

## Lawyer Grows Close to Client on Death Row for 25 Years

Tania Karas, New York Law Journal  
May 3, 2013

William Ernest Kuenzel wore white to his wedding. That was the color of his prison-issued jumpsuit at Holman Correctional Facility in Atmore, Ala., where he has been on death row for almost 25 years.

Standing next to Kuenzel at his Feb. 22, 2008, marriage to Jane Campbell, a British social worker with whom he had been corresponding, was his best man, David Kochman, a New York attorney who has represented Kuenzel pro bono since 2003.

Kochman had to petition prison officials to allow the ceremony. And since Kuenzel's bride was not a U.S. citizen, Kochman had to convince immigration officials that she was marrying for love, not just to obtain a visa.

On the day of the wedding, prison guards sliced the cake into pieces to screen for contraband before it could be brought into the group visitation room.

In the decades since Kuenzel's 1988 conviction for murder, Alabama has changed its preferred method of execution from the electric chair to lethal injection. The state has executed 52 people in that time.

Meanwhile, Kuenzel has gone back to court time after time in a so-far unsuccessful campaign to prove his innocence. The state has been just as adamant in urging that he is guilty and should die.



*Eric Forman*

Now, Kochman, a 33-year-old commercial litigation associate at Reed Smith, has petitioned the U.S. Supreme Court in what may be his best—and only—chance to hold off the execution of Kuenzel, a 51-year-old man with an eighth-grade education who Kochman says has become his close friend.

In January, Kochman, along with co-counsel Jeffrey Glen and Rene Hertzog of Anderson, Kill & Olick, filed [a petition](#) to make Kuenzel's case one of the fewer than 1 percent of applications for certiorari the high court accepts each year.

Their petition has the backing of former Manhattan District Attorney Robert Morgenthau, 93, who worked on [an amicus brief](#) in support of Kuenzel that was filed in March. ([See sidebar.](#))

"I've read all of the records and I think that he's innocent," Morgenthau said in an interview. "Not only as a matter of law, but I think he's innocent as a matter of fact."

The state of Alabama filed its [brief in opposition](#) on April 24, and the Supreme Court could render a decision on granting cert as early as this month.

Kochman says he has been warned about the perils of getting too close to a client, especially one whose time may be running out.

"In that regard, I have failed miserably," he said. "I'm all in, and will be devastated if we lose."

The lawyer said he has been deeply impressed by his client's lack of anger and his attempts to build a new life from an 8-by-5-foot cell where he is alone 23 hours a day.

"When I was first getting started, I was really reluctant to get as involved as I am," Kochman said. "And, you know, he has some warts on him. But Bill is a selfless, amazing individual."

"If I could have anybody else on my case, anywhere, I would want David," Kuenzel said in an interview from Holman. "I know this is my last rodeo. I'm not even worried about me anymore. I want my freedom, I want to clear my name. But I'm more concerned about the people who've worked on it all these years than I am about myself, because David has done everything he can."

Three times, Kuenzel's lawyers have asked the U.S. Court of Appeals for the Eleventh Circuit in Atlanta for a new trial, where they hope to introduce new evidence and address constitutional violations in the original trial. Three times, they have been rebuffed, largely due to a procedural default that occurred in 1993 when a previous pro bono attorney filed a relief petition that turned out to be six months late.

Now only one narrow gateway remains to circumvent the default and avert what Kuenzel's lawyers are certain would be a miscarriage of justice: a legal principle called "actual innocence" as defined by the U.S. Supreme Court in *Schlup v. Delo*, 513 U.S. 298 (1995).

"This appeal is our best and last shot to get Billy released," Kochman said.

Kuenzel has asked his attorney not to file useless motions that will prolong his life with no chance of getting him out of prison.

"He doesn't want to die, but he doesn't want to live any more on death row being innocent," Kochman said.

"I'm optimistic that we're going to win," Kuenzel explained. "And I do believe that if anybody can make it happen it's going to be David. I don't say, 'if we win'; I only say, 'when we win.' 'When we win, when I'm free, when this is all said and done.'"

## **Murder in Alabama**

Linda Jean Offord was a mother of three working the night shift at Joe Bob's Crystal Palace convenience store in Sylacauga, Ala., on Nov. 9, 1987, when she was shot and killed in a robbery attempt.

Kuenzel and his roommate Harvey Venn were charged with first-degree murder. Authorities said Kuenzel was the shooter.

Venn told authorities he was in the parking lot but never entered the store while Kuenzel was inside. Kuenzel claimed he had been asleep at his home 25 miles from the store when the crime occurred.

There was little physical evidence linking anyone to the crime, save for a pair of blood-spattered pants—Venn's—though he testified at trial the blood came from a squirrel. Prosecutors told jurors the blood was Offord's.

Twice, prosecutors offered Kuenzel, 25 at the time, eight to 10 years in prison in exchange for a guilty

plea. He refused.

A jury found him guilty, and a judge sentenced him to death. Venn accepted the same deal, testified against Kuenzel at trial and was released in 1997.

Though Kuenzel at times has "had doubts" about not taking the plea deal, he said he doesn't regret it because "I could not bring the shame of being a convicted murderer on my family."

The deck was stacked against Kuenzel from the beginning, Kochman said. At the time of the 1988 trial, the fee for counsel representing indigent defendants in Alabama was capped at \$1,000, even if the defense attorney spent hundreds of hours preparing for trials.

Kuenzel's court-appointed trial lawyer, William Willingham, spent fewer than 50 hours on witness interviews and discovery. Moreover, Kuenzel's appellate lawyers claimed the prosecution did not turn over exculpatory evidence to the defense.

Willingham admitted in a 2002 affidavit that he was ineffective. He was "lulled into complacency," he wrote, because he thought the state "had an extremely weak case against Mr. Kuenzel." The district attorney told Willingham he thought his own case was "problematic," he said.

Robert Rumsey, then district attorney of Talladega County, where the murder took place, was a skilled trial lawyer known for instilling fear in his opponents, according to Stephen Bright, president and senior counsel of the Southern Center for Human Rights, an Atlanta-based law office that represents prisoners facing the death penalty.

"He was this big, tall, great man who just dominated the courtroom," Bright said. "There were judges who were cowered by him. And when you take a skillful prosecutor against a very weak, unresourced defense lawyer, it was very unfair in terms of reaching justice."

With 193 prisoners on death row, Alabama has the fifth-largest death row in the nation and the highest capital conviction rate per capita, according to the Montgomery, Ala.-based Equal Justice Initiative. Rumsey sent a dozen people to death row, including Kuenzel, in his 20 years serving as district attorney from 1978 to 1998.

### **Pro Bono Life Line**

Kuenzel's first pro bono attorney, David "Duff" Dretzin, a New York labor and employment lawyer, took up the case in 1993. He'd been searching for meaningful public service work when he was referred to Kuenzel by Bryan Stevenson, executive director of the Equal Justice Initiative and a clinical law professor at New York University. Despite never having worked on a capital case before, Dretzin would spend the next 13 years representing Kuenzel.

Dretzin was advised to interpret Alabama's statute of limitations as permitting the filing of a state post-conviction petition two years after the U.S. Supreme Court denied cert. But Alabama later prevailed on the interpretation that "Supreme Court" in the statute referred to the "Alabama Supreme Court," thus the deadline was ruled to have passed months before Dretzin became involved in the case.

Kochman was hired as a summer associate in 2003 at Anderson Kill, where Dretzin, a solo practitioner, was renting the office next door to his. Eager to gain experience on a death penalty case, Kochman signed up to help. (Kochman moved to Reed Smith from Anderson Kill in 2008.)

Three years later, in June 2006, they had just filed their second appeal to the Eleventh Circuit when Dretzin, 77, died of injuries from a car accident. Kuenzel's case then fell to Kochman, who was only a second-year associate.

"I remember going outside onto my balcony, maybe a few days after I really started to think about this, and I just let it sink in, like, 'Wow, if this guy dies, it's going to be on my watch,'" Kochman said. "And this huge wave of nausea came over me. And I really questioned it for a minute, whether this is something I was willing to take on, whether I could handle it, and to this day I don't know that I can. But I know someone has to go out and do it."

In 2010, Talladega County prosecutors turned over records showing Venn and other eyewitnesses had initially given authorities starkly different accounts of the crime than they gave at trial. Neither the jurors nor Willingham knew their stories had changed. Jurors also did not hear that Venn possessed a .16-gauge shotgun, the same gauge as the murder weapon, which Dretzin uncovered years after the trial.

"I don't have any proof positive that Bill did not commit this murder," Kochman said. "What I do have is a mountain of evidence indicating that Harvey was involved, and that he was pressured to implicate someone other than himself so that he wouldn't get the death penalty, and that the police suggested his roommate, my client, as that possible person."

"What I see very obviously, what I know for a fact, is that he did not get a fair trial," Kochman added. "All Bill has asked for this entire time is one fair chance."

In January, Kochman met with Venn in an effort to find out what happened in the 2 1/2 days Venn was grilled by authorities. During that questioning, Venn changed his initial statement from one that did not implicate Kuenzel to one that did.

Venn, who is now married with children, refused to cooperate with Kochman. Accompanied by a lawyer, he insisted police told him he'd passed a lie detector test prior to the 1988 trial, though no record of it exists, Kochman said.

### **Actual Innocence**

"Actual innocence" claims like Kuenzel's place an enormously heavy burden of proof on the petitioner, a burden Kochman argues has been made even harder by erroneous court decisions.

In *Schlup*, the U.S. Supreme Court wrote that defendants claiming actual innocence "must show it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."

To do this, a petitioner must "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial," the court held.

A three-judge panel of the Eleventh Circuit unanimously held in August that in Kuenzel's case "some reasonable jurors—weighing what was available at trial and what has since been presented—would have found Petitioner guilty." *Kuenzel v. Commissioner*, 690 F.3d 1311 (2012).

The state of Alabama, in its brief opposing Kuenzel's petition for cert, echoes that conclusion, saying Kuenzel has not shown that all reasonable jurors, even if they had been shown all the evidence that is available now, would have voted to acquit him.

In fact, the state argues, "a jury reconvened for a trial today could be even more convinced that he committed this murder."

To back up that assertion, it points to an attempt by Kuenzel's mother to suborn perjury years ago by paying his cellmate to confess to the crime. They also say Kuenzel bragged to coworkers about participating in Offord's murder and tried to destroy the shotgun shell used to kill her.

In the face of that evidence, "Kuenzel has not raised the sorts of doubts that give rise to relief under *Schlup*," Alabama argues.

Kochman calls Kuenzel's alleged admissions "hearsay." He does not deny that Kuenzel's mother tried to strike a deal with another prisoner, but says her conduct was understandable.

"Bottom line: it's not excusable," he said in an interview. "But it's not indicative of guilt. This is what happens when you have a desperate, innocent person who's just been sentenced to death. These unsophisticated, uneducated, yet caring individuals took indefensible actions because the criminal justice system failed them."

Kochman complains in his own petition that the courts that have ruled against Kuenzel have all wrongly applied a "presumption of guilt" to the question of whether his procedural default can be excused, effectively imposing a higher burden than the Supreme Court contemplated in *Schlup*.

Instead, he argues the courts considering Kuenzel's *Schlup* claims should have reviewed his case without any presumptions regarding guilt or innocence.

Under the actual innocence standard set by the Supreme Court, "My client is more innocent than Lloyd Schlup," Kochman said in an interview.

The Eleventh Circuit pointed to Footnote 42 of *Schlup*, which states: "Having been convicted by a jury of a capital offense, Schlup no longer has the benefit of the presumption of innocence. To the contrary, Schlup comes before the habeas court with a strong—and in the vast majority of the cases conclusive—presumption of guilt."

Kochman contends the presumption of guilt should be applied only where the defendant was convicted in a fair, error-free trial. But he says Kuenzel's trial was tainted both by ineffectiveness of counsel and prosecutorial misconduct.

Alabama counters that the adoption of a rule requiring a presumption of innocence "cannot be right... That rule would require the State, having satisfied its constitutional duty to prove the defendant's guilt at trial and to defend that verdict on direct review, to prove it again on habeas."

The Alabama Attorney General's Office declined to comment for this story.

### **'It Makes You Remember'**

In his day-to-day practice, Kochman represents companies in complex commercial cases in state and federal courts in New York and around the United States. He is also co-pro bono coordinator for the firm's New York office and was appointed to a three-year term on the Second Circuit's Pro Bono Appellate Counsel.

Kochman's interest in death penalty cases extends beyond Kuenzel's. Through his connections with the Southern Center for Human Rights and the Equal Justice Initiative, Reed Smith has taken on six additional Alabama death row clients.

"It makes you remember that the law is not just for large companies," Kochman said of his pro bono work. "It makes things real."

Both Kochman and Kuenzel believe in capital punishment as a theory, they say, because there are some crimes so egregious they should be punished by death— but execution should only come after the justice system fulfills its responsibility to ensure a man has received a fair trial.

Kochman has spent between 400 and 700 hours annually representing Kuenzel in the last decade in

addition to his regular workload. Reed Smith and Anderson Kill have spent \$10 million in attorney hours and expenses on the case.

If the Supreme Court declines to review Kuenzel's case, seeking clemency may be Kuenzel's last chance. And only one Alabama death row inmate has ever been granted clemency.

"I'm terrified that this is not going to get corrected," Kochman said. "It scares me to my core that the judicial system that I believe in could possibly sentence a man to his death without any review, simply based on a foot fault."

Kochman has traveled to Alabama two dozen times to consult with his client. They talk for 20 minutes on the phone each week, their conversations covering everything from legal strategy to family, politics and religion.

"I've developed a deep relationship with a 51-year-old man in Alabama on death row," Kochman said. "I consider him within my inner circle of friends. I'm his lawyer, first and foremost. But as part of representing Bill, I don't think I could do that to my fullest ability without forming a friendship with him."

Rarely do they discuss what might happen if Kuenzel loses his Supreme Court petition. Though Kuenzel has not asked his attorney to be present if he is put to death, Kochman said he "absolutely" plans to be there.

"We recognize the overwhelming odds," Kochman said. "We believe we have a strong case. So when you take all of that into consideration, at best, we have a 50-50 shot at getting him out. So why focus on the bad? We've made the decision to focus on the positive. We talk about 'When he gets out, when we're having dinner together at my house, or what will he do when he visits New Orleans, his favorite city in the world.' We focus on, 'what [job] will he do? Where will he live? Will he move to England with Jane?' That's what we speak about."

Kuenzel remains hopeful.

"I'm at peace in my fate," Kuenzel said, adding that if the Supreme Court does not take his case, "then it's time to start making preparations. I'm not scared of the actual dying part."

On one recent week, Kochman and Kuenzel spent most of their allotted phone time discussing arguments for the Supreme Court.

An automated voice interrupted to announce there was one minute left on the collect call.

"I love you. Thanks for doing this," Kuenzel said.

"Love you too, Bill," Kochman replied. "I'll talk to you soon."