In the Supreme Court of Alabama

Ex parte William Kuenzel, Petitioner, (In re: William Kuenzel v. State of Alabama CR-13-0899).	)	No. 1141359

Motion for Leave to File a Brief as *Amici Curiae* by Eagle Forum of Alabama Education Foundation and Several Religious Leaders and Organizations in Alabama

In accordance with Rule 29 of the Alabama Rules of Appellate Procedure, the Eagle Forum of Alabama Education Foundation and several religious leaders and organizations in Alabama hereby move this Court for leave to file a brief as *amici curiae* in support of Petitioner William Ernest Kuenzel. As grounds therefor, they state as follows:

1. The Eagle Forum of Alabama Education Foundation generally aims to equip citizens with timely, reliable information from a conservative, Constitutional point of view on public policy issues. Particularly, this information includes the Declaration of Independence, which teaches that we owe our existence to the Creator who has endowed each of us with unalienable rights.

2. The religious leaders are:

a. Timothy George, Dean of the Beeson Divinity School of Samford University and Professor of Divinity History and Doctrine. He chairs the Doctrine and Christian Unity

Commission of the Baptist World Alliance. He has written more than 20 books and regularly contributes to scholarly journals.

b. Dr. Fisher Humphreys, a Professor of Divinity, Emeritus at the Beeson Divinity School of Samford University. He is the author of eight books on theology.

c. Rabbi Eytan Yammer, an Orthodox rabbi for the Knesseth Israel Congregation in Birmingham. Rabbi Yammer currently serves on the Institutional Review Board and the Professional Advisory Committee for the Clinical Pastoral Education program at the University of Alabama at Birmingham. Rabbi Yammer speaks often to students in the Department of Religion at Birmingham Southern College.

d. Bishop David E. Foley, a Bishop Emeritus of the Catholic Diocese of Birmingham. He served nineteen years as a bishop and eleven as diocesan administrator in Birmingham.

e. Reverend Rob Schenck, an ordained minister of the Evangelical Church Alliance. Rev. Schenck is founder and president of Faith and Action in the Nation's Capital and is a Senior Fellow of the Oxford Centre for the Study of Law and Public Policy, Harris Manchester College, University of Oxford. He joins this brief individually and on behalf of Faith and Action.

3. The brief of the *Amici Curiae* is intended to support the position of Petitioner William Ernest Kuenzel, who was sentenced to death for the 1987 murder of Linda Offord, and who now urges the State courts to consider new evidence not made available to him until 2010. The *Amici* each believe that due regard for truth and justice, and proper respect for human life require reversal of the Talladega Circuit Court's summary dismissal of Kuenzel's Rule 32, Ala. R. Crim. P., Petition

4. The *Amici* are interested in this matter because they are concerned about the protection of innocent human life, and about the integrity of the courts. They believe that extra precautions are needed for any system of justice that faces sanctioning the killing of another human being. They believe that Justice and mercy are the hallmarks of good government. *See* Matthew 23:23-24.

5. A brief from these *Amici* may provide a different perspective than will be provided by Kuenzel, or by the State. The focus of the *Amici* in this matter relates to the Court's due regard for life and truth in accord with Biblical principles, while the parties to the action rightly focus on the specifics of their dispute.

6. Copies of the *amici curiae* brief are submitted with this motion for filing conditionally on the granting of this motion.

Respectfully submitted this 9th day of November, 2015.

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Certificate of Service

I hereby certify that I have this 9th day of November, 2015, served a copy of the *Motion for Leave to File a Brief as Amici Curiae by Eagle Forum of Alabama Education Foundation and Several Religious Leaders and Organizations in Alabama* on the following counsel of record by electronic mail:

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No. 1141359

IN THE SUPREME COURT OF ALABAMA

Ex parte William Ernest Kuenzel,

Petitioner

(In re: William Ernest Kuenzel v. State of Alabama).

On Petition for a Writ of Certiorari to the
Alabama Court of Criminal Appeals
(Appeal No. CR-13-0899)

Amicus Curiae Brief of Eagle Forum of Alabama Education Foundation, *et al.* In Support of Petition for Writ of Certiorari

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Table of Contents

Table of Authorities

CASES **PAGE**

STATUTES, RULES & CONSTITUTIONAL PROVISIONS **PAGE**

OTHER AUTHORITIES **PAGE**

STATEMENT OF THE INTEREST OF THE *AMICI*

The *Amici* for this brief are the Eagle Forum of Alabama Education Foundation and several religious leaders and organizations in Alabama of different faiths.

The Eagle Forum of Alabama Education Foundation generally aims to equip citizens with timely, reliable information from a conservative, Constitutional point of view on public policy issues. Particularly, this information includes the Declaration of Independence, which teaches that we owe our existence to the Creator who has endowed each of us with unalienable rights.

All the religious leaders are concerned about the protection of innocent human life, and about the integrity of the courts. They believe that extra precautions are needed for any system of justice which is faced with being asked to sanction the killing of another human being. They believe that Justice and mercy are the hallmarks of good government. *See* Matthew 23:23-24.

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STATEMENT OF FACTS

This case presents continuing uncertainty about who murdered Linda Offord in November 1987 at a convenience store

in rural Talladega County. The State of Alabama argues that William Kuenzel did so, and means to execute him for the crime. It points to the testimony of Harvey Venn, his roommate who supposedly waited outside the store late in the evening as Kuenzel shot Offord, and then drove the two of them away from the scene in Venn's car. The State argues that Venn's testimony was corroborated as required by Ala. Code § 12-21-222 with the testimony of April Harris. At trial, she testified that she saw Kuenzel and Venn in the store a short time before Offord was murdered.

This Court described the 1988 trial testimony, and the testimony given to support the death sentence imposed on Kuenzel, in *Ex parte Kuenzel*, 577 So. 2d 531 (Ala. 1991). A more recent summary of the trial evidence is reported in a U.S. District Court opinion issued after the State provided new evidence not previously known. *See Kuenzel v. Allen*, 880 F. Supp. 2d 1205, 1213-17 (N.D. Ala. 2011).

Based on four primary facts, the *Amici* ask the Court to grant Kuenzel's Petition, order briefs, and reverse the Court of Criminal Appeals' summary dismissal in its Appeal No. CR-13-0899.

1. Kuenzel's supposed "accomplice" identified another person at the scene.

On the first day the police interviewed Venn, the principal witness against Kuenzel, Venn identified David Pope as being present with him at the store before the murder occurred-- not Kuenzel. Police recorded details of Venn's statements about Pope in the notes of their first interviews with Venn. (C.96-100, 108). Yet, Pope was not a witness at trial, and there is no indication that the police bothered to interview him. Police notes showing the details of Pope's possible knowledge of circumstances relevant to the murder or his possible involvement in it were withheld from Kuenzel at trial in 1988 and not provided to him until 2010. (C.85-86).

2. The victim's blood was on the clothing of the "accomplice," not the clothing of Kuenzel.

The only physical evidence tying any person to the murder implicates Venn, not Kuenzel. Offord's blood was on Venn's pants. *See* 880 F. Supp. 2d at 1215. At trial, Venn said he never entered the store and Kuenzel did. *Id.* at 1214. But in his first interviews with police, Venn said he was alone that night and never said he was with Kuenzel. (C.96-100, 102, 104, 108). Instead, on the first day the police talked to him, Venn identified Pope as being in the car with him at the store some time between 8:00 and 10:00 p.m. (C.96-100, 108). Kuenzel gave

consent to a search of the apartment he shared with Venn and the police seized Venn's pants with Offord's blood. (R.292-95 (State's Ex. 42-B)). Thereafter, for the first time, Venn said he was at the store when Offord was murdered-- and claimed Kunezel shot her. (C.110).

3. The "corroborating" witness told others that she was unable to get a description of Kuenzel at the scene.

The supposed "corroborating" witness for Venn's testimony -- April Harris-- faltered at the grand jury in her identification of Kuenzel, in contrast to her trial testimony. Like the police notes tying Pope to the murder scene, Harris's grand jury testimony was withheld from Kuenzel until 2010. (C.84-85). At the grand jury, Harris said she was not sure Kuenzel was present when she rode by the store the night of the murder and noticed two men in the store. As she put it, she "couldn't tell for sure," "couldn't say that it was them," "couldn't get any description," and "couldn't really see a face." (C.91-93). But at trial, she said that she "believed" she saw Kuenzel *in the convenience store with Venn* shortly before Offord was shot. Harris was the only witness at trial, other than Venn, to identify Kuenzel as being at the store.

4. The "accomplice" had a shotgun of the same gauge used to kill the victim, contrary to his trial testimony that only Kuenzel did.

Contrary to the trial testimony, at the time of the murder Venn was in possession of a shotgun of the same gauge as the murder weapon-- a 16 gauge. (C.157-58). This evidence came to light in 1999, when a witness whose husband loaned the 16 gauge shotgun to Venn gave a statement to Kuenzel's attorney. (C.157-59). At trial, the evidence was that Venn possessed only a 12 gauge. *See* 880 F. Supp. 2d at 1214-15. That gives new perspective to the trial testimony that Kuenzel had returned to his parents a borrowed 16 gauge shotgun the day before the murder and was, indeed, seen asleep at his home by his stepfather only 30 minutes before Offord was murdered. *Id.* at 1216.

ARGUMENT

The record shows enough new evidence to call into substantial doubt the truth of the guilty verdict and the justice of the death sentence against Kuenzel. Thus, the general need for finality in judicial decisions is due to be tempered by a proper exercise of this Court's supervisory power. As shown below, the Alabama Constitution has a textual commitment to the protection of innocent life which is meant

to be secured by the exercise of judicial power and not merely by popular rhetoric.

Rule 32 of the Alabama Rules of Criminal Procedure, of course, gives some effect to these concerns. It provides in Rule 32.1 for post-judgment relief when "[t]he constitution ... of the State of Alabama requires a new trial, a new sentence, or other relief." Rule 32.1 also provides for relief when "[n]ewly discovered material facts exist which require that the conviction or sentence be vacated by the court ...," and "the facts establish that the petitioner is innocent of the crime for which [he] was convicted, or should not have received the sentence that [he] received." Rule 32.2 protects finality by providing a "[l]imitations period" which is up to one year after appeal is completed. However, by the terms of Rule 32.2(c), the "limitations period" can be up to six months after the discovery of newly discovered material facts.

Of special import here, Rule 32.7 describes the procedure for administration of post-judgment petitions, including a procedure for "[s]ummary disposition" when "no purpose would be served by any further proceedings."

I. Given the new evidence of innocence, natural justice and good conscience require a hearing on post-conviction relief from a death sentence despite Rule 32 time limits.

There is significant evidence that Kuenzel's 1988 conviction for murder and his death sentence are based on false testimony. Absent a hearing to consider that new evidence, there is a substantial risk that the State will execute an innocent man. The Court should order a hearing despite the traditional time limits on post-conviction relief.

This Court should exercise its power conferred by the Alabama Constitution to reverse the summary dismissal of William Kuenzel's petition for relief upheld in *Kuenzel v. State*, No. CR-13-0899, 2015 WL 4162899 (Ala. Crim. App, July 10, 2015). In ordering the dismissal, the circuit court relied on the time limits established by Rule 32.2(c), Ala. R. Crim. P. This Court should conclude that those time limits should not be applied here, as a matter of natural, simple justice. The *Amici* regard these natural principles as in accord with the widespread public understanding that one of the core purposes for which civil government exists is to secure the inalienable, God-given dignity that every citizen possesses merely by virtue of being human.

This understanding-- that there are certain rights that government does not create but merely recognizes-- is itself

explicitly recognized by the Alabama Constitution and the decisions of this Court; it informs the rule of law in Alabama. *See* Ala. Const., art. I, § 1. While there may not be consensus concerning the contours of "natural rights," no one disputes that they include the right of an innocent person not to be killed by the State. Indeed, it is fair to say that when an institution of civil government fails to uphold this primary responsibility, it hardly deserves to be called an "authority." *See* Romans 13:4.

The primary new exculpatory facts in this case were not given adequate consideration by the courts below, but they are not complex. The main witness against Kuenzel told police two days after the murder that a different man was present with him. (C.96-100, 108). Only four days later did he assert that Kuenzel had been at the scene. (C.110). Moreover, the corroborating witness required by Ala. Code § 12-21-222 told grand jurors that she was not able to identify Kuenzel's face or get a description of him at the scene. (C.91-93). That Kuenzel discovered these facts in 2010 should not preclude relief for him.

In the courts below, the case turned on whether non-compliance with § 12-21-222 would be "jurisdictional," and presumably affect the power of the circuit court to enter

judgment. *See* 2015 WL 4162899 at *3. The purpose of § 12-21-222 is "to ensure that the testimony of a guilty party testifying in return for leniency from the state would not alone be sufficient to convict another." *Ex parte Scott*, 728 So. 2d 172, 177 n.1 (Ala. 1998) (capital case)(quoting *Hergott v. State*, 639 So. 2d 571, 573 (Ala. Crim. App. 1993)). Non-accomplice testimony-- like that in Kuenzel's case-- which "merely raises a conjecture, surmise, speculation, or suspicion that the accused is the guilty person is not sufficiently corroborative of the testimony of an accomplice to warrant a conviction." *Ex parte McCullough*, 21 So. 3d 758, 762 (Ala. 2009). The absence of the corroboration testimony required by § 12-21-222 certainly should affect the power of a court to render judgment.

Whether jurisdictional or not for the circuit court, Rule 32 relief should be available to Kuenzel. The Court may resolve the case even without using the terminology of "jurisdiction," if that language adds uncertainty and confusion. "'Jurisdiction' is a word of many, too many meanings." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998). The *Amici* urge the Court to exercise its supervisory power provided by the Constitution to prevent summary disposition below.

II. This Court should allow further post-judgment proceedings under Rule 32 or otherwise because they will serve a critical purpose.

The summary disposition of Kuenzel's petition cannot be justified. For a summary dismissal, Rule 32.7(d), Ala. R. Crim. P., requires that "no purpose would be served by any further proceedings." Where, as here, the petition shows that a potentially innocent life is at stake and there are doubts about the corroboration required by § 12-21-222, a critical purpose is served by further proceedings. Nothing less than a primary obligation of the judicial system is at stake. This Court is the maker of the remedy in Rule 32. The Court's application of the Rule and its terms should be informed by the Alabama Constitution as a whole.

A. Rule 32 should be construed to protect against a judicial order for the killing of an innocent man under the Alabama Constitution's faith-informed commitment to life.

The Alabama Constitution calls for the Court to conclude that a critical purpose would be served by further proceedings on Kuenzel's petition, for several reasons.

First, the terms of § 1 provide that certain rights of "all men ... are endowed by their Creator," and that these rights are "inalienable" and include the right to life itself. As this Court wrote recently in *Hamilton v. Scott*, 97 So. 3d

728 (Ala. 2012), "each person has a God-given right to life." *Id.* at 734 n.4 (civil remedy for taking innocent life of person completely dependent on third party). The Preamble says that the people establish the Constitution "in order to establish justice," and do so "invoking the favor and guidance of Almighty God."

These words are not recent inventions. The Declaration of Independence references the "Creator." Alabama's Constitution contained this language by 1875. Indeed, as of 1892, "[e]very constitution of every one of the 44 states contain[ed] language which, either directly or by clear implication, recognizes a profound reverence for religion, and an assumption that its influence in all human affairs is essential to the well-being of the community." *See Church of the Holy Trinity v. United States*, 143 U.S. 457, 468 (1892). By recognizing that God is the ultimate Grantor of inalienable natural rights, the Alabama Constitution recognizes that the civil institutions of the State have a divinely appointed vocation-- to secure basic justice for all citizens. When the courts have failed to live up to their responsibilities in this regard, all citizens have been the poorer for it. *See, e.g., Rosa Parks v. City of Montgomery*, 38 Ala. App. 681

(1957)(refusing to consider appeal of conviction for violation of segregation-era municipal ordinance on procedural grounds).

The familiar invocation of the Creator by courts at the beginning of their sessions is confirmation of the judicial vocation to secure the enjoyment of fundamental rights, to search for truth, and to protect innocent life. *See Town of Greece v. Galloway*, 134 S. Ct. 1811, 1825 (2014)(town council opening prayers not deemed proselytizing). Thus, when court officials pronounce: "May God save this honorable Court," they confirm that the State Constitution's reference to God is not merely *empty* ceremony for the comfort of interested citizens, but is meant to inform the judicial function itself. *Id.* at 1853 (Kagan, J., dissenting)(approving court invocation, but criticizing absence of mere ceremony for town prayers). After all, there is nothing empty about what courts must do. The judiciary exists to decide "cases," i.e., only where there is a winner and a loser. *See* Ala. Const., art. VI, §§ 140(b), 142(b); *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985); *Bradley v. Fisher,* 80 U.S. 335, 348 (1871)(judges immune from civil claims by losers). It is necessarily a grave responsibility, and all the more so when the State advocates that the loser be killed. In effect, if this Court, in the name of procedure,

refuses to act, it will be willfully ignoring a fundamental responsibility to ensure justice and protect innocent life.

The responsibility to support the Alabama Constitution's protection of innocent life, including as part of the judicial process, is further indicated by judicial the oath of office. Section 279 requires "all officers, executive and judicial," to support the Alabama Constitution by an oath which closes with the phrase, "[s]o help me God." This textual requirement dates from the beginning of Statehood with the 1819 Constitution, art. VI, § 1.

The requirement for corroborating testimony, and other requirements of Alabama law related to the death penalty, are strikingly consistent with norms found in ancient religious texts. Much like Ala. Code § 12-21-222, the Old Testament declares that one witness is not enough to convict anyone accused of any crime or offense. *See* Deuteronomy 19:15-17. Instead, a matter must be established by the testimony of two or three witnesses. *Id.* Biblical law thus highlights the fact that prosecuting witnesses may be sincerely mistaken or may lie. Thus, it recognizes the need for sufficient corroborating testimony. Sufficient corroboration protects the innocent by preventing the accused from suffering a false accusation that would lead to his unjustified execution. *See* Proverbs 6:16-19

(of six things the Lord hates, the third listed is hands that shed innocent blood); Proverbs 17:15 ("Acquitting the guilty and condemning the innocent- the Lord detests them both.").

In the New Testament, the Apostle Paul likewise writes instruction to Timothy: "Do not admit a charge against an elder except on the evidence of two or three witnesses." I Timothy 5:19. And, Paul himself stood before Caesar's district tribunal and said, if "I have done something worthy of death, then I do not refuse to die; however, I am innocent and I appeal to Caesar." Acts 25:10-11. By this admission, Paul did not deny the right of the State to administer its judgments. But, he insisted that truth matters in doing so. The accused must, in fact, be guilty of his crime and he should have the right to be heard by the highest authority before his sentence is carried out.

B. Courts protect against taking innocent life as part of a natural law tradition and foundational government documents.

The Alabama Constitution relies on the courts to protect life, especially when the court process itself results in taking life as a punishment. Section 13 provides for the courts to be open, and that "every person, for any injury done him, in his ... person ... shall have a remedy by due process of law." This provision has been included since the beginning

of Statehood in 1819, and reflects the natural rights protected by government. It is a virtual copy of a provision of the first Massachusetts Constitution in 1780, which reads: "Every subject of the Commonwealth, ought to find a certain remedy, by having recourse to the laws for all injuries or wrongs which he may receive in his person, property, or character." Part I, art. XI.

The judicial responsibility to protect against arbitrary taking of life is further guaranteed by the prohibition against depriving a criminal defendant of life except by due process of law, art. I, § 6, and the *habeas corpus* provision, art. I, § 17, which prohibits suspension of the writ. Further, § 35 affirms that the "sole object and only legitimate end of government is to protect the citizen in the enjoyment of life ...." And, "[w]hen government assumes other functions, it is usurpation and oppression." *Id.* These provisions are said to embody "natural laws existing under the law of reason...." *Alford v. State*, 54 So. 213, 223 (Ala. 1910)(citing § 36).

If these rights are not protected by the courts as "natural," they are certainly revered by age. Magna Carta, signed in 1215, set the basis for the modern rule of law. In Item 38, it prohibited any "bailiff" from making anyone accountable to law "on [the bailiff's] simple affirmation,

without credible witnesses brought for this purpose." This Court recognizes the incorporation of Magna Carta in American law and in inviolable procedural rights. *See Ex parte First Exch. Bank*, 150 So. 3d 1010, 1020 (Ala. 2013)(quoting *Alford v. State*, *supra*, at 214)(Magna Carta "appealed to, as the protector of the people against the encroachment of the prerogative or despotism of the sovereign.")).

Anglo-American legal tradition has long affirmed the priority of the court's role in protecting the citizen against unjust punishment administered by the state. As Blackstone wrote: "all presumptive evidence of felony should be admitted cautiously: for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer." 4 Wlm. Blackstone *Commentaries, etc.* 352 (*see also* 350-51 (suggesting that one *disinterested* witness may be enough, thus implying the need for corroboration when conviction rests on an interested witness)). Benjamin Franklin likewise said, "it is better a hundred guilty persons should escape than one innocent person should suffer." Letter from Benjamin Franklin to Benjamin Vaughan, Mar. 14, 1785, in 9 *The Writings of Benjamin Franklin* 293 (A. Smythe ed. 1909).

The Constitution-- and the principles it reflects-- implies that the judicial process must remain available to

hear claims that its own error has created a false judgment of conviction which may result in the taking of an innocent life.

C. This Court has authority to lift rigid time limits to ensure substantial justice.

When the execution of a prior judgment will result in taking human life, rigid time limits on post-judgment relief do not honor the function of the judicial process. This Court has authority to do what its duty requires-- in this case, to suspend rigid limits when life and justice are at stake.

This Court has held that Rule 60(b), Ala. R. Civ. P., is available to reopen a previous adjudication of paternity when DNA evidence is proffered to contradict the truthfulness of the judgment, despite the restrictions imposed by the limitations period set by the legislature. *See Ex parte Jenkins*, 723 So. 2d 649, 650, 659-60 (Ala. 1998)(separation of powers bars legislative interference with judgment). As the *Jenkins* case observed, the terms of Rule 60(b) are not fixed, and require only that the request be made within a "reasonable" time. This flexibility is a matter of "good conscience," and the commitment to true justice rather than finality. *Id.* at 660 (citing *Merrill v. Merrill*, 71 So. 2d 44, 46 (1954)).

In the Rule 32 context, where relief is sought from operation of a criminal judgment, this Court has shown regard for the risk that error may take innocent life. Thus, the Court construes Rule 32 not to require the defendant to plead that the disputed judgment lacks preclusive effect. *See Ex parte Beckwith*, No. 1091780, 2013 WL 33369983 (Ala. July 3, 2013) (murder conviction, death sentence); *Ex parte Hodges*, 147 So. 3d 973 (Ala. 2011)(post-murder-conviction challenge).

Even if the State here has invoked the preclusive effect of the 1988 judgment against Kuenzel, it should be incorrect as a matter of law to find that Rule 32.7 provides for summary dismissal. Rule 32.7(d) plainly requires that the lower court find "no purpose would be served by any further proceedings." Given the new evidence not available at trial, that the accomplice identified another man present instead of Kuenzel, and that the supposed corroborating witness could not identify Kuenzel before the grand jury, a hearing is needed.

Moreover, the delay in presenting the claim under Rule 32 does not justify finding, as a matter of law, that "no purpose would be served by any further proceedings." Rule 32.7(d). In light of the commitment of the State of Alabama in its Constitution to the "God-given right to life," *Hamilton*, 97 So. 3d at 734 n.4, there is plainly a purpose to be served by

further proceedings. Summary dismissal is not permitted by Rule 32.7(d).

D. Judicial relief has been sought with enough diligence to toll any Rule 32 time limits.

Even if relief under Rule 32 is deemed not available by its precise terms, this Court's position in the Alabama judicial system permits it to provide relief. Thus, in *Ex parte Ward*, 46 So. 3d 888, 894 (Ala. 2007)("*Ward III*"), this Court held, for the first time, that the limitations period in Rule 32.2(c) cannot be treated as a jurisdictional bar to relief because of § 150 of the Constitution.

The Constitution gives this Court the power to issue rules "governing the administration of all courts and rules governing practice and procedure in all courts." Ala. Const., art. VI, § 150. Further, "such rules shall not ... affect the jurisdiction" of the courts. *Id.*

In addition to the textual authority for the rule, the common reason for the *Ward III* holding was obvious in a capital case, where actual innocence was alleged:

> [T]he consequences of error are terminal, and we therefore pay particular attention to whether principles of "equity would make the rigid application of a limitations period unfair" and whether the petitioner has "exercised reasonable diligence in investigating and bring [the] claims."

898 So. 3d at 901 ((quoting *Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2011)). Thus, the issue here is whether Kuenzel has exercised the requisite "reasonable diligence" in bringing his claims.

The *Amici* submit that Kuenzel has done so. Once he was apprised of the new information and investigative notes in 2010, he filed for Rule 60(b) relief in the U.S. District Court for the Northern District of Alabama in his pending *habeas* proceedings. The Court of Criminal Appeals counter-intuitively faulted Kuenzel for doing so, and found him ineligible for equitable tolling. *See* 2015 WL 4162899 at *5. The court below said Kuenzel should have come to State court. It said he was not "prevented from filing a Rule 32 petition" in State circuit court in 2010. *Id.*

The lower court applied the wrong standard. It may be true that Kuenzel was not "prevented from filing a Rule 32 petition." However, that does not mean he failed to exercise the reasonable diligence contemplated by the equitable principles stated in the *Ward III* decision. After all, in federal court he was asserting the claim.

Ironically, the federal courts had faulted Kuenzel for not coming sooner. They pointed to the State's invocation of the limitations period-- in 1993-- and notice to him by the

state courts that the possibility that his very first Rule 32 petition *might* be untimely-- thereby obliging him to pursue federal relief sooner. *See Kuenzel v. Allen*, 880 F. Supp. 2d 1162, 1172 (N.D. Ala. 2009). But he was not faulted for delay because he had filed in federal court first. In those days, there was not equitable tolling for Rule 32 petitions as adopted by this Court in *Ward III* in 2007.

In effect, the decision below serves to allow Kuenzel to be whipsawed between the courts-- with each one faulting Kuenzel for not having come sooner. To make matters worse, well-known State policy does not permit the same cause of action to be pursued in two courts at the same time. As this Court knows, one Alabama statute bars the pendency of civil claims in two State courts at the same time on the same cause of action. *See* Ala. Code § 6-5-440. This bar is well-recognized as applying when there is a prior pending action in federal court. *See Johnson v. Brown-Service Ins. Co.*, 307 So. 2d 518 (Ala. 1974).

Given these circumstances, the Court of Criminal Appeals was wrong to find equitable tolling unavailable. Though Kuenzel had discovered new evidence in 2010, because he filed first for relief in federal court and concluded that case before coming to the circuit court with the new evidence, he

was deemed too late. The ruling conflicts with this Court's *Ward III* decision. And, insofar the ruling approves "summary dismissal," it seems starkly unjust-- as if to say "no purpose would be served by any further proceedings."

To the extent that Rule 32, in its present form, permits summary dismissal, the Court should use this case to make adjustments to make its requirements clear and protect against the kind of procedural trap which may take Kuenzel's life. The Court has done so in previous cases. *See Ward III*, supra; *Childers v. State*, 899 So. 2d 1025, 1035 (Ala. 2004)(noting power to change "either formally or by construction" as part of Rule 32 proceeding); *Schoenvogel v. Venator Group Retail, Inc.*, 895 So. 2d 225, 234 (Ala. 2004)(discussing § 150 power).

In addition to the power conferred in § 150, the Alabama Constitution gives this Court "original jurisdiction" to provide orders "as may be necessary to give it general supervision and control of courts of inferior jurisdiction." *Id.*, art. VI, § 140(b)(2). This power has been exercised sparingly and in critical moments for the protection of the basic features of natural law. *See Ex parte Alabama Policy Institute*, No. 1140460, 2015 WL 892752 at *7 & n.3 (Ala. March 3, 2015)(exercising original jurisdiction to secure protection of "natural rights" and "natural relation" of marriage); *Roe*

v. Mobile County Appointment Board, 676 So. 2d 1206 (Ala. 1995)(securing record for response to federal court in emergency election dispute about State-wide election); *see also Ex parte Alabama Textile Products Corp.*, 7 So. 2d 303, 306 (Ala. 1942)("where case is of more than ordinary magnitude and importance to prevent a denial of justice"). The supervisory power enables this Court to find that the time limits of Rule 32 are an inappropriate basis for summary dismissal of claims where the actual innocence of a criminal defendant sentenced to death at stake.

This Court "is the *final* arbiter of Alabama law, with ultimate authority to oversee and rule upon the decisions of the lower State courts." *Ex parte James*, 836 So. 2d 813, 834 (Ala. 2002). Moreover, this Court is empowered by the legislature to change its view of the same case which has previously been before the Court. *See* Ala. Code § 12-2-13 ("The Supreme Court, in deciding each case when there is a conflict between its existing opinion and any former ruling in the case, must be governed by what, in its opinion, at that time is law, without any regard to such former ruling on the law by it"); *Papastefan v. B & L Const. Co., Inc. of Mobile*, 385 So.2d 966 (Ala. 1980).

In sum, the "limitations period" imposed by Rule 32.2(c) does not prevent this Court from finding summary dismissal to be unwarranted. Rule 32.2(c) is not a legislative "statute" of limitations, but instead a policy choice by this Court. This Court may find that strict adherence to the Rule 32.2(c) limitations period-- especially when its application will assure a death sentence-- is not a proper balance between the "truth-seeking function" of courts, and the need for finality.

III. The courts below wrongly approved summary dismissal of the new evidence without due regard for the actual innocence implied.

The Court of Criminal Appeals took an unduly limited view of the facts which make summary dismissal improper in this case. That court summarized the newly discovered facts saying:

> (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.

2015 WL 4162899 at *3. This recitation fails to give due regard to the import of the new facts, especially in light of the existing trial evidence.

The Court should have noted in Item (1) the fact, unknown at trial, that the main witness for the State, Venn, identified for police two days after the murder a third person who was at the scene in the car with Venn. His name is David Pope. The police interview notes with details about Pope's presence were not shared with Kuenzel until 2010. (C.84-86). There was no trial testimony from Pope. Those interview notes also indicate that Venn said Kuenzel was not with him, but was instead asleep at their residence. (C.72, 100).

This new evidence, when considered with other evidence offered by Kuenzel at trial, brings doubt about the truth of the judgment. For instance, Kuenzel's stepfather testified at trial that, at 10:30 p.m. on the night of the 11:00 p.m. murder, he had seen Kuenzel asleep on the couch at Kuenzel's home when he arrived to replace a broken toilet tank. *See* 880 F. Supp. 2d at 1216. So, instead of the stepfather being in

conflict with the supposed accomplice, the stepfather's testimony is consistent what the accomplice initially told the police. In face of these doubts about the truth, a summary dismissal was not proper.

The Appeals Court also should have noted in Item (2) that April Harris told the grand jury: "I couldn't make out for sure whether it was Harvey Venn and William Kuenzel or not." (C.91). Later at the grand jury she could not say "positively" that Kuenzel was at the store, (*id.*), but that "driving by" and "judging from the stature of the people that were in there," she "believe[d] that it was them." (C.91). She also told the grand jury that she could not see their faces and could not get a description. (C.92). This was more than just being "equivocal." In fact, it failed to connect Kuenzel to the crime, a feature necessary to qualify Harris's testimony as corroborative evidence under § 12-21-222. *See McCullough*, 21 So. 3d at 762.

As for Item (3), Crystal Floyd indicated in an affidavit that Venn visited her at 10:00 p.m. the evening of the murder, and was alone. (C.144-45). That affidavit conflicts with what she told the grand jury, i.e., that Venn visited her only about 8 p.m., at the latest. (C.149-50).

And, Item (4) shows that Venn possessed a shotgun of the same gauge as the murder weapon, a 16-gauge, contrary to what he testified to, a 12-gauge. (C.157-58). This fact calls into question Venn's testimony, *and* gives new perspective to the separate trial testimony that a 16-gauge shotgun Kuenzel had was returned to its owner, Kuenzel's stepfather, before the murder. *See* 880 F. Supp. 2d at 1216.

Even though the State has argued that other witnesses presented at trial or sentencing may prevent the new evidence from being dispositive, (C.243-49), the State has actually only established that there is a factual dispute for consideration at a hearing, rather than that summary dismissal is required.

For a different reason, the adverse disposition of the federal proceedings which considered the new evidence should not control here as the Court of Criminal Appeals supposed. Federal proceedings about the new evidence discovered in 2010 began shortly thereafter. As the Eleventh Circuit explained in its 2013 decision, because Kuenzel asserts that he simply was not involved in the murder, the federal court grants relief only if it is "'more likely than not, ... no reasonable juror would have convicted him in light of the new evidence.'" *Kuenzel v. Commissioner,* 690 F.3d 1311, 1315 (11th Cir.

2013)(*quoting*, *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). This standard is not the one applied in State court proceedings under Rule 32, Ala. R. Crim. P. For instance, Rule 32.1(e) provides for relief due to "newly discovered material facts" if they "establish that the petitioner is innocent of the crime ..., or should not have received the sentence that the petitioner received." That is a lower standard than the one applied by the federal courts reviewing petitions for post-judgment relief.

The *Schlup* standard is more burdensome because federal court relief affects the prerogatives of another sovereign and its judicial system. *See Schlup*, 513 U.S. at 318. Those prerogatives are not affected when the State's own judiciary provides relief. Avoiding dismissal under the summary procedure of Rule 32.7(d) certainly does not require a petitioner to meet the *Schlup* standard. *See also*, *Danforth v. Minnesota*, 552 U.S. 264, 279-80 (2008)(federal court limits on remedy for Confrontation Clause violations do not preclude States from providing broader remedies under own rules of finality).

CONCLUSION

When the history of this time is written, this case will be featured. For historians, there is much to write about, regardless of whether this Court exercises its power of review.

As this Court's decision to allow equitable tolling of the limitations period has noted, life is at stake. Life, the *Amici* add, is a "God-given right." As a matter of the natural law tradition reflected in the texts which empower this Court, extra diligence is warranted. The courts below were wrong to the extent they concluded "no purpose could be served by further proceedings," given the significant new evidence of Kuenzel's innocence of Offord's 1987 murder.

The *Amici* urge this Court to grant Kuenzel's petition for a writ of certiorari. The Court should order a full review of the Court of Criminal Appeals decision and reverse the "summary dismissal" of Kuenzel's Rule 32 petition given the Court's authority to supervise the administration of justice.[1]

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[1]The *Amici* thank Regent University School of Law Professor James Duane and students Kathryn Thomas and Jessica Samms for their contributions to this brief. The sacrifice of their time and energy for the *Amici* on behalf of William Kuenzel is much appreciated.

Respectfully submitted this 9th day of November, 2015.

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Certificate of Service

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