No. 16-213

In the Supreme Court of the United States

WILLIAM ERNEST KUENZEL,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION

G. DOUGLAS JONES
JONES & HAWLEY, P.C.
2001 Park Pl. N., Suite 830
Birmingham, AL 35203
(205) 490-2290

LUCAS C. MONTGOMERY
MONTGOMERY PONDER LLC
2421 Second Ave. N., Unit 1
Birmingham, AL 35203
(205) 419-7931

JEFFREY E. GLEN
ANDERSON KILL P.C.
1251 Ave. of the Americas
New York, NY 10020
(212) 278-1000

MICHAEL F. WILLIAMS
Counsel of Record
SUSAN M. DAVIES
DANIEL A. BRESS
DEVIN S. ANDERSON
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
mwilliams@kirkland.com

DAVID A. KOCHMAN
HENRY SCHEIN, INC.
135 Duryea Rd.
Melville, NY 11747
(631) 845-2954

October 5, 2016

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Rules and Statutes

INTRODUCTION

The State does not and cannot dispute that the simultaneous application of Ala. Code § 6-5-440 and the six-month limitations period in Ala. R. Crim. P. 32.2(c) would violate Mr. Kuenzel's due process rights. Nor does the State so much as acknowledge the egregious violations of *Brady v. Maryland*, 373 U.S. 83 (1963), that took place here. *See also* Br. of Amicus Curiae Edwin Meese III. Instead, the State embarks on a campaign to disparage Kuenzel, apparently in the hopes of convincing this Court that Kuenzel is guilty and that the constitutional violations that produced his capital sentence can be quietly forgotten.

The State's effort fails. Its portrayal of the evidence at trial is deeply misleading and fails to account for the evidence it wrongfully withheld. What scant argument the State does devote to the question presented misses the mark. Contrary to the State's claim, this Court has the power to hear Kuenzel's petition. And the State's assertion that § 6-5-440 did not apply to Kuenzel's Rule 32 post-conviction petition because that petition was not a civil action is wrong: Alabama cases have repeatedly held that Rule 32 proceedings *are* civil actions, as habeas actions have long been regarded.

There can thus be no doubt that § 6-5-440 was applicable and placed Kuenzel in an unconstitutional Catch-22. This Court should correct that fundamental due process violation and ensure that severe constitutional wrongs—which create the intolerable risk that an innocent person will be executed—are not shielded from review.

RESPONSE TO THE STATE'S STATEMENT OF THE CASE

Although the underlying evidence relating to Kuenzel's conviction does not directly bear on the legal issue presented, the State's assertion that a "substantial volume of evidence … confirms [Kuenzel's] guilt," Opp. 5, cannot be squared with the record as it existed at trial, much less the evidence the State wrongfully withheld.

Importantly, "no physical evidence link[ed] Kuenzel to the crime scene." *Kuenzel v. Allen*, 880 F. Supp. 2d 1162, 1165 (N.D. Ala. 2009). The State tries to downplay the blood on Venn's pants, but the prosecutor conceded during closing argument that the blood was likely Offord's. R.673.[1] The State's explanation for the blood on Venn—that "the blood may have been on the shotgun" and then "spilled onto Venn's pants when he eventually took the gun out of his car," Opp. 10 n.8—has no evidentiary support.

Nor can the State use ballistics to make any plausible physical connection between Kuenzel and the murder. Forensic analysis showed that Offord was shot with a .16 gauge shotgun, and thus the State placed great weight on the fact that Kuenzel had borrowed a .16 gauge from his stepfather before Offord's murder (although witnesses testified that Kuenzel had returned it prior to November 9). Opp. 7. Years after trial, however, it was shown that at the time of the murder Venn had a .16 gauge shotgun that he had borrowed from his co-worker, which contradicted Venn's testimony that this gun

---

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

was a .12 gauge. Rule 32 Pet., Ex. K. That a burned piece of a shell from Kuenzel's stepfather's shotgun was found in a garbage can where Venn and Kuenzel lived and regularly burned trash, *see* Opp. 7, suggests only that somebody fired that gun at some point. It does not suggest that Kuenzel murdered Offord and has no tendency to point to Kuenzel over Venn.

Without any viable physical evidence connecting Kuenzel to the crime, the State's case hinged on witness testimony. Although the State slips its discussion of April Harris into the end of its Statement of the Case, the State does not and cannot dispute that its case depended as *a matter of law* on Harris' purported eyewitness identification of Kuenzel with Venn inside the convenience store approximately an hour and a half before the murder. Pet. App. 2a-5a. The State also does not dispute that for years it withheld Harris' grand jury testimony in flagrant violation of *Brady*. *See* Br. of Amicus Curiae 9-19.

Instead, the State asserts that Harris' grand jury testimony shows only that she was "a bit less certain about seeing Venn and Kuenzel" and that her grand jury testimony contained "slight variations" from her trial testimony. Opp. 20, 21 (citation omitted). The State's attempts to minimize the variation are astounding. As set forth in detail by the amicus brief filed on Kuenzel's behalf by former Attorney General Edwin Meese III, Harris' grand jury testimony—in which she said she was unable to see the faces of the individuals she glimpsed in the store—directly undermined her trial testimony, in which she

unequivocally identified those individuals as Kuenzel and Venn. *See* Br. of Amicus Curiae at 10-14.

The State concedes that the "majority of the evidence presented against Kuenzel was the testimony of Harvey Venn." Opp. 2-3. And the State does not contest that police notes of interviews with Venn were *Brady* material. Instead, the State claims (wrongly) that Kuenzel's trial counsel had the notes. *See* Opp. 9 n.7, 19-20. Kuenzel's trial counsel had a one-paragraph summary of the police interviews, not the extensive, contemporaneous notes taken by the officers. *See* N.D. Ala. Doc. No. 136, Ex. G. That summary excluded critical information in the notes, including:

- Venn's statement that Kuenzel "was in bed. Far as I remember he was."
- Police focus on David Pope—an obvious suspect who was not investigated—and his long relationship with Venn.
- Officer Zook's observation that Venn's "face got real flushed" when describing his whereabouts on the evening of the murder.
- Officer Zook's observation that it appeared "like he [Venn] had a black eye (left)" and that Venn's "arm looks bruised," suggesting a recent altercation.
- Officer Zook's observations that Venn's "[v]oice is now wavering," his eyes were "blood shot," and his voice "shaky."

Id., Ex. B. These statements directly supported Kuenzel's alibi of being at home asleep and further

undermined both Venn's credibility and the police investigation.[2]

The State nevertheless insinuates that Kuenzel changed his story about what happened on November 9 because Kuenzel also claimed he was having sex that night with one Lisa Sims. Opp. 13-15. But this aspect of the evening was not part of the trial—it was discussed only during a post-trial, post-sentencing motion for a new trial. It was also not a new or different alibi. That Kuenzel claims he had sex with a woman prior to retiring for the evening does not contradict his claim that he was home sleeping that night. Moreover, because Kuenzel's trial counsel failed to develop evidence supporting Kuenzel's claim about Ms. Sims, Kuenzel did not advance this point at trial and has not relied on it during post-conviction proceedings.

It is true that after the jury convicted Kuenzel and while he was awaiting the penalty phase, Kuenzel's mother engaged in a hapless effort to convince Kuenzel's cellmate to offer false testimony that he was with Venn when Offord was shot. Kuenzel has never shied away from his mother's crime, which reflected a terribly misguided and desperate effort to stave off her son's death sentence. But this all took place after Kuenzel was convicted of Offord's murder, does not add anything to the mix of

---

[2] The State claims Venn was lying to police because after Venn's initial interview with the police, the police saw Venn sitting with Kuenzel while Kuenzel wrote in a notebook that was later found to contain an account that corresponded with Venn's initial story. But this does not show an attempt to "fabricate an alibi," Opp. 12, and is no excuse for the State withholding the police notes for decades.

evidence presented at trial, and therefore is irrelevant to the constitutional violations at issue here.[3]

ARGUMENT

I. This Court Can Decide The Question Presented.

The State is wrong that this Court cannot decide the question presented because it was not "properly raised and necessarily decided" below. Opp. 30.

First, the State misstates the rule. It claims this Court lacks jurisdiction "'unless a federal question was raised *and* decided in the state court below.'" Opp. 29-30 (citing *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809)) (emphasis added). As this Court has subsequently explained, that early formulation "was generally not understood in the literal fashion in which it was phrased." *Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983). "Instead, the Court developed the rule that a claim would not be considered here unless it had been *either* raised or squarely considered and resolved in state court." *Id.* This rule operates "in the disjunctive," meaning that the Court will review issues that have been pressed, but not necessarily passed on (and vice versa). *United States v. Williams*, 504 U.S. 36, 41 (1992).

Second, Kuenzel sufficiently pressed a federal question. While Kuenzel did not cite the U.S. Constitution or "put a federal-question label," Opp. 30, on his argument regarding the irreconcilable

---

[3] The State cites other evidence that was not presented at Kuenzel's trial. *See, e.g.*, Opp. 11, 14. This evidence also cannot be regarded as evidence of Kuenzel's guilt when it was not part of evidence that the jury considered in convicting him.

conflict between Ala. Code § 6-5-440 and Ala. R. Crim. P. 32.2(c), this Court has said that

> [n]o particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

Street v. New York, 394 U.S. 576, 584 (1969) (quotations omitted); *see also Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982) ("[J]urisdiction does not depend on citation to book and verse."). Because it was Kuenzel's "clear intendment" to present a federal constitutional claim through his repeated references to the principles of "justice," "fundamental rights," and "equity" that animated his claim, Kuenzel's federal due process argument may be fairly regarded as having been raised below. Appellant Pet. for Writ of Cert. 9, 51, 55, 57, *Kuenzel v. State*, Case No. 1141359 (Ala. Nov. 9, 2015). Indeed, the entire tenor of Kuenzel's position in the Alabama courts was that his conviction was constitutionally unsound.

Moreover, Kuenzel advanced the substance of his § 6-5-440 argument at all levels of the Alabama state court system. *See* Pet. 14-17. Chief Justice Moore in dissent from the Alabama Supreme Court's order denying review "believe[d] that certiorari review would allow the Court to fully consider this argument" about § 6-5-440. Pet. App. 9a. No court

below found that the argument had not been preserved, nor did the State so argue below.[4]

Third, the "pressed or passed upon below" requirement is not necessarily jurisdictional. While some of this Court's cases have referred to that requirement in jurisdictional terms, the Court has "conclude[d] that this is 'an unsettled question.'" *Howell v. Alabama*, 543 U.S. 440, 445 (2005) (*per curiam*) (quoting *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988)); *see also Adams v. Robertson*, 520 U.S. 83, 90 (1997) (same); *Bankers Life & Cas. Co.*, 486 U.S. at 79 ("Early opinions seemed to treat the requirement as jurisdictional, whereas more recent cases clearly view the rule as merely a prudential restriction that does not pose an insuperable bar to our review.").

While any prudential exception to the "pressed or passed upon below" rule would likely be narrow, if there is any case that merits such an exception, it would be this one. Addressing Kuenzel's § 6-5-440 argument would not be inconsistent with comity toward the States, *see Adams*, 520 U.S. at 90, because Kuenzel *did* present the substance of his argument below. That is why the State's criticism of Kuenzel is largely that he did not "put a federal-question label" on the argument. Opp. 30. Nor is there any indication that the state courts were precluded from deciding this issue. In fact, the dissent below would have considered it. Pet. App. 9a.

---

[4] Thus the State waived any waiver argument by not raising it below. *See, e.g.*, *Hinrichs v. Gen. Motors of Can., Ltd.*, __ So. 3d __, No. 1140711, 2016 WL 3461177, at *4 (Ala. June 24, 2016).

There are also no "practical considerations" counseling against this Court's prudential review. *Adams*, 520 U.S. at 90. The State identifies no reason why there would need to be a more "developed record on appeal" to address the question presented. *Bankers Life & Cas. Co.*, 486 U.S. at 79. To the contrary, as discussed in the next section, the State's only response on the merits of Kuenzel's due process claim is a technical (and clearly incorrect) argument that Alabama's post-conviction relief is criminal in nature, as opposed to civil. No further development of the record is necessary to refute that argument.

Finally, Kuenzel is particularly deserving of any prudential exception to the "pressed or passed upon below" rule. Kuenzel's conviction is highly questionable and he was unconstitutionally deprived of critical exculpatory evidence at his trial. *See also* Br. of Amicus Curiae 9 (describing the *Brady* violations as "[s]evere"). Nor has Kuenzel had the opportunity to present the new evidence on the merits. Under these circumstances, this Court has the power to hear his petition. *See Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981) (considering due process issue "not raised on appeal below or included as a question in the petition for certiorari" in "the interests of justice"). To the extent this Court has questions on that score, it could grant Kuenzel's petition and add the jurisdictional issue as a Question Presented.

II. Section 6-5-440 Created An Unconstitutional Catch-22.

On the merits, the State does not contest that if § 6-5-440 applied to Kuenzel's successive habeas petition then he was indeed caught in an impossible

situation: file while federal proceedings are ongoing and face dismissal under § 6-5-440, or file after federal proceedings and face dismissal under Rule 32.2(c)'s six-month rule. Nor does the State contest that this quandary would violate due process. *See* Pet. 18-19, 23-25. The State's sole response on the merits is its assurance that § 6-5-440, a *civil* statute, "has no application to state post-conviction petitions filed pursuant to Rule 32 of the Alabama Rules of *Criminal* Procedure." Opp. 31 (emphasis added).

That is wrong. Under Alabama law, the writ of habeas corpus has long been recognized as "a civil, as distinguished from a criminal, remedy or proceeding." *Woods v. State*, 87 So. 2d 633, 635 (Ala. 1956). That is consistent with how this Court has long-treated habeas relief. *See, e.g.*, *Woodford v. Ngo*, 548 U.S. 81, 91 n.2 (2006) ("[H]abeas corpus [is] an original … civil remedy … rather than … a stage of the state criminal proceedings." (quotations omitted)). Consistent with the traditional notion that "[h]abeas corpus is a civil remedy," the Alabama Court of Criminal Appeal has held that § 6-5-440 applies and bars the filing of a second habeas action in state court while another habeas action is pending. *Moore v. State*, 462 So. 2d 1060, 1061-62 (Ala. Crim. App. 1985).

The State nonetheless claims that everything changed in 1987, when Alabama situated post-conviction remedies in the Alabama Rules of Criminal Procedure. Opp. 33. That adjustment, the State asserts, means that post-conviction relief is no longer civil in nature, and that § 6-5-440 does not apply. *Id.* at 33-34. That is again incorrect.

The State identifies no Alabama case that has characterized post-conviction relief as criminal as opposed to civil, or any case indicating that *Moore* is no longer good law. To the contrary, long after the relocation of the Alabama post-conviction remedy in Rule 32, the Alabama Supreme Court recognized that "postconviction proceedings filed pursuant to Rule 32 … are *civil proceedings*." *State v. Martin*, 69 So. 3d 94, 96 (Ala. 2011) (emphasis added; quoting *Ex parte Wright*, 860 So. 2d 1253, 1254 (Ala. 2002)); *see also State v. Hutcherson*, 847 So. 2d 378, 383 (Ala. Crim. App. 2001) (same), *judgment set aside on other grounds*, *Ex parte Hutcherson*, 847 So. 2d 386 (Ala. 2002); *State v. Click*, 768 So. 2d 417, 419 (Ala. Crim. App. 1999) (same).

This line of cases is entirely unsurprising given this Court's recognition that "[p]ostconviction relief … is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature." *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987). The State's claim that § 6-5-440 would not apply because "Rule 32" is not "considered a civil remedy" is thus contrary to well-settled Alabama law. Opp. 34. In fact, it only magnifies the due process violation for the State to suggest that Kuenzel should have filed a successive petition that was subject to automatic dismissal under existing law, based on the State's unfounded clairvoyance that Alabama would suddenly re-characterize the very nature of the post-conviction right.

Finally, the State errs in claiming that Kuenzel's "argument was shown to be false in this very case because … he litigated his first state post-conviction petition at the same time he was litigating his

federal habeas petition." Opp. 31. Section 6-5-440 is a rule of Alabama procedure that does not apply in federal court, which instead looks to applicable federal doctrines (such as *Colorado River* abstention). *See, e.g.*, *Am. Cas. Co. of Reading, Pa. v. Skilstaf, Inc.*, 695 F. Supp. 2d 1256, 1259-60 (M.D. Ala. 2010). That a federal court would have had more discretion to address duplicative habeas litigation than an Alabama state court is merely a function of the highly restrictive and unusual nature of § 6-5-440.

Thus, Kuenzel actually faced the precise Catch-22 whose permissibility the State does not address. The constitutionality of § 6-5-440 in combination with Rule 32.2(c)'s six-month rule is what may make the difference between Mr. Kuenzel's life and death.

CONCLUSION

For the foregoing reasons, the petition should be granted.

G. DOUGLAS JONES
JONES & HAWLEY, P.C.
2001 Park Pl. N., Suite 830
Birmingham, AL 35203
(205) 490-2290

LUCAS C. MONTGOMERY
MONTGOMERY PONDER LLC
2421 Second Ave. N., Unit 1
Birmingham, AL 35203
(205) 419-7931

JEFFREY E. GLEN
ANDERSON KILL P.C.
1251 Ave. of the Americas
New York, NY 10020
(212) 278-1000

MICHAEL F. WILLIAMS
Counsel of Record
SUSAN M. DAVIES
DANIEL A. BRESS
DEVIN S. ANDERSON
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
mwilliams@kirkland.com

DAVID A. KOCHMAN
HENRY SCHEIN, INC.
135 Duryea Rd.
Melville, NY 11747
(631) 845-2954

October 5, 2016