CASE NO. 1141359

IN THE SUPEME COURT OF ALABAMA

CRIMINAL APPEAL NUMBER CR-13-0899
TALLADEGA COUNTY CIRCUIT COURT
CC-1988-211.60

WILLIAM ERNEST KUENZEL,

Petitioner-Appellant,

v.

THE STATE OF ALABAMA,

Respondents-Appellees.

APPELLANT'S PETITION FOR A WRIT OF CERTIORARI

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ORAL ARGUMENT REQUESTED

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Dated: November 9, 2015

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a) of the Alabama Rules of Appellate Procedure, William Ernest Kuenzel, through counsel, respectfully requests oral argument. Kuenzel has been incarcerated on death row at Holman Correctional Facility since 1988. He is 53 years of age, has -- in his words – 'existed' on death row for 27 years, and he always has maintained his innocence. This Court represents his final opportunity to secure relief from conviction. Bill Kuenzel did not commit the crime for which he was convicted.

In over 22 years of post-conviction proceedings, no court has reviewed Kuenzel's substantive constitutional claims because of technicalities resulting in summary dismissals predicated upon various procedural default doctrines. He has collected evidence with no court funding, no subpoena power, no hearings, and no substantive process in any post-conviction court.

By this appeal, Kuenzel seeks only justice. Many, many people believe that this case was decided in grave error, and that a guilty man has enjoyed leniency and freedom while an innocent man rots on death row facing the looming

specter of execution. The situation is untenable, and this Court alone possesses the power to grant relief.

Given the circumstances, most especially what's at stake, but also the novel legal issues involved, it is respectfully submitted that the Court's consideration and adjudication of this case would benefit from oral argument.

COMES NOW Petitioner-Appellant William Ernest Kuenzel, who is currently on death row at Holman Correctional Facility, and hereby petitions this Honorable Court, pursuant to Rule 39 of the Alabama Rules of Appellate Procedure, for a writ of certiorari arising out of the criminal court of appeals' opinion in Kuenzel v. State, CR-13-0899, 2015 Ala. Crim. App. LEXIS 56 (July 10, 2015) ("Opinion"), affirming the summary dismissal on procedural grounds of Kuenzel's Successive Rule 32 Petition, filed on September 23, 2013 ("Petition").[1]

STATEMENT OF THE CASE

28 years ago today, Linda Offord was murdered while she worked the counter at a Sylacauga convenience store. She was 39 years of age, and a mother of three children. Bill Kuenzel had nothing to do with this crime; in fact, Kuenzel wasn't even at the store that night. But his innocence is *not* the only basis upon which we ask this Court to grant him relief. In addition, relief is needed to prevent a

[1] The Opinion is annexed as Appendix B. On September 11, 2015, the Court of Appeals overruled Kuenzel's request for rehearing of the Opinion. See Appendix C.

technicality from obstructing the 'right' outcome where potentially innocent life is involved.

Fair criticism frequently is leveled against guilty litigants who deploy technical arguments to relieve themselves from accountability. Criminal defendants often use constitutional protections to get a 'win', regardless of their guilt. And we suffer these outcomes because, when push comes to shove, our society values protections of liberty and justice more than punishment. See Brief of Amicus Curiae Eagle Forum of Alabama Education Foundation, et al., dated November 9, 2015 ("Amicus"), at 17-18.

But in this instance, it is the *government* leveraging technical arguments to wrongfully preserve a 'win'. For nearly a quarter century, the State has invoked a parade of procedural defaults to prevent merits adjudication of the substantive, fundamental, and devastating constitutional violations that plagued Kuenzel's 1987 trial.

Whether caused directly by the State or due to systemic failures, the government's special role is to ensure justice. Where the State ignores prior transgressions in the continued pursuit of a 'win', courts must intervene.

That the government acted unconstitutionally and Kuenzel did not receive a fair trial are not seriously disputed. The central debate has surrounded how to correct these past errors, and who bears responsibility to ensure they are corrected. "It is the State that tries a man, and it is the State that must insure that the trial is fair." Dowdell v. Alabama, 854 So. 2d 1195 (Ct. Cr. App. 2002) (Shaw, J., concurring).

The tension between what the rules permit and what justice demands was on full display before the Court of Appeals. Early on during oral argument, the Presiding Judge asked, "even if we agreed with your -- that in our hearts that you presented a strong case for a retrial, how does this Court follow the law and give you a decision?" Appendix A, 7:13-7:16.

Later, identifying the specific struggle in this case, the court observed:

> I think we agree that you presented a powerful case. [But] Where does this Court have the authority to ignore the plain mandate of the preclusionary provisions of Rule 32? You know in Marks v. State, a 2008 case, this Court found that -- on direct appeal, a claim that there was a lack of corroboration, had to be specifically part of a motion for judgment of acquittal ... Now we could not have made that decision if the failure to corroborate accomplice testimony presented a

> jurisdictional question. And we were forced to do that in Ex parte Weeks, a previous opinion of the Alabama Supreme Court, which found that in order to raise a lack of corroboration you must specifically argue that to the Trial Court in a motion ... Now you see while those aren't Rule 32 cases this Court is bound to recognize and deal with jurisdictional issues on direct appeal."

Id., 17:6-18:1.

Summarizing the central issue, Presiding Judge Welch framed the matter as follows:

> The question here is, let's say that all of us, our heart is with you, can we do our duty and uphold the law in deciding your favor. There is no -- I looked and unless I missed it there is no case in Alabama that deals with whether or not lack of corroboration presents a jurisdictional issue in a post conviction proceeding.

Id., 40:2 – 40:9. The answer is found in the need to revisit and recalibrate certain jurisprudence surrounding the historically significant corroboration requirement.

The duty to corroborate accomplice testimony is not a simple technicality. An accomplice offered leniency in return for testimony is predisposed to embellish, omit, and outright fabricate stories. This is one reason why, for thousands of years, societies have embraced accomplice-testimony corroboration protections. See, e.g., Amicus at 10, 14-16. See also Reed v. State, 407 So. 2d 153, 158

(Ct. Cr. App. 1980), rev'd on other grounds, 407 So. 2d 162 (Ala. 1981) ("Our legislature recognized a fact which has never been recognized in federal law -- that a guilty party, when offered immunity from prosecution, will point an accusing finger in any direction to avoid prosecution. The more serious the penalty, the more likely a false accusation will occur. Thus, our legislature, in order to protect the innocent and to preserve the presumption of innocence, has required additional evidence for a conviction in such cases via § 12-21-222.").

To execute Kuenzel, one must have confidence in Harvey Venn's testimony; absent sufficient confidence that Venn is telling the truth, we cannot execute Kuenzel according to the Alabama Code, and we should not, according to biblical principles derived from natural law.

There is, in this case, a growing chorus raising objection -- many proclaiming Kuenzel's innocence outright, see Morgenthau Aff. (R. 66.) -- based on such facts as:

- Kuenzel has a credible alibi.
- None of the witnesses who saw Venn at the convenience store with a white male identified Kuenzel as Venn's companion.

- Venn was seen alone prior to the crime, insisted in his first statements that he arrived at the store alone, and in those same statements told the police that he met up with another white male at the store whom the police never investigated.
- Most damning, neither Venn nor the State can account for how or why the victim's blood is splattered on Venn's pants -- the *only* physical evidence in this case.
- Finally, Kuenzel repeatedly refused plea deals on the basis of his innocence; the same deal that Venn -- who was released in 1998 -- took.

At bottom, a great wealth of evidence that was unknown and unknowable to Kuenzel when he was tried -- and in substantial measure unconstitutionally suppressed -- never has been considered by any court in the context of a claim for substantive relief.

Although this Supreme Court has not yet been presented with an after-discovered absence of corroboration claim in a post-conviction posture, the rules clearly allow relief. It is for cases like this that this Court always reserves the right to invoke its supervisory powers. See Ala.

Const., art. IV, § 150; Amicus at 10, 14. The sanctity of life, and basic notions of justice, each would be offended if Kuenzel were executed under these circumstances. Id.

This Court, the font of justice of this State, should accept this petition and permit Bill Kuenzel to demonstrate his innocence through a new, fair trial.

STATEMENT OF THE ISSUES

This petition for a writ of certiorari presents three issues:

(a) Whether a properly preserved claim under Ala. Code § 12-21-222 is jurisdictional in post-conviction when the State presents no evidence that would qualify as corroborative, and the failure of corroboration is unknown due to illegal behavior by the state.

(b) Whether the State's suppression of material evidence in this case warrants equitable tolling of Rule 32.2(c) to permit review of 32.1(a) and (e) claims.

(c) Whether, in light of the aggregated constitutional errors that occurred during the 1987 prosecution and trial, principles of natural law governing the

protection and sanctity of innocent life impose a duty upon this Court to afford Kuenzel a single merits-based examination in post-conviction of his claims.

STATEMENT OF FACTS[2]

UNDERLYING FACTS OF THE CRIME

The following is a summary of the evidence relevant to Kuenzel's claims in the Petition.

A. The Total Evidence Known Today Relevant to the Crime[3]

In the summer of 1987, William Kuenzel, 25, and Harvey Venn, 18, became friends at the textile factory in Goodwater, Alabama where they worked. (T.119-20 ; R. 170.) In September 1987, Venn moved into Kuenzel's nearby residence. (T.119-20; R. 170.) In lieu of paying rent, Venn drove them to and from work. (T.120; R. 170.) Kuenzel did not own a car. (T.120; R. 170.)

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[2] Pursuant to Ala. R. App. P. 39(d)(5)(A)(i) and (ii), this Statement of Facts is copied verbatim from the Statement of Facts presented to the court of appeals in the application for rehearing. The required certification is annexed hereto as Appendix D.

[3] The evidence that was unknown to Kuenzel at trial and on direct appeal is denoted with an asterisk ("*").

On Monday, November 9, 1987, Venn and Kuenzel worked until 2:30 p.m., spent the afternoon driving around and were last seen together around 7:00 p.m. (T.125-32; 448-49; Ex parte Kuenzel, 577 So. 2d 531, 531-32 (Ala. 1991).)

Kuenzel consistently has maintained that Venn dropped him off at their shared residence in Goodwater by 8:00 p.m. (See, e.g., R. 170. See also T.566-68 (Kuenzel's alibi witness's trial testimony).)

Sometime after 8:00 p.m. that same evening, Venn visited two people: first, a friend named Chris Morris who lived in Fayetteville, and next, Crystal Floyd, his then 13 year-old girlfriend who lived with her parents in Hollins.* (R. 96, 104, 106, 108, 144, 149.) Floyd recalls her interaction with Venn that evening, and describes why and how she knew that Venn was alone.* (R. 144, 149.)

Incidentally, Floyd related her encounter with Venn to at least the police, prosecutor and the grand jury.* (R. 144, 149.) Yet, Floyd did not testify at trial because she was not called by the prosecution, and her grand jury testimony was unknown to Kuenzel until post-conviction. (See R. 76.) The prosecution withheld all statements made by Floyd, and fee-capped defense counsel failed to conduct

any investigation into Floyd, having relied upon the prosecution's professed compliance with its disclosure obligations after being "lulled into complacency" by statements from the then-District Attorney, Robert Rumsey ("Rumsey"). (Id.)

Venn next was observed by eight disinterested individuals nearly continuously between 10:00 and 11:05 p.m. at the convenience store. (See, e.g., T.459, 470, 479, 484 and 504.) Each of those independent witnesses uniformly testified they (i) saw Venn's car, (ii) saw and/or spoke with Venn and (iii) noticed that Venn was accompanied by a white male. Despite ample opportunity, not a single one of those witnesses identified Kuenzel as the white male they observed with Venn.

It is important to note that the identity of this individual is not a complete mystery. Unbeknownst to Kuenzel until 2010, when Venn first spoke with the police he told them on multiple occasions that the person seated next to him in his car outside the store was a "friend" named "David Pope," and that Pope was a "white male" Venn knew from school in "Millersville" when Venn was in 8th grade and Pope was in 6th grade.* (R. 96, 102, 104, 106,

108.) Venn provided the police with a detailed description of Pope, along with Pope's approximate age, relationship to Venn and likely residence.* (R. 96, 106, 108.) Venn also confirmed he saw and spoke with a number of the witnesses who had seen him at the store. (R. 96, 102, 104, 106, 108.) Yet, despite these valuable statements from Venn in the days immediately following the crime, there is no record of the police conducting any investigation into Pope, no evidence of Pope's photograph being shown to any of the eight disinterested witnesses physically present at the store and who failed to identify Kuenzel, and no evidence whatsoever indicating how, if at all, Pope was excluded as Venn's companion.

Linda Jean Offord was 39 years old and a mother of three children. Her shift as the store clerk ended at 11:00 p.m. but she agreed to cover for a co-worker running late. At some point between 11:05 and 11:20 p.m., Ms. Offord was killed by a single round fired from a .16 gauge shotgun. Venn possessed a .16 gauge shotgun that evening, * (T.140; R. 157), and Ms. Offord's blood was found splattered on the left leg of Venn's jeans. Kuenzel v. State, 577 So. 2d 474, 493 (Ct. Crim. App. 1990).

The police questioned Venn twice on Wednesday, November 11th.* (R. 96, 102, 104.) It is believed that the police focused on Venn because his claim of being home by 10:00 p.m. was contradicted by statements from the eight disinterested witnesses who observed him at the store between 10:00 and 11:05 p.m.

In his first statements, Venn said that he had spent the day with Kuenzel. (R. 96.) At approximately 8:00 p.m., he traveled alone to the home of his friend, Chris Morris, to see about some concert tickets. (Id.) Morris was not home, so Venn "went by his friend's house to see if he was there." (Id.) Even though it was barely 48 hours later, Venn denied being able to remember this friend's name. (Id.) However, previously undisclosed police notes reveal that the officer taking Venn's statement observed that "his face got real flushed at the point when he's saying 'This guy wasn't home. Came on back towards Hollins.'"* (Id.) Venn's reluctance to name this "friend" could be explained by these facts: Venn's girlfriend at the time, Crystal Floyd, lived in Hollins with her parents; Floyd was only 13 years old; Floyd saw Venn that evening around 9:00 pm (which Floyd told the grand jury but was

unknown to Kuenzel*), and observed that Venn was alone. (R. 144, 149.)

Venn admitted to the police that he had visited the store Monday evening, but insisted he arrived home shortly after 10:00 p.m. and did not, therefore, commit the murder. (R. 96.)

As for Kuenzel's whereabouts that Monday, Venn told the police: "He was in bed. Far as I can remember he was." (Id.) In fact, Kuenzel's stepfather testified at trial that, sometime after 10:00 p.m., he observed Kuenzel asleep on a couch at the home he shared with Venn, 25 miles from the convenience store. (T.566-68.)

Later that Wednesday night, November 11th, the police executed a search warrant on Venn's residence. Venn was not home, but Kuenzel -- Venn's roommate -- granted the police permission to search the premises. The police recovered the pants Venn wore Monday evening. They were stained with Ms. Offord's blood.

When the police asked Venn about the stains, he first claimed it was "red paint" or "lead" from the textile factory (see, e.g., id.); at trial, Venn changed his story to testify -- again falsely -- that it was "squirrel

blood." (T.165-66, 542-43.) It is an undisputed fact of record that the stains on Venn's pants are Ms. Offord's blood spatter — Rumsey conceded the point during his summation. (T.673.) Although Venn denied entering the store, there was no blood found anywhere outside the store, except on Venn's pants. (T.369-75.) Venn never has been able to explain how or why Ms. Offord's blood is present on his clothes.

B. Venn Changes His Story to Implicate Kuenzel

At 2:20 a.m. on Sunday, November 15th, after days of being held in state custody, interrogated without counsel, and, upon information and belief, threatened with a capital prosecution, Venn "confessed." Venn conceded he was at the store during the murder, but now implicated Kuenzel as his companion and the triggerman. (R. 110.)

Later that day, the police contacted Kuenzel and asked him to come in for questioning; he appeared voluntarily. The prosecutor presented Kuenzel with a choice: he could enter a guilty plea and testify against Venn in exchange for an eight—to-ten year sentence, or he could go to trial on capital murder charges, in which case the State would seek the death penalty. Proclaiming his innocence, Kuenzel

rejected the plea deal. The prosecution then extended the same deal to Venn, and he accepted -- Venn was released from prison in 1997. (Notably, on the eve of trial, the prosecution once again offered Kuenzel this arrangement and, as before, he refused. (R. 170; R. 76.)

No physical evidence -- neither fingerprints, blood, nor ballistics -- connects Kuenzel to the crime.

None of the eight witnesses physically present at the store between 10:00 and 11:05 p.m. identified Kuenzel as Venn's "white male" companion, and David Pope cannot be excluded as this individual.

C. April Harris's Testimony and Ala. Code § 12-21-222

It is undisputed that, excluding Venn's testimony, April Harris's "identification" is the only evidence of a direct link between Kuenzel and this crime. See Rumsey Summation, T.682. Harris, a teenage passenger in a car driving by who testified that, for a split-second around "9:30 or 10:00", she saw Venn and Kuenzel together inside the store. On this basis, the jury was able to infer that Venn largely was telling the truth about Kuenzel's involvement, that Kuenzel's alibi witness must be lying, and that Kuenzel must have been the unidentified white male

who was observed, with Venn, by the eight witnesses present at the store.

There are a number of problems with Harris's supposed "corroboration". First, Harris's trial testimony contradicts Venn's testimony on certain meaningful points. For example, Harris testified that she observed Venn and Kuenzel at the store before the time that Venn claims he arrived at the store. Equally, if not more, damaging, Harris testified that she observed both Venn and Kuenzel inside the convenience store, but Venn adamantly denied he ever entered the store that evening. Unfortunately, the immediately-preceding inconsistencies were not pointed out by Kuenzel's court-appointed counsel during his cross-examination.

Nevertheless, it is possible that the jury, considering all the evidence, noted the conflicting testimony, and disregarded it; as the Court of Criminal Appeals held, "[t]he credibility of the witnesses who supplied the corroboration of the accomplice's testimony was for the jury and not an appellate court." Kuenzel v. State, 577 So. 2d at 515. But, even assuming the jury's considered rejection of the foregoing inconsistencies, we know for

certain that the jury never accounted for Harris's grand jury testimony.

Harris's grand jury testimony reveals fatal defects in her alleged "corroboration" testimony at trial, it became available only recently, and it precludes any claim that Harris's testimony can be used to in any way satisfy Ala. Code § 12-21-222. Specifically, unbeknownst to Kuenzel and denied by the State until 2010, Harris told the grand jury just four months after the crime occurred that she "couldn't get any description."* (R. 90.) Upon prompting by Rumsey, Harris explained she "believed it was them [Venn and Kuenzel]," but that the basis of her "belief" was having seen Venn's car parked outside the store and two people of similar height and with similar hair to that of Venn and Kuenzel.* (Id.) Yet, Harris could provide no further description of the individuals, flatly admitting before the grand jury that she "couldn't really see a face." (Id.)

As the Court of Criminal Appeals recognized, Harris's trial testimony was the essential link permitting satisfaction of Ala. Code § 12-21-222, and thereby the case validly proceeding to trial. See Kuenzel v. State, 577 So.

2d at 514-15. We now know that Harris's testimony is a nullity insofar as it purports to connect Kuenzel with Venn or the crime.

D. Discovery of Additional New Evidence Establishing Innocence

The evidentiary picture known today is vastly different than the one considered by the jury in 1988.

The new evidence was uncovered, first, by Kuenzel's pro bono post-conviction attorney. During his initial investigation in the mid-1990's, pro bono post-conviction counsel recovered the shotgun that Venn testified he borrowed from a co-worker and possessed in his car on the night of the murder. (T.123.) It is a .16 gauge shotgun, the same gauge as the murder weapon. (R. 157.)

But at trial, Venn testified that his borrowed shotgun was a .12 gauge. The prosecution never introduced Venn's shotgun into evidence, and Kuenzel's trial counsel never investigated Venn's weapon. Two of the three witnesses the defense presented -- including Kuenzel's alibi, his step-father -- testified that, one day before the murder, Kuenzel returned a .16 gauge shotgun that he had borrowed. Only Venn testified that Kuenzel returned his borrowed shotgun after the murder took place. But since the murder

weapon was a .16 gauge, the jury had to find that someone possessed a .16 gauge. Even though Venn was impeached with his prior testimony that he did not know when or how Kuenzel's borrowed shotgun had been returned (see T.170; R. 120), given that Venn's shotgun was presented as a .12 gauge, jurors necessarily believed that Kuenzel's witnesses must be lying about Kuenzel returning his .16 gauge. Kuenzel's present ability to challenge this evidence where he could not at trial would be of critical importance. (See Rumsey Summation, T.677 ("[T]here is no other gun, other than a .16 gauge shotgun that killed that woman.").)

Additionally, although the prosecution did not present any motive to support why Kuenzel might want to rob a convenience store, we now know that Venn had been borrowing money from at least his 13-year old girlfriend and from Kuenzel (R. 144, 170), and that Venn needed $500 to secure an attorney's appearance on his behalf at a drug hearing the following Monday, November 16, 1987. (R. 168.)

In February 2010, other new evidence was revealed by the prosecution when an Assistant Attorney General visited the home of Crystal Floyd. He carried with him a bag of documents that Floyd had never before seen, and that had

not yet been disclosed to Kuenzel or any court in any proceeding. After the State's attorney left, Floyd contacted one of Kuenzel's counsel and informed him of this visit.

As a consequence of that interaction, the State subsequently produced numerous documents that had been withheld for almost a quarter century, including grand jury testimony from Harris, Floyd, and others, as well as police interviews conducted with Venn shortly after the crime. In addition to describing David Pope as a possible alternative suspect, one of those statements reflected a police officer's observation of bruises on Venn's left eye and left arm, just two days after the murder. (R. 96.) Kuenzel promptly retained Dr. James Gill, Deputy Chief Medical Examiner for the City of New York, to examine the autopsy record. Acknowledging the limitations of his examination and what could have been done at the time of trial had Venn's initial statements been disclosed, Dr. Gill concluded to a reasonable degree of medical certainty that "the evidence is consistent with a factual scenario whereby Venn and Ms. Offord were involved in a physical

altercation with one another shortly before Ms. Offord's death." (R. 185, 188.)

There are two principal reasons why this evidence was not previously discovered and presented for the jury's consideration. First, the prosecution engaged in misconduct that was, at best, grossly negligent, and at worst, flagrant and tactical, including: the suppression of key evidence; provision of false testimony; fraudulent in-court representations concerning disclosure of Brady materials; and a remarkably uncritical police investigation. Underscoring the prosecution's misconduct pre-trial, there are now two pieces of evidence inexplicably missing from the Talladega County evidence locker: Venn's bloody pants and the shotgun the State alleges to be the murder weapon.

The second reason why Kuenzel failed to be acquitted at trial is the acknowledged failures of his inexperienced, overworked and statutorily fee-capped counsel. Mr. Willingham conducted virtually no factual investigation, leaving untouched the lowest-hanging of fruit during the 27.75 hours that he collectively devoted to witness interviews and discovery-related matters pertaining to both

guilt and sentencing phases. (See generally R. 76.) While not an excuse, Mr. Willingham was handling two capital cases simultaneously, the $1,000 reimbursable fee cap caused him to "limit [his] out-of-court time on each of these cases," and he felt "lulled into complacency" by Rumsey, who informed Mr. Willingham "that the prosecution's case was problematic." (R. 77-78.) As Mr. Willingham candidly admits:

> In these circumstances, the evidence that was readily available to me seemed sufficient to win the case, and so, given all of the other constraints under which I was working, I did not pursue investigative leads that might have led me to much more persuasive evidence of [Kuenzel's] innocence.

(R.78.)

Mr. Willingham also relied to his and Kuenzel's detriment on the prosecution's false claim that all Brady material had been produced, including Rumsey's specific representations that all statements given by Venn to the police had been turned over.

RELEVANT PROCEDURAL HISTORY

The Opinion at *1 through *4 accurately sets out the relevant procedural history of this case, except that Kuenzel would respectfully clarify three points, and include one additional column of information.

First, to the discussion at *1 through *2 of the Opinion, Kuenzel would add that his initial Rule 32 post-conviction petition was timely filed on October 4, 1993, within the two-year limitations period of Rule 32.2(c), *if* the statute began to run from the date of the United States Supreme Court's denial on direct appeal (March 28, 1991), as opposed to the Alabama Supreme Court's denial on direct appeal (October 7, 1991) -- a discrepancy of six months at a time when Kuenzel did not have counsel.

Second, relevant underlying law governing the timeliness of post-conviction filings and the consequences of filing late has, quite literally, developed in parallel to this case's 22-year journey through state and federal post-conviction proceedings. For example, Alabama law concerning timeliness remained deeply unsettled and was the subject of active litigation between, at least, 1993 and 2000. Kuenzel's Rule 32 petition was first ruled untimely by the Circuit Court in 1994. In 1996, the Circuit Court granted Kuenzel's motion for reconsideration, vacated its prior dismissal ruling on timeliness, and reinstated Kuenzel's Rule 32 petition -- only to once again "reinstate" the penultimate order in 1999. Like shifting

sand beneath his feet, Kuenzel lacked clear jurisprudential guidance throughout his post-conviction journey.

Third, Kuenzel would clarify that, following second remand in federal proceedings, the district court held that Kuenzel failed to make a *sufficient* – as opposed to "credible", Opinion at *3 – "showing of actual innocence" pursuant to Schlup v. Delo, 513 U.S. 298 (1995).

Finally, worth noting are Kuenzel's continuous efforts to obtain disclosure of, at least, all exculpatory and impeachment evidence, including the State's (a) wrongful misrepresentations about this evidence's existence, and (b) illegal suppression of material evidence for decades.

For example, on June 15, 1988, Kuenzel's trial counsel Mr. Willingham filed a pre-trial motion for production and disclosure with the Circuit Court that included, among other things, a request for any and all Brady material. On August 2, 1988, the trial court conducted a hearing at which Kuenzel's discovery requests were addressed. At that hearing, Rumsey generally agreed to comply with Kuenzel's discovery requests.[4] Yet, in response to the District

[4] See Transcript of Hearing, dated August 2, 1988, at pp. 14-16.

Attorney's characterization of certain evidence in its possession as non-exculpatory, and therefore not required to be produced, Kuenzel's trial counsel requested an in camera review of any statements made by any witnesses for potential Brady material, with the State to provide all witness statements to Judge Sullivan:

> MR. WILLINGHAM: Judge, the only thing I would move for. Of course, Mr. Rumsey is turning over to us what he feels is exculpatory but we move it be ultimately the Court's decision as to what is exculpatory and what is not exculpatory. We would ask for any statements made by any witnesses be examined for exculpatory [Brady material], … [including] any statements that [the State] would have gotten from any witnesses that they would contend is work product. Of course, without seeing it, we wouldn't know. But we would ask the Court to examine those things in camera and ask that copies be made for the Court's file for any possible appellate review.
>
> THE COURT: Okay.[5]

On the first day of trial, the State produced to Judge Sullivan what it claimed were all relevant witness statements (T.88-91), and Judge Sullivan later ruled that none of the materials provided by the State for in camera inspection contained exculpatory statements.

Significantly, none of the materials in the trial or appellate record include statements made to any agent of

[5] Transcript of Hearing, dated August 2, 1988, at pp. 22-23.

the State or the grand jury by, among others, April Harris or Crystal Floyd.

Later on at trial, Mr. Willingham asked Officer Dusty Zook, "Has anybody made available to you any information that would exculpate our client in this case?" (T.440.) Rumsey objected, representing that "I've given them [Kuenzel] the substance of the [exculpatory] statements." (T.441.) Kuenzel's counsel protested, arguing that Rumsey "has made available some information to her [Dusty Zook] that he will not make available to us, and we can't plead surprise with him not talking with us, your Honor." (T.441-42.) The Court sustained Rumsey's objection. (T.442-43.)

In state Rule 32 proceedings, Kuenzel filed two discovery motions generally seeking discovery, an evidentiary hearing and funding for expert and investigative assistance. The State did not oppose Kuenzel's discovery motions, yet the Circuit Court never addressed or ruled upon them. On three separate occasions in federal habeas proceedings, Kuenzel filed motions for discovery and/or an evidentiary hearing. As in the Rule 32 proceedings, the State did not oppose Kuenzel's discovery

motions, but the district court never addressed or ruled upon them.

Notably, Kuenzel's trial occurred prior to the Alabama Supreme Court's landmark decision in Ex parte Monk, 557 So. 2d 832 (Ala. 1989), establishing broadened rights to discovery at trial in a capital case. Id. at 836-37. Here, the District Attorney's false representations were taken at face value, and Kuenzel was denied the protections of Monk's holding that the death penalty justifies expanded discovery in capital cases.

STATEMENT OF THE STANDARD OF REVIEW

As applicable here, this Court may grant the petition for a writ of certiorari because:

(a) A material question requiring decision is one of first impression for the Supreme Court of Alabama, to wit, whether lack of corroboration, unknown due to illegal behavior, presents a jurisdictional issue in a post-conviction proceeding (Ala. R. App. P. 39(a)(1)(C));

(b) This case challenges whether controlling Alabama Supreme Court case law that was followed in the decision of the Court of Appeals is due to be re-

examined, qualified, or overruled (Ala. R. App. P. 39(a)(1)(E)), to wit, Ex parte Weeks, 591 So.2d 441 (Ala. 1991); and

(c) Because the Court of Appeals failed to recognize as prejudicial plain error and manifest structural defects in the original 1987 trial (Ala. R. App. P. 39(a)(2)(A) and (B)).

SUMMARY OF THE ARGUMENT

Ala. Code § 12-21-222 commands that a "conviction cannot be had" absent sufficient corroboration. The test is well-defined, and requires eliminating the accomplice's testimony before determining whether the remaining evidence tends to connect the defendant with the offense in a material, non-speculative way.

In some circumstances not present here, a claim of inadequate corroboration may be non-jurisdictional. However, where, as here, the prosecution's illegal suppression conceals *the government's inability to provide any evidence of corroboration*, a jurisdictional challenge may arise in the post-conviction context.

Where the inquiry concerns the *existence* of qualifying corroborative evidence, and the failure to corroborate was

previously unknown due to illegal conduct, a post-conviction claim under § 12-21-222 is jurisdictional. As there is no case adjudicating this issue, Kuenzel submits that certiorari review by the Alabama Supreme Court is appropriate.

Corroboration of accomplice testimony is a critical structural protection to ensure that only the guilty are convicted, with roots tracing back to the earliest written laws. See, e.g., Amicus at 14-16. This rule is directed to the sanctity of life, implicating core principles of fairness and justice. When lack of corroboration is raised in a post-conviction setting, based on evidence that was not previously reviewed, the claim affects the legality of the conviction and, by extension, the court's jurisdiction.

Although 32.1(b) claims affecting jurisdiction may be raised at any time, new facts to establish 32.1(e) innocence are subject to Rule 32.2(c) timeliness requirements. Equitable tolling has been granted, however, where "extraordinary circumstances" directly affect the timeliness of a petition's filing. There exists no precedential or temporal constraints upon this court's power to equitably toll its own statute, nor is there a

prohibition on this court's power to insure that justice is done. See Alabama Const., art. IV, § 150; Amicus at 16-20. Here, extraordinary circumstances warrant equitable tolling to permit a single opportunity for review of the underlying conviction.

ARGUMENT

POINT I

MERITORIOUS § 12-21-222 CLAIMS ARE JURISDICTIONAL IN POST-CONVICTION CAPITAL CASES WHERE LACK OF CORROBORATION IS PREVIOUSLY UNKNOWN DUE TO ILLEGAL BEHAVIOR BY THE STATE

Where the allegedly corroborating evidence fails to connect the defendant to the crime absent reference to the accomplice's testimony, there is no corroboration and a conviction "cannot be had." Ala. Code § 12-21-222. See generally McCullough v. State, 21 So. 3d 758, 761-64 (Ala. 2009); Williams v. State, 72 So. 3d 721, 722-24 (Ct. Cr. App. 2010). For the reasons stated below, this claim may present a jurisdictional issue in a post-conviction proceeding.

A. The Corroboration Rule Is A Material Protection

The obligation to sufficiently corroborate accomplice testimony traces back thousands of years. This history

underscores universal recognition "that prosecuting witnesses may be sincerely mistaken or may lie" and that "[s]ufficient corroboration is intended to protect the innocent by preventing the accused from suffering a false accusation that would lead to his unjustified execution." See Amicus at 15.

It must also be remembered that the Legislature recently had the opportunity to reconsider § 12-21-222. In 2012, Senator Gerald Dial introduced a bill to repeal this statute, and that legislation failed to advance. See SB475, 139673-1 (Apr. 5, 2012). As such, there is no reason to presume that the Legislature is reconsidering this statute, and there certainly is no reason to believe the Legislature wants innocent citizens to be executed.

B. Weeks Should Be Overruled, or Qualified for Post-Conviction Claims Arising From Brady Violations

The Court of Appeals refused to consider whether Venn's testimony was illegally corroborated because Ex parte Weeks, 591 So.2d 441 (Ala. 1991), holds that § 12-21-222 challenges can be waived on direct appeal, reasoning that:

> [A] claim that a conviction is based on the uncorroborated testimony of an accomplice is waived on direct appeal if not properly and specifically presented to the trial court. ...

> Because a claim that a conviction is based on the uncorroborated testimony of an accomplice can be waived, it is necessarily a non-jurisdictional claim.

Opinion at *6-*7. No case is cited for that proposition in the post-conviction context because it does not exist.

The Court of Appeals correctly observed during oral argument that "there is no case in Alabama that deals with whether or not lack of corroboration presents a jurisdictional issue in a post conviction proceeding." Appendix A, 40:6-40:9. The facts and posture of Rule 32 proceedings are materially different than "cases that deal with jurisdictional questions in terms of preservation on direct appeal." Id., 40:9-40:12. When new evidence arises in the post-conviction context, § 12-21-222 claims may raise a jurisdictional challenge.

1. Weeks is an Aberration

It is significant to note that the "waiver" contention relied on by the Court of Appeals is highly questionable as regards the corroboration requirement. In Ex parte Weeks, this Court created a special rule for preserving claims of

insufficient corroboration of accomplice testimony.[6] While a judgment of acquittal is preserved by a general objection to the sufficiency of evidence, Weeks commands specific presentation of the challenge to corroboration for direct appeal review. 591 So.2d at 442.

The question is critical, because failure of corroboration means that the State has failed to establish an element of the crime. As the Chief Justice recently pointed out in dissent from the quashing of the writ of certiorari in Gaston v. State, 2015 Ala. LEXIS 79 (Ala. June 12, 2015), § 12-21-222, in its own terms, demands that:

> if a conviction for a felony is based on an accomplice's testimony, then there must be corroborating evidence tending to connect the defendant with the commission of the offense. It would appear, then, that if the State does not present such corroborating evidence, it has not presented sufficient evidence to send the question of the defendant's guilt to the jury.

Id, at *13 (dissent, Moore, C.J.). If the failure to present "such corroborating evidence" prohibits submission of a case to the jury, the claim is jurisdictional.

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[6] Petitioner does not allege insufficient corroboration, but *lack of any corroboration*. See Infra, at 42-47. Thus the Weeks doctrine, even if retained, does not avail the State.

The Court of Appeals in Marks v. State, 29 So. 2d. 166, 172 (Ct. Cr. App. 2008) was equally critical of Weeks. In Marks, trial counsel objected that the State's evidence did not establish beyond a reasonable doubt all the elements of the crime charged. Although noting that Weeks was an "anomaly" among Supreme Court precedent, the appellate court deemed itself bound to apply Weeks and barred consideration of a claim of alleged lack of corroboration of accomplice testimony.[7]

As the Court of Appeals pointed out in Marks, failure to specify a lack of proof for particular elements of a crime had, prior to Weeks, not waived the argument on appeal, citing Ex parte Maxwell, 439 So. 2d 715 (Ala. 1983), and that rule had been routinely applied in other accomplice testimony cases such as Adkison v State, 548 So. 2d 606 (Ct. Cr. App. 1988).[8]

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[7] In Marks, Judge (now Justice) Shaw called for this Court to revisit Weeks. 20 So. 3d at 172.

[8] "The appellant argues that his conviction should be reversed because it as based upon uncorroborated accomplice testimony, in violation of § 12-21-222, Code of Alabama (1975). The appellant made a motion for judgment of acquittal, stating 'that the State had not made out a prima facie case . . ..' That ground was sufficient to preserve this matter for our appeal." 548 So. 2d at 609.

Correspondingly, lack of proof of a necessary element of the crime charged has been deemed preserved for appeal where (i) the alleged missing element is proof of previous conviction of a crime of violence in a prosecution for possessing a pistol after such previous conviction, Ex parte Johnson, 620 So. 2d. 665, 668 (Ala. 2002), (ii) the State allegedly failed to prove the municipal ordinance under which the defendant had been prosecuted, Ex parte Hall, 843 So. 2d 746, 748 (Ala. 2002), and (iii) the State allegedly failed to prove in a felony murder prosecution that the death was caused by a participant in the felony, Ex parte Parks, 923 So. 2d 330, 335 (Ala. 2005).

The law of this state, with the *single* exception of the corroboration of accomplice testimony requirement, has been that convictions lacking proof of a necessary element of the crime charged are preserved by the inevitable motion for judgment at the end of the trial, and thus are jurisdictional for preservation purposes. The Chief Justice in Gaston wrote: "In the appropriate case, this Court should consider overruling Weeks and Marks." Gaston, 2015 Ala. LEXIS 79, at *14.

2. A Contextual Analysis Is Necessary To Determine Whether a Claim Is Jurisdictional

A single issue can be both non-jurisdictional and jurisdictional, depending upon the context in which it is raised. For example, double jeopardy claims are classically construed as jurisdictional. Yet, this Court recognizes that whether a double jeopardy claim is or is not jurisdictional depends upon the circumstances of when and how it is presented. See, e.g., Heard v. State, 999 So. 2d 992, 1005 (Ala. 2007) (quoting Ex parte Benefield, 932 So. 2d 92, 94-95 (Ala. 2005)). "[I]f a double jeopardy claim is viable before trial, then the defendant must object by pretrial motion, or the double jeopardy claim is foreclosed." Benefield, 932 So. 2d at 94.

Despite the exceptions, many violations of double jeopardy rights raise questions of the trial court's jurisdiction to enter a verdict. See, e.g., Ex Parte Robey, 970 So. 2d 1069, 1071-72 (Ala. 2004). "[B]ecause [defendant's] double-jeopardy claims raised jurisdictional issues, they could not be waived and thus can be raised at any time." Heard, 999 So. 2d at 1006.

Accordingly, the ability to waive cannot be the touchstone of whether or not a given issue is

jurisdictional. The ability to waive instead follows from the contextual analysis of whether the claim is addressed to the court's power to adjudicate a claim. See generally Neder v. U.S., 527 U.S. 1, 8-9 (1999) (collecting cases).

Consistent with jurisprudence surrounding double jeopardy claims, the failure to satisfy the corroboration statute can be both a jurisdictional defect and non-waivable, and non-jurisdictional: when presented as a claim of *sufficiency* of the evidence that otherwise satisfies "corroborative" evidence, the claim is non-jurisdictional; in contrast, where the claim is addressed to the *existence* of evidence meeting the threshold definition of "corroborative", the claim concerns the legality of the conviction itself and is jurisdictional.

3. Illegality of the Conviction Identifies Claims Raising Jurisdictional Defects

As discussed above, the relevant question is not whether a particular claim must be specifically preserved on direct appeal; instead, it is whether and when § 12-21-222 claims constitute "illegal" convictions for Rule 32.1(b) purposes. See, e.g., Bradley v. State, 925 So. 2d 232, 234 (Ala. 2005) (errors addressed to whether the conviction is legal or illegal, as opposed to a sentence,

are jurisdictional). Because, by the text of § 12-21-222 itself, a conviction based on uncorroborated accomplice testimony "cannot be had", such conviction is illegal and, thus, presents a jurisdictional issue.

A conviction is illegal and cannot stand where a necessary element of the crime is missing. The point is incontestable as regards a sentence that is imposed without statutory authority. "Matters concerning unauthorized sentences are jurisdictional," and "[t]hus this Court may take notice of an illegal sentence at any time." Enfinger v. State, 2012 Ala. Crim. App. LEXIS 113, *5 (Ct. Cr. App. Dec. 14, 2012). Enfinger makes clear that the inquiry is *not* whether counsel preserved a claim for review, but whether the claim is "jurisdictional" in its own terms, for in Enfinger no challenge to the sentence was made in the trial court at all.

The doctrine is explicated in McClintock v. State, 773 So.2d 1057 (Ct. Cr. App. 2000), in which an enhanced sentence otherwise validly imposed was rendered illegal because an essential element of the enhancement -- namely, valid predicate convictions -- was not proved at trial.

In McClintock, the defendant was given an enhanced sentence based on a prior 1986 conviction which was set aside in January of 1989. In February of 1989, defendant filed a Rule 32 petition raising the HFOA claim, but the petition was summarily dismissed in April of 1989. In June of 1999, McClintock filed another Rule 32 petition, raising the same argument about the invalidity of his enhanced sentence. The Circuit Court again dismissed the petition as successive.

But the Court of Appeals reversed, holding that challenges to the legality of a sentence are jurisdictional and can be raised at any time. The Court of Appeals explained that:

> [A] conviction that has been set aside or reversed may not be used to enhance a penalty. Because McClintock's conviction in case no. CC-85-2744 was set aside in January 1989, McClintock was entitled to be resentenced for his first-degree escape conviction, with the circuit court considering only two prior felony convictions . . . for enhancement purposes. However the circuit court's April 1989 order, which indicated merely that McClintock's life sentence was within the authorized statutory range, fails to establish that McClintock was properly resentenced using two prior felony convictions, rather than three, for enhancement. Because McClintock has not received a sentencing hearing at which only two prior felony convictions were considered for enhancement purposes, his sentence *is illegal. Therefore, the claim in his present Rule 32 petition is not (as*

> *the circuit court found in its October 12, 1999 dismissal), subject to the procedural bar of Rule 32.2(b).*

McClintock, 773 So. 2d at 1059 (emphasis added; internal citations omitted).

The same rule enunciated in McClintock applies where the alleged procedural default is failure to file an initial Rule 32 petition within the statutory period. See Barr v. State, 4 So. 3d 578 (Ala. Cr. App. 2008).[9] The rule also applies where the alleged procedural default is failure to file an appeal from the conviction which included the enhanced sentence. See Horn v. State, 913 So. 2d 539, 542 (Ct. Cr. App. 2004). In sum, "Matters concerning unauthorized sentences are jurisdictional and, therefore, can be reviewed even if they have not been preserved." McHarris v. State, 678 So. 2d 258, 259 (Ct. Cr. App. 1995) (citations omitted).

By the plain language of § 12-21-222, a "conviction cannot be had" absent sufficient corroboration. Although the "sufficiency" of the corroborating evidence presents a

[9] Notably, this is the same default that prevented Kuenzel from having his underlying constitutional claims reviewed during initial Rule 32 proceedings.

mixed question of law and fact, the "existence" of corroborating evidence is a question of law. It is as to this latter category of claims that Kuenzel's argument is addressed.

The errors that occurred here are of the type Chief Justice Rehnquist described as "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Neder v. U.S., 527 U.S. at 8 (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)). "Such errors 'infect the entire trial process,' Brecht v. Abrahamson, 507 U. S. 619, 630 (1993), and 'necessarily render a trial fundamentally unfair,' Rose v. Clark, 478 U.S. [570,] at 577 [(1986)]. Put another way, these errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair.' Id. at 577-578." Neder, 527 U.S. at 8-9.

C. This Case Illustrates Why Weeks Should Be Reconsidered, and Possibly Overruled

For Mr. Kuenzel to be legally convicted, he must be legally tried. Under Alabama law, that means his

conviction must rest on more than the uncorroborated testimony of an accomplice. Due to the withheld evidence, that did not happen. The present case is an appropriate vehicle to revisit the Weeks holding and either revise, qualify, or overrule the anomalous separate preservation rule for accomplice testimony.

Kuenzel was convicted at trial on the testimony of Harvey Venn, who told the jury that he was petitioner's accomplice. On direct appeal, the Court of Appeals sustained the conviction, citing as the only corroboration of Venn's testimony the testimony of April Harris. Kuenzel v. State, 577 So. 2d at 514-15.

As demonstrated at Point I(C) of the Statement of Facts herein, April Harris's grand jury testimony, which was withheld for decades by the prosecution, would have precluded her identification at trial for lack of foundation. By withholding Harris's grand jury testimony, the prosecution improperly allowed this case to go to a jury.

The State's belated disclosure of April Harris's grand jury testimony reveals the stark absence of any evidence that satisfies Ala. Code § 12-21-222 because, as the Court

of Appeals identified in its 1990 opinion on direct appeal, April Harris was essential to establish corroboration. Kuenzel v. State, 577 So. 2d at 514-15. Applying the subtraction rule, the court held:

> 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.

Id.

Here, it is unnecessary to "weigh the evidence" because, as the Court of Appeals recognized, without April Harris's testimony there simply is no other qualifying evidence of corroboration to consider. See, e.g., Jackson v. State, 98 So. 3d 35 (Ct. Cr. App. 2012); Green v. State, 61 So. 3d 386 (Ct. Cr. App. 2010); Miles v. State, 476 So. 2d 1228, 1234-35 (Ct. Cr. App. 1985); Anderson v. State, 44 Ala. App. 388, 391-92, 210 So. 2d 436 (Ct. Cr. App. 1968). Excluding Venn's testimony, there never was, nor is there

today, any evidence directly linking Kuenzel to the murder or suggesting his involvement.[10]

Compounding the damage caused by the willful suppression, during summation, prosecutor Rumsey's closing arguments heavily leveraged Harris's positive identification of Kuenzel and resultant corroboration of the veracity of Venn's account:

> As to where the cars were parked and everything else, I'm not going to continue to go through that. But I'll tell you this. April Harris says she saw them in there. And April Harris ain't no surprise in coming up here. She has been around a long time. Ever since Day One in this case. And she says she saw Vinn [sic] and Kuenzel in there.

Rumsey Summation, T.672.

The importance of Harris's testimony to the prosecution's satisfaction of its burden to prove jurisdiction cannot reasonably be disputed, nor can it be overstated. Given Harris's grand jury testimony, she could not have later testified to positively observing Kuenzel,

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[10] See Rumsey Summation, T.682 ("I submit this case is not all circumstantial evidence. There is a lot of direct evidence. I submit that Harvey Vinn [sic] told you the best he could. He didn't remember everything that happened that night. Not in detail on the time frames. There is no question about that."); T.666 ("Harvey Vinn [sic] is not circumstantial evidence. Harvey Vinn [sic] is direct testimony.").

Venn, or, for that matter, any specific individual. And, absent Harris's corroboration, the other evidence presented by the prosecution does not even "raise a suspicion of guilt," which itself is plainly insufficient to satisfy § 12-21-222. See, e.g., Williams v. State, 72 So. 3d 721 (Ct. Cr. App. 2010).

As Kuenzel demonstrated in his Petition at pages 26-34, neither the trial court nor the direct appeal courts could adequately have considered the § 12-21-222 claim because they lacked access to critical facts. And those facts were absent at the time of trial, on direct appeal, and throughout original Rule 32 proceedings because crucial evidence undermining the prosecution's theory was illegally withheld by the State.

Unlike in Gaston, where the issue of corroboration was front and center during the trial, and counsel's failure to specify lack of corroboration as an explicit ground for dismissal was arguably a conscious and intentional tactical decision, the infirmities in April Harris's testimony only became known when her grand jury testimony was finally revealed years later.

And unlike defendant Gaston, defendant Kuenzel was sentenced to death. "The hovering death penalty" justifies the abandonment of an inexplicably stringent preservation rule for accomplice testimony as applied to post-conviction claims, and the recognition that lack of corroboration is a jurisdictional defect in a conviction that hinged on accomplice testimony. See Ex parte Monk, 557 So.2d 832, 836-37 (Ala. 1989). See also Amicus at 10-18.

Thus, the issue has moved from whether the corroborative testimony was persuasive, to one of whether there is any corroboration at all. This reformulation of the inquiry transforms the corroboration point from non-jurisdictional to jurisdictional -- which makes perfect sense. Had trial counsel known of the grand jury testimony and failed to use it effectively, a challenge to the sufficiency of the Harris trial testimony, testable at the time it was given, would be subject to waiver analysis. But because the grand jury testimony was unknown and unknowable at the time of trial, the legality of the conviction is tainted.

At bottom, corroboration is a "gating" issue and the prosecution illegally shielded its inability to satisfy

this requirement at trial, and for decades thereafter. Because we now know that Venn's testimony alone served as the single pillar underpinning the prosecution's direct evidence connecting Kuenzel to the commission of this crime, the Circuit Court lacked the power to submit the case to a jury pursuant to § 12-21-222. Thus, Kuenzel's conviction must be vacated pursuant to Ala. R. Crim. P. 32.1(b).

Finally, to the extent there are factual disputes, it was error to accept the State's version of events as true at this stage of proceedings. At a minimum, the Court should permit one opportunity to consider the competing narratives before ruling upon the summary dismissal motion.

POINT II

UNDER THE PRESENT CIRCUMSTANCES, KUENZEL'S CLAIMS ARE ENTITLED TO THE BENEFIT OF EQUITABLE TOLLING

The Court of Appeals also held that Kuenzel's time-barred claims are ineligible for equitable tolling. See generally Opinion at *11-*13. The Court of Appeals recognized that equitable tolling is appropriate when "extraordinary circumstances" outside of the petitioner's control prevent the petitioner from timely filing, see id. at *12 (citing cases), and that there is no express

limitation upon the "'extraordinary circumstances justifying the application of the doctrine of equitable tolling.'" Id. (quoting Ex parte Ward, 46 So. 3d 888, 897 (Ala. 2007)). Yet, the Court of Appeals disavowed the ability to apply equitable tolling here.

According to the Court of Appeals, it is bound to find Kuenzel's corroboration claim "time-barred by Rule 32.2(c) because Kuenzel's petition was filed over 20 years after his conviction and sentence became final." Opinion at 9. Of course, Kuenzel could not have raised this claim in 1993. When Kuenzel filed his initial Rule 32 post-conviction petition 22 years ago, he was unaware of April Harris's grand jury testimony. The government did not disclose this evidence until 2010. Our position is that it is unfair to bar previously undisclosed grand jury testimony of April Harris from being fully considered.

As to Kuenzel's 32.1(e) claim, the Court of Appeals responds by noting that Kuenzel *could have* filed this successive petition earlier; beginning either in the late-1990's, when new evidence was first uncovered by pro bono counsel, at various points during the 2000's, when additional evidence was uncovered through pro bono

counsel's independent investigation, or in 2010, immediately after the State revealed the existence of long-suppressed grand jury testimony and police notes, among other materials. Opinion at *14.

Of course, Kuenzel was far from idle; he was actively litigating in federal court at the time of the State's disclosure. Nevertheless, the Opinion holds that "the doctrine of equitable tolling does not permit a Rule 32 petitioner to belatedly reconsider his or her choice not to timely file a Rule 32 petition only after he or she is denied relief in another forum." Id.

It is "the duty of this court to insure that justice is served and fundamental rights are not indiscriminately denied." Ex parte Duncan, 1984 Ala. LEXIS 5048, *7 (Ala. 1984). "Consistent with society's 'overriding concern with the justice of the finding of guilt', the courts, as well as the prosecution, must be vigilant to correct a mistake." Ex parte Ward, 89 So. 3d 720, 728 (Ala. 2011) (internal citations omitted). See generally Amicus at 18-26.

Because the doctrine of equitable tolling seeks as its end to do justice, and the circumstances here truly are extraordinary, formulaic denial of relief to Kuenzel

because he litigated in federal court and did not file a placeholder petition is needlessly rigid for several reasons.

1. The lower court's criticism of Kuenzel's counsel appears to be an application of "placeholder petition" law developed by the federal courts interpreting AEDPA. Regardless of the wisdom and value -- or lack thereof -- of federal habeas placeholder rules, nothing in Alabama case law requires the state courts to deny review of a meritorious new evidence claim in post-conviction simply because it was first presented in ongoing federal proceedings, after state proceedings were procedurally dismissed. To the contrary, analogous civil law of Alabama would preclude the state court's consideration of a claim under active litigation in the federal courts. See Ala. Code § 6-5-440; Ex Parte Canal Ins. Co., 534 So. 2d 582 (Ala. 1988); Ex parte Boys & Girls Clubs of Southern Alabama, Inc., No. 1130051, 2014 WL 3012523, *19 (Ala. July 3, 2014).

2. Far from ignoring settled precedent with clear direction, many legal principles impacting Kuenzel's ability to access the courts have literally developed in

tandem with Kuenzel's journey through post-conviction. See, e.g., Siebert v. State, 78 So. 2d 842 (Ct. Cr. App. 1999); Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003); Hurth v. Mitchem, 400 F.3d 857 (11th Cir. 2005); Pace v. DeGugliemo, 544 U.S. 408 (2005); Siebert v. Allen, 455 F.3d 1269 (11th Cir. 2006); Siebert v. Allen, 506 F.3d 1047 (11th Cir. 2007); Allen v. Siebert, 552 U.S. 3 (2007).

3. The State alone possessed the power to disclose evidence it possessed exclusively. Under such circumstance, equity does not urge empowering the State to determine when, tactically, it should release illegally suppressed materials. Simply stated, where the State actively withholds evidence that is otherwise unavailable, it should not receive any strategic litigation advantage by and through the timing of its release.

4. In contrast to the government's delay, Kuenzel sought the most expeditious routes to resolving this case throughout post-conviction. Kuenzel, following federal requirements, attempted to have his constitutional claims heard in federal court after he was prevented from presenting his claims in state court. There is simply no rule that when a successor Rule 32 petition becomes

procedurally available -- as occurs where there is newly discovered evidence that has been withheld for years without the petitioner knowing of its existence -- a federal court must defer to state adjudicatory processes.

Here, the federal court was in the process of deciding, under the narrow confines of its power to review state convictions, whether the new evidence met the strictures of federal equitable tolling. Kuenzel ultimately was unsuccessful, but his efforts to overcome a procedural default should not per se preclude equitable tolling, especially where Kuenzel would otherwise be awarded relief on his incontestably meritorious constitutional claims.

5. It was unavoidable that Kuenzel would face a procedural default argument raised by the State in some form. If Kuenzel had filed this same successive Rule 32 petition in 2010, the State would argue that his Brady claims are not "new"; rather, the State would contend -- as it has done in many other cases -- that Kuenzel's claims are barred as merely an extension of his prior, now-procedurally defaulted Brady claims contained in the initial Rule 32 petition. The State would argue -- as it has done in many other cases -- that all claims which are

an extension of claims properly subject to a procedural default also are due to be summarily dismissed.

In initial Rule 32 proceedings, the state courts ultimately foreclosed Kuenzel's ability to obtain merits review of his constitutional claims. In federal court, Kuenzel still had the opportunity to obtain relief from conviction on the basis of his substantive constitutional claims. Returning to state court, as he does now, offers relief only in the extremely limited universe available for successive post-conviction petitions.

The point is, Kuenzel did not delay action when he learned -- from a lay witness -- of the existence of unproduced grand jury transcripts, and later, of withheld police notes. But he *was* forced to gamble between the federal courts and the state courts. And these choices were forced upon Kuenzel because of the State's illegal conduct. Equity should not condone or further such behavior where a litigant has otherwise acted diligently.

6. The Court of Appeals' equitable tolling analysis of the factual innocence claim assigned zero weight to the State's tactical suppression of material evidence, in circumstances where the government's case rests upon the

thinnest of reeds: self-serving, inconsistent, and inherently suspicious testimony of an 18-year-old admitted accomplice testifying in return for a reduced sentence that avoids the death penalty. See Reed v. State, 407 So. 2d 153, 158.

Nor did the court assign any weight to the police department's "remarkably uncritical" investigation of the lowest-hanging fruit -- including David Pope -- that might have revealed the true identity of Venn's companion. See Kyles v. Whitley, 514 U.S. 419, 445 (1995). As in Kyles:

> Damage to the prosecution's case would not have been confined to evidence of the eyewitnesses, for Beanie's various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well. By the State's own admission, Beanie was essential to its investigation and, indeed, "made the case" against Kyles. Contrary to what one might hope for from such a source, however, Beanie's statements to the police were replete with inconsistencies and would have allowed the jury to infer that Beanie was anxious to see Kyles arrested for Dye's murder. Their disclosure would have revealed a remarkably uncritical attitude on the part of the police. If the defense had called Beanie as an adverse witness, he could not have said anything of any significance without being trapped by his inconsistencies.

Id. Here, the police conducted no investigation of Pope or any other possible suspects, despite not a single witness at the convenience store identifying Kuenzel as Venn's companion.[11]

Where 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.

The courts of Alabama always have remained cognizant of the need to insure a fair trial process, that the defendant is afforded due process of law, and that a conviction does not offend principles of justice, commenting that a prosecutor:

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal

[11] See also Banks v. State, 845 So. 2d 9, 26-27 (Ct. Cr. App. 2002) ("A defendant can disprove his guilt by proving the guilt of some other person", and whether evidence is "merely cumulative or impeaching" turns on whether the evidence "seek[s] to discredit the veracity of any witnesses" or whether it "serve[s] to controvert, that is, disputed the State's witnesses' findings and opinions, not their credibility") (quoting Houston v. State, 208 Ala. 660, 95 So. 145, 147-48 (Ala. 1923) (citing Brown v. State, 120 Ala. 342, 25 South. 182 (1899), and McDonald v. State, 165 Ala. 85, 51 South. 629 (Ala. 1910))).

> prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Ex parte Duncan, No. 83-75, 1984 Ala. LEXIS 5048, *5-6 (Ala. 1984) (quoting Berger v. U.S., 295 U.S. 78, 88 (1935) (defining the obligations in a state prosecution of the State's attorney)).

Kuenzel maintains that the unprecedented circumstances of this case justify and demand the court's discretionary exercise of its sparingly-used equitable powers.

CONCLUSION

A solution is urgently needed to address this unique situation. There is nothing circumscribing this Court's power to do justice by tolling the statute within the narrow confines of this case. Alabama law comfortably accords a petitioner, like Kuenzel, *one* opportunity to persuade a post-conviction court that he is, in fact, a wrongfully and unfairly convicted inmate on death row.

Because Kuenzel's constitutional claims were summarily disposed of on a procedural default, this Petition is his last opportunity to correct this grave error.

Finally, even if this Court is not yet persuaded of Kuenzel's factual innocence, dismissal is not the appropriate remedy at this stage. Ward and other binding jurisprudence advise that Kuenzel need not "establish that he was innocent of the murder", but rather that he is entitled to a hearing at which the question is whether, in light of the newly discovered evidence, "the result would probably have been different." Ex parte Ward, 89 So. 3d at 727. Whether the evidence is sufficiently strong to "tend to destroy or obliterate the effect of the evidence upon which the verdict rests" is a question most appropriately resolved after an evidentiary hearing. Id. A pre-eminent issue at such hearing would be Venn's and Harris's responses in light of the newly available information.

For all of the foregoing reasons, Kuenzel's conviction violates Alabama law because the State failed in its duty to corroborate the testimony of an admitted accomplice, and because evidence unavailable at trial demonstrates that Kuenzel is factually innocent.

Kuenzel respectfully submits that certiorari should be taken, and the Petition granted.

Dated: November 9, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2015, I served a copy of the attached motion by first-class mail, postage prepaid to:

J. Clayton Crenshaw, Esq.
Office of the Attorney General
500 Dexter Avenue
Montgomery, AL 36130-0152

I also have caused the original and 12 copies to be filed with the Clerk of the Supreme Court, and one copy to be filed with the clerk of the Court of Criminal Appeals.

/s/ Lucas C. Montgomery
Lucas C. Montgomery

STATE OF ALABAMA
COURT OF CRIMINAL APPEALS
----------X

IN THE MATTER OF:

WILLIAM ERNEST KUENZEL,

APPELLANT,
Docket No.:
CR-13-0899

Vs.

STATE OF ALABAMA,

APPELLEE.

----------X

April 7, 2015

HELD AT: STATE OF ALABAMA
COURT OF CRIMINAL APPEALS
300 Dexter Avenue
Montgomery, Alabama 36104

BEFORE: HONORABLE SAMUEL WELCH,
Presiding Judge

J. ELIZABETH KELLUM
LILES C. BURKE
J. MICHAEL JOINER
Judges

APPEARANCES: JEFFREY E. GLEN, ESQ.
RENE F. HERTZOG, ESQ.
G. DOUGLAS JONES, ESQ.
DAVID A. KOCHMAN, ESQ.
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TRANSCRIBER: LOUISA RETTLER

SENIOR JUDGE SAMUEL WELCH: I was going to introduce the Court before we got started. Presiding Judge Mary Windom has recused herself from this case. That's why this chair to my left is empty. I'm the Senior Judge on accordance. It's my duty to present in her absence. I'd like to introduce the Court. To my left is Judge Beth Kellum from Tuscaloosa County, received her JD from the University of Alabama, has served as Assistant Attorney General, Senior Staff Attorney for the Alabama Court of Criminal Appeals. Has served in private practice specializing in appellate work and later served as a Senior Staff Attorney on the Alabama Supreme Court. She's served on this Court since 2009.

To my right is Judge Liles Burke from Marshall County, received his Juris Doctorate from the University of Alabama, practice law in Marshall County and served as Municipal Judge for the City of Arab. In 2006 he was appointed to serve as District Judge in Marshall County and during his service he was also in the District Judges Association and the Juvenile Judges Association. He's served on this Court since 2011.

To my far left is Judge Michael Joiner from Shelby County. He graduated from Stanford and

received his Juris Doctorate from Cumberland Law School and was an editor of the Cumberland Law Review. He practiced law in Shelby County until his election as Circuit Judge of Shelby County in 1992 and served as presiding Judge from 2005 until his appointment on this Court. And he's served on this Court since 2009.

I'm Judge Sam Welch from Monroe County. I received my law degree from the University of Alabama and was an editor of the Law and Psychology Review there. I practiced law and served as a Municipal Judge for the City of Monroeville, served as District Judge in Monroe County and then served as a presiding Circuit Judge in the 35th Circuit which is Monroe and Conecuh County from 1989 through 2007. I've served on this Court since that time. And we appreciate your appearance here and are looking forward to hearing your arguments. I'll ask the Clerk to call the first case.

THE CLERK: CR-13-0899, William Ernest Kuenzel versus the State of Alabama. An appeal from the Talladega Circuit Court. For the Appellant, David Kochman, Doug Jones, Jeffrey Glen, Renee Hertzog and Luke Montgomery. For the Appellee, Clay Crenshaw and Lauren Simpson. CR-13-0899.

DAVID KOCHMAN: May I approach, Your Honor?

SENIOR JUDGE WELCH: Certainly.

MR. KOCHMAN: Good morning. And may it please this Honorable Court. My goal before you today is twofold. First, I am to convince you that my client did not not receive a fair trial. And that in light of all the evidence known today his conviction is manifestly unjust. And second I want to provide comfort to this Court that the narrow jurisdictional solution that we propose, is in fact the best outcome to satisfy all parties expressed interest for justice in this case, while at the same time avoiding tagalong petitioners.

Implications of justice lie at the center of this case and the errors that occurred must be corrected. In a situation like here where the prosecution played fast and loose with the evidence, Courts must take special care to see that justice is done. I'd like to start off by explaining some of the reasons why this case is unique and why the present set of facts will be difficult to replicate by anyone else.

This was a weak case built on accomplice testimony.

The sole corroboration was denied before the Grand Jury. And the same prosecutor, who elicited that testimony before the Grand Jury, elicited

the testimony from the same witness at trial.

Only the prosecutor knew of that Grand Jury testimony. And that Grand Jury testimony was not produced, was not produced by the State initially, in fact it was disclosed in the first instance to a lay witness. That testimony directly contradicts the prior Grand Jury testimony. It is not simply less certain. And that is a critical point and a point of distinction between our case and what the State presents. In this witness's trial testimony she indicates that she could clearly identify Kuenzel with Venn. This is a disinterested witness and in fact was the only independent evidence supporting Venn's statement that Kuenzel with Venn. Yet before the Grand Jury she states that I couldn't get any description, I couldn't see a face, I couldn't tell you what clothes they have on. Her professed belief, that she saw Kuenzel and Venn, is not an identification. There is simply no basis for that and absent April Harris's trial testimony there is no way that the prosecution would have been able to obtain a conviction. What the prosecutor should have done in this instance here, as soon as he elicited that testimony at trial, was either (A) withdraw the witness because he knew of the prior statements or (B) disclose the Grand Jury

testimony and ask for a continuance. And yet neither of those happened. In fact the prosecutor let the case come up before this very Court and let this Court issue its decision, which I think is critical to look at. This Court in examining the 12-21-222 claim stated that there were multiple witnesses who saw Harvey Venn at the store, spoke with Harvey Venn, saw his car there and—

SENIOR JUDGE WELCH: All right. May I ask you a question? In view of the fact that this claim was litigated on direct appeals so 32.2(a)5 applies. It was also litigated in the First Rule 32 petition, so 32.2(b) applies. And that it was filed in an untimely manner, outside the statute of limitations set out in the Rule, which at the time of his conviction was two years, but it's now been shortened to one. Is there any authority that you found that states that the failure to properly corroborate an accomplice's testimony is a jurisdictional issue to avoid a conclusionary bar as it exists in those provisions of the Rule?

MR. KOCHMAN: Your Honor, this is a unique situation, where we are not speaking about the sufficiency of the corroboration which was what was at issue in those prior cases--in our prior

petitions. What we're talking about here is the existence of corroboration. Our argument to this Court is that there is no corroboration absent April Harris.

SENIOR JUDGE WELCH: I saw it at trial that she recognized him. He wasn't in the store with Venn, if I'm pronouncing his name correctly. So that's corroboration. Now what you're showing is classic impeachment. And under 32.1(e)3 it may not be--that newly discovered evidence may not merely be impeachment evidence. So why is this a jurisdictional claim and does this Court have the authority to ignore the plain mandate of Rule 32 even if we agreed with your -- that in our hearts that you presented a strong case for a retrial, how does this Court follow the law and give you a decision?

MR. KOCHMAN: Certainly, Your Honor. And it's an excellent question that really strikes to the heart of what we're talking about here. The first point I'd like to address is that April Harris's Grand Jury testimony is not simply impeachment. As this Court and the Supreme Court has recognized in Ferris v. State and Banks v. State, impeachment can take multiple forms. Impeachment evidence goes to the credibility of the witness whereas testimony,

prior testimony, that controverts the substance and findings and opinions.

SENIOR JUDGE WELCH: Back when I was in law school I thought my professor told me that a prior inconsistent statement was classic impeachment evidence.

MR. KOCHMAN: Your Honor, I'm simply going off the Court's jurisprudence here which delineates between attacks on credibility and attacks on the findings and opinions here. This is not simply impeaching her. Her statement before the trial is that she could clearly identify both witnesses. And in her earlier Grand Jury testimony she says I didn't get any description. In fact a fair reading of the Grand Jury testimony indicates that she was encouraged to try to provide an identification. Ostensibly for the reason that the prosecutor knew he needed some corroboration. I think it's an important point to note that there were eight witnesses or of all the witnesses that were at the store that evening that spoke with Venn, saw Venn, not a--and they saw him there with another white male. Not a single one identified Kuenzel as that person. And yet the woman driving by in a car provides this identification. The driver of the car doesn't even provide the identification.

Your Honor, so our position is that this is not simply impeachment. This actually goes to provide substantive evidence and in fact nullifies April Harris's testimony. Now had April Harris--

SENIOR JUDGE WELCH: What are those cases if you don't mind?

MR. KOCHMAN: Certainly, Your Honor. And they're cited in our brief. Ferris v. State and Banks v. State.

SENIOR JUDGE WELCH: Banks, okay.

MR. KOCHMAN: Your Honor, just to clarify this, we are speaking here about the existence of corroboration and that's what makes this case so unique. The prosecutor in this case decided to present a case based purely on accomplice testimony. There is no other evidence that would satisfy the corroboration as delineated by this Court and the Supreme Court. And so it's for that reason there that it makes this so unique. If there was corroboration in some other form we would be speaking about sufficiency, and it would relate back, but this is about the existence. Now as to this Court's authority to consider this, there is nothing that I have seen in the State's brief or that we have found which circumscribes this Court's power to permit

evidence and for it to be heard in such a situation like this. Where the State exclusively possessed this evidence. It was unknown to anyone else. The State turns it over in active proceedings. And then it's introduced promptly by us into those proceedings and then promptly thereafter, after those proceedings are done, we filed our petition here. You know, we were in active Federal Court proceedings. We had no reason to believe that there wouldn't be additional evidence that might come out as opposed to presenting evidence in a piecemeal fashion, we waited until the conclusion of that hearing.

JUDGE JOINER: Counsel, is there any authority or can you cite any authority that gives an exception to Rule 32.2(c) which says that you have six months from the discovery of that newly discovered evidence. Now you claim that the Federal litigation, the proceedings there, give you an exception. But is there any authority for that in Alabama law that you can cite?

MR. KOCHMAN: Certainly. Well Alabama law does recognize that the Court has the inherent power to equitably toll the statute of limitations in--

JUDGE JOINER: Did you plead equitable tolling--specifically plead equitable tolling in your

petition? It has to be pled and proved. And from my review of it I don't even see it pled in the petition.

MR. KOCHMAN: Your Honor, while I believe we plead all of the underlying facts to that, whether we actually intoned the words equitable tolling, you know, if that is the defect that underlies the Court's inability to reach that, we would ask respectfully to have the ability to amend to put that in. But the facts that are contained within our petition all set out exactly the basis for equitable tolling. If that's what the Court would find to be appropriate. And there certainly is basis in a number of cases. Now one of most recent ones would be Jenkins v. State which is cited by the State. There was a case very recently--and I will on rebuttal come up and provide you with the name of that. Beavers v. State also provides a basis for equitable tolling.

But let's delineate here, we're talking about the six month presentation of new evidence timely filing rule. We're not talking about the now one year timely filing rule, the prior two year. That one is mandatory and jurisdictional. And in fact it is that rule which is why we didn't get relief on our initial petition. But for that initial procedural bar, we maintain that the constitutional

errors here would have provided a basis for relief initially.

JUDGE JOINER: Well isn't the--

SENIOR JUDGE WELCH: I don't agree that it's jurisdictional. For example a jurisdictional claim can be raised at any time. And I just--do you have any evidence at all that a prior inconsistent statement constitutes a jurisdictional claim? You're characterizing it as an absence of evidence but basically she said one thing at one time and she said another thing at another time. That is prior inconsistent statement.

MR. KOCHMAN: Your Honor, in this situation where April Harris's Grand Jury testimony had been provided here, we would not be able to make this claim. And I will concede that before the Court. This is--

SENIOR JUDGE WELCH: [Interposing] That's the Brady matter right?

MR. KOCHMAN: Pardon?

SENIOR JUDGE WELCH: That's in Brady--

MR. KOCHMAN: No, not as a Brady matter but as a corroboration matter because at that point there it would go to the sufficiency of the evidence. Because we would have April Harris testifying and

saying I know I made that statement, but I'm still maintaining here that I believe that I saw them. That would be a sufficiency argument. Here we're talking about the existence. And so for this Court to accept April Harris's trial testimony that was not confronted with her earlier statement where she says the exact opposite thing, goes to the existence we maintain.

SENIOR JUDGE WELCH: How is that any different than a witness saying it was a red light when the accident occurred and then later on at trial saying it was a green light when the accident occurred? How is that any different?

MR. KOCHMAN: The difference is that the State knew. And only the State knew about that prior statement.

SENIOR JUDGE WELCH: That's why I mentioned Brady.

MR. KOCHMAN: Well that's right. And you know, Your Honor, although we are now unable to receive relief on the Brady claims, the ripple effects, the consequences of that failure to provide this evidence is what we challenge. And this is one of those consequences. This is a rare case, Your Honor. I'm not arguing here that there is vast jurisprudence

prudence which supports what we're talking about, but indeed that's the reason that this Court possesses the inherent power to do justice in situations just like this, where the State acted in a way that was wholly improper. And we need to find a way to capture Kuenzel's case so that justice can be done. This is a situation here where the new evidence, and the evidence that was withheld really go to the core of this case. You know the State is certainly allowed to present a weak evidence case if that's what the prosecutor chooses to do. But the State is not allowed to strike hard blows as this Court had mentioned in Ward and cited from--

SENIOR JUDGE WELCH: They can strike hard blows, just not allowed to strike unfair ones.

MR. KOCHMAN: Thank you, Judge. That's exactly right and better said. The statements that were withheld here in addition to Harris's Grand Jury testimony, the five pages of police notes taken by Officer Dusty Zook, are incredible. And there's absolutely no basis for those to have been withheld, nor for the prosecutor to have said in the April 2nd hearing, nor at trial, that we have provided them with every statement. And in fact those issues were exacerbated later on in two ways. When Dusty Zook

was questioned, trial counsel asked her "are you aware of any other statements that might exist or anything else that might exculpate our client"? And the prosecutor Robert Rumsey objected at that point saying we've given them everything. And the objection was sustained. And in fact this Court noted in its 1990 opinion regarding April Harris that the prosecutor improperly argued that April Harris has been a witness in this case, since day one, that she was on the witness list. Although the Court ultimately found that that statement itself was not so egregious as to warrant a reversal, it is indicative of what the prosecutor was doing in this case. Venn's statements contained detailed descriptions of David Pope. Multiple times, Venn told the police "I was with David Pope at the store." These are new elements that were not contained in the summary of Venn's statement that was provided by the police--summary of Venn's statement, just one. We didn't know that there were multiple, wherein he describes the interaction that Venn had with Pope. He says in there, in those statements, "I came to the store alone," which is consistent with Venn's 13 year old girlfriend who says "I saw him earlier that night and he was alone." It describes that I knew David Pope from school in Millersville.

It describes the interaction they had in that car. And yet there's not a shred of evidence, anything about David Pope. We didn't get this information until 2010.

The bruising that was observed by Dusty Zook is incredible. We have Venn exhibiting damage to his left eye and on his left arm. And there's evidence in the record in the forensic--of the autopsy statements of the victim having bruising or petechia on her right hand. This also--the specificity with which Venn is able to describe what happened in the store. There's a lot, and I think it's clear, there's a lot that Venn doesn't remember. We were driving around for 90 minutes and he can't provide any detail. Yet I would urge the Court to look at in the trial testimony page 181 and Venn's December 9th testimony which is 135 in the record where he describes the specific interaction that occurred between the assailant and the convenience store clerk. It wasn't a simple interaction. The clerk actually said, according to Venn, "I'm not going to give you any of the money in the register. You better go ahead and squeeze that trigger." Well, in light of the new evidence it provides an explanation for one of the most damming pieces of evidence, and one that no one can explain, which is that Venn has

the victim's blood splattered on his pants. No one can explain that. Venn says he never went in the store. This new piece of evidence provides an ability to make an argument that was otherwise not present at the time. Venn's--

SENIOR JUDGE WELCH: I think we agree that you presented a powerful case. Where does this Court have the authority to ignore the plain mandate of the preclusionary provisions of Rule 32? You know in Marks v. State, a 2008 case, this Court found that-- on direct appeal, a claim that there was a lack of corroboration, had to be specifically part of a motion for judgment of acquittal. You had to actually argue that through the Trial Court. And if you did not do that, you waived it. Now we could not have made that decision if the failure to corroborate accomplice testimony presented a jurisdictional question. And we were forced to do that in Ex Parte Weeks, a previous opinion of the Alabama Supreme Court, which found that in order to raise a lack of corroboration you must specifically argue that to the Trail Court in a motion--either in a motion for judgment of acquittal or in your motion for a new trial. Now you see while those aren't Rule 32 cases this Court is bound to recognize and deal with

jurisdictional issues on direct appeal. We frequently remand cases for resentencing or if there's a double jeopardy violation in the like. So you see that's why you need to--I would say that you need to show us how we can ignore the plain mandate of Rule 32.2 and the preclusionary grounds set out in there in order to do what you want us to do. And is there a case that says we can just ignore that?

MR. KOCHMAN: Let me address Your Honor's question in two ways. First I think Your Honor mentioned double jeopardy cases. And I think that that is a perfect universe of case law to look at. As the Supreme Court recognized in Herd v. State, double jeopardy claims are not per se jurisdictional. In fact there are non-jurisdictional double jeopardy claims and jurisdictional ones. If in the first instance, when someone is indicted, they know of a prior conviction that would serve as the basis for a double jeopardy claim, it must be raised otherwise it is a non-jurisdictional claim. However, the double jeopardy claim when you are indicted based on two statutes--subsections of the statute the double jeopardy itself doesn't attach until such time as the conviction is entered. And it's that point where it is double jeopardy to have you convicted of

both. The same applies here. Until we knew of the Grand Jury testimony, which we maintain, our position is that that defeats the existence of corroboration. We did not have a jurisdictional claim. It existed but we did not know of it until that time.

SENIOR JUDGE WELCH: But the first case that would establish that principle would be this case?

MR. KOCHMAN: Your Honor, this case is unique for many reasons and we are certainly before the Court, you know, without--we believe we have strong case law to support our position here. But we are appealing to this Court's equity. This is an equitable case. And as I said at the outset here, this Court needs to believe that this man didn't get a fair trial for it to do what we're asking this Court to do.

We're not asking for broad rules to be set and that's why the limiting principles we advocate are highly important.

This evidence-- this isn't evidence that we found or that someone else came forward with. This is evidence that resided exclusively within the corridors of the State, the prosecutor and the capital litigation division and yet it was not turned over. There is not a single statement in fact that this evidence would have been turned over but for the fact that a

witness that we've kept in touch with happened to call and tell us about it. This situation is not just and that is unique really to this case.

On top of that, we then came forward with that evidence promptly and presented it in the context of active proceedings and then promptly initiated this litigation after. There is no case that I am aware of which precludes the Court from tolling whatever statute of limitations exist with respect to the six month one. The one year one is not at issue, the six month one in a situation like this. With respect to the April Harris testimony which serves as the basis as that you can go even further to limit it where it is the prosecutor who elicits the prior inconsistent statement, elicits the subsequent statement which is contrary to it. There are a number of ways to write a very narrow opinion that only applies to this case and at the end of the day that's what we're seeking. Mr. Kuenzel did not get a fair trial. What happened here is horrific. And we need to find a way to correct that. We have offered a number of different ways that this Court can do it.

I'd like to go back just to, you know, happy to address anything the Court would like to address here, but I think it's important to focus a little bit

on Venn and what we have here. You know this a man who independent of everything else, who is 18 years old. He's seen at the store by multiple witnesses. At first he says I was only at the store until 10:00, and from all of these witnesses it's clear that he was there. He says that he was alone initially and that my client was at home asleep. And that evidence is, in fact, corroborated by a disinterested witness from Kuenzel, by his girlfriend who testified before the Grand Jury and that was not provided as well. So the girlfriend says he was alone before he went there, Venn says he was alone and that my client was at home asleep. We now know he possessed a 16 gauge shotgun. Now Kuenzel's trial attorney has put in an affidavit in this case explaining the Strickland violation essentially, his ineffective assistance. And he explains why he was lulled - - into complacency here. So whoever is at fault for not obtaining that shotgun, the fact remains it's a 16 gauge shotgun that he possessed.

SENIOR JUDGE WELCH: Are you saying there were two 16 gauge shotguns in the car?

MR. KOCHMAN: Our position, Your Honor, is that Kuenzel's 16 gauge shotgun had been returned prior to the murder. And in fact there's only one

witness who says that it wasn't returned before the murder and that's Harvey Venn. And notably, Harvey Venn's first statement to the police on November 15th when asked what about "did Kuenzel have a gun?" "did he return the gun" and he says "I don't know--I don't know when he returned it, I wasn't with him."

SENIOR JUDGE WELCH: - - Were the bullets traceable?

MR. KOCHMAN: So, Your Honor, because it was a shotgun there was no way--and it was a shell, it was simply pellets. So there was no way to identify--

SENIOR JUDGE WELCH: [Interposing] You're talking about the projectile, the shells themselves - - markings that come from the extraction mechanism and also from the firing pin. So a tool mark examiner, you know, we call it ballistics but ballistics also refers to the path of bullet, could examine both marks and determine if a shell came from a given shotgun. And in some cases sometimes they can't.

MR. KOCHMAN: Certainly, Your Honor, and in this case there was no physical evidence connecting anything to the crime. All that was found was a shotgun shell in a trash basin outside of Venn and

Kuenzel's shared residence. And that shell was connected to the gun that Kuenzel had borrowed from his step-father.

SENIOR JUDGE WELCH: I read in the State's brief that there was an examination of the shell and that it was more than just consistent with a 16 gauge shotgun. That it was--had been matched to the shotgun and along with the wadding.

MR. KOCHMAN: Well no--

SENIOR JUDGE WELCH: It was the same kind of shell.

MR. KOCHMAN: That's exactly right, Your Honor. And that is an undisputed fact that the shell found outside of Venn and Kuenzel's residence was connected to the gun that Kuenzel had borrowed. But that standing alone does not satisfy corroboration, in fact it's not evidence of anything unless you look to Venn's testimony for direction. Venn says, well Kuenzel disposed of the shell in the trash basin outside the house. It's important to note this wasn't found in some odd place where Venn said it was buried somewhere. This was outside of their shared residence. There is no way to indicate that that shell was used in fact in this. There's a number of pieces of evidence, and you know on rebuttal I'd be

happy to address anything. Certainly the most troubling evidence which we flatly concede which is the fact that Kuenzel's mom bribed a witness which was horrible. The important note here is that these aren't inconsistent with innocence, this is consistent simply with hapless people that were unsophisticated who after conviction all of these things transpired. And that's a really important point in the narrative here which is there was a cavalcade of injustices that just kept getting worse. This is something that needs to be unwound from the beginning. If there are no further questions I'll reserve the balance of my time.

MR. CLAY CRENSHAW: May I please the Court. My name is Clay Crenshaw and I represent the State of Alabama. In this case--before I get to the corroboration issue I just want to address something briefly about some of the misperceptions stated here today and that are also contained in Kuenzel's brief. The District Court in the Eleventh Circuit extensively looked at the factual innocence issue that Kuenzel has presented. And those Courts stated that none of this evidence implicates anything about innocence. The District Court said that none of this evidence positively and affirmatively points to

anything regarding the innocence of the petitioner and that it only relates to the credibility of Venn. And then it said that the evidence that Kuenzel presented along those lines with itself so flawed as to not be effective at all. And that's at 880 F. Supp. 2d 1224. Now the Eleventh Circuit, and it was a very ideologically diverse three Judge panel that heard this case, they held that Kuenzel failed to make the needed demonstration of actual innocence. Indeed they even minimized this evidence and said that this does not strike us as an extraordinary case.

Now on to the corroboration issue, we have a time bar, procedural bar here and also two procedural defaults. The time bar is implicated because this Court issued its certificate of judgment in 1991. This petition was filed 22 years later. Even if the Grand Jury testimony of April Harris is considered, that was produced in March of 2010. And a petition should have been filed by August of 2010 but it was not. So the petition is out of date by three years and that's what the Circuit Court here held. We also have--I'm sorry. The Circuit Court held that there was a successive petition bar in place. And that was because this exact claim was raised in the first Rule

32 petition. The Circuit Court for authority cited this Court's decision in Barber v. State. And in that particular case there was also a claim that was held to be procedurally barred in the first Rule 32 petition, it was also raised in the successive petition and it was held to be barred. And then we also have the direct appeal bar that was mentioned. Now the Circuit Court found that the lack of corroboration claim was not jurisdictional here. The Circuit Court noted that there is no case that has been cited by Kuenzel or that the Court could find that holds that a lack of corroboration claim is a case that implicates the jurisdiction of the Court or it implicates Rule 32.1(b). Now the State cited Patton v. State in ex parte Seymour which are cases that even though they talk about defective indictments, they relate to whether or not a claim in and of itself is jurisdictional. And those cases point out that jurisdiction is a Court's power to decide a case or issue a decree. The subject matter jurisdiction concerns a Court's power to decide certain types of cases. And the in power of a Court to decide a case comes from the Alabama constitution and Alabama state statutes. Now here Kuenzel's claim does relate to a statute and not to a provision of

the Alabama constitution but the statute doesn't relate to anything involving the jurisdiction of the Court. As the Rule 32 Circuit Court held here, corroboration of accomplice testimony is not a constitutional requirement but it's only a statutory requirement. And indeed the statute can be repealed. In fact there's legislation that's been proposed for the last five years to repeal this very statute but it hasn't been repealed. And the Trial Court is not divested of any kind of jurisdiction if this statutory requirement isn't met. This is not a jurisdictional issue as the Rule 32 Circuit Court held because it does not affect the actual authority of the Court to try a case or to issue any kind of decree. So thus the rules of preclusion do apply in this case. Now Kuenzel says that in his brief, and I believe this was in his reply brief, that this Court and the Alabama Supreme Court have held that cases that raise a claim involving double jeopardy in a sentence that exceeds the maximum allowed by law are considered jurisdictional claims even though those claims don't implicate anything about subject matter jurisdiction. But as this Court has repeatedly held and as the Alabama Supreme Court has repeatedly held, a Court doesn't have jurisdiction to find somebody

guilty of multiple offenses on the same set of facts. And that's what double jeopardy is. A Court just doesn't have the jurisdiction to accept that kind of a verdict. And again on the unauthorized sentences of this Court and the Alabama Supreme Court have repeatedly held that a Judge doesn't have the jurisdiction to sentence a defendant to a sentence that exceeds the maximum allowed by law. So those cases are - - to this particular situation. In our brief we note that issues regarding corroboration of accomplice testimony implicate the overall sufficiency of the evidence. And this Court has very consistently held that those type claims are not jurisdictional. So because this claim isn't jurisdictional it is subject to the Rule 32.2 rules of preclusion. And it's time barred. It was raised in a successive petition and that bar applies--and it was also raised on direct appeal.

So now let's assume that the procedural bars aren't in place and that the time bar isn't in place and is there corroboration in this case. There are six items here that have been--that I point out in my brief that also the Federal Court looked at that do indicate that there is sufficient corroboration. And the first item has been mentioned by Judge Welch.

That there was a match to the shotgun that Kuenzel had possession of. And the shotgun shell was found in a trash barrel outside of the house I believe a couple of days after the crime occurred. And there was a match of that shotgun shell to the shotgun that Kuenzel borrowed from his father. And I cite to the record there 147 4d.8 347 and 349. And also the police recovered material from the victim's body in the crime scene known as shotgun wadding that was the same manufacturer as that particular shell. The second item, Kuenzel has acknowledged the substantial attempts of his attempts to fabricate an alibi. Now Kuenzel was--I'm sorry, Venn was questioned several days after the crime occurred. And a police investigator came into their home, Kuenzel and Venn lived together at the time, and he discovered Kuenzel and Venn at a table and Kuenzel was writing in a notebook. The police eventually seized this notebook and found Kuenzel's notes documenting the false story that Venn was telling the police at that time. And of course Venn changed his story and started telling the truth. But Venn testified that Kuenzel was the one that had asked him what he told the investigators. And that's why he was writing this in the notebook. The jury also learned that Kuenzel

resisted attempts to provide examples of his handwriting for the purposes that the State could compare that handwriting to the notebook. Kuenzel even refused to obey a Grand Jury's subpoena and a court order compelling him to hand over these exemplars. These actions reflect a consciousness of guilt. They are a suspicious conduct by a defendant and it can provide sufficient corroboration of accomplice testimony. This Court has held that. In Green v. State, 61 So. 2d 394, where this Court held that evidence showing the defendant's consciousness of guilt may be corroborative of accomplice testimony and that such evidence may be inferred from the defendant's actions after the offense. The fact of a notebook does provide an example that Venn and Kuenzel were trying to get their stories straight at the time and it does demonstrate a consciousness of guilt. The third item of corroboration, Kuenzel made highly incriminating statements to coworkers the very next morning after this murder happened at 11:00 at night. And these comments were made at 6:15 the next morning. Kuenzel told a coworker, me and Harvey we could kill somebody and get by with it. When the coworker asked him what he meant, Kuenzel said if you're going to kill someone you shoot them with a

shotgun because the police will trace the bullet back to you if you kill them with a pistol or a rifle. And Kuenzel then said referring to Ms. Offord's murder, just like that girl over in Sylacauga, they don't have a clue to who did that and they won't. Two other of Kuenzel's coworkers testified that Kuenzel asked them as early as 6:15 on the morning after the murder--and there's evidence to show Venn or Kuenzel didn't listen to any radio or television reports about the murder. But Kuenzel was--these coworkers said that Kuenzel asked whether these coworkers had heard about the shooting and the fact that the perpetrator had taken nothing from the store. And that happened in a matter of seven hours after the murder occurred. And the fourth item is that the defendant has made two attempts to procure perjury in this case. And I know this is explained away by this is some family who's hapless and unsophisticated. And I don't know whether they are or they're not but there's no evidence to support that. But the important part of this is Kuenzel was an active participant in these two demonstrations. The first happened during the penalty phase or was brought to light in the penalty phase. But the first involved Kuenzel's cellmate, a man by the name of

Orrie Goggins. And at the penalty phase Goggins testified that he was offered money by Kuenzel and his mother to testify that he was the one in the car with Venn at the convenience store on the night of the shooting. And it was even arranged for Goggins to attend a hearing where Venn and Kuenzel were both present so that Kuenzel could point out to Goggins who Venn was so that he could say that he was with him in the car. The second attempt is even worse. And it continues by the way to this day. After sentencing Kuenzel moved for a new trial, claimed that he was having sex or was with a woman on the night of the crime, her name was Lisa Sims. And he was trying to provide an alibi. To support this scheme Kuenzel offered the testimony of a 15 year old cousin of Ms. Sims and her name's Darlene Peoples. Ms. Peoples testified that Ms. Sims told her that she had been with Kuenzel on the night of the murder. However she recanted her testimony after Ms. Sims testified that she didn't know anybody by the name of William Kuenzel and had obviously never been with him or had been to his house. At the hearing--at the motion for new trial the defendant himself took the stand and consistent with his fraudulent scheme he testified that at the time of the murder he had spent

the night with Ms. Sims. He identified her by her name, by photo and then had her brought into court where he identified her as well. So all of these attempts to procure perjury that Kuenzel himself has been involved in, certainly are evidence of his guilt. And as I've said this fraudulent scheme is being maintained to this day because Kuenzel in an unsigned declaration that he presented in the District Court and also the Court below this Court, and the declaration for whatever reason is not signed, but he still maintains that he with a woman named Lisa on the night of the murder. And his declaration is in the record at Volume I at 170.379.

The fifth item, even though--the other side is correct that no one identified Kuenzel as being in Venn's car close to the time of the murder. There were several witnesses that do say they saw a male person in the car with bushy hair and moustache. And Kuenzel does fit that description. And the reason that Kuenzel was unable to be identified is because it was kind of humid rainy night and the windows had fogged up so nobody could see in the car. And the sixth item is Kuenzel escaped or attempted--or did escape rather from the jail before his trial. As this Court stated on direct appeal, evidence is

generally relevant which shows that after the accused was taken into custody he or she escaped, attempted to escape or prepared to escape is tending to show guilt or consciousness of guilt.

And now to April Harris. Her Grand Jury testimony was a bit more equivocal than her trial testimony but she does say, this is Volume I at 91 and this from the Grand Jury testimony, but judging from the stature of the people that were in there I believe that it was them referencing Kuenzel and Venn. At 94 she says I believe that it was them. The Eleventh Circuit looked at this evidence and they said that the certainty about her testimony may have evolved between--and she also gave a sworn witness statement that was audio taped and transcribed before her Grand Jury testimony, very solid in that sworn witness statement, then in the Grand Jury testimony a little bit more equivocal and then her trial testimony. But the Eleventh Circuit just looked at this as just a way that, you know, that she did have slight variations but she repeatedly did identify the two as being in the store at a point, an hour to an hour and a half before the murder.

SENIOR JUDGE WELCH: Was it clear in your Grand Jury testimony that when she says I saw them

that she used the appellant's name?

MR. CRENSHAW: Yes, Your Honor. Yes she did. And like I said look at 91 and 94, it's very clear that--I mean there's not any kind of a doubt that that's who she's referring to. And just some of the things that have been mentioned, just some of the random points here. Now as I said Venn when he was initially interrogated did have this story that he was at a friend's house at like 8:00 in the evening and that he then came I believe to the store at some point around 10:00 and said that Kuenzel was not with him. And he does identify--at some point he says there was this person at the store named David Pope who got in the car with him I think for, like, two or three minutes is what he said. You know there's some implication that this wasn't turned over, look at in the trial record at 165 and 66. Venn was questioned about this person named David Pope. All of this information regarding Venn's statements, and he gave three of them, the last two were audio taped and transcribed, but read Venn's testimony and read the cross examination. It was all turned over and Venn was thoroughly impeached on the fact that he had given some inconsistent statements. I believe that's all I have today and I'll be glad to entertain any

further questions. The State asks for this Court to affirm the Lower Court. Thank you.

MR. KOCHMAN: Your Honor, first the remainder of my time let me speak to the case that I was referencing which is State v. Baker. It's a February 6th, 2015 case from this Court, which recognizes that equitable tolling can apply for the six month statute. Your Honor -- like with double jeopardy, Courts do not have the power to accept a conviction where there is insufficient corroboration. It is the same thing as with double jeopardy. And that's what exists in this case. It can be a limited rule and it only pertains to the existence and not the sufficiency. And this is a good rule, the corroboration rule as counsel recognized there have been statutes to try to repeal it but it's a solid rule as recognized by the Court in Reed v. State, 407 So. 2d 153. A guilty party when offered immunity from prosecution will say virtually anything. The more serious the penalty, the more likely someone is going to present false testimony. If this conviction is going to stand it is on the basis of Harvey Venn and we must recognize that.

Addressing the other items of evidence, and I think it's important to go there, the other items

most of which occurred after the conviction had transpired. So if we accept the underlying premise that my client was unjustly convicted, just accept it for one moment there, everything that happened afterwards, the attempt to procure bribery by someone's mother, you know, it's a horrible fact in our case but no case is perfect. This is an attempt by a mother to try to correct what she perceived as an injustice. The implication that Kuenzel was involved in this is false. And if Kuenzel was offered an opportunity to explain he would explain that he was only implicated. He pled to aiding and abetting this to keep his mother out of jail. And the Court can take notice of the fact that his mother did not serve a single day in jail time. Additionally the same prosecutor that prosecuted the mother is the prosecutor who was involved in this underlying case. There were serious misgivings and serious problems that occurred at the trial in this case in Talladega County by Robert Rumsey. The hearsay point that the State has offered here, I think it's important to note that the State didn't even introduce this in its case and chief. In fact it only came in later. So the State thought it so unimportant to not introduce it in its initial

statements. The fact about Kuenzel maintains that he was with a woman that night that he had met two days beforehand, we have been unable to locate this woman. And that is the reason why I don't argue to you that Kuenzel is innocent because of that or that she provides an alibi. Instead our argument is that Kuenzel's alibi as presented at trial which is his step-father who says he saw him sleeping--Kuenzel sleeping in his house at about 10:00 that night. That that alibi now could be believed. And that's because of the gun evidence. At first it was only Kuenzel who had a 16 gauge shotgun and only Venn who says that Kuenzel had a 16 gauge shotgun. The evidentiary landscape has dramatically evolved here based on the State's releasing of new evidence.

I'd also note that this Court was aware of all of these facts at the time it issued its 1990 decision. And when addressing lack of corroboration, none of these facts were raised. The only facts that were raised were that multiple witnesses saw Venn at the store and April Harris identifies Venn and Kuenzel together. I disagree with the State's characterization of this being mere equivocation or less certain. She flatly says I didn't see anything. I couldn't get a description, I couldn't see a face.

There's simply--and our position is there simply is no way to reconcile that. Her belief that she saw Venn and Kuenzel together is completely unsubstantiated evidence. We would not allow someone to go in and present evidence that she believes she saw them if there is no foundation. This isn't a case of I thought I saw them. Basing it on stature when she couldn't tell them what they're wearing, she couldn't see a face, she couldn't get any description. It simply is non-evidence and it's because this evidence was not--the Grand Jury evidence was not turned over in the initial phase.

JUDGE JOINER: You're giving a quite different description of the Grand Jury testimony that Mr. Crenshaw gave. If I understand him correctly, he quoted I believe it was him regarding April--or I believe it was them. And again Judge Welch I think asked the question, was that clearly a reference to Kuenzel and Venn.

MR. KOCHMAN: It certainly was clearly a reference. The selective--that was at the prompting of the prosecutor. So I think if you'd look at the Grand Jury testimony you'll see. The prosecutor was prompting the witness or encouraging the witness to provide that identification because he knew how

important it was. The witness also says--

SENIOR JUDGE WELCH: [Interposing] The question here is, let's say that all of us, our heart is with you, can we do our duty and uphold the law in deciding your favor. There is no--I looked and unless I missed it there is no case in Alabama that deals with whether or not lack of corroboration presents a jurisdictional issue in a post conviction proceeding. There are cases that deal with jurisdictional questions in terms of preservation on direct appeal. But aren't we mandated by our duty to follow the rules as they exist? We can't just willy-nilly ignore them can we?

MR. KOCHMAN: Absolutely not. And I don't believe that's--

SENIOR JUDGE WELCH: [Interposing] - - allows us to ignore the fact that this is a non-jurisdictional claim.

MR. KOCHMAN: Well, Your Honor, there's no rule that holds that it is a non-jurisdictional claim. What we are asking this Court to find is that in the scenario here where it is about the existence of corroboration, where there isn't something else to look at.

SENIOR JUDGE WELCH: If she says in the

Grand Jury testimony I believe it was the appellant. And then she says I can't give a face. And then she testifies it was him during the trial itself. What we're dealing with is prior inconsistent statements.

MR. KOCHMAN: Your Honor, in the event of this situation it would only be appropriate to go back and to present it. To allow this conviction to stand--may I continue, Your Honor, the thought?

SENIOR JUDGE WELCH: Yes, finish your thought. But let's not make it five minutes long.

MR. KOCHMAN: Okay. To allow this conviction to stand where April Harris says one thing at trial and says something that is inconsistent, we maintain directly contradictory, without at least offering an opportunity to reexamine where Kuenzel has not received an evidentiary hearing or any process in the Courts, we believe would be manifestly unjust. Your Honors, we implore the Court to find a way to reverse this case and to send it back down. Thank you for the Court's time.

SENIOR JUDGE WELCH: I want to thank you both. I appreciate you coming here and advancing your arguments. It's clear that you were both well prepared and have advanced a number of important points. As you can see we are also prepared and we

have looked at this case in some detail to prepare ourselves to hear what you had to say. We'll certainly take into consideration and issue a decision in an appropriate time frame. And we do appreciate you coming. Thank you. We're in recess.

[END OF HEARING]

C E R T I F I C A T E

I, Louisa Rettler certify that the foregoing transcript of proceedings in the State of Alabama, Court of Criminal Appeals of William Ernest Kuenzel v. State of Alabama, Case No. CR-13-0899 was prepared using the required transcription equipment and is a true and accurate record of the proceedings to the best of my ability. I further certify that I am not connected by blood, marriage or employment with any of the parties herein nor interested directly or indirectly in the matter transcribed.

Signature: 

Date: October 29, 2015

REL: 07/10/2015

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2014-2015

CR-13-0899

William Ernest Kuenzel

v.

State of Alabama

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

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

[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.

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, 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).

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

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 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

[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.

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, 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,

[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.

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, 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.

Appendix C

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

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Montgomery, AL 36130-1555
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September 11, 2015

CR-13-0899 **Death Penalty**

William Ernest Kuenzel v. State of Alabama (Appeal from Talladega Circuit Court: CC88-211.60)

NOTICE

You are hereby notified that on September 11, 2015, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. William E. Hollingsworth, III, Circuit Judge
Hon. Brian York, Circuit Clerk
Jeffrey E. Glen, Attorney - Pro Hac
Rene F. Hertzog, Attorney - Pro Hac
G Douglas Jones, Attorney
David Kochman, Attorney - Pro Hac
Luke Montgomery, Attorney
James Clayton Crenshaw, Asst. Atty. Gen.
Kristi Deason Hagood, Dep. Atty. General

APPENDIX D

VERIFICATION PURSUANT TO ALA. R. APP. P. 39(d)(5)

I hereby certify under penalty of perjury that the Statement of Facts contained in this Petition for a Writ of Certiorari is copied verbatim from the Statement of Facts presented to the court of appeals in the application for rehearing.

/s/ Lucas C. Montgomery
Lucas C. Montgomery