

No. __-____

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*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

CAPITAL CASE

Whether it is fundamentally unfair and violates the Due Process Clause of the Fourteenth Amendment to require a capital habeas petitioner to bring a successive state habeas petition within six months of the discovery of previously unproduced evidence pursuant to Alabama Rule of Criminal Procedure 32.2(c), when Alabama Code § 6-5-440 would have simultaneously barred such a suit.

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William Ernest Kuenzel respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals in this case.

OPINION BELOW

The opinion of the Alabama Court of Criminal Appeals (Pet. App. 11a-24a) is to be published in the Southern Reporter, 3d, and is currently available in online database form at *Kuenzel v. State*, __ So. 3d __, No. CR-13-0899, 2015 WL 4162899 (Ala. Crim. App. July 10, 2015).

The order of the Alabama Supreme Court denying Kuenzel's petition for certiorari and Chief Justice Moore's dissenting opinion (Pet. App. 1a-10a) are to be published in the Southern Reporter, 3d, and are currently available in online database form at *Kuenzel v. State*, __ So. 3d __, No. 1141359, 2016 WL 1273445 (Ala. Apr. 1, 2016).

JURISDICTION

The Alabama Court of Criminal Appeals issued its opinion on July 10, 2015. Pet. App. 11a. On April 1, 2016, the Alabama Supreme Court denied a petition for writ of certiorari. Pet. App. 1a. On June 7, 2016, JUSTICE THOMAS extended the time within which to file a petition for a writ of certiorari by 46 days, to and including August 15, 2016 (15A1241). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof,

are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 6-5-440 of the Alabama Code provides:

Simultaneous actions for same cause against same party prohibited.

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.

Rule 32.1 of the Alabama Rules of Criminal Procedure provides in relevant part:

Subject to the limitations of Rule 32.2, any defendant who has been convicted of a criminal offense may institute a proceeding in the court of original conviction to secure appropriate relief on the ground that ...

(e) Newly discovered material facts exist which require that the conviction or sentence be vacated by the court, because:

(1) The facts relied upon were not known by the petitioner or the petitioner's

counsel at the time of trial or sentencing or in time to file a posttrial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;

(2) The facts are not merely cumulative to other facts that were known;

(3) The facts do not merely amount to impeachment evidence;

(4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and

(5) The facts establish that the petitioner is innocent of the crime for which the petitioner was convicted or should not have received the sentence that the petitioner received.

Rule 32.2(c) of the Alabama Rules of Criminal Procedure provides in relevant part:

.... The court shall not entertain a petition based on the grounds specified in Rule 32.1(e) unless the petition is filed ... within six (6) months after the discovery of the newly discovered material facts

STATEMENT OF THE CASE

Petitioner William “Bill” Kuenzel has spent nearly thirty years on death row in Alabama, convicted of capital murder based on the uncorroborated testimony of Harvey Venn, a self-confessed accomplice. Despite compelling physical and testimonial evidence that pointed directly to

Venn—and the absence of any such evidence pointing to Kuenzel—the State pursued its capital case against Kuenzel. And it did so even as Kuenzel steadfastly protested his innocence with the most basic of defenses that today would have been easy to prove with electronic evidence and security cameras: that he was at home sleeping when the murder was committed.

During the intervening decades, the State has deployed a myriad of procedural arguments to stymie Kuenzel's attempts to vindicate his claims of innocence and constitutional violations in state and federal courts. Just a few years ago, however, and during federal habeas proceedings, Kuenzel discovered that the State had failed to provide him with a bevy of critical exculpatory evidence, in blatant violation of *Brady v. Maryland*, 373 U.S. 83 (1963). This evidence remarkably included undisclosed notes of police interviews with Venn. Kuenzel demanded this evidence, which completely undermines Kuenzel's already shaky conviction.

Rather than acknowledge the injustice it has wrought on Kuenzel, the State has doubled down and invoked Alabama procedural laws to shield these wrongs from judicial review and ensure that no Alabama court would ever be able to evaluate the very evidence that the State unconstitutionally withheld. With innocent life at stake, Kuenzel comes to this Court to prevent a unique and unconstitutional confluence of Alabama procedural

laws from blocking his basic request that a court review his claims on the merits.¹

A. The Evidence Presented At Trial

On the rainy night of November 9, 1987, Linda Offord was shot and killed behind the counter of the convenience store where she worked in rural Sylacauga, Alabama. That same day, Kuenzel and Harvey Venn had worked until about 2:30 p.m. at a textile factory in nearby Goodwater, Alabama, where they were both employed. Kuenzel was twenty-five years old, and Venn eighteen. Kuenzel had met Venn earlier that year, and offered him a room in his Goodwater residence in exchange for Venn driving Kuenzel to work, since Kuenzel did not own a car.

Kuenzel and Venn were last seen together around 7:00 p.m. on November 9, 1987, with Kuenzel consistently maintaining that Venn dropped Kuenzel off at his home in Goodwater by 8:00 p.m. There is no dispute Venn was at the Sylacauga store that night. Eight individuals testified or reported that they saw Venn and/or Venn's car at the store between 10:00 p.m. and 11:05 p.m. on the evening of November 9, and some of those witnesses testified that Venn was with another white male. None of these individuals identified Kuenzel as the second person at the store. Sometime between 11:05 p.m.

¹ The facts relayed in this petition are drawn from the submissions that Kuenzel made in connection with his Rule 32 petition in the Circuit Criminal Court of Talladega County, Alabama. Kuenzel can provide those substantial filings to the Court should it so request. Some of the relevant filings and evidence in this matter has been collected at the following website: <http://alabamainjustice.com/>.

and 11:20 p.m., Offord was shot and killed by a single round from a .16 gauge shotgun.

The investigation led the police to Venn, whose initial story that he was home by 10:00 p.m. directly conflicted with the statements of eight witnesses who saw him or his car at the store after 10:00 p.m. During police questioning, Venn acknowledged that he had a borrowed shotgun in his car the night of November 9, but claimed that it was a .12 gauge shotgun, not a .16 gauge like the murder weapon.

Two days after the murder, the police searched the residence where Kuenzel and Venn lived, with Kuenzel giving permission for the search. The police recovered the pants Venn wore the evening of the murder. Blood was spattered on the pants, and there is no dispute that it was Offord's blood. Venn has never explained how the blood got there, except for previously lying that it was squirrel blood or red paint. After days of questioning without counsel present and with the threat of a capital murder charge hanging over him, Venn abruptly changed his story. He admitted that he was at the convenience store when Offord was murdered, but claimed Kuenzel was the killer.

Kuenzel voluntarily appeared for questioning and maintained his innocence. Kuenzel confirmed that he had borrowed a .16 gauge shotgun from his stepfather but two witnesses testified that it was returned before the murder. The State charged Kuenzel and Venn with capital murder in connection with Offord's death and presented each of them with a choice: plead guilty and testify against the other, or go to trial on a capital charge. Venn took the deal and was released from prison in 1997. Kuenzel

refused to plead guilty to a crime he did not commit, maintaining he was asleep at home at the time of the murder. No physical evidence linked Kuenzel to the store that night. Kuenzel's stepfather testified that he saw Kuenzel at home asleep at 10:30 p.m. that night. The State offered the same plea deal to Kuenzel after jury selection, and Kuenzel again refused. Venn testified at trial and implicated Kuenzel.

Under Alabama law, before the death penalty can be imposed there must be corroboration of an accomplice's testimony. *See* Ala. Code § 12-21-222. In this case, the sole piece of corroborating evidence was the testimony of April Harris, a teenager who testified that she glimpsed Venn and Kuenzel inside the convenience store from the passenger seat of a car that drove past the store between 9:30 and 10:00 p.m. the night of the murder. Harris' testimony was inconsistent with other evidence presented at trial. For example, Harris testified to seeing Venn and Kuenzel at the store prior to the time Venn said he arrived, and further testified that Venn was in the store despite his testimony that he remained outside in the car.

Based on this evidence, and with Kuenzel having only the limited services of a severely under-financed and over-worked State-provided attorney who was handling his first capital case, a jury on September 23, 1988, convicted Kuenzel of Offord's murder. He was sentenced to death.

Venn's blood-stained pants disappeared from the evidence locker shortly after trial, as did the .16-gauge shotgun the State claimed was the murder weapon.

B. The New Evidence

Decades later, the evidentiary picture has changed dramatically. In the mid-1990s, Kuenzel's pro bono post-conviction counsel located the shotgun that Venn had borrowed. Contrary to Venn's testimony at trial, this shotgun was not a .12 gauge, but a .16 gauge, the same gauge as the murder weapon. Contrary to other witnesses, only Venn had testified that Kuenzel still possessed a borrowed .16 gauge at the time of the murder.

In 2010, and during federal habeas proceedings, Kuenzel discovered that the State had been withholding critical exculpatory evidence from him. In February 2010, Alabama Assistant Attorney General Clayton J. Crenshaw without invitation visited the home of Crystal Floyd, Venn's former girlfriend who was thirteen at the time of the murder.² It is unclear why Crenshaw was visiting Floyd at this time, years after the murder. Regardless, during this meeting, Crenshaw showed Floyd documents from the case. Floyd thereafter contacted Kuenzel's counsel and told them how a State prosecutor had come to her home with documents she had never seen before.

Kuenzel's counsel immediately demanded the evidence. The State eventually produced to Kuenzel, among other things, grand jury testimony of Crystal Floyd and April Harris, as well as notes from police interviews with Venn. Astoundingly, none of these materials had ever been provided to Kuenzel or his

² By this time Crystal Floyd's new last name was Moore. For ease of reference, this petition will refer to her as Crystal Floyd.

counsel, despite prior requests. And they rocked the evidentiary foundations of Kuenzel's conviction to its core.

Harris's grand jury testimony directly contradicted her drive-by identification of Kuenzel in the convenience store, eliminating the sole corroborating testimony necessary to apply the death penalty under Alabama law. Four months after the murder and before she would identify Kuenzel at trial, Harris told the grand jury that she "couldn't get any description" of the two men who she saw inside the convenience store while driving by that evening. She said she merely "believed" it was Venn and Kuenzel because she saw Venn's car, and because the men inside the store were of similar height and hair. Harris further told the grand jury that she "couldn't really see a face" of either man. April Harris's grand jury testimony, given before any possible influence from the State prosecutors in the run-up to a criminal trial, comports with common sense about what a passenger in a car would be able to see from hundreds of feet away while driving past a convenience store on a highway during a dark, rainy night in rural Alabama. And it is devastating for the State's capital murder case, which depended on Harris to corroborate Venn's self-serving testimony that Kuenzel was present when Offord was shot.

The previously undisclosed police notes from police interviews with Venn were even more revealing. Those notes included police officers' observations of bruising on Venn's face and arms two days after the murder. The bruising would be consistent with an altercation. As the interview

proceeded, police officers recorded how Venn's "face got real flushed" and his "[v]oice is now wavering" and "shaky."

The police notes also repeatedly identify a possible alternative suspect: a friend of Venn's named David Pope, who Venn identified as being present with him in his car on the night of the murder. During his first conversations with the police, Venn identified Pope as a white male and friend that he knew from grade school. Venn gave the police detailed information about Pope, including where he might live. However, there is no record of Pope being questioned or investigated, and he was never charged. In the newly produced police notes of interviews with Venn, there is no suggestion of Kuenzel's involvement in the murder. In fact, the notes reference Venn informing officers that Kuenzel was asleep at home on the night of November 9, Kuenzel's defense all along.

None of this evidence was made available to Kuenzel in his capital murder trial, even though it existed at the time.

C. Procedural History

The procedural history of this matter has been convoluted, but is directly relevant to the legal issues presented in this petition. Kuenzel's conviction was affirmed on appeal to the Alabama Court of Criminal Appeals. *See Kuenzel v. State*, 577 So. 2d 474 (Ala. Crim. App. 1990). The Alabama Supreme Court denied review on January 11, 1991, *see Ex parte Kuenzel*, 577 So. 2d 531 (Ala. 1991), and this Court denied certiorari in October 1991, *see Kuenzel v. Alabama*, 502 U.S. 886 (1991). Kuenzel was without

legal counsel between October 1991 and August 1993.

After securing representation, Kuenzel in October 1993 filed his first Rule 32 petition for post-conviction relief in Alabama state court, arguing that his imprisonment was in violation of multiple constitutional provisions. The petition was filed within two years of this Court's denial of Kuenzel's petition for writ of certiorari. At first, the state court denied the petition as time-barred, ruling that the two-year limitations period ran from the final judgment of the Alabama Supreme Court, not this Court. Nearly two years later, that same state trial court reversed itself and set aside the order dismissing the petition as untimely. Then, in February of 1999, the court without notice backtracked, reinstating the original order denying Kuenzel's Rule 32 petition on timeliness grounds and dismissing it with prejudice. The court did so without entertaining any further motions or even holding a hearing.

The Alabama Court of Criminal Appeals affirmed the dismissal of Kuenzel's first post-conviction petition, *see Kuenzel v. State*, 805 So. 2d 783 (Ala. Crim. App. 2000), and both the Alabama Supreme Court, *see Ex parte Kuenzel*, 806 So. 2d 414 (2000), and the United States Supreme Court, *see Kuenzel v. Alabama*, 531 U.S. 1114 (2001), denied certiorari. *See also Kuenzel v. Allen*, 880 F. Supp. 2d 1162 (N.D. Ala. 2009) (*Kuenzel I*), *aff'd sub nom. Kuenzel v. Comm'r, Alabama Dep't of Corr.*, 690 F.3d 1311 (11th Cir. 2012) (*Kuenzel II*). The merits of Kuenzel's underlying constitutional claims, including claims for

Brady violations and ineffective assistance of counsel, were never examined in state court.

Kuenzel then sought federal habeas relief. Here again, he ping-ponged back and forth in the system. The United States District Court for the Northern District of Alabama stayed the federal petition during the appeals of his state petition. Order (Dkt. No. 4), *Kuenzel v. Allen*, No. 1:00-cv-00316-IPJ-TMP (N.D. Ala. Feb. 15, 2000). After the stay was lifted, however, the district court determined that Kuenzel's state petition failed to toll the one-year limitation period under 28 U.S.C. § 2244(d) during the years when the state petition was reinstated, because the state petition was ultimately found to be untimely. See Order (Dkt. No. 53), *Kuenzel v. Allen*, No. 1:00-cv-00316-IPJ-TMP (N.D. Ala. Sep. 27, 2002).

The Court of Appeals for the Eleventh Circuit vacated this decision and remanded the case for further proceedings in light of that Court's decision in *Siebert v. Campbell*, 334 F.3d 1018 (11th Cir. 2003). See *Kuenzel v. Campbell*, 85 F. App'x 726 (11th Cir. 2003). In *Siebert*, the Eleventh Circuit had held that Alabama's time limitation for filing state post-convictions petitions was not "jurisdictional" at the time and therefore did not constitute a "condition to filing" that prevented a "habeas petition's state application from being 'properly filed'" under § 2244(d)(2). *Siebert*, 334 F.3d at 1023.

In February of 2006, and following this first remand, the Northern District of Alabama again dismissed Kuenzel's first federal habeas petition as time-barred. See Order (Dkt. No. 93), *Kuenzel v.*

Allen, No. 1:00-cv-00316-IPJ-TMP (N.D. Ala. Feb. 9, 2006). Once again, however, the Eleventh Circuit disagreed with the district court's interpretation of intervening Eleventh Circuit and Supreme Court authority on the effect of the untimely state post-conviction petition on section 2244(d)'s limitations period, vacating and remanding the case a second time. *See Kuenzel v. Allen*, 488 F.3d 1341, 1343 (11th Cir. 2007).

On remand a second time, the district court once more determined that Kuenzel's first habeas petition was untimely and dismissed it. *See Kuenzel I*, 880 F. Supp. 2d at 1205. As discussed above, however, Kuenzel then learned through Crystal Floyd that the State had been withholding exculpatory evidence. At Kuenzel's request, the State finally disclosed this previously unproduced evidence, including the grand jury testimony and police investigation notes discussed above. Despite extensive efforts to obtain additional information over the course of decades, Kuenzel had never received any of the documents that were revealed to him for the first time in 2010.

After receiving the new evidence from the State, Kuenzel's counsel immediately brought the material to the federal court's attention in the then-pending federal habeas case, filing a Rule 60 motion for relief from the judgment dismissing his habeas petition as time-barred. In this motion, Kuenzel outlined his previous requests to the prosecution for *Brady* materials in Kuenzel's original trial over twenty-five years earlier. The district court allowed some limited discovery and briefing, but eventually denied the motion for relief in 2011, refusing to alter the judgment dismissing Kuenzel's federal habeas

petition as time-barred. *See Kuenzel I*, 880 F. Supp. 2d at 1225-27. This time, the Eleventh Circuit affirmed, *see Kuenzel II*, 690 F.3d at 1318, and this Court denied certiorari, *see Kuenzel v. Thomas*, 133 S. Ct. 2759 (2013).

Five months after this Court denied certiorari, Kuenzel filed a second petition in Alabama state court for relief from judgment under Rule 32 of the Alabama Rules of Criminal Procedure, “based on the disclosure of previously unavailable and unknown evidence.” Ala. R. Crim. P. 32.1(e). Kuenzel’s petition included an affidavit from former New York County District Attorney Robert M. Morgenthau, who reviewed the record in this case and opined “to a reasonable degree of prosecutorial certainty that there is little to no doubt that Mr. Kuenzel is factually innocent of having any involvement in the murder of Linda Offord.” Pet. App. 31a-32a.

The Circuit Court summarily dismissed Kuenzel’s Rule 32 petition as time-barred under Rule 32.2(c), which as relevant here requires successive petitions based on new evidence to be brought “within six (6) months after the discovery of the newly discovered material facts.” The Circuit Court dismissed Kuenzel’s second state habeas petition over Kuenzel’s objection that “at the time” the previously undisclosed evidence was obtained from the State, “Kuenzel actively was litigating claims in federal court,” and that it would be fundamentally unfair not to toll the Rule 32.2(c) six-month limitations period under these circumstances. Successive Rule 32 Pet. 35, *Kuenzel v. State*, Case No. CC-88-211.60 (Ala. Cir. Ct. Sept. 23, 2013).

Kuenzel then appealed to the Alabama Court of Criminal Appeals. Among other things, Kuenzel argued that his second state habeas petition should not have been dismissed as untimely “where, as here, the newly discovered evidence is unearthed in an active litigation currently being prosecuted in federal court,” because “a state court petition involving analogous factual issues ... would necessarily have been dismissed under Ala. Code § 6-5-440.” Appellant Reply Br. 17, *Kuenzel v. State*, No. CR-13-0899 (Ala. Crim. App. Sept. 8, 2014). On July 10, 2015, the Alabama Court of Criminal Appeals affirmed. *See* Pet. App. 15a-16a. Notwithstanding Kuenzel’s invocation of § 6-5-440, the Court of Criminal Appeals without explanation (and without discussing § 6-5-440) held that “Kuenzel has cited no authority, and we have found none, that prevents a Rule 32 petitioner from filing a Rule 32 petition in state court while he or she has a habeas petition pending in federal court.” Pet. App. 22a-23a.

Kuenzel then sought review in the Alabama Supreme Court, contending that the application of the six-month rule in Rule 32.2(c) placed him in an untenable position and that “extraordinary circumstances” warranted equitable tolling. Appellant Pet. for Writ of Cert. 31, 32, 49, 50, *Kuenzel v. State*, Case No. 1141359 (Ala. Nov. 9, 2015). Among other things, Kuenzel argued that the State was foisting on him an impossible choice, “forc[ing] [him] to gamble between the federal courts and the state courts” because an unusual provision of Alabama law, Ala. Code § 6-5-440, would have barred him from filing a state habeas petition while his federal habeas proceeding was ongoing. Pet. 55, *Kuenzel v. State* (Ala.). As Kuenzel maintained, it

was unfair and unjust to impose Rule 32.2(c)'s six-month limitations period when "analogous civil law of Alabama would preclude active litigation in the federal courts. *See* Ala. Code § 6-5-440." *Id.* at 52. Kuenzel contended that "[e]quity should not condone or further such behavior where a litigant has otherwise acted diligently," and that "[w]here constitutional rights going to a conviction's fairness are violated, Kuenzel maintains that core principles of equity and justice must intervene to permit at least one re-examination of the underlying facts." *Id.* at 57.

An amicus brief on behalf of various religious leaders and organizations in support of Kuenzel in the Supreme Court of Alabama advanced the same point concerning Ala. Code § 6-5-440:

In effect, the decision below serves to allow Kuenzel to be whipsawed between the courts—with each one faulting Kuenzel for not having come sooner. To make matters worse, well-known State policy does not permit the same cause of action to be pursued in two courts at the same time. As this Court knows, one Alabama statute bars the pendency of civil claims in two State courts at the same time on the same cause of action. *See* Ala. Code § 6-5-440. This bar is well-recognized as applying when there is a prior pending action in federal court.

Amicus Br. of Eagle Forum of Ala. Educ. Found. & Several Religious Leaders & Orgs. in Ala. 22, *Kuenzel v. State*, No. 1141359 (Ala. Nov. 9, 2015).

On April 1, 2016, the Supreme Court of Alabama denied Kuenzel's petition for review. Pet. App. 1a. Chief Justice Moore, joined by Justice Murdock, issued a dissenting opinion. Chief Justice Moore expressed concern that April Harris's corroborating testimony was in fact "consistent with [Kuenzel's] innocence." Pet. App. 4a. In light of the "irreversibility of the death penalty," the fact that Kuenzel "has never had an opportunity to present his postconviction claims on the merits in any Alabama court," and because "equitable tolling, if appropriate, could potentially alter the ultimate disposition of this case," Chief Justice Moore and Justice Murdock would have granted certiorari. Pet. App. 9a. Expressly citing Ala. Code § 6-5-440, the dissenting opinion acknowledged Kuenzel's argument that "Alabama law prohibits the same claims from being heard simultaneously in two different courts of this state," which under Alabama law "include[s] federal courts." Pet. App. 9a. Chief Justice Moore "believe[d] that certiorari review would allow the Court to consider this argument too." Pet. App. 9a.

Kuenzel now seeks a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Alabama Procedural Law Violates Due Process By Requiring Habeas Petitioners To File Successive Post-Conviction Petitions That Would Be Subject To Dismissal Under Alabama Code Section 6-5-440

Alabama's unique abatement right, Ala. Code § 6-5-440, placed Kuenzel in a fundamentally unconstitutional Catch-22. On the one hand, Alabama law required Kuenzel to file his successive

state post-conviction petition based on the previously unproduced evidence that the State belatedly disclosed within six months of Kuenzel's discovery of that evidence. See Ala. R. Crim. P. 32.2(c). On the other hand, Kuenzel was then in the middle of federal habeas proceedings; had he at that time filed the Rule 32 petition in state court, Alabama Code § 6-5-440 would have mandated the dismissal of this duplicative action. Thus, Kuenzel would either be too late (subject to dismissal under Rule 32.2 of the Alabama Rules of Criminal Procedure) or too early (subject to dismissal under Ala. Code § 6-5-440). The Alabama courts violated Kuenzel's rights under the Due Process Clause by failing to allow him to proceed with his second state habeas petition in the face of directly contradictory, and therefore unconstitutional, rules of state procedure. That Kuenzel has never had the opportunity to present on the merits his constitutional claims and the previously unproduced evidence supporting his actual innocence only compounds the due process violation.

It is well-established that State rules of procedure can be so unfair as to violate the Due Process Clause of the Constitution. The federal guarantee of due process operates as a "safeguard[] against essentially unfair procedures." *Bridges v. Wixon*, 326 U.S. 135, 153 (1945); see also *Betterman v. Montana*, 136 S. Ct. 1609, 1613 (2016) (explaining that "the Due Process Clause" is "a safeguard against fundamentally unfair" actions by the government). For this reason, this Court has maintained an important role in ensuring that "state procedures . . . conform to the requirements of the Fourteenth Amendment." *Pate v. Robinson*, 383 U.S. 375, 386 (1966).

A state procedural rule in the state post-conviction context violates the Due Process Clause if it “transgresses any recognized principle of fundamental fairness in operation.” *Dist. Attorney’s Office v. Osborne*, 557 U.S. 52, 69 (2009) (quoting *Medina v. California*, 505 U.S. 437, 448 (1992)). When a State affords post-conviction relief, it cannot utilize procedures that are “fundamentally inadequate to vindicate the substantive rights provided,” as such procedures violate the Due Process Clause. *Id.* The Due Process implications of State rules of procedure are, if anything, even more amplified in the death penalty context, where a seemingly minor procedural issue can be the difference between life and death.

The constitutional problem presented in this petition arises from the perfect storm created by the timing of the State’s belated disclosure of new exculpatory evidence and the combination of Alabama Rule of Criminal Procedure 32.2(c) and Alabama Code § 6-5-440. As relevant here, Rule 32.2(c) requires that successive habeas petitions based on new evidence be filed “within six (6) months after the discovery of the newly discovered material facts.” Section 6-5-440 provides that “[n]o 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.” The “no win” situation in which Kuenzel found himself is a direct result of the unusual nature and scope of this provision.

Alabama Code § 6-5-440 creates an automatic rule of dismissal in instances of duplicative litigation over the same cause and against the same party. Although perhaps not inevitable, the Supreme Court

of Alabama has held that the “phrase ‘courts of this state,’ as used in § 6-5-440, includes all federal courts located in Alabama.” *Ex parte Norfolk S. Ry. Co.*, 992 So. 2d 1286, 1289 (Ala. 2008) (quoting *Ex parte Univ. of S. Ala. Found.*, 788 So. 2d. 161, 164 (Ala. 2000)). Thus a plaintiff cannot file a federal court action and then pursue a state court action for the same cause and against the same party while the federal action is pending.³

Under Alabama law, two actions are prosecuted “at the same time” for purposes of § 6-5-440 unless the first action “has been finally adjudged, which would include the resolution of a timely appeal.” *Ex parte Compass Bank*, 77 So. 3d 578, 585 (Ala. 2011); *see also L.A. Draper & Son, Inc. v. Wheelabrator-Frye, Inc.*, 454 So. 2d 506, 508 (Ala. 1984) (“An action is deemed pending in federal court so long as a party’s right to appeal has not yet been exhausted or expired.”). The identified purpose of § 6-5-440 is to strictly preclude the possibility of multiple actions over the same cause in multiple courts, *see Ex parte J.E. Estes Wood Co.*, 42 So. 3d 104, 111 (Ala. 2010), a purpose that is fully served only when a second-filed action is barred until resolution of any appeals on the first-filed action, including a petition for writ of certiorari in this Court. That is because a remand on appeal or after certiorari could result in further proceedings on the first-initiated action. *See Compass Bank*, 77 So. 3d at 585 (noting that “[i]f the

³ This is in contrast to what happened when Kuenzel filed a habeas petition in federal court while his first state habeas petition was pending. In that instance, the district court stayed the federal action pending the outcome of Kuenzel’s appeals concerning the dismissal of his first state habeas petition.

federal appeals court reverses the district court's decision" and reinstates the state law claims, then § 6-5-440 would preclude the later-filed state action).

As long as the two actions are "for the same cause," § 6-5-440 operates to bar the subsequent action. Whether two claims are "for the same cause" turns on whether they "arise[] out of a single wrongful act or dispute," *Equity Res. Mgmt., Inc. v. Vinson*, 723 So. 2d 634, 638 (Ala. 1998), and whether the first claim "would be conclusive between the parties and would operate as a bar to the later action." *Moore v. State*, 462 So. 2d 1060, 1061 (Ala. Crim. App. 1985).

Section 6-5-440 has been applied in the habeas context. *See Moore*, 462 So. 2d at 1062. Whether it would apply in a given case depends on the relief requested as part of the habeas petition. If a prisoner files a petition contesting the deprivation of his accumulated good time due to his behavior in prison, for example, a judgment in his favor would not bar the very distinct challenge to his original conviction, nor be conclusive between him and the State. On the other hand, the Alabama Court of Criminal Appeals has held that if a habeas petitioner attacks his *conviction*, "[t]he result of this petition, if favorable to him, might be his outright and, so, *conclusive* release." *Id.* (emphasis added). In such a circumstance, a second-filed action that also challenged the conviction "would [] be, in the language of the statute, 'for the same cause,'" thus compelling dismissal under § 6-5-440. *Id.*

As a result, a habeas petitioner who files two habeas petitions against the State, both of which seek to vacate his conviction, prosecutes two actions

“for the same cause,” and triggers abatement under § 6-5-440. As the Alabama Court of Criminal Appeals has explained, “[w]hen a petitioner has pending before any court of this state a petition for writ of habeas corpus or an appeal from a denial of such petition, a subsequently filed petition for writ of habeas corpus for the same cause, may not be entertained and should properly be dismissed pursuant to § 6-5-440.” *Moore*, 462 So. 2d at 1062.

Importantly, if the requirements of § 6-5-440 are met, Alabama courts are required to dismiss the second-filed action and cannot stay it. According to the Supreme Court of Alabama, § 6-5-440 affords defendants a “clear legal right . . . to a dismissal” of the second-filed action. *Compass Bank*, 77 So. 3d at 587. In fact, § 6-5-440 “*compels dismissal*” without regard to the discretion of the trial judge, *J.E. Estes Wood*, 42 So. 3d at 109. Section § 6-5-440 thus “is not satisfied by a *stay* of the later filed case *in lieu* of dismissal.” *Id.* at 111 (granting a writ of mandamus ordering the lower court to dismiss the stayed action). This statute therefore poses a distinct threat to Alabama habeas petitioners because § 6-5-440 would subject protective state habeas petitions to dismissal when a federal proceeding is ongoing.

It merits noting that Alabama’s statutory right of abatement is apparently unique among the States. It appears that no other State affords defendants an absolute statutory right of abatement, stripping the lower courts of the power to stay proceedings as a matter of comity or discretion. While the majority of States entertain pleas in abatement when there is a prior action pending in another *state court* in the State, it appears that only Alabama, Kentucky, New

Hampshire, and North Carolina consider a pending suit in *federal court* located within the State to be grounds for a plea in abatement.⁴ Furthermore, it appears that Alabama alone grants a statutory *right* of abatement that overrides the discretion afforded trial courts in other States, leaving a litigant who has brought an earlier federal court suit without the option to file a placeholder state court action and move for a stay.⁵ Alabama's posture also stands in contrast to federal procedure, which, when confronted with a pending state action, applies the "wise judicial administration" principle of *Colorado River Water Conservation Dist. v. United States*. 424 U.S. 800, 817-18 (1976), which grants federal district courts ample discretion to address such situations, including through stays, *see, e.g., Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 n.2 (1995).

Section 6-5-440 created an impossible situation for Kuenzel. Had he filed his second post-conviction petition in Alabama state court within six months of

⁴ *See Wilson v. Milliken*, 44 S.W. 660, 663 (Ky. 1898); *Smith v. Atl. Mut. Fire Ins. Co.*, 22 N.H. 21, 25 (1850); *Eways v. Governor's Island*, 391 S.E.2d 182, 186-87 (N.C. 1990).

⁵ The other three States that will consider a plea in abatement from an action pending in federal court look to the purpose of the second action and leave the trial court with ultimate discretion. *See, e.g., Wilson*, 44 S.W. at 664; *Home Indem. Co. v. Hoechst-Celanese Corp.*, 393 S.E.2d 118, 120-21 (N.C. App. Ct. 1990); *Pac. & Atl. Shippers, Inc. v. Schier*, 205 A.2d 31, 32 (N.H. 1964). In contrast, "[t]he 'offense or wrong' that [Ala. Code. §6-5-440] seeks to prevent consists in the very 'existence *simul et semel*' of the second action," and, "[a] stay is, therefore, not an option that can be exercised at the *discretion* of the judiciary." *J.E. Estes Wood Co.*, 42 So. 3d at 110-11.

the State providing him with new exculpatory evidence but before the completion of his ongoing federal habeas proceedings, there is no doubt Kuenzel's second state habeas petition would have been subject to dismissal under § 6-5-440. That is because, as discussed above, concurrent federal proceedings in Alabama trigger § 6-5-440, and because the two actions would have been "for the same cause": Kuenzel's federal habeas petition and any successive state habeas petition would have both sought his release from prison. *See Moore*, 462 So. 2d at 1061. Nor could Kuenzel have filed a "protective" state habeas petition and sought a stay, given that Alabama law forbids such stays. *See J.E. Estes Wood Co.*, 42 So. 3d at 111.

The State has never addressed how Kuenzel could have avoided this conundrum, nor has it ever claimed that § 6-5-440 would not have applied. State procedural rules that simultaneously render a state habeas petition both too early and too late are the very definition of procedures that are "fundamentally inadequate to vindicate the substantive rights provided," thereby violating the Due Process Clause. *Osborne*, 557 U.S. at 69. Kuenzel's only other option would have been to voluntarily dismiss his federal habeas proceedings so he could pursue his rights in state court. But that suggestion only confirms the Due Process violation that § 6-5-440 created. *See also Simmons v. United States*, 390 U.S. 377, 394 (1968) ("[W]e find it intolerable that one constitutional right should have to be surrendered in order to assert another."). Surely Kuenzel should not have been forced to drop his federal habeas proceedings, especially when at the time he had already twice secured reversals from the Eleventh

Circuit and when the State's belated disclosure of exculpatory evidence had drawn the attention of the federal district court.

Instead, and in the face of contradictory provisions of Alabama law, Kuenzel followed an entirely reasonable approach. Consistent with the letter and spirit of Rule 32.2(c) and § 6-5-440, Kuenzel filed a successive state habeas petition within six months of the conclusion of his federal habeas proceedings. If anything, that approach was fully consistent with § 6-5-440, because it was possible Kuenzel would have achieved his desired relief in federal court, making resort to state court unnecessary. As Chief Justice Moore recognized in dissent, "Kuenzel argues that his delay in filing his second Rule 32 claim while he was litigating the same matter in federal court is consistent with the policy embodied in [§ 6-5-440]." Pet. App. 9a. To fault Kuenzel's successive petition as untimely when it would have been subject to automatic dismissal under § 6-5-440 is the height of unfairness and violates Due Process. *See Maples v. Thomas*, 132 S. Ct. 912, 922 (2012) (excusing failure to comply with state timing deadline because "something *external* to the petitioner, something that cannot fairly be attributed to him[,] ... impeded [his] efforts to comply with the State's procedural rule" (quoting *Coleman v. Thompson*, 701 U.S. 722, 753 (1991)); *see also, e.g., Betterman*, 136 S. Ct. at 1613; *Pate*, 383 U.S. at 386; *Estes*, 381 U.S. at 542-43; *Bridges*, 326 U.S. at 153.

The State will predictably argue that this case does not warrant this Court's review because no split of authority is presented. But the only reason that is so is because of the extremely unusual situation

created by the combination of Alabama's unique procedural rules and the State's withholding of critical exculpatory evidence until decades after Kuenzel was sentenced to death. It should not be that a Due Process violation can be so extreme and unusual, and yet not warrant this Court's review.

Indeed, this Court has not hesitated to review and reverse state post-conviction rulings that denied petitioners their constitutional rights, particularly in death penalty cases, in the absence of a circuit split. *See, e.g., Foster v. Chatman*, 136 S. Ct. 1737, 1743 (2016) (reversing denial of habeas relief for *Batson* violations); *Wearry v. Cain*, 136 S. Ct. 1002, 1006-07 (2016) (reversing denial of post-conviction relief for *Brady* violations); *Hinton v. Alabama*, 134 S. Ct. 1081, 1083 (2014) (reversing denial of post-conviction relief by Alabama Court of Criminal Appeals based on ineffective assistance of counsel); *Kennedy v. Louisiana*, 554 U.S. 407, 434 (2008) (finding execution for child rape unconstitutional where Louisiana was "the only state" to have imposed such a sentence in the previous 45 years). If anything, it is deeply troubling for the State to have created this entire situation through its withholding of evidence, only to fault Kuenzel for not seeking to vindicate his rights earlier.

Certiorari is further justified because of what is at stake in this particular case. Kuenzel was convicted of capital murder after Harvey Venn, his alleged accomplice, sought to save himself by pointing the finger at Kuenzel. Without any physical evidence connecting Kuenzel to the crime, the only other person to have identified Kuenzel at the convenience store was teenager April Harris, who

claims she saw Kuenzel at the store while she drove by on a rainy night some time prior to Offord's murder. As the dissent below recognized, "[t]hough one might speculate from this evidence that Kuenzel was involved in the crime, the sighting is also consistent with his innocence." Pet. App. 4a; *see also* Pet. App. 33a-34a (Morgenthau Affidavit).

The evidence used to convict Kuenzel was limited and highly questionable. But what has tumbled out years later—including grand jury testimony from Harris that undermined her identification of Kuenzel at trial and police notes that implicate Venn and possibly another person (but not Kuenzel)—shows that this is a death penalty conviction that is, at best, highly suspect, and, at worst, wrong. Here, "[b]eyond doubt, the newly revealed evidence suffices to undermine confidence in [Kuenzel]'s conviction. The State's trial evidence resembles a house of cards, built on the jury crediting [Venn]'s account rather than [Kuenzel]'s alibi." *Wearry*, 136 S. Ct. at 1006; *see also Banks v. Dretke*, 540 U.S. 668, 696 (2004) ("Prosecutors' dishonest conduct or unwarranted concealment should attract no judicial approbation.") *Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (noting that the previously undisclosed evidence would have challenged "the thoroughness and even the good faith of the [police's] investigation" by "reveal[ing] a remarkably uncritical attitude on the part of the police").

All Kuenzel asks is the opportunity to present on the merits the previously unproduced evidence supporting his innocence, as well as evidence of underlying constitutional violations that took place at his trial. The decision to put Kuenzel to death for

a crime he maintains he did not commit should not turn on idiosyncratic Alabama procedural rules that placed Kuenzel in an untenable and unconstitutional Catch-22. Regardless of one's views on the broader questions surrounding capital punishment, this particular case presents the intolerable risk that an innocent man will be put to death without any consideration of long-withheld exculpatory evidence that gravely undermines the already limited evidence supporting his conviction.

CONCLUSION

For the foregoing reasons, the petition should be granted.

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APPENDIX

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SUPREME COURT OF ALABAMA

EX PARTE WILLIAM ERNEST KUENZEL

October Term, 2015-2016

April 1, 2016

No. 1141359

Petition for Writ of Certiorari to the Court of Criminal Appeals (Talladega Circuit Court, CC-88-211.60; Court of Criminal Appeals, CR-13-0899).

ORDER

BRYAN, Justice.

WRIT DENIED. NO OPINION.

STUART, BOLIN, PARKER, SHAW, MAIN, and WISE, JJ., concur.

MOORE, C.J., and MURDOCK, J., dissent.

OPINION

MOORE, Chief Justice (dissenting).

William Ernest Kuenzel has been on death row in Alabama since 1988. He was convicted of murder for the killing of Linda Jean Offord, a convenience-store clerk. The murder was made capital because Offord was killed during an armed robbery. *See* § 13A-5-40(a)(2), Ala. Code 1975. The main witness against Kuenzel was Harvey Venn, with whom Kuenzel shared a residence. Venn, who pleaded guilty as an

accomplice to the murder, testified that Kuenzel suggested robbing the convenience store in Sylacauga. Venn owned a 1984 Buick Regal automobile, which a number of witnesses testified to seeing at the convenience store on the night of the murder with Venn in the driver's seat and an unidentified man in the front passenger seat. Venn testified that he sat in the car while Kuenzel went inside the convenience store with a 16-gauge shotgun. Venn heard a shot and saw the clerk fall backwards. Offord died shortly thereafter from a gunshot wound to the chest.

The only witness, apart from Venn, who identified Kuenzel as being at the scene was then 16-year-old April Harris, who testified that she was riding in a car past the convenience store approximately an hour before the murder and that she saw Venn and Kuenzel inside the store. Without Harris's identification, the evidence was insufficient to convict Kuenzel. Alabama requires that accomplice testimony be corroborated:

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

§ 12-21-222, Ala. Code 1975 (emphasis added). The

corroboration requirement exists to protect the innocent from the natural tendency of malefactors to avoid the consequences of their actions, thus “recognizing the frailty of human nature and proneness of one caught in the meshes of the law to lay his crime on another, if by so doing he may escape a just punishment.” *Segars v. State*, 19 Ala. App. 407, 407-08, 97 So. 747, 747 (1923). In the absence of the corroboration requirement, “any guilty party is apt to implicate an innocent party in exchange for a grant of immunity from prosecution.” *Lindhorst v. State*, 346 So. 2d 11, 15 (Ala. Crim. App. 1977).

The Alabama Court of Criminal Appeals on direct appeal found Harris’s corroboration testimony adequate to satisfy the statute:

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

Kuenzel v. State, 577 So. 2d 474, 514 (Ala. Crim. App. 1990), *aff'd*, 577 So. 2d 531 (Ala. 1991).

I question whether the corroboration evidence was sufficient to satisfy the statute. The methodology for testing corroboration evidence is first to eliminate the accomplice's testimony and then to see "if upon examination of all the other evidence there is sufficient inculpatory evidence tending to connect the defendant with the commission of the offense." *Sorrell v. State*, 249 Ala. 292, 293, 31 So. 2d 82, 83 (1947) (quoting 2 Wharton, *Criminal Evidence* § 752 (11th ed.)). Leaving out Venn's testimony, the only evidence presented to this Court tending to connect Kuenzel to the murder of Offord is Harris's drive-by sighting of Venn and Kuenzel in the convenience store an hour or more before the crime. Though one might speculate from this evidence that Kuenzel was involved in the crime, the sighting is also consistent with his innocence. "Corroboration, to be legally sufficient, must be unequivocal and of a substantive character. It must be inconsistent with innocence of the defendant and do more than raise a suspicion of guilt." *White v. State*, 48 Ala. App. 111, 117, 262 So. 2d 313, 319 (Ala. Crim. App. 1972). Indeed, Harris's testimony, in the absence of Venn's testimony, tends neither to incriminate nor to exonerate Kuenzel. A fact presented to corroborate accomplice testimony "is not sufficient if it is equivocal or uncertain in character and must be such that legitimately tends to connect the defendant with the crime." *Sorrell*, 249 Ala. at 293, 31 So. 2d at 83.

"Being in the company of an

accomplice in proximity in time and place to the commission of a crime is not always sufficient corroboration to meet the requirements of our statute.... Yet, when the accomplice and accused are seen together in rather unusual places and times, in proximity to the scene of the crime which was committed at an unseasonable hour, the requirements of corroboration are met.”

Tidwell v. State, 37 Ala. App. 228, 230-31, 66 So. 2d 845, 847 (1953).

One’s presence in a convenience store at 9:30-10:00 p.m. is not of itself unusual. Although connecting Kuenzel to the place of the crime, his presence there does not connect him to the crime itself or the time of its occurrence, which was after 11:00 p.m. “[M]ere presence at the scene of the crime is not enough to support a conviction.” *Ex parte Smiley*, 655 So.2d 1091, 1095 (Ala. 1995). Corroboration evidence “must tend to connect the defendant with the crime or point to the defendant, as distinguished from another person, as the perpetrator of the crime.” 2 Charles W. Gamble & Robert J. Goodwin, *McElroy’s Alabama Evidence* § 300.01(5) (6th ed. 2009).

Regardless of the weakness of the corroboration evidence, the merits of Kuenzel’s murder conviction are not before us. Kuenzel raised the corroboration issue on direct appeal, and, as stated above, the

Court of Criminal Appeals ruled against him and this Court affirmed that judgment. He has now filed his second Rule 32, Ala. R. Crim. P., petition. Further review of the corroboration evidence presented at Kuenzel's trial is precluded by the rule against successive petitions, Rule 32.2(b), Ala. R. Crim. P., and the bar against raising issues in a Rule 32 petition that have already been decided on direct appeal. Rule 32.2(a)(4), Ala. R. Crim. P. However, Kuenzel does not seek review of the trial evidence. Instead he argues that he wishes to present "newly discovered material facts," Rule 32.1(e), Ala. R. Crim. P., that require reversal of his conviction. The evidence he proffers as newly discovered is grand-jury testimony of April Harris, first disclosed in 2010, that, he claims, indicates she could not identify Kuenzel as the man she saw in the convenience store on the night of the murder. Because the discovery of this evidence occurred over two decades after Kuenzel's conviction, his only procedural route for bringing that evidence before the circuit court for a hearing was a new Rule 32 petition filed within six months of discovery of that evidence. Rule 32.1(c), Ala. R. Crim. P. Kuenzel filed his current Rule 32 petition in September 2013, long past the six-month filing deadline.

That deadline, however, is not jurisdictional and in extraordinary circumstances may be disregarded under the doctrine of equitable tolling. *Ex parte Ward*, 46 So. 3d 888, 896-98 (Ala. 2007). In general "equitable tolling is available in extraordinary circumstances that are beyond the petitioner's control and that are unavoidable even with the exercise of diligence." 46 So. 3d at 897. Kuenzel

argues that he was litigating his postconviction claims in federal court when he learned of the previously undisclosed grand-jury transcripts¹ and that he deferred filing his Rule 32 petition alleging newly discovered evidence until the federal proceedings concluded. The Court of Criminal Appeals, perceiving no reason why Kuenzel could not file his second Rule 32 petition while his federal case was proceeding, affirmed the circuit court's finding that the petition was untimely.

Ordinarily, that would be the end of the matter. Because of the irreversibility of the death penalty, however, I believe some leeway may be warranted in this case. "In a capital case such as this, the consequences of error are terminal, and we therefore pay particular attention to whether principles of "equity would make the rigid application of a limitation period unfair" and whether the petitioner has "exercised reasonable diligence in investigating and bringing [the] claims.'" *Ex parte Ward*, 46 So. 3d at 897 (quoting *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001), quoting in turn *Miller v. New Jersey Dep't of Corr.*, 145 F.3d 616, 618 (3d Cir. 1998)).

A significant consideration, I believe, in assessing the equities in this matter is that Kuenzel's first Rule 32 petition, filed in 1993, was never heard on the merits because of another missed deadline. Kuenzel's attorney at that time apparently measured the time for filing his first Rule 32 petition from the

¹ In addition to the disclosure in 2010 of Harris's grand-jury testimony, Kuenzel also claims that he became aware of other exonerating evidence at that time.

denial of a petition for the writ of certiorari by the United States Supreme Court rather than by this Court. See *Kuenzel v. State*, [Ms. CR-13-0899, July 10, 2015] --- So.3d ---, --- (Ala. Crim. App. 2015). Ultimately the trial court dismissed that petition as time-barred and thus did not hold an evidentiary hearing. *Id.* Kuenzel subsequently litigated his claims in federal court, but, because of the procedural default in state court, had to meet the high burden of demonstrating that “it is more likely than not that no reasonable juror would have found [Kuenzel] guilty beyond a reasonable doubt.” *Kuenzel v. Commissioner, Ala. Dep’t of Corr.*, 690 F.3d 1311, 1315 (11th Cir. 2012) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

Kuenzel’s counsel apparently delayed filing his second Rule 32 petition in state court until the conclusion of the federal proceedings. The current petition was filed September 23, 2013, four months after the United States Supreme Court denied Kuenzel’s petition for a writ of certiorari in his federal case. *Kuenzel v. Thomas*, 569 U.S. ---, 133 S.Ct. 2759 (2013). Because that petition has now also been defaulted, Kuenzel has never had an opportunity to present a postconviction claim on the merits in state court. Further, the original state-court default adversely affected his standard of proof in federal court. Although “[i]n noncapital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the ‘extraordinary’ circumstances required for equitable tolling,” *Fahy*, 240 F.3d at 244, I believe that in this *capital* case the procedural errors that have consistently prevented Kuenzel from having a Rule

32 petition considered on the merits may constitute an extraordinary circumstance that could justify granting him relief from his second default.

Another consideration may reinforce this argument. Kuenzel argues in his brief that Alabama law prohibits the same claims from being heard simultaneously in two different courts in this state. “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.” § 6-5-440, Ala. Code 1975. “[T]he courts of this state” include federal courts. *Johnson v. Brown-Serv. Ins. Co.*, 293 Ala. 549, 307 So. 2d 518 (1974). Kuenzel argues that his delay in filing his second Rule 32 claim while he was litigating the same matter in federal court is consistent with the policy embodied in that statute. I believe that certiorari review would allow the Court to fully consider this argument too.

Because Kuenzel, a death-row inmate, has never had an opportunity to present his postconviction claims on the merits in any Alabama court and because the two procedural defaults may not have arisen from a lack of diligence on his part in pursuing his claims, but from unfortunate errors of counsel, I would grant Kuenzel’s petition for a writ of certiorari to examine whether he qualified for equitable tolling of the six-month filing deadline for presenting newly discovered evidence. Because the transcript of Harris’s grand-jury testimony may shed further doubt on what I consider to be a questionable application of the accomplice-corroboration statute, I believe that equitable tolling, if appropriate, could potentially alter the ultimate disposition of this case.

Therefore, I respectfully dissent from the decision to deny Kuenzel's petition for a writ of certiorari.

ALABAMA COURT OF CRIMINAL APPEALS

**WILLIAM ERNEST KUENZEL v. STATE OF
ALABAMA**

October Term, 2014-2015

July 10, 2015

No. CR-13-0899

Appeal from Talladega Circuit Court (CC-88-211.60)

Opinion

KELLUM, Judge.

William Ernest Kuenzel appeals the circuit court's summary dismissal of his second petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P.

In 1988, Kuenzel was convicted of murder made capital because it was committed during the course of a robbery, *see* § 13A-5-40(a)(2), Ala. Code 1975. The jury unanimously recommended that Kuenzel be sentenced to death, and the trial court followed the jury's recommendation and sentenced Kuenzel to death for his capital-murder conviction. This Court affirmed Kuenzel's conviction and death sentence on appeal, *Kuenzel v. State*, 577 So. 2d 474 (Ala. Crim. App. 1990), and the Alabama Supreme Court affirmed this Court's judgment, *Ex parte Kuenzel*, 577 So. 2d 531 (Ala. 1991). This Court issued a certificate of judgment on March 28, 1991. The United States Supreme Court denied certiorari

review on October 7, 1991. *Kuenzel v. Alabama*, 502 U.S. 886 (1991).

On October 4, 1993, Kuenzel filed his first Rule 32 petition for postconviction relief challenging his conviction and death sentence. The circuit court summarily dismissed the petition on the ground that it had been filed after the limitations period in Rule 32.2(c), Ala. R. Crim. P., had expired.¹ This Court affirmed the circuit court's judgment on appeal in an unpublished memorandum issued on January 28, 2000, *Kuenzel v. State* (No. CR-98-1216), 805 So. 2d 783 (Ala. Crim. App. 2000) (table), and the Alabama Supreme Court denied certiorari review, *Ex parte Kuenzel* (No. 1991081), 806 So. 2d 414 (Ala. 2000) (table).

On February 7, 2000, Kuenzel filed a federal habeas corpus petition in the United States District Court for the Northern District of Alabama, requesting relief from his conviction and death sentence. In 2002, that court found Kuenzel's habeas petition to be time-barred by the limitations period in 28 U.S.C. § 2244(d). On appeal, the United States Court of Appeals for the Eleventh Circuit vacated the district court's judgment. *Kuenzel v. Campbell*, 85 Fed. App'x 726 (2003) (table). On remand from the Eleventh Circuit, the district court again found Kuenzel's habeas petition to be time-barred. On appeal, the Eleventh Circuit vacated the district court's judgment a second time. *Kuenzel v. Allen*,

¹ In 1993, the limitations period was two years. The Alabama Supreme Court amended Rule 32.2(c) effective August 1, 2002, to reduce the limitations period to one year.

488 F.3d 1341 (11th Cir. 2007). On second remand, the district court found, for the third time, that Kuenzel's habeas petition was time-barred; the court also concluded that Kuenzel's assertion of actual innocence did not excuse his procedural default because Kuenzel had failed to make a credible showing of actual innocence founded on new and reliable evidence that had not been presented at trial. *Kuenzel v. Allen*, 880 F. Supp. 2d 1162 (N.D. Ala. 2009). The district court subsequently denied Kuenzel's postjudgment motion filed pursuant to Rule 60(b), Fed. R. Civ. P., to set aside the district court's dismissal of his habeas petition. *Kuenzel v. Allen*, 880 F. Supp. 2d 1205 (N.D. Ala. 2011). On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the district court's dismissal of Kuenzel's habeas petition and its denial of Kuenzel's postjudgment Rule 60(b), Fed. R. Civ. P., motion. *Kuenzel v. Commissioner, Alabama Dep't Of Corr.*, 690 F.3d 1311 (11th Cir. 2012).

On September 23, 2013, Kuenzel filed his second Rule 32 petition for postconviction relief, which is the subject of this appeal. In his petition, Kuenzel alleged: (1) that the trial court lacked jurisdiction to render the judgment or to impose the sentence because, he said, his conviction was based on the uncorroborated testimony of his accomplice, in violation of § 12-21-222, Ala. Code 1975; and (2) that newly discovered material facts would show that he is actually innocent of the crime. Kuenzel attached to his petition several exhibits in support of his claims. On or about December 27, 2013, the State filed a response and motion for summary dismissal of Kuenzel's petition, arguing, in relevant part, that

both of Kuenzel's claims were time-barred by Rule 32.2(c), Ala. R. Crim. P. On February 11, 2014, the circuit court issued an order summarily dismissing Kuenzel's petition. In its order, the circuit court found, in relevant part, that both of Kuenzel's claims were time-barred by Rule 32.2(c).² On March 12, 2014, Kuenzel filed a postjudgment motion to alter, amend, or vacate the circuit court's judgment. That motion was effectively denied on March 13, 2014, 30 days after the circuit court's order summarily dismissing Kuenzel's petition. See *Loggins v. State*, 910 So. 2d 146, 148-49 (Ala. Crim. App. 2005) (a circuit court retains jurisdiction to modify a judgment in Rule 32 proceedings for only 30 days after the judgment is entered; even a timely filed postjudgment motion does not extend the circuit court's jurisdiction).

On appeal, Kuenzel reasserts the two claims asserted in his petition and argues that the circuit court erred in summarily dismissing those claims without affording him an evidentiary hearing. We disagree.

"[W]hen the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is *de novo*." *Ex parte White*, 792 So. 2d 1097, 1098 (Ala. 2001). "However, where there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, '[t]he standard of review on appeal ... is whether the trial judge abused

² The circuit court also made alternative findings regarding Kuenzel's claims.

his discretion when he denied the petition.” *Boyd v. State*, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting *Elliott v. State*, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)). “On direct appeal we reviewed the record for plain error; however, the plain-error standard of review does not apply to a Rule 32 proceeding attacking a death sentence.” *Ferguson v. State*, 13 So. 3d 418, 424 (Ala. Crim. App. 2008). Additionally, “[i]t is well settled that ‘the procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed.’” *Nicks v. State*, 783 So. 2d 895, 901 (Ala. Crim. App. 1999) (quoting *State v. Tarver*, 629 So. 2d 14, 19 (Ala. Crim. App. 1993)).

A Rule 32 petitioner is entitled to an evidentiary hearing on a claim in a postconviction petition only if the claim is “meritorious on its face.” *Ex parte Boatwright*, 471 So. 2d 1257, 1258 (Ala. 1985). A postconviction claim is “meritorious on its face” only if the claim (1) is sufficiently pleaded in accordance with Rule 32.3 and Rule 32.6(b); (2) is not precluded by one of the provisions in Rule 32.2; and (3) contains factual allegations that, if true, would entitle the petitioner to relief. A Rule 32 petitioner is not entitled to an evidentiary hearing on claims that are precluded by one or more of the provisions in Rule 32.2. See *Sumlin v. State*, 710 So. 2d 941, 943 (Ala. Crim. App. 1998) (“[B]ecause the issues he raised were procedurally barred, the appellant was not entitled to an evidentiary hearing on his petition.”).

For the reasons explained below, we conclude that both of the claims in Kuenzel’s petition are time-barred by Rule 32.2(c) and that, therefore,

Kuenzel was not entitled to an evidentiary hearing on those claims.

I.

Kuenzel first alleged in his petition that the trial court lacked jurisdiction to render the judgment or to impose the sentence because, he said, his conviction was based on the uncorroborated testimony of his accomplice, Harvey Venn, in violation of § 12-21-222, Ala. Code 1975

Although couched in jurisdictional terms, Kuenzel's claim that he was convicted based on the uncorroborated testimony of his accomplice is not truly a jurisdictional claim. Both the Alabama Supreme Court and this Court have recognized that a claim that a conviction is based on the uncorroborated testimony of an accomplice in violation of § 12-21-222 is waived on direct appeal if not properly and specifically presented to the trial court. See *Ex parte Weeks*, 591 So. 2d 441 (Ala. 1991), and *Marks v. State*, 20 So. 3d 166 (Ala. Crim. App. 2008) (both refusing to consider argument that conviction was based on uncorroborated accomplice testimony when that argument had not been properly presented to the trial court). "Nonjurisdictional issues can be waived; jurisdictional issues cannot." *Mitchell v. State*, 777 So. 2d 312, 313 (Ala. Crim. App. 2000). Because a claim that a conviction is based on the uncorroborated testimony of an accomplice can be waived, it is necessarily a nonjurisdictional claim. Indeed, a challenge to the alleged lack of accomplice corroboration under § 12-21-222 is clearly nothing more than a challenge to the sufficiency of the

evidence, an undisputedly nonjurisdictional challenge. See, e.g., *Ex parte Batey*, 958 So. 2d 339, 343 (Ala. 2006) (“Alabama courts have repeatedly held that an argument about the adequacy of the State’s evidence is not jurisdictional and is therefore barred by Rule 32.2.”); and *Baker v. State*, 907 So.2d 465, 467 (Ala. Crim. App. 2004) (“A challenge to the sufficiency of the evidence is not jurisdictional.”).

Because Kuenzel’s claim that he was convicted based on the uncorroborated testimony of his accomplice in violation of § 12-21-222 is nonjurisdictional, it is subject to the preclusions in Rule 32.2. Specifically, his claim is, as the State asserted and as the circuit court found, time-barred by Rule 32.2(c) because Kuenzel’s petition was filed over 20 years after his conviction and sentence became final.³ To the extent that this claim is based on newly discovered material facts, it is time-barred for the reasons stated in Part II of this opinion.

II.

Kuenzel next alleged in his petition that he was actually innocent of the crime based on what he claimed was newly discovered material facts under Rule 32.1(e), Ala. R. Crim. P. Kuenzel alleged that the following evidence constituted newly discovered material facts entitling him to a new trial: (1) recorded statements made to the police by Kuenzel’s accomplice, Harvey Venn, that were inconsistent with Venn’s trial testimony and, Kuenzel alleged,

³ Because this claim is time-barred, we need not address Kuenzel’s arguments regarding the propriety of the circuit court’s alternative findings on this claim.

pointed to another man as the perpetrator; (2) the grand-jury testimony of State's witness April Harris, who testified at trial that she saw Kuenzel and Venn at the convenience store where the crime occurred approximately an hour before the crime, but who was more equivocal during her grand-jury testimony regarding her identification of Kuenzel and Venn; (3) the grand-jury testimony of Crystal Floyd—who was Venn's 13-year-old girlfriend at the time of the crime but who did not testify at Kuenzel's trial—that was inconsistent with affidavits she had given to Kuenzel's postconviction counsel in 1997 and 2008; and (4) evidence that Venn had in his possession the night of the crime a 16-gauge shotgun, the same caliber weapon as the murder weapon, not a 12-gauge shotgun as Venn had testified at trial. Kuenzel alleged in his petition that the first three items of evidence listed above were first discovered "in March 2010" (C. 44) and that the fourth item of evidence listed above was discovered "in the mid-1990's." (C. 21.)

Rule 32.2(c) provides, in relevant part:

"Subject to the further provisions hereinafter set out in this section, the court shall not entertain any petition for relief from a conviction or sentence on the grounds specified in Rule 32.1(a) and (f), unless the petition is filed: (1) In the case of a conviction appealed to the Court of Criminal Appeals, within one (1) year after the issuance of the certificate of judgment by the Court

of Criminal Appeals under Rule 41, Ala. R. App. P. ... The court shall not entertain a petition based on the grounds specified in Rule 32.1(e) unless the petition is filed within the applicable one-year period specified in the first sentence of this section, or within six (6) months after the discovery of the newly discovered material facts, whichever is later; provided, however, that the one-year period during which a petition may be brought shall in no case be deemed to have begun to run before the effective date of the precursor of this rule, i.e., April 1, 1987.”

Kuenzel admitted in his petition that he had discovered the majority of the evidence forming the basis of his claim of newly discovered material facts in March 2010 and that he had discovered one item of evidence in the mid 1990s. However, Kuenzel did not file this petition raising his claim of newly discovered material facts until September 2013, over three years after the majority of the evidence had been discovered (and almost two decades after one of the items of evidence had been discovered) and long after the six-month limitation period for newly discovered material facts in Rule 32.2(c) had expired. Therefore, Kuenzel’s claim of actual innocence based on newly discovered material facts under Rule 32.1(e) is time-barred by Rule 32.2(c).

We note that it appears that Kuenzel attempted

in his petition, albeit vaguely, to assert the doctrine of equitable tolling for his claim of newly discovered material facts, and he reasserts that argument on appeal. In his petition, Kuenzel alleged:

“While Kuenzel anticipates the State will argue that Kuenzel should have filed this successive Rule 32 petition in or about August 2010, within six months of its disclosure in March 2010 of evidence the State had long suppressed, at the time Kuenzel actively was litigating claims in federal court and, if relief had been granted, there would have been no need for this proceeding. Moreover, the State can identify no prejudice because at no time did Kuenzel delay in presenting his evidence, and Kuenzel had no control over when (or if) the State would eventually decide to produce evidence that Kuenzel always had been entitled to receive; evidence that plainly could not have been discovered earlier through the exercise of reasonable diligence because it was being suppressed by the State. If any party has been prejudiced by the delayed presentation of evidence, it is Kuenzel.”

(C. 44-45.)⁴ The circuit court rejected this argument as insufficient to establish that Kuenzel was entitled to equitable tolling. We agree with the circuit court.

It is well settled that equitable tolling of the limitations period in Rule 32.2(c) “is available in extraordinary circumstances that are beyond the petitioner’s control and that are unavoidable even with the exercise of diligence.” *Ex parte Ward*, 46 So. 3d 888, 897 (Ala. 2007). In other words, a Rule 32 petitioner is entitled to equitable tolling of the limitations period in Rule 32.2(c) if extraordinary circumstances beyond the petitioner’s control prevented the petitioner from timely filing his or her Rule 32 petition despite the petitioner’s exercise of diligence. See, e.g., *Helton v. Secretary for Dep’t of Corr.*, 259 F.3d 1310, 1312 (11th Cir. 2001) (“Equitable tolling can be applied ... when ‘extraordinary circumstances’ have worked to prevent an otherwise diligent petitioner from timely filing his petition.”); and *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000) (noting that a habeas corpus petitioner is entitled to equitable tolling if he or she establishes an “extraordinary circumstance beyond his [or her] control that prevented him [or her] from complying with the statutory time limit”). “Because equitable tolling is ‘an extraordinary remedy,’ it ‘is limited to rare and exceptional circumstances’ and ‘typically applied sparingly.’” *Hunter v. Ferrell*, 587 F.3d 1304, 1308 (11th Cir. 2009) (quoting *Lawrence v. Florida*, 421 F.3d 1221,

⁴ Although Kuenzel repeatedly stated in his petition that the State had “suppressed” the alleged newly discovered material facts, Kuenzel did not specifically raise a *Brady v. Maryland*, 373 U.S. 83 (1963), claim in his petition.

1226 (11th Cir. 2005), *aff'd*, 549 U.S. 327 (2007)). Moreover, “[b]ecause the limitations provision is mandatory and applies in all but the most extraordinary of circumstances, when a petition is time-barred on its face the petitioner bears the burden of demonstrating in his petition that there are such extraordinary circumstances justifying the application of the doctrine of equitable tolling.” *Ex parte Ward*, 46 So. 3d at 897. “A petition that does not assert equitable tolling, or that asserts it but fails to state any principle of law or any fact that would entitle the petitioner to the equitable tolling of the applicable limitations provision, may be summarily dismissed without a hearing.” *Id.* at 897-98.

In this case, Kuenzel’s vague attempt to assert equitable tolling is woefully insufficient to establish the existence of extraordinary circumstances beyond Kuenzel’s control that were unavoidable even with the exercise of diligence and that prevented Kuenzel from timely filing his Rule 32 petition within the six-month limitations period for newly discovered material facts applicable here. Kuenzel argued that he was entitled to equitable tolling because, he said, his failure to timely file his Rule 32 petition alleging newly discovered material facts was the result of his litigating his habeas corpus petition in federal court. However, his pending federal habeas petition was not an extraordinary circumstance that prevented him from filing a Rule 32 petition within six months of his learning, in March 2010, about the alleged newly discovered material facts. Kuenzel has cited no authority, and we have found none, that prevents a Rule 32 petitioner from filing a Rule 32 petition in

state court while he or she has a habeas petition pending in federal court.

Kuenzel further appeared to allege that he was entitled to equitable tolling because, he said, the State would not be prejudiced if equitable tolling were applied to toll the limitations period in Rule 32.2(c). However, the alleged lack of prejudice to the State is not a valid basis for the application of equitable tolling. Alleged lack of prejudice to the State is not an extraordinary circumstance and certainly would not operate to prevent a Rule 32 petitioner from timely filing a Rule 32 petition.

It is apparent here that Kuenzel could have timely filed his Rule 32 petition within six months of his learning of the alleged newly discovered material facts, or by September 2010, but that he made a conscious choice not to do so in hopes of obtaining relief in federal court. Only when he did not obtain the relief he wanted in federal court did Kuenzel decide to pursue a state remedy. However, 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. Therefore, Kuenzel is not entitled to equitable tolling.

III.

Rule 32.7(d), Ala. R. Crim. P., authorizes the circuit court to summarily dismiss a petitioner's Rule 32 petition

“[i]f the court determines that the petition is not sufficiently specific,

or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings....”

See also *Hannon v. State*, 861 So. 2d 426, 427 (Ala. Crim. App. 2003); *Cogman v. State*, 852 So. 2d 191, 193 (Ala. Crim. App. 2002); *Tatum v. State*, 607 So. 2d 383, 384 (Ala. Crim. App. 1992). Because both of Kuenzel’s claims were time-barred by Rule 32.2(c) and because Kuenzel failed to allege in his petition any principle of law or any fact that would entitle him to equitable tolling, summary disposition of Kuenzel’s Rule 32 petition was appropriate.

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

WELCH, BURKE, and JOINER, JJ., concur.

WINDOM, P.J. recuses herself.

WILLIAM ERNEST KUENZEL v. STATE OF ALABAMA

(Related to Case No. CV-93-351)

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK

1. I submit this 10-page affidavit in support of William E. Kuenzel's Successive Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure.

Professional Qualifications

2. I was born in 1919 and trace my roots through my grandmother who was born in Montgomery, Alabama. I volunteered for the U.S. Navy V7 program in June of 1941 and spent my 21st birthday aboard the USS Wyoming in Guantanamo Bay, Cuba. I graduated from Amherst College in 1941 and then graduated from the midshipman program as an Ensign in September of 1941. I served for four and half years, attaining the final rank of Lieutenant Commander. I was the Executive Officer and Navigator for both the USS Lansdale DD426, which was sunk in the Mediterranean, and the USS Harry F. Bauer DM26, which received the Presidential Unit of Citation for service in Iwo Jima and Okinawa. Upon returning from service, I obtained my law degree from Yale Law School in 1948.

3. I was an associate and then a partner at the firm of Patterson, Belknap & Webb engaging in the general practice of law. I was appointed by President John F. Kennedy in 1961 to serve as the United States Attorney for the Southern District of New York, a position I maintained until 1970.

4. After returning to private practice, I was elected to the Office of the District Attorney for New York County in 1974. I continued to serve as the District Attorney for New York County until 2009. During my 35-year tenure in that office, I oversaw approximately 3,500,000 million criminal prosecutions, including thousands of murder cases. Measured by crime statistics, my time in office as District Attorney was incredibly successful: by 2009, there were 90.4 percent fewer murders in New York County than there were when I took office.

5. I am now of counsel at the law firm Wachtell, Lipton, Rosen & Katz in New York, New York.

6. I have devoted my legal career to serving in the public interest, actively working to vindicate the rights of crime victims while also ensuring that the full panoply of constitutional protections are afforded to those accused of crimes. My career reflects a devotion to fairness and justice; in 2009, I received the Senator Paul H. Douglas Award for Ethics in Government from the University of Illinois and, in 2011, I was honored to receive the New York State Bar Association's highest honor, the Gold Medal, noting my "tremendous success" and "unsurpassed professionalism." More recently, I received the Medal of Honor from the International Association of Prosecutors and I have been selected as one of sixteen attorneys to receive the Lifetime Achievement Award in commemoration of the 125th anniversary of the New York Law Journal.

7. I also have had direct experience confronting situations where I obtained a conviction that, years later, appeared to have been incorrect. Most notable among those situations is what transpired in the Central Park jogger case.

8. In 1990, five young teenagers were prosecuted by my Office for the rape and brutal beating of a female jogger in Central Park. At the time we prosecuted those cases, I was certain of their guilt beyond a reasonable doubt. Among other evidence of guilt, those defendants were seen in Central Park that evening not far from where the victim's body

was found, and four of the five defendants confessed to the attack that night, each implicating the others. The fifth defendant made verbal admissions but refused to sign a confession, yet his participation was confirmed by each of the other four defendants. As was customary at the time, the police used the full spectrum of interrogation tactics available when questioning these juvenile witnesses in the presence of their parents or guardians, including ruses. Because no DNA evidence directly linked the defendants to the crime, the confessions were the principal evidence relied upon by my office. The defendants were each convicted and all convictions were affirmed on appeal.

9. However, twelve years later a man named Matias Reyes told the Inspector General of the New York City Department of Corrections that he was, in fact, the actual and sole perpetrator. The Inspector General then passed this information to my office. Reyes was serving a life sentence for other crimes but had not, at that point, been associated with the Central Park jogger case. Upon closer inspection of Reyes's account and the evidence in the case, I became disturbed that our office may inadvertently have prosecuted the wrong individuals. Of my own accord, I ordered that a DNA test be performed. The results of the test positively identified Reyes as the sole contributor of the semen found in and on the victim to a factor of one in 6,000,000,000 people. Following a months-long investigation, I determined that the new evidence came within the New York statute governing newly discovered evidence.

10. Yet, there was a procedural problem. My Office was time barred from moving to set aside the verdict, so I contacted defense counsel and advised them to make a motion to set aside the verdict. The motion was made. In support of the motion, I submitted an Affirmation offering my opinions of the defendants' confessions based upon a fresh look, testifying as follows:

A comparison of the statements reveals troubling discrepancies. ... The accounts given by the five defendants differed from one another on the specific details of virtually every major aspect of the crime-who initiated the attack, who knocked the victim down, who undressed her, who struck her, who held her, who raped her, what weapons were used in the course of the assault, and when in the sequence of events the attack took place. ... In many other respects the defendants' statements were not corroborated by, consistent with, or explanatory of objective, independent evidence. And some of what they said was simply contrary to established fact.

I thereby recommended to the Court that the convictions be vacated, opining that, had the newly discovered evidence been available during the original trials, it likely would have caused the juries to question the veracity and reliability of the defendants' confessions. The court promptly set aside the verdict convicting the "Central Park Five".

11. Given my many years of experience with criminal law, I submit that I am qualified to give an opinion as an expert on proper prosecutorial procedures, including compliance with constitutional and ethical precepts, the possibility that a wrongful conviction has been had, the effect that new evidence likely would have on the minds of jurors reviewing the total evidentiary record subsequently available, and the likelihood that an individual is guilty based upon an impartial review of the total evidentiary record subsequently available.

My Review of the Record in this Case

12. Mr. Kuenzel's attorneys have offered me complete and unfettered access to anything and everything in the case file maintained by their offices, including trial records and records from state post-conviction proceedings and federal *habeas* proceedings:

13. In the course of my review of the record, I have considered the trial testimony, the evidence presented by the prosecution at trial and the testimony presented by Mr. Kuenzel at trial. I also have reviewed the multiple documents that were not available to the trial jury, including evidence withheld from the defense by the prosecution—such as grand jury testimony of April Harris, trial counsel's affidavit and statements made by Harvey Venn to the police officers who questioned Venn in the days immediately following the murder in 1987—and evidence that was uncovered and collected by Mr. Kuenzel's postconviction counsel. Although

much of this previously undiscovered evidence “existed” at the time of trial, it was either not turned over to defense counsel by the prosecuting attorneys, or not investigated by defense counsel. Finally, I have considered what evidence is *not* in the record, including the absence of any physical evidence connecting Mr. Kuenzel to the crime, the post-trial loss of physical evidence directly connecting Venn to the crime, and the lack of any records documenting how or why the prosecution team failed to investigate obvious leads suggesting alternative suspects, and concluded that such alternative suspects were not likely to be Venn's accomplice at the convenience store.

14. I submitted an *amicus curiae* brief to the United States Supreme Court on behalf of Mr. Kuenzel, along with Gil Garcetti, the former District Attorney of Los Angeles County, and E. Michael McCann the former District Attorney of Milwaukee County. My central involvement with that briefing allowed me to become intimately familiar with the proceedings in this matter.

Expert Conclusions

15. In the first instance, I want to make clear that my intention is not to supplant the Court's role in evaluating Mr. Kuenzel's claims; rather, I submit this Affidavit to assist the Court in its consideration of Mr. Kuenzel's petition because my experiences afford me a unique vantage point from which to offer the assessment set forth herein.

16. Based on my review of the record in this case, I am convinced to a reasonable degree of

prosecutorial certainty that there is little to no doubt that Mr. Kuenzel is factually innocent of having any involvement in the murder of Linda Offord. I am further convinced to a reasonable degree of prosecutorial certainty that there is no doubt that Mr. Kuenzel did not receive a constitutionally permissible trial. Finally, I am convinced to a reasonable degree of prosecutorial certainty that the facts known today but unknown to the trial jury are noncumulative, do not amount to mere impeachment evidence and, had they been known at the time of trial, Mr. Kuenzel would have been acquitted, both because the prosecution could not have proven guilt beyond a reasonable doubt and because Mr. Kuenzel would almost certainly appear innocent. It is my opinion that Mr. Kuenzel is, indeed, factually innocent and deserving of a new trial. My opinion is based on, among other things, the factors discussed below.

17. First, it is clear that evidence critical to the determination of Mr. Kuenzel's innocence and the reliability of the prosecution's case was withheld from the defense, both before and during Mr. Kuenzel's original trial. At trial, only two witnesses put Mr. Kuenzel anywhere near the scene of the crime that evening. The prosecution's key witness was Mr. Kuenzel's roommate, Harvey Venn. Venn was an admitted accomplice who pled guilty and testified, in exchange for a 10 year sentence, that Mr. Kuenzel went into the store alone and killed the clerk. But in 2010, almost 22 years after trial, the State turned over records of police interviews with Venn in the days following the crime that had never before been produced. Those interview notes reveal

that Venn initially described to the police an interaction he had at the store that night with a white male named David Pope, and that Venn provided a detailed description of what Pope looked like, how he knew Pope and that he was seated in his car with Pope outside the convenience store. Eight disinterested witnesses who were physically present at the store observed Venn seated in his car with a “white male,” and none of them identified Mr. Kuenzel as the person they observed accompanying Venn. Yet, neither the police nor the prosecutors conducted any investigation into David Pope, and there is no record of how Pope was excluded as a witness. Those interview notes also reveal that Venn initially told the police Kuenzel was not with him that evening, but was instead asleep at their shared residence miles away. The prosecution denied Mr. Kuenzel’s trial lawyer access to this potentially exculpatory evidence and, therefore, deprived the defense of a fair opportunity to promptly investigate Pope and confront Venn with these statements at trial.

18. Second, the new evidence also undermines the only other evidence, apart from Venn’s testimony, that Mr. Kuenzel was with Venn that night. April Harris testified at trial that she saw Mr. Kuenzel and Venn inside the store for a split-second as she drove by at approximately 9:45 p.m. Ms. Harris’s testimony was critical to the prosecution’s case because Alabama law requires independent corroboration of accomplice testimony. *See* Ala. Code § 12-21-222. However, the prosecution failed to disclose Ms. Harris’s grand jury testimony until 2010, wherein she stated, also under oath, that she

“couldn't get any description” and “couldn't really see a face.” Defense counsel was thereby unable to confront Ms. Harris with her prior inconsistent statement when, at trial, she testified confidently that she positively identified Mr. Kuenzel and Venn as the persons she observed inside the convenience store. At the time of trial, Ms. Harris was a teenager. Based upon a review of the transcript of Ms. Harris's statement to the police, grand jury transcript and trial testimony, it is my opinion that the prosecution team coerced Ms. Harris to corroborate Venn's testimony in order to satisfy Ala. Code § 12-21-222 even though she was, by her own earlier admission, unable to do so.

19.Third, there is no other evidence which suggests that Mr. Kuenzel was at the convenience store on the night of the murder. Only the testimony of Mr. Venn and Ms. Harris placed Mr. Kuenzel at the scene of the crime and, as detailed above, that testimony is severely undermined by the new evidence. Moreover, the record shows that an additional eight witnesses saw Venn at the convenience store before the murder, but not one of the eight identified Mr. Kuenzel as his companion, and Mr. Kuenzel has an alibi witness.

20.Fourth, there is no physical evidence linking Mr. Kuenzel to the crime, and the physical evidence points directly to Venn's involvement. Among other things, the blood of Ms. Offord was splattered on the pants worn by Venn that night. Venn was clearly worried about the implications of this fact because he denied that the stains were human blood on two occasions, including at trial. Yet the prosecutor

conceded this fact before the jury, acknowledging that he believed the forensic expert who testified the blood on Venn's pants was mostly likely the victim's blood. The newly discovered physical evidence also reveals that, contrary to Venn's testimony at trial, Venn possessed a .16 gauge shotgun on the night of the murder, the same gauge weapon that was used to commit the murder. I am informed that both of the foregoing pieces of evidence have gone missing from the County evidence locker.

21. Fifth, absent strong independent corroboration, there is little reason to suspect that Venn's testimony implicating Mr. Kuenzel is reliable. There is substantial direct evidence of Venn's involvement in this crime. Venn has told multiple different versions of what transpired that evening, and he lied to the trial jury regarding central facts, including most notably the blood on his pants. Additionally, portions of the story he tells are irreconcilable with the testimony of other, disinterested witnesses. For example, Venn testified that he never actually entered the convenience store at any time, and yet Ms. Harris testified that she observed Venn inside the convenience store. Venn also testified that he drove away from the convenience store shortly after 10:00 p.m. and returned just before 11:00 p.m., and yet multiple witnesses testified seeing and/or speaking with Venn, outside the convenience store, at various times between 10:00 p.m. and 11:00 p.m. Given Venn's strong incentive to deflect blame from himself, it is unsurprising that Venn would implicate someone else in exchange for avoiding a death sentence. There simply is no reason to place much, if any

weight in Venn's words when evidence corroborating Venn's implication of Mr. Kuenzel is otherwise absent.

22. Based on my experience as a prosecutor and the millions of cases I have overseen, it is my belief that, upon a review of the evidence known today, Venn is falsely framing Mr. Kuenzel, Mr. Kuenzel is factually innocent of the murder of Ms. Offord, and any jury would almost certainly acquit Mr. Kuenzel if he were re-tried today.

23. If a new trial were held today and Venn's testimony excluded—as required by Ala. Code § 12-21-222—the jury would be left to consider the following facts: (1) no witness observed Mr. Kuenzel at the convenience store on the night of the murder; (2) there is no physical evidence connecting Mr. Kuenzel to this crime; (3) Mr. Kuenzel has an alibi witness as to his whereabouts, shortly before the murder and many miles away without means of transportation; (4) Venn had a motive to commit the crime while the prosecution offered no motive for Mr. Kuenzel; (5) Venn was observed at the convenience store by multiple witnesses with a white male who was not identified by any of those witnesses as Mr. Kuenzel; (6) Venn identified his white male companion to the police as David Pope, describing him in detail, and the police apparently failed to conduct any investigation of Pope; (7) Venn's 13-year old girlfriend saw Venn shortly before the murder, and observed that he was both under the influence of drugs and/or alcohol, and was alone, i.e., without Mr. Kuenzel; (8) Venn told multiple stories to the police and trial jury; (9) the shotgun Venn admitted that he

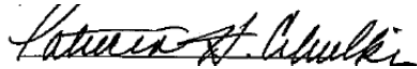
25. The death penalty is final and irreversible. I believe that justice cannot be served here without an opportunity for Mr. Kuenzel to demonstrate his innocence. It is my opinion, that I reach with a reasonable degree of prosecutorial certainty, that Mr. Kuenzel is factually innocent of this murder.

By Mr. Moore

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Robert M. Morgenthau

Sworn to before me this
3rd day of September, 2013

A handwritten signature in cursive script, appearing to read "Patricia H. Cibulka".

Notary Public

PATRICIA H. CIBULKA
Notary Public, State of New York
No. 01CI4647805
Qualified in Westchester County
Certificate File in New York County
Commission Expires November 30, 2013