No. 16-213

IN THE

Supreme Court of the United States

WILLIAM ERNEST KUENZEL,
Petitioner,

v.

ALABAMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

BRIEF FOR EDWIN MEESE III AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Edwin Meese III served as Attorney General of the United States from 1985 until 1988. He has worked as an officer of the law at every level of government—from Alameda County Deputy District Attorney, to California state legal affairs secretary under then-

[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Rule 37.2, counsel of record for both parties received timely notice of intent to file this amicus brief. Letters of consent are on file with the Clerk.

Governor Reagan, to his time at the Department of Justice.

Mr. Meese has practiced, studied, and taught criminal law and criminal justice issues for over four decades. After serving as a prosecutor in California early in his career, he was the director of the Center on Criminal Justice Policy Management and a professor of law at the University of San Diego. In the Reagan administration, Mr. Meese served as chairman of the Domestic Policy Council prior to his role as the nation's top prosecutor. In addition, Mr. Meese has written extensively about constitutional, legal, and criminal justice issues. He is the author of, among other titles, *Leadership, Ethics and Policing* (2004) and *Making America Safer* (1997). Mr. Meese also headed the Editorial Advisory Board for the best-selling *The Heritage Guide to the Constitution* (2005).

Mr. Meese has long held the Ronald Reagan Chair in Public Policy at the Heritage Foundation and was the founding chairman of the Foundation's Center for Legal and Judicial Studies, which has since been named after him. He is also a Distinguished Visiting Fellow at the Hoover Institution at Stanford University. He sits on the board of the Federalist Society, among numerous other organizations, and is a past chairman of the Board of Visitors of George Mason University, where he continues to serve on the board of the Mercatus Center. Mr. Meese retired from the Army Reserve as a Colonel in 1984.

Mr. Meese's extensive experience as a prosecutor, state and national policymaker, and constitutional and legal thinker give him a unique perspective on the issues regarding prosecutorial conduct and the funda-

mental fairness of the criminal process raised in this case.

SUMMARY OF ARGUMENT

Prosecutors' *Brady* obligations are a cornerstone of our system of justice. The *Brady* rule ensures that the adversarial process works as it was meant to, through the full and fair presentation of facts to the jury. *Brady* thus ensures that all convictions are the result of a fair trial and that the innocent are not convicted. Responsible prosecutors accordingly embrace *Brady* as part of their special, systemic role to seek justice, rather than merely a conviction.

Kuenzel's case involves precisely the injustice that *Brady* forbids: the withholding of critical evidence that, if known, would have undermined the testimony of an indispensable witness and cast serious doubt on Kuenzel's guilt. Without this witness, the State could not even have proceeded to trial under Alabama's accomplice corroboration rule—a rule adopted to guard against convicting the innocent based on self-serving accomplice testimony.

The only significant evidence against Kuenzel was the testimony of his supposed accomplice, Harvey Venn. Venn's pants were covered in blood, but there was no physical evidence implicating Kuenzel. Under Alabama law, Venn's testimony alone was not sufficient to convict Kuenzel; rather, corroboration was required. Prosecutors allowed the supposed corroboration witness, April Harris, to testify that she saw Kuenzel at the scene of the crime, but withheld her earlier grand jury testimony that she did not see the face of the person she glimpsed from her moving car and could not give "any description" of that person. Prosecutors also

failed to disclose a prior statement by Venn contradicting his trial testimony and placing Kuenzel at home during the crime. If this withheld *Brady* material had been disclosed at the time of trial, Kuenzel could not have been convicted. Instead, he was sentenced to death. The *Brady* violation here was egregious.

But what is even more egregious is that Kuenzel has been systematically prevented from litigating the merits of his *Brady* claim, despite his likely innocence. The State did not disclose the withheld *Brady* material until two decades after Kuenzel's trial, when Kuenzel was in the midst of federal habeas proceedings. Because Alabama law prevented him from raising the new evidence while his federal proceedings were ongoing, he waited until the federal proceedings had concluded before presenting the new evidence in a state petition. But the Alabama courts then held that his state petition was time-barred under a separate provision of Alabama law because he had not brought it within six months of discovering the new evidence. The Alabama courts have thus refused to consider the merits of Kuenzel's constitutional claim.

Without review, Alabama's internally contradictory procedural rules will be used to shield the very worst kind of *Brady* violation, which resulted in condemning to death a defendant whose conviction was obtained in violation of the Constitution and who is very likely actually innocent of the crime of which he was convicted.

ARGUMENT

I. PROSECUTORS' *BRADY* OBLIGATIONS ARE A CORNERSTONE OF OUR SYSTEM OF JUSTICE AND A BULWARK AGAINST WRONGFUL CONVICTIONS

Brady v. *Maryland* requires prosecutors to disclose all evidence that is "favorable to an accused" and "material either to guilt or to punishment." 373 U.S. 83, 87 (1963). The rule is necessary to prevent "an unfair trial," *id.*, which would result in a verdict that is not "worthy of confidence," *Kyles* v. *Whitley*, 514 U.S. 419, 434 (1995). The *Brady* obligation reflects and enforces prosecutors' special role in our criminal justice system. A prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty … whose interest … in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). That special role requires prosecutors to "refrain from improper methods calculated to produce a wrongful conviction." *Id.*

Brady ensures that our adversarial system operates as it ought to—with all material evidence weighed and evaluated by the jury, after informed argument by both sides—and that it produces just results. Prosecutors have "inherent information-gathering advantages," including the ability to compel witnesses to cooperate, to "'search private areas and seize evidence,'" and to access the "'vast amounts of information in government files.'" *Wardius* v. *Oregon*, 412 U.S. 470, 476-477 n.9 (1973). The *Brady* rule prevents these inherent advantages from being used for unjust ends. *See id.* at 480 (Douglas, J., concurring in the judgment) ("Much of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution."). Most obviously—and most importantly—such unjust ends in-

clude possible wrongful convictions due to the suppression of exculpatory evidence. *E.g.*, *United States* v. *Mathur*, 624 F.3d 498, 507 (1st Cir. 2010) (*Brady* "'minimize[s] the chance that an innocent person [will] be found guilty.'" (quoting *United States* v. *Moussaoui*, 591 F.3d 263, 285 (4th Cir. 2010)); *see also Kyles*, 514 U.S. at 434-435; Gould et al., *Predicting Erroneous Convictions* 67-68, 84-85, 89-93 (Nat'l Inst. of Justice 2012) (discussing correlation between *Brady* violations and wrongful convictions).

No responsible prosecutor wants to win a case by unfairly leveraging government's structural advantages and withholding exculpatory material. Scrupulous compliance with *Brady* is essential to prosecutors' discharging their duty "'to seek justice, not merely to convict,'" *Connick* v. *Thompson*, 563 U.S. 51, 65-66 (2011), and to earning the trust that juries place in prosecutors, and the confidence that the public places in our system of justice and the convictions it produces.

Compliance with *Brady* is all the more important because of prosecutors' tremendous discretion. *See, e.g.*, *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364-365 (1978). The obligation to disclose the most compelling evidence *against* a defendant's guilt forces prosecutors to consider the arguments against bringing a case in the first place. *Brady* thus promotes accuracy as well as prosecutorial ethics. *See, e.g.*, Freedman, *Lawyers' Ethics in an Adversary System* 88 (1975) ("[A] prosecutor should be professionally disciplined for proceeding with prosecution if a fair-minded person could not reasonably conclude … that the accused is guilty beyond a reasonable doubt."). Indeed, where a prosecutor decides to move forward after reviewing all the evidence and complying with *Brady*, he or she is ultimately more effective at responding to defense arguments

at trial. *Cf.* Burke, *Improving Prosecutorial Decision Making*, 47 Wm. & Mary L. Rev. 1587, 1598-1599 (2006).

Because the disclosure of exculpatory evidence is so critical to a fair trial and a just verdict under our adversarial system, *Brady* does not require intent: A new trial may be necessary when a prosecutor overlooks or misplaces such evidence as well as when he or she purposefully withholds it. *See* 373 U.S. at 87-88.

Kuenzel's case represents precisely the injustice that the *Brady* rule was meant to prevent. This is a capital case, where "'[the Court's] duty to search for constitutional error with painstaking care is never more exacting.'" *Kyles*, 514 U.S. at 422. The most important piece of undisclosed evidence here went directly to an indispensable part of the prosecution's case—the eyewitness identification made by a key witness.[2] As explained further below, while this witness testified at trial that she saw Kuenzel at the scene, she had told a grand jury that she could not identify Kuenzel with any confidence. *See infra* Part II. Critically, this witness was the only eyewitness other than Kuenzel's supposed accomplice, Harvey Venn, and no physical evidence implicated Kuenzel. Under Alabama law, her corroboration of Venn's testimony was legally *required*, Ala. Code § 12-21-222, and without it, the evidence

[2] Disclosure obligations are particularly important for eyewitness identification testimony. Jurors place particularly high value on such testimony, despite its inherent shortcomings. *See, e.g.*, Connors et al., *Convicted by Juries, Exonerated by Science* 24 (Nat'l Inst. of Justice 1996) ("eyewitness testimony was the most compelling evidence" in the majority of cases studied where DNA evidence led to exoneration); *see also United States* v. *Wade*, 388 U.S. 218, 228 (1967) ("[T]he annals of criminal law are rife with instances of mistaken identification.").

would have been insufficient to proceed to trial. *See* Pet. App. 2a (Moore, C.J., dissenting).

Corroboration rules like Alabama's serve a function similar to *Brady*: They ensure a fair trial and guard against the conviction of the innocent. *See Jackson* v. *State*, 98 So. 3d 35, 40 (Ala. Crim. App. 2012) ("'The more serious the penalty, the more likely a false accusation will occur. Thus, our legislature, in order to protect the innocent … has required additional evidence[.]'"); *see also*, *e.g.*, *State* v. *Stone*, 216 P.3d 648, 649 (Idaho Ct. App. 2009) ("'This statutory corroboration requirement is intended to protect against the danger that an accomplice may wholly fabricate testimony, incriminating an innocent defendant[.]'"); *Lindhorst* v. *State*, 346 So. 2d 11, 15 (Ala. Crim. App. 1977) ("[A]ny guilty party is apt to implicate an innocent party in exchange for a grant of immunity from prosecution."); *Comba* v. *State*, 99 P.2d 170, 172, 173 (Okla. Crim. App. 1940) ("The statute was adopted … to prevent one guilty of a crime from implicating another falsely[.]"). Tellingly, the State's *other* major *Brady* violation here also involved the exact danger the corroboration rules were designed to avoid: Prosecutors withheld early statements from Harvey Venn that placed Kuenzel away from the convenience store where the crime occurred and corroborated Kuenzel's alibi that he was asleep at home. *See infra* pp. 17-19.

Here, where the State had a single witness offering legally necessary corroboration for purported accomplice testimony, and where it violated *Brady* by failing to disclose exculpatory or contradictory statements by both these witnesses, the risk of a wrongful conviction is at its zenith.

II. THE *BRADY* VIOLATIONS HERE WERE SEVERE AND RAISE SERIOUS RISKS OF A WRONGFUL CONVICTION

Kuenzel has identified multiple *Brady* violations in the documents that were not turned over to him until 2010—none of which, as explained below, *infra* Part III, he has ever been able to raise on the merits in the Alabama courts. Perhaps the most serious of these is the failure to disclose the grand jury testimony of April Harris. Harris, who claimed to have glimpsed Venn and Kuenzel inside the convenience store from a moving car, was the *only* person other than Venn to testify that Kuenzel was at the scene.[3] Thus, under Alabama's corroboration rule, "the evidence was insufficient to convict Kuenzel" without her testimony. Pet. App. 2a (Moore, C.J., dissenting).

A prior inconsistent statement by a key government witness is heartland *Brady* material. *See, e.g.*, *Smith* v. *Cain*, 132 S. Ct. 627, 630-631 (2012); *Kyles*, 514 U.S. at 441-442, 444. Indeed, the withholding of April Harris's prior grand jury testimony, by itself, fatally undermines confidence in Kuenzel's conviction. *Cf. Smith*, 132 S. Ct. at 631 (unnecessary to consider other

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[3] At trial, the defense called a witness, Tony McElrath, who "said that Venn was the shooter he witnessed kill Linda Offord …. But when asked to point out the killer, he pointed at [Kuenzel]." *Kuenzel* v. *Allen*, 880 F. Supp. 2d 1205, 1216 (N.D. Ala. 2011). Given this and multiple other intractable inconsistencies in McElrath's testimony, and his history of mental illness, *see id.* at 1216 & n.6, McElrath's evidence should be discounted entirely—as the State appears to have done, *see* Tr. 28-34, No. CR-13-0899 (Ala. Crim. App. Apr. 7, 2015) (no mention of McElrath in account of evidence that could corroborate Venn's testimony); *see also* Trial Tr. 680 (Rumsey summation) ("Tony McElrath did not see the shooting. … What Tony McElrath saw, he is not able to articulate to you.").

undisclosed evidence when undisclosed prior statements of key witness "alone suffice[s] to undermine confidence in [the] conviction").

April Harris's trial testimony was seemingly damning. At trial, Harris identified Kuenzel unequivocally.[4] On direct examination by lead prosecutor Robert Rumsey, she testified:

> Q. Did you see anybody in the store?
>
> A. Yes.
>
> Q. Or in your judgment that you recognized?
>
> A. Yes.
>
> …
>
> Q. In your judgment who did you see in that store?
>
> A. Harvey and Kuenzel, Billy.

App. 11a.

But in her grand jury testimony, Harris was equally clear that she could *not* confidently identify the individuals she saw in the convenience store from her moving car.[5] Questioned by Dennis Surrett, she testified:

> Q. Okay, did you see something that you recognized or someone you knew?
>
> A. *All I saw* was Harvey Venn's car parked at the side of the building.
>
> …

---

[4] The full transcript of Harris's trial testimony (direct and cross-examination) is reproduced in Appendix A.

[5] The full transcript of Harris's grand jury testimony is reproduced in Appendix B.

> 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 out for sure whether it was Harvey Venn and William Kuenzel or not.*

App. 2a-3a (emphases added).

Surrett then reminded Harris that she had told him in an interview at the police station that she had seen Venn and Kuenzel and asked if she was now "saying you can't say that's who it was?" App. 3a. Harris replied:

> A. I don't—under oath—I don't really want to say that it 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.

Id.

Clearly aware of how fundamentally this testimony differed from the identification he expected Harris to make, Surrett asked, "Has anything happened to get you to change?" App. 3a. Harris replied, "No, sir." *Id.*

Rumsey then took over the questioning. After eliciting that Harris saw no cars present other than the car she had said she recognized as Venn's (App. 3a), he sought to have Harris say that she was merely "le[e]ry about saying … [t]hat [she was] 100% positive" that Venn and Kuenzel were in the store (App. 4a). But Harris's answers made clear that she was unable to make an identification with any confidence: She "couldn't really see a face" and "couldn't get any description." *Id.*

Although Harris acceded to Rumsey's statement that it was her "judgment" that the two figures she saw were Venn and Kuenzel (App. 4a), and that she "believed" it was them (*id.* 6a), Harris clearly made an inference, not an identification. Harris recognized Venn's distinctive car parked outside the store. *Id.* 4a. Venn and Kuenzel had been together on the only occasion when Harris met them—when Venn showed her that same car months earlier. *See infra* n.6. Combining that with the "stature" or "height," and perhaps the "hair," of the two individuals inside the store—whose faces she testified under oath that she could not see—Harris inferred that they were Venn and Kuenzel. App. 3a, 4a.

Like Surrett, Rumsey then asked about intimidation, revealing his awareness that Harris's grand jury testimony fell far short of a positive identification:

> Q. Are—you['re] 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.

App. 5a.

At trial, Harris's testimony changed fundamentally. First, she give the direct testimony set out above, stating that she recognized the people she saw in the store as Venn and Kuenzel. Then, on cross-examination, she was even more adamant:

> Q. [D]o you have a judgment as to how far you would have been from the … entrance of

that store, when you saw Harvey and Billy? …

It would be a good distance, wouldn't it?

A. Yeah, but *I knew it was them in the store*.

App. 13-14a (emphasis added).

Q. Would your observation that it was Harvey and Billy be based on the fact that you saw their car, or that you know that it was them?

A. I know that it was them because I saw the car there and *I saw them there*.

App. 15a (emphasis added).

Q. How long were they in your observation[?]

…

A. It would have been seconds because we were moving.

…

Q. But you could *clearly identify them* with your vehicle moving?

A. *Yes, sir*.

App. 17a (emphases added).[6]

---

[6] Harris also testified that she had met Venn and Kuenzel only once (App. 7a), months before the November 9 murder (*id.* 13a), and that she had only set eyes on each of them about three times, most recently in late October (*id.* 19a-20a). Even that contradicted her grand jury testimony. *See id.* 6a ("Q. Have you talked to either one of them or anything before? A. No, sir. Not—the only conversation that we had was about the car, and since then I hadn't talked to either one of them. *Hadn't even saw either one of them.*" (emphasis added)).

This testimony is irreconcilable with Harris's withheld grand jury testimony, yet the grand jury testimony was never turned over to the defense.

There is no question that the withheld grand jury testimony was material under *Brady*. "[E]vidence is 'material' … when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone* v. *Bell*, 556 U.S. 449, 469-470 (2009). A defendant need not show that it is more likely than not that he would not have been convicted—only that "the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Smith*, 132 S. Ct. at 630 (quoting *Kyles*, 514 U.S. at 434); *see also Wearry* v. *Cain*, 136 S. Ct. 1002, 1006 n.6 (2016) (defendant can prevail "even if … the undisclosed information may not have affected the jury's verdict") (per curiam reversal of denial of *Brady* relief).

This case is not even close. Harris's corroboration was *legally necessary* not only to find Kuenzel guilty, but also to survive summary dismissal. Ala. Code § 12-21-222 ("A conviction of felony cannot be had on the testimony of an accomplice unless corroborated[.]"); *see, e.g.*, *Jackson*, 98 So. 3d at 42 (conviction reversed for failure to satisfy corroboration requirement where nonaccomplice testimony identified only a "black male" and did "nothing but raise a mere speculation of Jackson's guilt"); *see also, e.g.*, *Ex parte McCullough*, 21 So. 3d 758, 760-762 (Ala. 2009) (testimony corroborating the manner of the crime insufficient) (discussing cases). As Chief Justice Moore explained, "[w]ithout Harris's identification, the evidence was insufficient to convict Kuenzel." Pet. App. 2a. If the State had disclosed Harris's contradictory grand jury testimony, it could not have credibly presented her as an eyewitness—and

thus might well have determined that there was insufficient evidence to try Kuenzel.

And even if the State had pursued a trial, if Harris's grand jury testimony had been disclosed, there would not have been sufficient corroborating evidence to sustain a conviction. Harris's purported identification was never particularly robust in the first place: The jury had to believe that Harris was able to identify two people she had met only once by glimpsing them through a doorway as she rode by at 35 miles per hour. Harris's testimony was even weaker as corroboration of Venn's testimony against Kuenzel, given that Harris contradicted Venn's claim that he had never entered the store. *Cf. United States* v. *Agurs*, 427 U.S. 97, 113 (1976) ("[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.").

If Kuenzel's counsel had had Harris's grand jury testimony at trial, he could have conducted a devastating cross-examination. *See Kyles*, 514 U.S. at 443 (changes in key witness's account revealed by withheld statements "would have fueled a withering cross-examination, destroying confidence in [the witness's] story and raising a substantial implication that the prosecutor had coached him to give it"). Once Harris had been confronted with her statements that "under oath" she "d[id]n't really want to say that it was [Venn and Kuenzel]," couldn't "give a description" of the people she saw, "couldn't make out for sure whether it was Harvey Venn and William Kuenzel or not," "couldn't really see a face" and "couldn't get any description" of the people she saw (App. 3a-4a), her trial testimony that she "*knew* it was [Venn and Kuenzel]" in the store and could "*clearly identify them*" (*id.* 14a, 17a) would have lacked any credibility. Nobody can "clearly identi-

fy" someone she has met only once without "see[ing] [his] face." Nobody can "kn[o]w" that a person glimpsed fleetingly was a particular individual if she cannot give "any description" of the person she glimpsed. With no other credible corroboration of Venn's testimony, the jury would not even have been permitted to convict Kuenzel under Alabama law, and would have been instructed regarding that rule. Pet. App. 2a (Moore, C.J., dissenting); *see, e.g.*, *Ziegler* v. *State*, 886 So. 2d 127, 142 (Ala. Crim. App. 2003) ("[A]n instruction on corroboration of accomplice testimony should generally be given."). This *Brady* violation severely undermines confidence in the outcome of Kuenzel's trial.

This case bears striking similarities to *Smith*, where this Court held that undisclosed prior statements by the State's key witness that he was unable to identify the perpetrator warranted *Brady* relief. Just like April Harris, the witness in *Smith*, Boatner, said in the undisclosed statements that he "'*could not … supply a description* of the perpetrators'" and "could not ID anyone because [he] *couldn't see faces*." 132 S. Ct. at 629 (emphases added). Just as in this case, Boatner identified Smith without hesitation at trial. *Id.* at 630 ("Boatner told the jury that he had '[n]o doubt' that Smith was the gunman"). And, just as in this case, the State could not have secured a conviction without Boatner's identification. *See id.* at 631.

This *Brady* violation was even more egregious because much of the withheld evidence was grand jury testimony elicited by the prosecution. It is not plausible that the same prosecutor who conducted part of Harris's grand jury examination forgot that this essential witness had given inconsistent statements in her grand jury testimony. In fact, Rumsey specifically in-

voked the fact that Harris had testified before the grand jury in defending against defense counsel's claim that Harris had been a surprise witness, implying to the jury that Harris's testimony had been consistent throughout.[7]

Nor is it plausible that Rumsey believed that Harris's grand jury and trial testimony were consistent. The contradictions are clear on their face, and Rumsey and Surrett would not have asked Harris whether she was "scared," whether anybody had "called [her] and … [t]alked to [her] about the case," or whether "anything happened to get [her] to change" (App. 3a, 5a), unless they recognized that her grand jury testimony fell short of a reliable identification.

Standing alone, the failure to disclose Harris's grand jury testimony raises an unacceptable risk that Kuenzel was wrongfully convicted. But that risk is further heightened because the State also withheld critical evidence undermining Venn's testimony. Testimony from Venn could not have been used standing alone to convict Kuenzel, but Venn's testimony was by far the most specific account of Kuenzel's supposed involvement. However, police notes of the initial interview with Venn—which, like Harris's testimony, were with-

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[7] Trial Tr. 667 ("April Harris has been a witness in this case since Day One, and she is on the subpoena list. … She testified before the Grand Jury and everything else."); *see also id.* 672 ("April Harris … has been around a long time. Ever since Day One in this case. And she says she saw V[e]nn and Kuenzel in there."). Kuenzel's counsel had described Harris as a surprise witness because, in his opening statement, Rumsey did not tell the jury that any witness aside from Venn would be able to identify Kuenzel as being at the convenience store—indeed, Rumsey warned the jury that none of the customers would place him there. *Id.* 108-109.

held until decades after the trial—show that Venn told police that Kuenzel was at home sleeping at the time of the murder. The same notes show that, in the initial interviews, the police focused on Venn's statements that he was with a different person that night: David Pope, an old friend of Venn's whom police never even investigated. Pet. 10; Pet. App. 32a-33a.

These notes, which both undermined Venn's trial testimony against Kuenzel *and* confirmed the police's initial interest in a *different* potential accomplice who was with Venn at the convenience store, were obvious *Brady* material. *See, e.g.*, *Kyles*, 514 U.S. at 446-447 (describing relevance for *Brady* purposes of evidence that police conducted an inadequate or negligent investigation in failing to pursue other suspects); *see also, e.g.*, *Giglio* v. *United States*, 405 U.S. 150, 154 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the *Brady*] rule." (quoting *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959)). Had the notes been disclosed, the defense could have informed the jury that Venn had initially *confirmed* Kuenzel's alibi that he was at home asleep and impugned the failure to investigate whether Pope was the "white male" seen with Venn at the convenience store by multiple witnesses. Pet. App. 33a. Together, the withheld materials would have grounded a compelling case that Venn's belated accusation against Kuenzel was just as baseless as Harris's identification.

The *Brady* violations here so badly undermine confidence in the verdict that they raise the grave risk that Kuenzel will be executed even though he is not in fact guilty. The eminent prosecutor Robert Morgenthau reviewed the record in this case and concluded that, "to a reasonable degree of prosecutorial certainty … there

is little to no doubt that Mr. Kuenzel is factually innocen[t]." Pet. App. 32a. Based on his review of the evidence, Morgenthau further concluded that "Mr. Kuenzel did not receive a constitutionally permissible trial" (*id.*), and that, in his opinion, "the prosecution team coerced Ms. Harris to corroborate Venn's testimony in order to satisfy [Alabama's accomplice corroboration requirement] even though she was, by her own earlier admission, unable to do so" (*id.* 34a). Given the lack of credible evidence of Kuenzel's guilt, it is difficult to disagree with these conclusions.

If *Brady* had been followed here, Harris's testimony would have been completely undermined by her statements under oath to the grand jury, Venn's accomplice testimony would have been even weaker (if the jury had given sufficient weight to Harris's testimony to consider it at all), and the prosecution would have had no case. Kuenzel's case undoubtedly involves a "true *Brady* violation"—the suppression of exculpatory or impeaching evidence going to the heart of crucial testimony without which the government could not have obtained a conviction. *Strickler* v. *Greene*, 527 U.S. 263, 281-282 (1999). These egregious *Brady* violations, raising the real risk of a wrongful conviction in a capital case, cry out for review—but Alabama has refused to consider Kuenzel's *Brady* claim.

III. A Death Row Petitioner Who Was Likely Wrongfully Convicted Due To *Brady* Violations Should Not Be Denied A Hearing On The Merits Because Of Unfair Procedural Bars

Kuenzel's conviction raises the intolerable risk that an innocent man may be executed. Without this Court's review, Kuenzel will pay the ultimate price for a clear "'constitutional error'" that he has never been

able to raise due to non-jurisdictional state procedural bars. *Kyles*, 514 U.S. at 422.

As Chief Justice Moore explained, "Kuenzel … has never had an opportunity to present his postconviction claim on the merits in any Alabama court." Pet. App. 9a. Kuenzel first filed a petition for post-conviction relief under Alabama Criminal Rule 32 in 1993, almost two decades before Harris's grand jury testimony was disclosed. Because his attorney interpreted an ambiguously worded rule to mean that the deadline for a Rule 32 petition was 60 days from the denial of certiorari by this Court, rather than by the Alabama Supreme Court, Kuenzel's petition was dismissed as time-barred without merits consideration, and his subsequent federal claims were evaluated under the challenging "no reasonable juror" standard for defaulted claims. *Id.*; *see also Kuenzel* v. *Commissioner, Ala. Dep't of Corr.*, 690 F.3d 1311, 1314-1315 (11th Cir. 2012) (per curiam) (citing *Schlup* v. *Delo*, 513 U.S. 298, 327 (1995)). It was only deep into this federal post-conviction litigation that Kuenzel first learned of the Harris grand jury testimony and the Venn police interview notes. In 2010, months after the district court had dismissed Kuenzel's petition, and 22 years after Kuenzel's trial, an attorney for the state visited Crystal Floyd Moore, showed her "two bags of documents," including the Harris grand jury and police interview notes, questioned her about them, *Kuenzel* v. *Allen*, 880 F. Supp. 2d 1205, 1208 (N.D. Ala. 2011), and then, after Moore told Kuenzel's lawyers, disclosed them to Kuenzel for the first time (Pet. 8).

Alabama law prevented Kuenzel from filing a second Rule 32 petition until the conclusion of the federal litigation. Pet. App. 8a-9a (Moore, C.J., dissenting) (citing Ala. Code § 6-5-440 and *Johnson* v. *Brown-Service*

Ins. Co., 307 So. 2d 518 (Ala. 1974)). Accordingly, Kuenzel waited until after this Court denied certiorari in his federal habeas proceedings before filing his successive state petition raising the newly discovered *Brady* material. Pet. App. 8a-9a; *see also Kuenzel* v. *Thomas*, 133 S. Ct. 2759 (2013). The Alabama courts then found this successive petition untimely because it had not been raised in 2010, while the federal litigation was still pending, and dismissed it, again with no hearing on the merits. Pet. App. 6a-7a (Moore, C.J., dissenting).[8]

As a result of this procedural Catch-22, Kuenzel has *never* had a court consider his compelling *Brady* claims—and the concomitant possibility that an actually innocent person was convicted of a capital crime. Despite his diligent attempts to have his claims heard, Kuenzel was thwarted by Alabama's internally contradictory procedural rules, which impose stringent time bars on Rule 32 petitions but also bar simultaneous litigation in federal court.

The combined effect of these procedural rules makes it highly likely that a capital defendant like Kuenzel, who discovers a *Brady* violation long after his conviction, while in the midst of typically lengthy federal post-conviction proceedings initiated before the *Brady* violation was uncovered, will have no avenue to litigate the issue on the merits.

As a matter of due process, "[a] state must furnish corrective process to enable a convicted person … to establish that in fact a sentence was procured under

[8] The six-month Rule 32 deadline that has twice thwarted Kuenzel from receiving proper merits review "is not jurisdictional." Pet. App. 6a (Moore, C.J., dissenting) (citing *Ex parte Ward*, 46 So. 3d 888, 896-898 (Ala. 2007)).

circumstances which offend 'the fundamental conceptions of justice which lie at the base of our civil and political institutions.'" *Taylor* v. *Alabama*, 335 U.S. 252, 272 (1948) (Frankfurter, J., concurring) (quoting *Mooney* v. *Holohan*, 294 U.S. 103, 110 (1935)); *see also Young* v. *Ragen*, 337 U.S. 235, 239 (1949) ("We recognize the difficulties [for state courts] in adapting available state procedures to the requirement that prisoners be given some clearly defined method by which they may raise claims of denial of federal rights. Nevertheless, that requirement must be met."); *Mooney*, 294 U.S. at 113 (rejecting argument that "the state was not required to afford any corrective judicial process to remedy" prosecution's use of perjured testimony); *see also Case* v. *Nebraska*, 381 U.S. 336, 336-337 (1965) (per curiam) (granting certiorari where Nebraska offered no post-conviction process, but remanding after Nebraska passed post-conviction statute). Moreover, all state post-conviction processes must comport with "principles of fundamental fairness in operation." *District Atty's Office for Third Jud. Dist.* v. *Osborne*, 557 U.S. 52, 69 (2009).[9] And in the federal habeas context, this Court has recognized the basic unfairness of barring post-conviction claims on procedural grounds where "the factual or legal basis for [the] claim was not reasonably available to counsel, or … 'some interference by officials' made [asserting it] impracticable." *Murray*

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[9] Whether *other* constitutional rights normally associated with trial, such as the right to counsel, apply in post-conviction proceedings, *see, e.g.*, *Murray* v. *Giarratano*, 492 U.S. 1, 7 (1989) (plurality opinion); *Pennsylvania* v. *Finley*, 481 U.S. 551, 556-557 (1987), is a categorically different question from whether the post-conviction proceedings themselves must provide a defendant with the opportunity to raise a claim that his or her conviction was obtained in violation of the Constitution.

v. *Carrier*, 477 U.S. 478, 488 (1986) (citations omitted); *see, e.g.*, *Amadeo* v. *Zant*, 486 U.S. 214, 223-224 (1988) (*Brady* violation uncovered by exhaustive search of state records). The availability of a fair corrective process for vindicating core federal rights is all the more important in capital cases, where "corrective or modifying mechanisms with respect to an executed capital sentence" are by definition unavailable. *Lockett* v. *Ohio*, 438 U.S. 586, 605 (1978). It is more important still where a capital defendant never received a fair trial, and there is strong reason to believe he is actually innocent.

Although state procedural rules ordinarily deserve deference, Alabama's rules as applied here contravene basic notions of fairness and due process. The procedural bars Kuenzel has faced have deepened an already grave injustice. This Court should grant review and ensure that the compelling constitutional claims of a man who is very likely actually innocent are resolved on the merits. "The alternative to granting review, after all, is forcing [Kuenzel] to endure yet more time on … death row in service of a conviction that is constitutionally flawed." *Wearry*, 136 S. Ct. at 1008.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

GRAND JURY TESTIMONY OF APRIL HARRIS

BY NELSON G. CONOVER:

Q. Raise your right hand, please. Do you solemnly swear to tell the truth, the whole truth and nothing but the truth, so help you God?

A. Yes, sir.

Q. State your name, please.

A. April Harris.

Q. Okay, April, you're going to have to speak up so all these people can hear you, hear? What's your address, please?

A. …, Sylacauga, Alabama

Q. Okay.

BY DENNIS SURRETT:

Q. Okay, April, I believe you and Crystal Epperson on the night of November the 9th, 1987, went to visit a friend over there in Hollins?

A. Yes, sir.

Q. Okay, and I believe you went over there and stayed a little while and the three of y'all returned back to Sylacauga, to get something to eat, is that right?

A. Yes, sir.

Q. Do you have a judgment as to what time y'all arrived over there in Hollins to begin with?

A. It was fairly early in the evening. It hadn't got good and dark yet. I'm not really sure about what time it was. It may have been five or six at the latest.

Q. Okay, and do you have any idea about what time it was when y'all came back into Sylacauga to get something to eat?

A. About eight.

Q. Okay, and the roadway that y'all used is what is called Highway 511 and going up 511 toward Hollins you get the frontal view of the store—Joe Bob's—is that right?

A. Yes, sir.

Q. Coming back down, you get the side view with all the windows and part of the frontal view?

A. Uh hmm (positive)

Q. Okay, and then y'all left Sylacauga going back to drop your friend off?

A. Right.

Q. Okay, and on your way back in what's your best judgment as to the time that y'all were coming home?

A. Between ten and fifteen till eleven at the latest.

Q. Okay, did you see something that you recognized or someone you knew?

A. All I saw was Harvey Venn's car parked at the side of the building.

Q. Okay, that would have been this car here?

A. Yes, sir.

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 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 it 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?

A. No, sir.

BY ROBERT RUMSEY:

Q. April, I'm Robert Rumsey, district attorney, and I certainly don't want you to tell anything that you don't know is true, but obviously, and I know that you know Venn and I know you know Kuenzel. It's awfully—it's obviously also a very important case.

A. Yes, sir.

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 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—the statue of them

Q. Frame, size, height?

A. Their heights, yes, sir.

Q. Length of hair, color of hair?

A. Yes, sir.

Q. Facial Hair? Was the same?

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

Q. Has anybody been and talked to you about this?

A. Not anybody but Detective Brasher. Since I gave an affidavit at the Sylacauga Police Department—

(Tape ends)

(Tape begins)

A. Were at a place called Moses Grocery and Harvey had just got this car and he was showing it off and when he pulled up there he called us out to come

and look at it and I walked out with Christy and Chris to look at his car. He opened it up, showed us the interier, we felt of the interior on the inside of the car and I would know the car anywhere.

Q. Where were the two people standing in the store when you saw them?

A. In front of the counter.

Q. In front of the counter?

A. Yes, sir.

Q. Could you see anything else?

A. No, sir.

Q. Did you see whether they had anything in their hands or anything like that?

A. No, sir.

Q. Did Mrs. Kuenzel say anything to you while ago as she was leaving?

A. Not directly to me but she made the statement that the gun was at—she said something like the gun was at her house that night.

Q. Okay.

A. And several of the other witnesses out there heard her say the same thing.

Q. Are—your not—are you scared or anything?

A. No, sir.

Q. But you told Dennis back then that 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.

Q. But it'd be your best justment that it was?

A. It was.

Q. Do you know anything else about it?

A. No, sir.

Q. Have you talked to either one of them or anything before?

A. No, sir. Not—the only conversation that we had was about the car, and since then I hadn't talked to either one of them. Hadn't even saw either one of them.

Q. And nobody's called you and—

A. No, sir, I haven't even—

Q. Talked to you about the case whatsoever?

A. No, sir.

Q. Okay.

(Inaudible)

BY GRAND JUROR:

Q Did you see the cashier?

A No, sir.

APPENDIX B

TRIAL TESTIMONY OF APRIL HARRIS

(AFTER THE NOON RECESS, COURT RECONVENED, THE DEFENDANT PRESENT IN OPEN COURT, COUNSEL AS BEFORE, IN THE PRESENCE OF THE COURT AND JURY.)

APRIL HARRIS

(BEING BY THE COURT SWORN, TESTIFIED AS FOLLOWS:)

DIRECT EXAMINATION

BY MR. ROBERT RUMSEY:

Q State your name to the Court, please maam.

A April Harris.

Q If you would, you have to talk up, if you would.

A Okay.

Q Do you know Harvey Vinn and William or Billy Kuenzel?

A I met them once, just an acquaintance.

Q All right, let me take you back to a Monday night, which is November the 9th, 1987. Were you out riding around and stuff that night?

A Yes, sir, I was.

Q And who were you with?

A Crystal Epperson.

Q Okay, and that Monday night, would you tellus, please, maam. After it got dark, did you have an occasion to go down to Hollins?

A Yes, sir.

Q And did you go to see somebody at Hollins?

A Yes, sir, I did.

Q And who was that, please?

A Chris Scott.

Q Was he somebody's boy friend or something?

A Yes, sir, he was Crystal's boy friend.

Q He was Crystal's boy friend. And y'all were traveling in Crystal's car?

A IN Crystal's dad's truck.

Q And approximately what time did you go down there?

A We got to Hollins around six.

Q And did you stay at Hollins or did you come back to Sylacauga?

A We stayed for a while and shot pool and then we left and went back to Sylacauga, to McDonald's.

Q Okay, and how would you go to Hollins when you would go?

A Past the Crystal.

Q Okay, and that would be the Crystal station there at what they call the Forks?

A Yes, sir.

Q Okay, would you go down 511 like the Goodwater Road, or do you know the number?

A I don't know the number of it.

Q But the road ultimately goes to Goodwater, doesn't

it?

A Yes, sir.

Q It is the road that runs to the left as you pass the Crystal Station, the road runs to the left.

A Yes, sir.

Q Then did you go back to Hollins after you came up town and stuff?

A After we left McDonald's we did.

Q Okay, do you have a judgment as to what time that you went back down to Hollins?

A When we went back down to Hollins it was around 7:00 or 8:00 when we went back.

Q Okay, when was the last time you came by the Crystal Station?

A Around 9:30 or ten, something around that time.

Q Sometime between 9:30 and 10:00?

A Yes, sir.

Q Okay, did you see somebody's car at the Crystal Station that you recognized?

A Yes, sir.

Q And whose car was it?

A It was Harvey Vinn's.

Q Harvey Vinn's. Could you describe—had you seen it before?

A Yes, sir, I had.

Q And could you describe what kind of car it was or anything?

A It was a newer model car. It was a silverish kind of color. It was a Regal. It had plush interior.

Q And it was a pretty nice little car, wasn't it?

A Yes, sir.

Q Okay, and when you came back by there, you say it was between 9:30 and 10:00?

A Yes, sir.

Q And where was the car parked?

A In front of the Crystal there beside the building.

Q Let me get you to look around here just a minute. Okay? Assuming that this is the Crystal Building.

A Yes, sir.

q And there are two sets of gas pumps out front?

A Yes, sir.

Q Could you show us where it was when it was parked?

A Yes, sir, it was over at the side, away from the gas pumps.

Q I tell you. Why don't you just come up here. And assuming this is the side towards Rockford and this is the side towards Goodwater. And this is the front.

A In here.

Q Back over in this area?

A Yeah.

Q Back over towards the Goodwater way?

A Yes, sir.

Q All right, now, was there anybody sitting in the vehicle when you saw it?

A No, sir, there was not.

Q Did you see anybody in the store?

A Yes.

Q Or in your judgment that you recognized?

A Yes.

Q Maam?

A Yes, sir.

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

A Harvey and Kuenzel, Billy.

Q Harvey Vinn and Billy Kuenzel.

A Uh, huh. (affirmative response)

Q And in your best judgment this was between 9:30 and 10:00?

A Yes, sir.

Q Whereabouts were they in the store?

A In front of the counter at the door.

Q Okay. I believe that's all. Answer Mr. Willingham's or Mr. Adcock's questions.

CROSS EXAMINATION

BY MR. STEVE ADCOCK:

Q Miss Harris, where exactly were you when you saw the vehicle?

A Coming down the hill from Hollins on the way towards Sylacauga, in front of the store.

Q So, were you coming in this direction?

A Yes, sir.

Q On this road?

A Yes.

Q And whereabouts would you have been, with this diagram, when you saw them?

A Almost in front of the store, at a place—

Q Somewhere—

a I was at an angle where I could see through the door.

Q Well, if you would, just step down, with the Court's permission, and point out for the jury where you were when you saw the vehicle, if you would. If this is the road coming back.

A This is the road coming down from Hollins off the hill.

Q And you are coming in this direction.

A As we were coming this way we saw the car and we got on around and I could see through the door and I could see where they were.

Q Okay, when you first saw the car, you were over here?

A Yeah.

Q And as you were coming around the curve here you looked into the building, is that right? Okay you can go back. Is there anything that prompted your attention toward that car? Was there anything that made you aware of that car sitting out there?

A Just that Harvey had shown it to us and I liked the car.

Q How do you know Harvey and Billy?

A Well, I met them at a place called Masers Grocery when Harvey showed me this new car that he got.

Q When would that have been?

A That would have been previous, months before then?

Q Several months before then?

A Maybe.

Q Before that night?

A Yeah.

Q Was that the only occasion that you had ever seen Billy or Harvey?

A No. I have saw them around in Hollins a few times.

Q You have seen Harvey and Billy on more than just that one other occasion?

A Yes, sir.

Q And you saw the vehicle, if I'm not mistaken about what you told us, you saw the vehicle somewhere over on this side of the store?

A Yeah.

Q And it wasn't anywhere over on the other side?

A No.

Q Now, do you have a judgment as to how far you would have been from the inside, the entrance of that store, when you saw Harvey and Billy?

A As to how far in yards?

Q Yards, feet, whatever you can judge it in. Do you know approximately how far it would be?

A No, sir—

Q From this road here to the doors of that store?

A No, sir.

Q It would be a good distance, wouldn't it?

A Yeah, but I knew it was them in the store.

Q How did you know it was them in the store?

A Because I had saw them before.

Q Because you had seen them before. If you would, please maam. Please tell me where they were in that store?

A They were at the door in front of the counter.

Q Okay. Do you know how wide that door is?

A No.

Q Would it be wider than this here at the witness stand, this opening here?

A Yes, sir.

Q Is it a double door? In other words, two sides to that swinging door, or is it just one opening.

A It's one.

Q Okay. But they were both at the door?

A Both standing inside.

Q Was one of them in front of the other or just how were they?

a I believe they were side by side.

Q Do you know what they were doing?

A No.

Q You didn't recognize anything that they were doing?

A No.

Q Do you know what they were wearing?

A No, sir.

Q But you know it was them?

A Yes, sir.

Q Would your observation that it was Harvey and Billy be based on the fact that you saw their car, or that you know that it was them?

A I know that it was them because I saw the car there and I saw them there.

Q Okay, you did see them there?

A Yes, sir, I did.

Q Where had you been to shoot pool?

A Messer's Grocery.

Q And whereabouts is that?

A That's in Hollins.

Q HOw many times had you been by that store that evening? Do you recall?

A About four, going and coming on all trips.

Q Okay, during what times? When was the first time you passed there?

A Around six o'clock.

Q Okay, when is the last time you passed that store?

A From 9:30 to 10:00, about.

Q Okay, that's four different occasions you passed there, right?

A Yes, sir.

Q And how many times did you see that vehicle there?

A On the way back the last time.

Q You saw it there on one occasion?

A Yes, sir.

Q Which would have been from somewhere around 9:30 or 10:00?

A Yes, sir.

Q But you don't know what the two individuals were wearing?

A No, sir.

Q And you don't know what they were doing inside the store?

A No, sir.

Q Is that correct? You just know that you saw them?

A Yes, sir.

Q Let me ask you this. Were you driving your car?

A No, sir.

Q YOu were a passenger?

A Yes, sir.

Q Were you seated on the passenger's side in the front seat?

A Yes, sir.

Q Okay. But nothing obstructed your view into that store?

A No.

q Would it be fair to say that the distance from when

you first observed them in the store, would it be fair to say that it was a length of at least to the back of the courtroom where the doors are? Would it be at least that far or would it be—

A Yes, sir.

q —less—do you think it would be further than that?

A No, sir.

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?

A It was.

Q Whether it was seconds or minutes or how long?

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.

Q Around 35 miles an hour. Did you notice any other vehicles there at the store at that time?

A I noticed another vehicle parked in front of the vehicle that Harvey was driving at the time.

Q I'm not sure if I understand you.

A Where I indicated—

Q Excuse me. Just one second. I'm sorry. I know I'm not making myself clear. But you testified that Harvey's vehicle would have been somewhere over here. And where in relation to that would this other vehicle be?

A In front of it.

Q In other words, are we talking about in front of here, or here?

A Directly in front of it.

Q Just come down here and show me. If we are talking about—if this is where—

A If this is where Harvey's car is. The other car would have been around in here.

Q Do you know which direction Harvey's vehicle was pointing in.

A Right this way.

Q His was kinda parked facing that way, and how was the other car.

A Back this way. The front would be this way and the back end that way.

Q Okay, but you saw Harvey's car when you were somewhere over here?

A Yes, sir.

Q And that car did not obstruct your vision from seeing that car?

A No, because it was right in front of it.

Q Okay. Had you been drinking that night?

A No, sir.

Q No?

A I don't drink.

q Can you tell me, in your best judgment, how many times you have seen Harvey Vinn in your lifetime?

A Not more than three.

Q Approximately three times.

A Not approximately. But—

Q I'm just talking about, in your best judgment you say it is about three times.

A Around three.

Q Do you know when those dates would be that you saw Harvey? Just generally?

A Yes, sir, I saw him as Messer's Grocery in the game room.

Q Do you know how many times that you had seen Billy Kuenzel?

A Most of the time he was with Harvey.

Q Then are you saying you have seen him about three times too?

a Yes, sir.

Q When was the last time you saw either one of them before NOvember the 9th?

A I have no idea as to what date it would have been.

Q Would it have been a month before, two months before, or a week?

A About two weeks at the Washateria.

Q I believe that is all.

MR RUMSEY: That's all.

(WITNESS EXCUSED)