'S MOTION IS PREMATURE

As described above, Kuenzel is prosecuting a successive Rule 32 petition, and that petition is *sub judice* before the Court of Criminal Appeals. The issues on appeal are substantial and, in many respects, unique to Kuenzel. First, the complete lack of corroboration of the incriminating trial testimony provided by the actual murderer, Harvey Venn, is a jurisdictional omission that is cognizable on a successive Rule 32 petition.

Second, Kuenzel should be afforded one opportunity to establish his actual innocence in light of the volume of evidence unearthed since 1987, the weakness of the State's

case founded upon the most self-interested and untrustworthy witness one could imagine, and the patently unfair process he received.

Nothing about Bill Kuenzel's time in our justice system inspires confidence in the reliability of his guilt. The police investigation reflects a systemic manufacturing of reasons to support a conclusion, without regard to whether the conclusion represents truth. The prosecution intentionally withheld evidence — including during direct appeal proceedings and for nearly two decades thereafter. The prosecution's "star witness" is guilty according to a mountain of evidence, and yet this accomplice's testimony is offered as the sole basis for believing Kuenzel is guilty. Finally, no court has granted Kuenzel a single day to be heard in any post-conviction proceeding. Kuenzel does not come within what some might deem as a class of suspect petitioners; namely, prisoners requesting yet another round of review for their case. To the contrary, Kuenzel has had *no* collateral review of his conviction — neither in federal court nor in the courts of Alabama. His case is the archetype of a proper post-conviction claim clamoring for review.

At bottom, the currently-pending proceedings should not be prejudiced or pre-judged by a premature motion for an execution order.

II. CHANGED LETHAL INJECTION PROCEDURE.

In its Motion to Set an Execution Date, the State of Alabama announced, for the first time, its intention to change the legal injection protocol to use midazolam hydrochloride instead of pentobarbital. Midazolam hydrochloride is the same drug used in the botched executions carried out by other states.

This method of legal injection is subject to currently pending litigation in the federal courts of Alabama. See, e.g., Complaint, Price v. Thomas, et al., Case No. 14-cv-472-KD-C (S.D. Ala. Oct. 8, 2014), ECF No. 1; Motion for Leave to File Second Amended Complaint, Arthur v. Thomas, et al., Case No. 2:11-cv-00438 (M.D. Ala. Oct. 3, 2014) ECF No.190. Kuenzel reserves all rights to similarly challenge the changed lethal injection procedure.

CONCLUSION

For all of the foregoing reasons, Kuenzel respectfully requests that this Court exercise its power to deny the State's request to set an execution date, along with such

other and further relief as this Court deems just, equitable and proper.

Dated: October 17, 2014

Respectfully submitted,

/s/ Lucas C. Montgomery

Lucas C. Montgomery
Stringer Montgomery & Montgomery
138 East Street N
Talladega, AL 35160
Tel: (256) 362-3154

G. Douglas Jones
Jones & Hawley, P.C.
2001 Park Place, North, Suite 830
Birmingham, AL 35203
Tel: (205) 490-2290

Jeffrey E. Glen
Rene F. Hertzog
(pro hac vice)I
Anderson Kill P.C.
1251 Avenue of the Americas
New York, New York 10020
Tel: (212) 278-1000
Fax: (212) 278-1733

David A. Kochman, Esq.
(pro hac vice)
National Concessions Group, Inc.
1058 Delaware Street
Denver, Colorado 80204
Tel: (720) 726-6522

Counsel for Petitioner-Appellant
William Ernest Kuenzel

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2014, I served a copy of the attached brief by first-class mail, postage prepaid to:

J. Clayton Crenshaw
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130-0152

/s/ Lucas C. Montgomery
Lucas C. Montgomery