No. 16-213

In the Supreme Court of the United States

WILLIAM ERNEST KUENZEL,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals

BRIEF IN OPPOSITION

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CAPITAL CASE
QUESTIONS PRESENTED

1. Does this Court have jurisdiction to address Kuenzel's federal due process claim when it was not raised in the state courts?

2. Should this Court grant Kuenzel's petition even though it mischaracterizes and misrepresents the purpose of Ala. Code § 6-5-440 that, contrary to Kuenzel's argument, only prohibits two civil actions alleging the same cause of action and against the same party?

3. Should this Court grant Kuenzel's petition to address a state-law claim that was improperly raised in the state intermediate appellate court because it was mentioned in one sentence of the reply brief filed in that court and, as a result, was not addressed?

PARTIES

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INTRODUCTION

Alabama death row inmate William Kuenzel is again before this Court, presenting his repackaged, but still meritless, claim of actual innocence. This Court denied Kuenzel's claim three years ago, when he used "actual innocence" as an excuse for the untimely filing of his first state post-conviction petition and his federal habeas petition. Kuenzel v. Allen, 880 F.Supp.2d 1162 (N.D. Ala. 2009), *motion to vacate denied*, Kuenzel v. Allen, 880 F.Supp.2d 1205 (N.D. Ala. 2011), *affirmed*, Kuenzel v. Comm'r, Ala. Dept. of Corrs., 690 F.3d 1311 (11th Cir. 2012), *cert. denied*, Kuenzel v. Thomas, 133 S. Ct. 2759 (2013).

This time around, Kuenzel appeals from the denial of his successive state post-conviction petition, filed pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, because he did not present his "newly discovered evidence" of actual innocence within six months of its discovery, as he is required to do under a subsection of that rule. The new legal package that Kuenzel has wrapped around his claim of actual innocence alleges a due process violation. He now argues, that it is unfair to require him to bring a newly-discovered evidence claim of actual innocence within six months because a state statute, section 6-5-440 of the Code of Alabama, would bar such a suit if he had another lawsuit pending with the same cause of action and against the same defendant. The other lawsuit that Kuenzel had pending at the time the evidence was "discovered" was an untimely federal habeas petition that contained, among other claims, a claim of innocence.

Kuenzel has many problems to overcome in this litigation. First and foremost, this Court does not have jurisdiction of this petition because Kuenzel never presented his due process federal claim to the state courts. Second, Kuenzel did not present his state-law claim concerning section 6-5-440 until he filed his reply brief in the Alabama Court of Criminal Appeals, wherein he referenced that statute in one sentence. Thus, he did not preserve his state-law claim for review in the state appellate courts. Third, Kuenzel mischaracterizes and misrepresents the purpose of section 6-5-440, in arguing that that statute prohibited the simultaneous filing of his successive state post-conviction petition during the pendency of his federal habeas proceedings. The purpose of section 6-5-440 is to prevent duplicate civil lawsuits alleging the same cause of action against the same defendant. This statute is only applicable to civil litigation—it does not apply to state post-conviction petitions attacking criminal convictions and sentences. Indeed, Kuenzel does not cite a case where a state court has prohibited or dismissed a state post-conviction petition because of that statute.

Finally, Kuenzel's claim of actual innocence is absolutely meritless. The story of innocence that he presents to this Court is that "he was at home sleeping when the murder was committed." Pet. at 4. But neither Kuenzel nor his lawyers have been consistent when arguing that Kuenzel is factually innocent of this crime. In 1988, Kuenzel was convicted of the capital murder of Linda Offord, a convenience store clerk who was shot to death in 1987 during a robbery. The majority of the evidence presented against

Kuenzel was the testimony of Harvey Venn, a co-defendant who testified in exchange for pleading guilty to murder and receiving a life sentence. Venn testified that he drove Kuenzel to the convenience store and remained in the car while Kuenzel entered the store and killed the clerk during an attempted robbery. From these facts, Kuenzel has made many attempts to establish an alibi and to fabricate stories that another person was with Venn.

Kuenzel's stepfather, Glenn Kuenzel, testified at the trial that he drove to Kuenzel's house on the night of the murder to fix a toilet, but looked through a window of the house, saw Kuenzel asleep on the couch, and drove home, not wanting to disturb Kuenzel. R. 566, 568.[1] But Kuenzel told a different story to a mental health professional during a psychological evaluation disclaiming any knowledge of the crime because he drank a large quantity of alcohol and remembered being "awakened by his [stepfather] at some point." R. 744.

Kuenzel ganged up with his mother, Barbara Kuenzel, in presenting two different stories that were proved to be fraudulent, and these efforts resulted in Barbara being convicted of attempting to bribe a witness and perjury. In the Kuenzels' first effort to perpetrate a fraud on the court, Orrie Goggins, Kuenzel's pre-trial cellmate, testified that they offered him money to testify that he was with Venn at the convenience store on the night of the murder. R. 779, 783-84. Their second effort was even worse.

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[1] "R" refers to the transcript of the 1988 trial.

Kuenzel and his mother presented evidence during a motion for new trial hearing to establish that Kuenzel was having sex with a woman named Lisa Sims at his house on the night of the murder, and thus, he could not have committed the crime. MNT1 at 16-29.[2] But Sims was called as a prosecution witness, and she testified that she had never met Kuenzel and had no idea who he was. MNT1 at 29-33, MNT2 at 52-56.[3]

During the federal habeas proceedings, Kuenzel presented several affidavits, prepared by his present counsel, for the apparent purpose of establishing that he was at his house on the night of the murder. One of those affidavits repeated his fraudulent claim that he had sex with a woman named Lisa (either he forgot her last name or this was another woman named Lisa) around the same time that the murder occurred. Doc. 45, Ex. 8, at 7.[4] In that same affidavit, for the first time in any proceeding, Kuenzel claimed that Venn awakened him around midnight and told him to say, if anyone asked, that Venn had come home around 10 or 10:30 PM. Id.

Kuenzel's petition does not mention these alternate versions but is apparently going with the story that has him asleep at the time of the murder.

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[2] "MNT1" refers to the first motion for new trial hearing that occurred on March 15, 1989.

[3] "MNT2" refers to the second motion for new trial hearing that occurred on March 22, 1989.

[4] "Doc." refers to the documents filed during federal habeas proceedings.

STATEMENT OF THE CASE

Many of Kuenzel's assertions about pertinent facts and procedural circumstances are erroneous, or at least not established by the record. These disputes and ambiguities concern not only the facts surrounding the murder, but also the evidence presented at trial and the timing and nature of the prosecutor's evidentiary disclosures. Although Kuenzel catalogues evidence in an effort to question some of the arguments the prosecution made at this trial approximately thirty years ago, he fails to acknowledge a substantial volume of evidence that confirms his guilt. The facts set forth below will attempt to give this Court a more accurate and complete version of the facts.

A. The evidence presented at the trial, including Kuenzel's repeated efforts to present fraudulent alibi evidence.

On the night of November 9, 1987, Linda Offord was shot at a convenience store in Sylacauga where she worked as a clerk. R. 142. The last sale on the cash register tape was at 11:05 PM, and the victim was discovered by the third-shift clerk, who arrived at 11:20 PM. R. 187-88. Offord was alive and gasping at the time, but died on the way to the emergency room. R. 204. The forensic evidence established that she was killed by a single shot from a 16-gauge shotgun based on plastic wadding from a 16-gauge Remington shotgun shell found in her body. R. 393. There was no other physical evidence found at the scene.

Venn and his car were identified by a number of witnesses as being at the convenience store anywhere from 10 to 11 PM that night. Several witnesses saw and acknowledged Venn at the scene. R. 453, 505. Several additional witnesses saw Venn and another man in the car. R. 458. Although those witnesses could not specifically identify that other person as Kuenzel, this was not because they saw someone who did not look like him. Rather, it was dark, and the car windows were not clear. R. 456, 473, 487. The features of the person some of these witnesses were able to see—a man with bushy hair and a mustache—matched Kuenzel's appearance. R. 470, 484.

Because Venn was seen at the store that night, the Sylacauga police contacted him and interviewed him several times, the first being two days after the murder. R. 149. Venn told Kuenzel about the police contact, and Kuenzel told him to tell the police the false story that Venn went to visit a friend in a nearby town and stopped by the convenience store at 9 PM to use the bathroom. R. 149. After Venn was questioned, he told Kuenzel that he told the police the false story, and Kuenzel wrote it down on a pad. R. 151.

After the police left, one officer realized that he had left his notepad at Venn's residence, and he instructed another officer to go back and retrieve it. R. 434. Upon arriving at Venn's residence, the officer found Venn and Kuenzel sitting at the kitchen table, and Kuenzel was writing in a spiral-bound notebook. R. 435. Three days later, on November 14, police re-

turned to Venn's residence, obtained consent to search from both Venn and Kuenzel, and seized, among other things, the notebook. Id. The notebook contained Kuenzel's notes documenting the false story Venn had initially told the police. State Ex. 32.

Venn was interviewed again that day at the Sylacauga police station, at which time he confessed that he drove Kuenzel to the convenience store in Sylacauga, where Kuenzel exited the car and murdered the clerk during a robbery. During this confession, Venn stated that Kuenzel used a 16-gauge shotgun that he had borrowed from his stepfather, and that Kuenzel had disposed of the spent shotgun shell by putting it in a paper bag and burning it in a trash barrel in the yard. R. 147-48. Kuenzel was arrested the next day, November 15. After obtaining a search warrant, the police retrieved the brass head of a burned 16-gauge Remington shotgun shell from the trash barrel used to burn trash. R. 346. A firearms expert later conducted ballistics testing and determined that the shell had been fired from Kuenzel's stepfather's shotgun. R. 147-48, 347-49. Moreover, police recovered material from the victim's body and the crime scene, known as shotgun wadding, that was from the same manufacturer that made the shell. R. 393.

Venn testimony, testified at Kuenzel's capital murder trial. R. 171-72.[5] On Monday, November 9,

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[5] Kuenzel's petition offers no citation for his assertion that prosecutors offered him a plea deal to testify against Venn. See Pet. at 7. The State is unaware of such an offer being made.

he and Kuenzel, who worked together at a factory, arrived home around 2:30 p.m., then left their residence around 3:30 p.m. R. 124. In the backseat of the car were a 16-gauge shotgun Kuenzel borrowed from his stepfather, a 12-gauge shotgun Venn borrowed from a co-worker named Sam Gibbons, and a .32 caliber pistol. R. 123, 135-36. They separated for a brief period that afternoon around 4:00 p.m., when Venn dropped off Kuenzel at his parents' house and Venn visited his thirteen-year-old girlfriend, Crystal Floyd. R. 127. Around 5:00 p.m., Venn left his girlfriend's house and picked up Kuenzel. Id.

Venn and Kuenzel continued to ride around in Venn's car the rest of the evening, stopping by the convenience store to use the restroom. R. 133. According to Venn, sometime during that evening around 9:00 p.m., Kuenzel first brought up the idea of robbing the convenience store, because he said it would be easy money. R. 134-35. They drove back to the store around 10:00 that evening, and parked in front of the outdoor bathrooms, waiting for customers to leave the store. R. 136-37. While parked there, Venn saw several people that knew him. R. 136-37. Venn and Kuenzel left in their car, then returned around 11:00 p.m. R. 139. They waited until all of the customers left the convenience store. R. 140. Then, Kuenzel covered up the license plate with a paper sack, covered his face with a ski-mask, took the 16-gauge shotgun, and went into the store by himself. R. 140-42. Venn stayed in the car, heard a shot, and saw the clerk fall backward. R. 142. Kuenzel ran out of the store, told Venn to "haul ass,"

that he "didn't mean to do it," and that he did not take any money. Id.

At trial, Kuenzel's defense counsel used Venn's three statements to impeach Venn's trial testimony.[6] R. 159-80, 540, 557. Venn admitted that in his first statement, he falsely claimed that he was at Chris Morris's house on the night of the crime. R. 165, 167, 542-44. He also admitted that in his first statement he falsely stated that he saw David Pope that night at the convenience store.[7] R. 165-66. Venn first testified that a small bloodstain on his pants was

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[6] Venn's first "statement" consisted of handwritten notes made by the police during several interviews on November 11, two days after the murder. R. 27, 178, 540-41; Doc. 136, Ex. 2, Ex. 5, Ex. 6, Ex. 7, and Ex. 8. Venn's second statement was taken on November 14-15, Doc. 136, Ex. 9, and his third statement was taken on December 9, 1987. R. 25, 178; Doc. 136, Ex. 10. Venn's second and third statements were audiotaped and subsequently transcribed.

[7] Venn's cross-examination shows that defense counsel had copies of Venn's statements and used them to impeach his testimony. Venn first talked to the police two days after the murder, and the participating police officers made handwritten notes of these conversations. Doc. 135, Ex. 2, 5, 6, 7, and 8. Venn testified that the statement he gave in these notes was false and he was impeached on this admission. R. 165-66. He specifically testified that his assertion that he saw David Pope that night was false. R. 166-67. Despite this testimony, Kuenzel alleges that the police notes from this first interview were not disclosed. Pet. at 4. Even though Venn testified that he did not see David Pope the night of the murder and that his statement asserting that he did see Pope was false, Kuenzel alleges that Pope is a "possible alternative suspect." Pet. at 10. None of the witnesses who saw Venn at the convenience store that night testified that they saw David Pope at the store.

"squirrel blood," R. 166, then he stated he did not know what the reddish stain was or how it got on his pants.[8] R. 542, 545, 555.

The prosecutor offered the following evidence, among other things, to bolster Venn's testimony. First, the prosecutor offered the testimony of a handwriting analyst to show that the handwriting in the spiral-bound notebook seized from Kuenzel's residence was Kuenzel's, and that the contents matched the details of Venn's first statement to police. R. 165, 167. Second, as previously mentioned, the prosecutor offered testimony from a firearms expert that the burnt brass shotgun shell found in the trash at Kuenzel's home had been fired from the 16-gauge shotgun that Kuenzel borrowed from his stepfather. R. 382-84. Third, the prosecutor offered the testimony of April Harris, a sixteen-year-old girl who knew Venn and Kuezel. R. 492. She had been a passenger

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[8] Just as his defense counsel did approximately thirty years ago, Kuenzel now emphasizes the police's discovery of a small bloodstain on one leg of Venn's pants. Although it is reasonable for Kuenzel to posit that the blood was probably the victim's, he is being imprecise when he definitively states "there is no dispute that it was Offord's blood." Pet. at 6. The trial testimony was that the blood was consistent with about 5% of the Caucasian population and that the victim fell within that group. R. 368-69. Kuenzel also does not mention other explanations, which the jury apparently accepted, for the blood's presence. Police found no blood on the counter where the victim was working or on the customers' side of that counter, so it seemed unlikely for blood to have splattered on the shooter. R. 262. The prosecutor posited in his closing argument that the blood may have been on the shotgun, and spilled onto Venn's pants when he eventually took the gun out of his car. R. 675-66.

in a truck that passed by the convenience store around 9:30 or 10 PM, and saw Venn's car in the parking lot and Venn and Kuenzel inside the store, standing in front of the checkout counter. R. 494. Fourth, Dianne Mason testified that, while she was driving home from work after 11 PM, she followed a car with its license plate partially covered. R. 505. This corroborated Venn's testimony that Kuenzel covered the license plate with a paper sack. R. 515. Mason also correctly identified the make of the car driven by Venn. R. 521.

During the penalty phase of Kuenzel's trial, the prosecutor presented evidence of inculpatory statements that Kuenzel made to his coworkers. One of these coworkers testified that Kuenzel told him in the wake of the murder, "Me and Harvey [Venn], we're capital assholes." R. 772. When the coworker asked what he meant, he explained, "Me and Harvey, we could kill somebody and get by with it." Id. When the coworker asked how Kuenzel would avoid being caught, Kuenzel replied, "If you're going to kill someone, you shoot them with a shotgun." Id. This was so, Kuenzel elaborated, because "[t]hey will trace the bullet back to you" if "[y]ou … kill them with a pistol or a rifle." Id. Kuenzel then said, referencing Offord's murder, "Just like that girl over in Sylacauga. They don't have a clue to who did that, and they won't." R. 773. That coworker and another also testified that Kuenzel had asked them, as early as 6:15 on the morning after the murder, whether they heard about the shooting and the fact that the perpetrator had taken nothing from the store. R. 765.

Kuenzel's petition is remarkable in that it fails to mention his numerous failed efforts to create an alibi. These efforts include Kuenzel presenting false testimony in an affidavit filed during his federal habeas proceedings, a scheme that involved his mother ultimately being convicted of bribing a witness and of perjury in 1989,[9] and the false story (still being repeated in his petition here) that his stepfather drove to Kuenzel's residence late on the night of the murder to fix Kuenzel's toilet. A summary of these failed efforts is set forth below.

Kuenzel's first attempt to fabricate an alibi occurred soon after the murder. Upon arriving at Kuenzel's home several days after the crime, an investigator discovered Kuenzel and Venn at a table, with Kuenzel writing in a notebook. R. 434. Police seized the notebook and found Kuenzel's notes documenting the false story Venn had initially told the police. R. 435. Venn testified that Kuenzel had asked for everything Venn had told investigators so they could keep their stories consistent. R. 151.

Kuenzel attempted to present evidence of yet another alibi through the testimony of his stepfather. Glenn Kuenzel testified that around 10 PM, he drove fifteen minutes to Kuenzel's house, to fix his son's toilet. R. 566. He claimed that after he arrived, he looked inside from a window and saw Kuenzel asleep on the couch. R. 568. He went home without waking Kuenzel because he did not want to disturb him. R.

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[9] See State v. Kuenzel, CC-1989-268, 269 (Talladega County Cir. Ct. Sept. 29, 1989).

569. But Glenn admitted that he had to wake up the following day around 4:45 AM to go to work, and he provided no plausible explanation as to why he had decided to go fix the toilet around 10:15 the night before. R. 566. Indeed, when Glenn provided an explanation, he was caught in a lie: he claimed that he had gone to Kuenzel's house at that late hour because he had to take another one of this children to the emergency room around 4:30 PM that day, but during the prosecution's rebuttal, a clerk in the hospital's records department explained that the father and his son had left the hospital no later than 1:55 PM. R. 573-75, 606-07. Despite this alibi being exposed as false, Kuenzel's petition claims "that he was at home sleeping when the murder was committed." Pet. at 4.

Kuenzel's petition also does not mention either of the two documented instances in which he made up stories to defraud the court. His first attempt to defraud the court was exposed during his trial. At some point, it became evident that Kuenzel and his mother, Barbara Kuenzel, had tried to procure perjury from his cellmate, Orie Goggins. At the penalty phase, Goggins testified that Kuenzel and Barbara offered him money to testify that he had been with Venn at the convenience store on the night of the shooting. R. 779, 783-84. It was even arranged for Goggins to attend a hearing so Kuenzel could show him who Venn was. R. 781. Goggins testified that both Kuenzel and Barbara were directly involved in the effort to perpetrate a fraud on the court. R. 779.

Kuenzel's second attempt to defraud the court was more brazen. After being sentenced to death, Kuenzel moved for a new trial, claiming that he was having sex with a woman named Lisa Sims on the night of the murder. MNT1 at 16-29, MNT2 at 22-35. These allegations not only marked a documented fraud on the court, but also defamed a married woman who did not even know Kuenzel, and brought a fifteen-year-old girl into his conspiracy.

Following his arrest, Kuenzel had exchanged letters with the fifteen-year-old. MNT2 at 44. People in the Kuenzel household then persuaded her to falsely testify that Sims, one of her cousins, had been having sex with Kuenzel on the night of the murder. MNT2 at 45, 48, 53-54.

Kuenzel took the stand at the motion for new trial hearing. Consistent with the plan, he testified that at the time of the murder he was with Sims. He identified her by name, by a photo, and then by sight in court. MNT1 at 19-22, 38-40. Members of the Kuenzel household followed up by testifying that the fifteen-year-old had confirmed her cousin's affair. Id. at 25-28. Finally, the fifteen-year-old testified that Sims had told her about the incident. Id. at 34-37, 49-51. Meanwhile, the State called Sims to the stand, and she testified that she had never met Kuenzel and had no idea who he was. Id. at 29-33, 52-56.

The prosecution soon confirmed that Kuenzel and his family had fabricated his new alibi. Shortly following the hearing on the motion for a new trial, the fifteen-year-old met with the district attorney's in-

vestigator and told him she had lied on the stand. MNT2 at 62-64. The district attorney then asked the court to reconvene. The prosecutor first re-called Kuenzel's relatives to the stand. Apparently unaware that the fifteen-year-old had recanted her testimony, those witnesses stuck with their story. MNT2 at 7-43. The prosecutor then called the fifteen-year-old, and she confessed that she had lied and that people in the Kuenzel household had put her up to it. MNT2 at 54-56.

The trial judge then entered an order finding that Kuenzel's assertions were "completely false and a … lie on the part of the defendant and other members of his family." Kuenzel v. State, 577 So. 2d 474, 529 (Ala. Crim. App. 1990). The court found "[t]his attempt to implicate this innocent and unsuspecting lady … in the affairs of the defendant a disgrace." Id. Incredibly, Kuenzel continued to maintain to both the federal district court and the Eleventh Circuit during habeas proceedings that he was having sex with woman named Lisa on the night of the murder. This time around, however, he claimed that he did not know her last name. Kuenzel, 880 F.Supp. 2d at 1191 n.31; Kuenzel CA11 Reply 27-28. He even filed a sworn affidavit to this effect in the federal district court. Doc. 45, Ex. 8, at 6-7.[10]

[10] Kuenzel appears to have abandoned this attempt to fabricate an alibi because he does not mention it in his petition.

B. Kuenzel's evidence discovered during the state and federal post-conviction stages.

The evidence Kuenzel describes as newly discovered evidence does not purport to affirmatively establish his innocence. As the federal district court found, "[t]here is no evidence that can be described as directly probative of [Kuenzel's] innocence, such as new DNA evidence, new forensic evidence, new alibi evidence, or a confession by someone claiming to be the murderer." Kuenzel v. Allen, 880 F.Supp.2d 1205, 1218 (N.D. Ala. 2011). Instead, the new evidence Kuenzel offered attempts to undermine some of the evidence the prosecution used to establish his guilt. Moreover, the evidence was not newly discovered. As explained by the federal district court, "the basic facts of the evidence existed at the time of trial and is not really new." Kuenzel, 880 F.Supp.2d at 1218.

In its opinion affirming the denial of federal habeas relief, the Eleventh Circuit Court of Appeals explained that Kuenzel's new evidence falls into five categories: "(1) 'new evidence' that the shotgun Venn had at the time of the murder—which at trial was thought to be a 12-gauge—may actually have been a 16-gauge; (2) 'new evidence' that Venn was alone with his then-girlfriend [Crystal Floyd] for a few minutes an hour or more before the time of the murder; (3) 'new evidence' that Venn bore some signs of struggle when interviewed by the police shortly after the murder and that the victim also bore some signs of an altercation; (4) 'new evidence' that Venn made statements to the police just after the crime that did

not implicate [Kuenzel], instead mentioning another man who was with Venn near to the time of the murder; (5) 'new evidence' that April Harris's testimony before the grand jury about [Kuenzel's] presence at the convenience store was more equivocal than her later trial testimony." Kuenzel v. Comm'r, Ala. Dept. of Corrs., 690 F.3d 1311, 1316 (11th Cir. 2012).

1. Venn's shotgun

The record does not support Kuenzel's categorical assertion that Venn possessed a 16-gauge shotgun on the night of the murder rather than the 12-gauge shotgun that Venn testified that he borrowed from a co-worker named Sam Gibbons. Kuenzel based his assertion on a 1999 affidavit procured from Gibbons's widow, obtained ten years after the trial. Doc. 45, Ex. 2. As the federal district court explained, that affidavit was "little more than a hearsay account of what" the widow "was told by her husband." Kuenzel, 880 F.Supp.2d at 1218. She states that Venn borrowed her husband's shotgun and it was returned, but she does not know when or by whom. Doc. 45, Ex. 2. After the shooting occurred in 1987, she said that her husband expressed concern that his gun might have been involved in the shooting, but he told her later that the police ruled out his gun after looking at it. Id. Years later, she delivered a shotgun to Kuenzel's investigators from a van in her front yard that was not in working order, and was used for storage. Id. Kuenzel's lawyers, in turn, claim they handed that shotgun over to a "self-described firearms expert," who determined it to be a

16-gauge. Kueznel, 880 F.Supp.2d at 1218-19. In addition to noting the unreliability of the information in the affidavit, the district court stated, "Mrs. Gibbons' testimony that her husband told her that the police had ruled out his gun tends to undermine the possibility that the Gibbons gun was involved." Kuenzel, 880 F.Supp.2d at 1219.

2. Venn's visits to Crystal Floyd's house on the day of the murder.

Kuenzel's post-conviction attorneys prepared two affidavits from Crystal Floyd, one in 1997, Doc. 45, Ex. 6, and the other in 2008, Doc. 136, Ex. 11, who was Venn's thirteen-year-old girlfriend at the time of the crime. She stated, among other things, that Venn came to visit her alone around 10 PM on the night of the killing. Floyd's affidavits conflicted with Venn's testimony that he visited her several hours before the murder. The court found her new account not "believable" or "trustworthy." Kuenzel, 880 F.Supp.2d at 1221. This is because numerous disinterested witnesses saw Venn at the convenience store around 10 PM, R. 453-54, 466, 477, 481, 482-83, which is inconsistent with Floyd's affidavits that Venn was at her house around the same time. Id. As the court concluded, "Floyd's testimony simply is not sufficiently trustworthy to raise any questions about Venn's description of the events that night." Id.

3. Testimony of New York Deputy Chief Medical Examiner.

The court also properly dismissed, as "utter and unsustainable speculation," Kuenzel, 880 F.Supp.2d at 1223, the supposition of a purported expert witness that Venn and the victim were involved in a physical altercation with one another shortly before the victim's death. Kuenzel's proffered evidence comes from a medical examiner's review, decades after the fact, of the notes on the original autopsy report. The report referred to "occasional minute blue marks on" one of the victim's fingers and an "abrasion on her right forearm." Id. As the court noted, Kuenzel's newly proffered expert was not even "sure what the blue marks on the victim's hand were." Id. The physician who actually examined the victim during her autopsy "did not note any bruising, swelling, or other marks on [the victim's] right hand" at all. Id. The court noted that the "abrasion and blue marks may have been caused by an infinite variety of events." Id. The most obvious would have been the victim's "fall backward" from the gunshot that killed her and fractured her leg. Id. The court ultimately concluded that Kuenzel's purported expert's opinion was not "reliable under the standard mandated in Daubert v. Merrell Dow Pharmaceutical, Inc, 509 U.S. 579 (1993)." Kuenzel, 880 F.Supp. 2d at 1223.

4. Venn's first statement to the police that did not implicate Kuenzel, instead mentioning another man.

Kuenzel contends that the police investigators' handwritten notes of their first interview with

Venn—in which he implicated someone other than Kuenzel as being with him on the night of the murder—differed from the statement he later told to police and then to the jury. Venn's false story implicating someone else was planted by Kuenzel and was his first attempt to come up with an alibi. Contrary to Kuenzel's assertion that these notes were suppressed, see Pet. at 9, Venn's cross-examination demonstrates that Kuenzel's trial counsel had these notes. Venn admitted that he falsely claimed that he was at Chris Morris's house on the night of the murder. R. 165, 167, 542-44. Venn also admitted that in his first statement he falsely stated that he saw David Pope the night of the murder at the convenience store. R. 165-66. Kuenzel emphasizes the portion of Venn's false story concerning Pope, see Pet. at 10, as he did throughout his federal habeas proceedings. But Venn has admitted this portion of his first statement was false, and, moreover, none of the witnesses who saw Venn at the convenience store that night testified that they saw Pope. Kuenzel's continued efforts to suggest that Pope was with Venn on the night of the murder are incredible.

5. April Harris's identification of Venn and Kuenzel

At trial, April Harris testified that she and a friend rode by the convenience store between 9:30 and 10 PM the night of the shooting, and that she saw Venn's car and then saw both Venn and Kuenzel standing inside the door of the store. R. 494. But in her grand jury testimony, she was a bit less certain about seeing Venn and Kuenzel. At that time, Har-

ris identified Venn's vehicle and stated that it was her best judgment that she saw Kuenzel and Venn in the store between 10 and 10:45 PM. SR32Vol. 1 at 91[11] ("but judging from the stature of the people that were in there I believe that it was them"); SR32Vol. 1 at 94 ("I believe that it was them."). The Eleventh Circuit held that while Harris's certainty about her testimony may have evolved between her witness statement, her grand jury testimony, and her trial testimony, she repeatedly identified Kuenzel and Venn as being in the store on the night of the murder, "and the slight variations in Harris's testimonies would not prevent a reasonable juror from believing Harris's testimony at trial." Kuenzel, 690 F.3d at 1317.

C. Proceedings below

Kuenzel offers an incomplete account of this case's procedural history. He omits mention of several opinions the courts have issued, and he misreads what the federal district court and Eleventh Circuit said in rejecting his claim of factual innocence.

1. Direct appeal and state post-conviction

This case had a complicated history in state court. The Alabama courts issued two published decisions on direct review. See Kuenzel v. State, 577 So. 2d 474 (Ala. Crim. App. 1990), aff'd. Ex parte Kuenzel, 577 So. 2d 531 (Ala. 1991), cert. denied. Kuenzel v.

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[11] "SR32Vol" refers to the three-volume transcript of the successive state post-conviction proceedings.

Alabama, 502 U.S. 886 (1991). The state-court opinions took note of, among other things, Kuenzel's attempt to escape from jail and his multiple attempts to defraud the lower courts. See Kuenzel, 577 So. 2d at 509-12, 519-20, 529, 534-35. When Kuenzel filed an untimely petition for post-conviction review in 1993, the state courts issued unpublished opinions rejecting his claims. See Kuenzel v. State, 805 So. 2d 783 (Ala. Crim. App. 2000), cert. denied. Ex parte Kuenzel, 806 So. 2d 414 (Ala. 2000), cert. denied. Kuenzel v. Alabama, 531 U.S. 1114 (2001).

2. Federal habeas review

Kuenzel also sought federal habeas review in 2000, almost ten years after the statute of limitations had run. The case has made its way to the Eleventh Circuit three times. In the first two instances, the Eleventh Circuit erroneously found that the petition was timely under 28 U.S.C. § 2244(d), which tolls the statute of limitations while a "properly filed" state post-conviction petition is pending. See Kuenzel v. Campbell, 85 Fed. Appx. 726 (11th Cir. 2003); Kuenzel v. Allen, 488 F.3d 1341, 1342-43 (11th Cir.2007). This Court eventually summarily reversed the governing Eleventh Circuit precedent on this statutory-tolling point. See Allen v. Siebert, 552 U.S. 3 (2007). Accordingly, when the case was remanded, the federal district court focused on Kuenzel's argument that he could, by showing actual innocence under Schlup v. Delo, 513 U.S. 298 (1995), establish both equitable tolling of the federal statute of limitations and a sufficient excuse for his state-court procedural default.

When it comes to those federal proceedings, Kuenzel's petition does not discuss an important procedural detail. Kuenzel presented his actual-innocence argument in two distinct pieces, and the federal district court rejected it in two distinct orders.

First, the court issued an opinion in 2009 dismissing his federal habeas petition with prejudice. Kuenzel v. Allen, 880 F.Supp.2d 1162 (N.D. Ala. 2009). The Court considered and rejected Kuenzel's actual-innocence arguments based on, among other things: (1) the testimony of the widow about what her husband had said about loaning Venn a shotgun; and (2) the testimony of Venn's girlfriend claiming that Venn had visited her about an hour before the murder. Kuenzel, 880 F.Supp.2d at 1188-91. Kuenzel filed a notice of appeal of that judgment, and asked the court to grant him a certificate of appealability. Doc. 119. The court did so on August 6, 2010. See Doc. 132 at 2.

Second, a little less than three months after the court entered its original judgment—and while his original motion for a certificate of appealability was pending—Kuenzel filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure. Kuenzel, 880 F.Supp.2d at 1208. He asked the court to vacate its original dismissal of the habeas petition, arguing that Kuenzel had obtained additional evidence that established his innocence: (1) more testimony from Venn's former girlfriend, and (2) a statement taken in 1987 and grand-jury testimony from April Harris, the eyewitness who testified that in her

judgment she had seen Venn and Kuenzel on the night of the murder. Id. at 1208-09. After allowing limited discovery on these issues, the court issued a thorough opinion denying the Rule 60(b) motion. Kuenzel, 880 F.Supp.2d 1205.

After the court dismissed Kuenzel's federal habeas petition, Kuenzel appealed to the Eleventh Circuit Court of Appeals. That court affirmed, holding that Kuenzel's evidence was insufficient to satisfy the actual innocence standard for reviewing Kuenzel's procedurally barred claims. Kuenzel, 690 F.3d 1311. This Court denied Kuenzel's petition for writ of certiorari. Kuenzel v. Thomas, 133 S. Ct. 2759 (2013).

Despite Kuenzel's repeated assertions that he is factually innocent, it should be noted that the federal district court and the Eleventh Circuit have stated that none of Kuenzel's "newly discovered evidence" implicates factual innocence. The district court explained:

> At best, the evidence [Kuenzel] offers attempts to raise so many doubts about Venn's credibility that one must reasonably assume Venn's testimony was false. But it has failed to do so. Virtually all of the "new" evidence offered by [Kuenzel] is itself so flawed the court is unable to say that it necessarily devastates Venn's credibility.

Kuenzel, 880 F.Supp.2d at 1224-25. For its part, the Eleventh Circuit flatly stated that Kuenzel "failed to make the needed demonstration of actual innocence."

Kuenzel, 690 F.3d at 1318. Indeed, the court minimized the evidence presented by Kuenzel, noting that "this case does not strike us as truly extraordinary." Id.

3. Kuenzel's successive state post-conviction proceedings.

On September 23, 2013, Kuenzel filed his second petition for relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. SR32Vol. 1 at 8-49. Kuenzel did not raise in his successive Rule 32 petition the claim presented in the instant petition. Kuenzel's petition alleged: (1) that the trial court lacked jurisdiction because, he said, his conviction was based on the uncorroborated testimony of his accomplice, in violation of Ala. Code § 12-21-222 (1975), and (2) that newly discovered material facts would show that he is actually innocent. Id. at 28-46. Both of these claims were raised solely on state-law grounds, and there were no federal constitutional or statutory grounds raised in the petition.

Kuenzel raised his claim concerning the alleged lack of corroboration as a jurisdictional claim because it would then not be subject to any state procedural default rules or state rules of time limitations, as such claims can be raised at any time. Id. at 28-31; see Ala. R. Crim. P. 32.2(c). Regarding his claim of innocence, Kuenzel recognized that state procedural rules require such a claim to be raised within six months of its discovery. Id. at 43-45. But Kuenzel argued that he could not comply with this state procedural rule because he was "actively … litigating claims in federal court and, if relief had been grant-

ed, there would have been no need for this proceeding." Id. at 44.

The State responded and moved for summary dismissal, arguing that both of Kuenzel's claims were time-barred by Rule 32.2(c) of the Alabama Rules of Criminal Procedure. The circuit court summarily dismissed Kuenzel's successive petition. SR32Vol. 3 at 436-55. In its order, the circuit court found, among other things, that both of Kuenzel's claims were time-barred by Rule 32.2(c).

Kuenzel appealed to the Alabama Court of Criminal Appeals, which affirmed the lower court's decision. Kuenzel v. State, 2015 WL 4162899 (Ala. Crim. App. July 10, 2015). Regarding the first claim, the court held that Kuenzel's claim alleging a lack of corroboration was a non-jurisdictional claim, and therefore, "subject to the preclusions in Rule 32.2(c)." Id. at *3. Specifically, the court held that this claim was "time-barred by Rule 32.2(c) because Kuenzel's petition was filed over 20 years after his conviction and sentence became final." Id. The court also held that Kuenzel's claim of factual innocence was time-barred. Id. at *3-*6. The court explained that Kuenzel argued that he discovered the majority of his new evidence in March 2010 but that he did not file his successive state post-conviction petition until September 2013, and thus, "the six-month limitation period for newly discovered material facts in Rule 32.2(c) had expired." Id. at *4. Further, the court noted that some of the evidence Kuenzel cited was over twenty years old. Id. Turning to Kuenzel's equitable tolling argument, the court noted that Kuen-

zel had made a "vague attempt" to assert it in arguing that he could not file an actual innocence claim pursuant to Rule 32 because he was litigating his actual innocence claim in federal court. Id. at *5-*6. The court rejected this argument, explaining that Kuenzel could have pursued his actual innocence claim in state court while he was pursuing that same challenge in federal court. Id. at *5. The court also noted that Kuenzel could have timely filed his petition, "but [] he made a conscious choice not to do so in hopes of obtaining relief in federal court." Id. at *6. Ultimately, the court concluded that "the doctrine of equitable tolling does not permit a Rule 32 petitioner to belatedly reconsider his or her choice not to timely file a Rule 32 petition only after he or she is denied relief in another forum." Id.

Kuenzel, in his reply brief to the Court of Criminal Appeals, raised for the first time his argument that Ala. Code § 6-5-440 (1975), barred him from raising a state post-conviction petition at the same time he was litigating a federal habeas corpus petition. Kuenzel v. State, CR-13-0899 (Reply Br. at 17). His argument in toto stated that when "newly discovered evidence is unearthed in an active litigation currently being prosecuted in a federal court, a state court petition involving analogous factual issues, albeit under state rather than Federal law, would necessarily have been dismissed under Ala. Code § 6-5-440." Id. at 16-17. To the extent that this sentence raised a claim, Kuenzel did not cite any federal constitutional or statutory grounds. The court's opinion did not address this sentence in Kuenzel's reply brief.

After the court affirmed the lower court's denial of Kuenzel's successive state post-conviction, petition, he filed a petition for writ of certiorari in the Alabama Supreme Court. Kuenzel again mentioned Ala. Code § 6-5-440 in one sentence and acknowledged that this statute applied only to civil-law cases. Ex parte Kuenzel, No. 1141359, Pet. at 52 ("To the contrary, analogous civil law of Alabama would preclude the state court's consideration of a claim under active litigation in the federal courts."). To the extent that this one sentence preserved a claim, Kuenzel did not raise any federal constitutional or statutory grounds. The court denied Kuenzel's petition. Ex parte Kuenzel, 2016 WL 1273445 (Ala. Apr. 1, 2016).

ARGUMENT

This Court, in Rule 10, explains that, since review on writ of certiorari is a matter of judicial discretion rather than of right, certiorari will be granted "only for compelling reasons." The considerations that are enumerated are said to be "neither controlling nor fully measuring the Court's discretion," but merely "indicate the character of the reasons" that will be considered. Kuenzel's petition does not state any of the reasons listed in Rule 10. In fact, Kuenzel did not raise the federal claim that he now alleges in the state courts. As a result, this Court does not have jurisdiction to grant Kuenzel's petition.

I. This court does not have jurisdiction because Kuenzel did not raise a federal claim in the state courts.

It is essential to the jurisdiction of this Court under 28 U.S.C. § 1257(a) that a substantial federal question has been properly raised in the state-court proceedings. As summarized in Cardinale v. Louisiana, 394 U.S. 437, 439 (1969), the policy considerations underlying this jurisdictional requirement are: (1) federal questions not raised in the state court "are those on which the record is very likely to be inadequate, since it certainly was not complied with those questions in mind," (2) in a federal system, "it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of [federal] constitutional challenge, since the statutes may be construed in a way which saves their constitutionality," and (3) the federal question, if raised below, might "be blocked" by the state court on an adequate and independent state ground, thereby rendering unnecessary any review by this Court of the federal issue. Although Kuenzel alleges a due process violation, he never raised those grounds, or for that matter, any federal grounds in the state courts.

It is a rule of longstanding application that this Court "will not decide federal constitutional issues raised here for the first time on review of state court decisions" because "this Court [is not vested with] jurisdiction unless a federal question was raised and decided in the state court below." Id. at 438 (citing, e.g., Owings v. Norwood's Lessee, 5 Cranch 344, 3 L.

Ed. 120 (1809)). As a result, this Court's rules require that if review of a state-court judgment is sought, the statement of the case portion of the certiorari petition must specify (1) where the federal claim was raised, both in the trial court and in the appellate courts, (2) "the method or manner of raising them and the way in which they were passed on by those courts," and (3) "pertinent quotations of specific portions of the record" "with specific reference to the places in the record where the matter appears [], so as to show that the federal questions was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." Sup. Ct. R. 14.1(g)(i). Put simply, this subsection requires a petition seeking review of a state-court judgment to specify, from the record of proceedings both in the state court of first instance and in the state appellate courts, when and how the federal questions were raised, plus the way in which those questions were passed on by those courts.

Kuenzel's petition does not assert that he raised a due process claim in the state courts. His petition acknowledges that he raised a claim concerning § 6-5-440 for the first time in his reply brief filed in the Court of Criminal Appeals, but it does not assert that he put a federal-question label on it. Pet. at 15. This Court's jurisdiction to review decisions of the state courts is codified in 28 U.S.C. § 1257(a). To invoke that jurisdiction, Kuenzel must demonstrate that the final judgment of the state court reflects a substantial federal question that has been properly raised and necessarily decided. As Kuenzel has failed to do this, his petition is due to be denied.

II. Kuenzel's petition should be denied because he mischaracterizes and misrepresents the Alabama state statute, Ala. Code § 6-5-440, that prohibits two civil actions for the same cause of action and against the same party; moreover, that state statute has no application to state post-conviction petitions filed pursuant to Rule 32 of the Alabama Rules of Criminal Procedure.

Kuenzel lifts a state statute that applies to civil litigation and argues that it prohibited him from filing a state post-conviction petition at the same time that he was litigating his federal habeas petition. But that statute, section 6-5-440, is contained in a portion of the Code concerning civil litigation and is applicable only to that type of litigation, and its purpose is to prevent a civil plaintiff from filing two actions in the courts at the same time for the same cause and against the same defendant. Kuenzel has not cited a case that supports his argument that his successive state post-conviction petition would have been dismissed because he was simultaneously litigating his federal habeas petition. Indeed, his argument was shown to be false in this very case because, as Kuenzel's petition concedes at page twenty, he litigated his first state post-conviction petition at the same time he was litigating his federal habeas petition. Finally, Kuenzel did not raise this argument until he filed his reply brief in the Court of Criminal Appeals, and thus, his state-law claim was not properly preserved and was not addressed by any state court.

The purpose of section 6-5-440, also known as the "abatement statute," is to prevent duplicate civil lawsuits alleging the same cause of action against the same defendant. The statute provides:

> No plaintiff is entitled to prosecute two actions in the courts of this state at the same time for the same cause and against the same party. In such a case, the defendant may require the plaintiff to elect which he will prosecute, if commenced simultaneously, and the pendency of the former is a good defense to the latter if commenced at different times.

§ 6-5-440 (1975). This statute, therefore, "stands for the proposition that a person cannot prosecute two suits at the same time, for the same cause against the same party." Johnson v. Brown-Service Ins., 307 So. 2d 518, 520 (1974). "The purpose of the rule is to avoid multiplicity of suits and vexatious litigation." Id. The statute treats a defendant asserting a counterclaim as a plaintiff and thus may bar that defendant from asserting the same claim in another, simultaneous or later lawsuit. Ex parte Parsons & Whittemore Ala. Pine Construction, 658 So. 2d 414, 419 (Ala. 1995) ("Section 6-5-440 also acts to bar a subsequent action by a party who first appeared as the defendant in a prior action"). Moreover, this statute is contained in Title 6, which governs Alabama's codified statutory law concerning "civil practice." Therefore, this statute is only applicable to civil litigation and does not apply to state post-conviction petitions

alleging claims concerning criminal convictions and sentences.

The only case Kuenzel cites to support his position involved a state-court petition for writ of habeas corpus, not a petition filed pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. Pet. at 20-22 (citing Moore v. State, 462 So. 2d 1060, 1061 (Ala. Crim. App. 1985)). In Moore, the prisoner filed a second petition for writ of habeas corpus at a point in time when his appeal from the denial of his first-filed state habeas petition was pending. Id. at 1061. Both of his petitions concerned his prison disciplinary hearing, which had resulted in the loss of prison "good time." Id. The statutory writ of habeas corpus in Alabama is "a civil remedy," id., and thus, section 6-5-440 was applicable to dismiss the second habeas petition while the appeal of the first habeas petition was pending. Id. at 1062.

Kuenzel's petition omits the fact that Moore was decided several years before the enactment of the Alabama Rules of Criminal Procedure in 1987. See Maddox, Alabama Rules of Criminal Procedure, § 32.0 at 996. At that point in time, the post-conviction remedy of statutory habeas corpus, see §§ 15-21-1 through 15-21-34, was largely consolidated into Rule 32 of the Alabama Rules of Criminal Procedure. Drayton v. State, 600 So. 2d 1088, 1089 (Ala. Crim. App. 1992). The statutory remedy of habeas corpus has not been completely abolished and can still be used to challenge "loss of good time deductions from a sentence, challenges to changes in custody classification, or complaints of jail or prison

conditions," id. at 1090, but challenges to a conviction or sentence are governed by Rule 32. While the statutory writ of habeas corpus was considered a civil remedy, Rule 32 is not, especially because it is a rule of criminal procedure. Kuenzel has not cited any case that applies section 6-5-440 to the post-conviction remedy stated in Rule 32.

Kuenzel did not properly preserve his argument concerning the abatement statute because he did not reference that statute until he filed his reply brief in the Court of Criminal Appeals. See Kyser v. Harrison, 908 So. 2d 914, 917 (Ala. 2005) (quoting Brown v. St. Vincent's Hosp., 899 So. 2d 227, 234 (Ala. 2004)) ("We note 'the well-established principle of appellate review that we will not consider an issue not raised in an appellant's initial brief, but raised only in its reply brief."). Kuenzel referenced section 6-5-440 in one sentence of his reply brief, Kuenzel, CR-13-0899 (Reply Br. at 17), and the court's opinion did not address this sentence. After the court affirmed the lower court's denial of Kuenzel's successive state post-conviction petition, he filed a petition for writ of certiorari in the Alabama Supreme Court in which he again mentioned section 6-5-440 in one sentence and acknowledged that this statute applied only to civil cases. Ex parte Kuenzel, No. 1141359, Pet. at 52 ("To the contrary, analogous civil law of Alabama would preclude the state court's consideration of a claim under active litigation in the federal courts."). The court denied certiorari review, and thus, did not address Kuenzel's one-sentence argument.

Kuenzel's present petition concedes that his first Rule 32 petition was pending when he filed a federal habeas petition. Pet. at 20. But he attempts to make a distinction by arguing that the federal district court had "stayed the federal action pending the outcome of Kuenzel's appeals concerning the dismissal of his first state habeas petition." Pet. at 20 n.3. Kuenzel's attempt at a distinction is inconsistent with his argument that section 6-5-440 requires a dismissal of the state proceeding whenever the plaintiff files the same cause of action against the same defendant in another court. In making that argument, Kuenzel's petition never stated that there were exceptions to the rule (of his creation) that dismissal is not required when the filing in the second court has been stayed.

CONCLUSION

This Court should deny Kuenzel's petition.

Respectfully submitted,

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