

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 KUENZEL'S UNOPPOSED
MOTION FOR A STAY OF THE ORDER FOR HIS
EXECUTION**

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Dated: January 27, 2015

PRELIMINARY STATEMENT

Petitioner William "Bill" Kuenzel moves this Court pursuant to Alabama Code § 12-2-2 to stay his execution, currently scheduled for March 19, 2015, pending a resolution of his appeal that currently is pending before the Court of Criminal Appeals.

On December 23, 2014, this Court granted the State's petition and ordered Kuenzel's execution (the "Order"), while the Court of Criminal Appeals was considering Kuenzel's appeal challenging the summary denial of his successive Rule 32 petition (the "Successive Petition") by the Circuit Court of Talladega County. Then, on January 12, 2015, the Court of Criminal Appeals calendared oral argument for April 7, 2015.

As of the date of this Motion, Kuenzel's execution remains scheduled for March 19, 2015. The State's motion to set an execution date seems to have been made as a matter of routine, despite the fact that an appeal was pending. Now that oral argument has been scheduled, the State of Alabama has advised undersigned counsel that it does not oppose Kuenzel's request for a stay of execution.

Kuenzel respectfully requests that this Court stay the execution so that the courts may have an opportunity to hear and assess the claims in the Successive Petition. Accordingly, petitioner respectfully asks this Court to grant this motion to stay.

ARGUMENT

I. THIS COURT SHOULD DEFER TO THE DECISION OF THE COURT OF CRIMINAL APPEALS TO SCHEDULE ORAL ARGUMENT ON KUENZEL'S APPEAL FROM THE SUMMARY DISMISSAL OF HIS SUCCESSIVE PETITION

Courts must demonstrate a "heightened degree of concern for reliability" in the process of capital trials. *Ex parte Woodall*, 730 So. 2d 652, 665 (Ala. 1998). Because "the penalty of death is qualitatively different from a sentence of imprisonment[,]" procedural deficiencies will not prevent a reviewing court from correcting injustices that took place in earlier proceedings. *Id.*

Importantly, the Court of Criminal Appeals of Alabama has determined that Kuenzel's petition raises substantial issues meriting oral argument. Under Rule 34 of the Alabama Rules of Appellate Procedure, an appellant does not have an unconditional right to oral argument. Rather, if the court in which the appeal is pending

believes the appeal to be frivolous, "oral argument will not be allowed." ARAP Rule 34(a). Here, after examining the briefs and the record, the Court of Criminal Appeals found that "oral argument is desirable." *Id.*

Under ordinary circumstances, it would be appropriate for Kuenzel to seek his stay from the Court of Criminal Appeals, where the appeal is pending. However, under ARAP Rule 8(d)(1), stay of execution orders, like the orders themselves, issue from the Supreme Court, which is empowered to "make other appropriate orders" in death [penalty] cases. In the only reported Alabama decision addressing the stay of an execution warrant, this Court stayed the execution to enable the Alabama court system to fully adjudicate a successive Rule 32 petition alleging actual innocence and raising *Brady* violations. See *Arthur v. State*, 71 So. 3d 733 (Ala. Crim. App. 2010). Kuenzel respectfully requests that the deliberative processes of the Court of Criminal Appeals be furthered by this Court's stay of the execution order.

II. TO EXECUTE KUENZEL WHEN HIS CLAIMS OF ACTUAL INNOCENCE AND UNCONSTITUTIONAL PROSECUTION ARE IN ACTIVE LITIGATION IN THE COURTS OF THIS STATE IS ITSELF UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION

Ultimately, Kuenzel should not be executed without an evidentiary hearing because "the execution of a legally and factually innocent person [is] . . . a constitutionally intolerable event." *Herrera v. Collins*, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring); see also *Jackson v. Virginia*, 443 U.S. 307 (1979) (holding that, under the Fourteenth Amendment, no person shall suffer the onus of a criminal conviction except upon sufficient proof). Further, the Supreme Court has found that it can be inequitable to allow procedural rules to bar claims of actual innocence. See, e.g., *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1932 (2013) ("[T]he miscarriage of justice exception [justifies] consideration of claims defaulted in state court under state timeliness rule."). These constitutional concerns are only exacerbated where, as here, it is alleged that the defendant's trial was rendered constitutionally defective by a failure of the trial prosecutor to turn over material exculpatory evidence in

violation of the Fourteenth Amendment. See *Brady v. Maryland*, 373 U.S. 83 (1963).¹

CONCLUSION

Significantly, in light of the decision by the Court of Criminal Appeals, to grant oral argument, the State of Alabama does not oppose Kuenzel's request to stay his execution. The Court of Criminal Appeals has determined that Kuenzel presents colorable claims on appeal, and the

¹ It also cannot be forgotten that the District Court for the Middle District of Alabama recently confirmed that a stay of execution should remain in force until that court and the Eleventh Circuit have "conduct[ed] additional proceedings, including an evidentiary hearing, to resolve the issue of whether the change in drugs . . . constituted a 'significant' change to Alabama's lethal injection protocol." *Arthur v. Thomas*, Doc. 201 at 5, No. 2:11-CV-438 (WKW) (Jan. 15, 2015). This same district court has five other lawsuits pending that also challenge Alabama's new execution protocol. As the district court noted, "[t]his litigation is not happening in a vacuum." *Id.* at 8 n.8. Additionally, on January 23, 2015, the United States Supreme Court granted certiorari on Oklahoma's lethal injection protocol which mirrors the new protocol sought to be used by Alabama, see *Glossip, et al., v. Gross, et al.*, No. 14-7955, and, on January 26, 2015, the State of Oklahoma agreed to the petitioners' request for a stay of execution pending resolution of the appeal. Although Kuenzel has not yet elected to file a parallel lawsuit, he urges that prudence and caution each counsel for his not being executed while those claims remain the subject of active litigation.

court, exercising its discretion, has requested oral argument to better understand those claims. Kuenzel respectfully requests a stay of the Order pending resolution of the Successive Petition.

Dated: January 27, 2015

Respectfully submitted,

/s/ G. Douglas Jones

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